***Prebublication Version: The final publication is available at:** https://doi.org/10.3790/gyil.2024.373904

Decolonisation and Self-Determination à géométrie variable: The Forgotten Vicissitudes of Post-Soviet Peoples

By André-Philippe Ouellet*

All peoples have the right to self-determination. Notwithstanding, the mainstream definition of people posits there are only two types of peoples: those already constituted as States and colonial peoples inhabiting non-self-governing territories. Under this definition, peoples are colonial when separated by sea from their metropolis. Far from neutral, this definition has historically advantaged land powers, e.g., China, the United States, and Russia/The Soviet Union (USSR), since the territories they conquered and annexed never underwent a decolonisation process.

On the one hand, this article analyses the situation of the former constitutive USSR republics to show they should have been characterised as colonies under international law. Accordingly, this article reviews the main approaches relating to self-determination and decolonisation and demonstrates that, based on existing United Nations (UN) legal instruments and State practice, land-connected territories could also be considered colonies since the decisive criterion remains the domination of a people over another people. Indeed, most Soviet peoples were conquered by Tsarist Russia, and, to varying degrees, all had the attributes of colonies. This double standard exemplifies how far off mainstream conceptualisations of self-determination are. For instance, English, French, or Portuguese colonies achieved independence with the help of the UN, while Central Asian Soviet peoples could not. On the other hand, as the international community, save for certain countries, failed to recognise former Soviet republics were colonies, the article builds on the practice of their peoples to evince the scope of self-determination beyond decolonisation. Indeed, at the moment of becoming independent, formerly communist peoples justified their accession to independence based on the right of peoples to self-determination. In turn, many States recognised self-determination was at stake during the 1990s wave of independence, which prompted international recognition.

All in all, this article constitutes a call for coherence *vis-à-vis* self-determination, seeing that peoples are the beneficiaries of the right to self-determination. The international community must be careful not to let States instrumentalise self-determination and take away this right from peoples. Russia's instrumentalisation of self-determination in Crimea is a tragic reminder of the continuing relevance of such a call.

Les petites nations ne connaissent pas la sensation
heureuse d'être là depuis toujours et à jamais ; *elles sont toutes passées,*
à tel ou tel moment de leur histoire, par l'antichambre de la mort ;
toujours confrontées à l'arrogante ignorance des grands,
elles voient leur existence
perpétuellement menacée ou mise en question ;
car leur existence est question.[1]
Milan Kundera

INTRODUCTION

'All peoples have the right of self-determination', so begins Common Article 1 to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] Nevertheless, many peoples all over the world never had the chance to exercise their collective right to self-determination, while other peoples were more fortunate and managed to exercise this right either through free association or plainly gained independence. Among peoples that were able to seize their right to self-determination, countries proceeding from the former Soviet Union (USSR) and, more largely, former Eastern European Communist countries, i.e., Yugoslavia and Czechoslovakia, represent the bulk of recently independent countries. Indeed, in the early 1990s, former communist countries and, in particular, USSR components such as Ukraine or the Baltic States, started a coincident march towards independence.

Alas, independence and the right to freely determine one's future remain precarious. As the current war of aggression waged by Russia against Ukraine and the situation in Georgia remind the world, fights to maintain one's independence and freedom can be reactivated anytime. However, to fully understand the roots of those conflicts situated at the crossroads of international law, one must understand how the right to self-determination operates, how former USSR Republics wielded it to gain independence in the first place, and the reasons Soviet peoples did not manage to achieve independence from the USSR before the 1990s. Indeed, despite a rich Afro-Asian decolonisation practice from the 1960s onwards, the USSR

1 Milan Kundera, *Testaments Trahis* (2016), at 942.

2 International Covenant on Civil and Political Rights, 999 UNTS 171, 19 December 1966, (Entry into Force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, 10 December 1966, 933 UNTS 3 (Entry into Force 3 January 1976).

is one of the only major colonial powers, as the heir to the Tsarist Empire, which never proceeded to decolonisation.

In terms of self-determination, the two Covenants' entry into force in 1976 has been considered by self-determination late-recognisers, such as the United States (US) and the United Kingdom (UK), to be the moment when a political principle became a *right*. Nevertheless, the International Court of Justice (ICJ) recognised that self-determination has been a customary international law (CIL) grounded right since at least 1965.[3] The United Nations (UN) Charter mentions self-determination as a fundamental principle since it enables 'develop[ping] friendly relations among nations' which are 'based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace', indicative of the fact that self-determination is one of the means available to achieve universal peace. Article 55 UN Charter reiterates that 'peaceful and friendly relations among nations' are based on equal rights and self-determination.

Within the former USSR and beyond, the sinews of war remain the identity of the holders of the right to self-determination, the *peoples*. Three main approaches exist in international law (IL) to identify them. The first one, the 'Territorial' approach,[4] builds on United Nations General Assembly (UNGA) Resolutions 1541 (XV) and 2625 (XXV) to posit that a single people inhabit each country and that to preserve States' territorial integrity, only colonial peoples (in addition to peoples already constituted in States), on account of the territorial separation between their territory and their metropolis, have a right to attain or maintain independence.[5] As per this approach, territories not having attained independence to be considered 'separate' need to be separated from their metropolis by sea, following what some have called the 'Salt-Water' test.[6]

The second one, the 'Constitutive' approach,[7] like the 'Territorial' one, posits that in addition to peoples inhabiting existing States, colonial peoples have a right to become independent. The difference between those two approaches lies in the fact that the 'Territorial' approach does not necessarily rely on UNGA determinations, while under the 'Constitutive' approach,

3 International Court of Justice, (ICJ), *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports 2019, 95.

4 The terminology has been borrowed to Corten. Oliver Corten, 'Les visions des internationalistes du droit des peuples à disposer d'eux-mêmes: une approche critique', 32 *Civitas Europa* (2014) 93, at 99.

5 *Ibid*.; See generally J. Crawford, *The Creation of States in International Law* (2007); Shaw, 'Peoples, Territorialism and Boundaries', 8(3) *European Journal of International Law* (1997) 478, at 481.

6 T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (1999), at 53; Corten, *supra* note 4, at 31; Crawford, *supra* note 5, at 611.

7 Corten, *supra* note 4, at 106. See Marcelo G. Kohen, 'Sur quelques vicissitudes du droit des peuples à disposer d'eux-mêmes', *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (*Mélanges Jean Salmon*) (2007) 961, at 967.

to be recognised as a people, a group needs to be formally identified by the UNGA as inhabiting a 'non-self-governing territory' (NSGTs) under Chapter XI of the UN Charter.[8] In addition, the 'Constitutive' approach, although using 'geographical separation' as a criterion to determine which territories are not-self-governing, is not bound by the 'Territorial' interpretation of geographical (Salt-Water) separation.

The third one is the 'National' approach,[9] which posits peoples are human communities that have a collective will to maintain their distinctiveness/uniqueness.[10] Whether a group forms a people has to be objectively determined, considering either cultural – including religious and linguistic – grounds, ethnicity or both. This approach has also been called the 'sociological' approach, which is, in fact, a combination of an objective conception of peoples in ethnic, religious or cultural terms and a subjective common will of a population to exist as a people.[11] This approach conceives self-determination as inherently dynamic to avoid the domination of a people by another dominant people within a State. According to Schindler, '*[l]e sentiment national, différent de peuple à peuple* [...] *est conditionné par les facteurs indiqués, ancré dans les expériences historiques du peuple et tenu en éveil par sa situation politique*'.[12] This approach is also the only one not limiting the right to self-determination to colonial peoples (in addition to peoples already constituted in States) as it posits States can host more than one people even in the absence of geographical separation between its constitutive elements. Indeed, the 'Territorial' approach is, in essence, limited to decolonisation, while the 'Constitutive' approach although not strictly bound to decolonisation, *de facto* is given UNGA practice.

Finally, a variation of the 'Territorial' approach – not discussed in this paper – posits that, in any event, groups become peoples endowed with a distinct right to self-determination when victims of systematic discrimination within their States, i.e., remedial secession.[13]

8 Jean Charpentier, 'Autodétermination et Décolonisation', in Jean Charpentier (ed.), *Mélanges Charles Chaumont*: *Méthode d'analyse du droit international* (1984) 117, at 122; Corten, *supra* note 4, at 106; Alain Pellet, 'Quel Avenir Pour Le Droit Des Peuples à Disposer d'eux-Mêmes', in Manuel Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformación*: *liber amicorum: en homenaje al profesor Eduardo Jiménez de Aréchaga*, vol. 1 (1994) 255, at 269, para. 17. This also includes or Trust territories under Chapter XII, and former League of Nations Mandate territories.

9 Corten, *supra* note 4, at 101; Vesna Crnić-Grotić, 'The principle of equal rights and self-determination of peoples and the dissolution of Yugoslavia', in Vesna Crnić-Grotić and M. Matulović (eds.), *International Law and the Use of Force at the Turn of Centuries: Essays in Honour of V. Đ. Degan* (2005) 257, at 264.

10 Aristides Spyros Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes* (1973), at 208.

11 Vladimir Đuro Degan, *Création et Disparition de l'État* (*à La Lumière Du Démembrement de Trois Fédérations Multiethniques En Europe*) (1999), at 240.

12 Dietrich Schindler, 'Contribution à l'étude Des Facteurs Sociologiques et Psychologiques Du Droit International', 46 *The Hague Academy of International Law: Collected courses* (*RdC*) (1933) 229, at 261 and 287.

13 See Georges Abi-Saab, *Cours Général de Droit International Public* (1984), at 404.

The first two approaches, 'Territorial' and 'Constitutive' have often been described as arbitrary, as they aim to limit the scope of self-determination to decolonisation,[14] or reductive, as those approaches, in fact, 'confiscate' this right from peoples to the benefit of States.[15] Indeed, on the one hand, the 'Territorial' approach reinforces some colonial situations, being limited to territories separated from their metropolis by 'Salt-Water', i.e., overseas colonies. The 'Territorial' approach and its corollary, the 'Salt-Water' test, have been deemed to be unfair, rigid, and arbitrary by publicists[16] but also, as detailed in Section I.C, by many States such as China, the UK, the US, as well as some newly independent States, e.g., Thailand and Somalia, which all affirmed that colonialism was not limited to overseas territories.[17] On the other hand, the 'Constitutive' approach has been deemed equally arbitrary as resting on purely political decisions, i.e., the inhabitants of a territory to be deemed a 'people' by the UN need to secure a majority of votes in the UNGA regardless of their factual situation. This approach has also been rejected on account of the lack of competence of the UN to decide which human grouping constitutes a people.[18]

The crux of the problem, to be illustrated below through the examination of the Soviet situation, is the inconsistent application of self-determination law to similar situations. Indeed, one of the minimum requirements of law and justice is that legal norms must be applied consistently to like situations and differentiated treatment be factually justified.[19] Yet, excluding colonies connected by land with their metropolis, when their treatment and situation are, in fact, similar under the strict 'Salt-Water' test or on political grounds – obtaining sufficient political support to appear on the NSGT list – is a clear inconsistency.

As a matter of fact, the non-characterisation of Soviet non-Russian peoples as *colonial* is generally justified by the fact they were never listed under the NSGT list ('Constitutive' approach) or on account of a lack of separation by sea from Russia ('Territorial' approach). This article aims to expose further the incoherence of these two approaches and show that they

14 Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *The International and Comparative Law Quarterly* (1994) 241, at 242.

15 Pellet, *supra* note 8, at 256-258; Paul Tavernier, 'Variations Sur Le Theme de l'autodétermination Des Peuples (de Reims a La Haye)', in *Mélanges Jean Salmon*, *supra* note 7, 1095.

16 Charpentier, *supra* note 8, at 118-119; Koskenniemi, *supra* note 14, at 242; James Summers, *Peoples and International Law* (2nd ed., 2014), at 24-26, 208-210; Daniel Turp, 'Le Droit de Secession En Droit International Public', 20 *Canadian Yearbook of International Law* (1982) 24.

17 Gudmundur Alfredsson, 'Peoples', in Anne Peters (ed.), *Max Planck Encyclopedias of International Law* (2007), at 6; Marie-Claude Smouts, 'Décolonisation et Sécession Double Morale a l'ONU?', 22(4) *Revue Française de Science Politique* (1972) 832, at 832 and 837; Summers, *supra* note 16, at 208-209.

18 Charpentier, *supra* note 8, at 122.

19 Robert Kolb, *Réflexions de Philosophie Du Droit International: Problemes fondamentaux du droit international public: théorie et philosphie du droit international* (2003), at 258-262; Chaim Perelman, *Ethique et Droit* (2nd ed., 2012), at 94; Charles Rousseau, 'Le droit international et l'idée de justice', in Michel Virally (ed.), *Le Droit International au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991) 40, at 74.

neither exhaust the realm of decolonisation nor self-determination by using the specific cases of post-Communist countries – post-Soviet in particular. Indeed, the post-Soviet/Communist 1990s practice has been largely overlooked by the doctrine despite a rich practice in terms of decolonisation and self-determination which was labelled as a 'parade of sovereignties'.[20] Yet, Russia was – and to some extent remains[21] – one of the world's most important colonial powers, having conquered millions of square kilometres between the 16th and 20th centuries, mostly in Asia. The interest deficit, despite some authors' endeavours,[22] suffered by Asian peoples subjugated by Tsarist Russia, at first and then by Soviet Russia, in comparison with the fate of peoples subjugated by other imperialist forces, e.g., the UK, is striking. Indeed, only Western powers had to proceed to decolonisation in Asia; Russia maintained all its territorial gains without further ceremony. This lack of attention to the USSR's colonial reality and imperialism might be explained by its authoritarian nature, which gathered more attention.[23] Indeed, the fact all Soviet inhabitants suffered contributed to obliterating its colonial nature.

Despite being largely historical, this analysis is not meritless for at least two reasons. First, one of IL's substrates is custom, which results from *opinio juris* juxtaposed to practice. In this instance, State practice following the big waves of decolonisation of the 1960s-1970s remains scarce, making the relatively recent and compelling set of post-Soviet/Communist States practise extremely valuable. Second, this analysis highlights Russia's imperialist nature and its all-time manipulation of self-determination law, e.g., referenda in Eastern Ukraine, in the context of the current war of aggression waged against Ukraine since 2022. To fully understand this conflict, knowledge of the past remains precious, especially considering the rhetoric pushed to the forefront by Russia, which has also misused self-determination as a justification for the 2014 annexation of Crimea.[24] Indeed, one must understand that the USSR's role as a historical flagbearer of self-determination is derived from Soviet efforts to shape self-

20 Jeffrey Kahn, 'The Parade of Sovereignties: Establishing the Vocabulary of the New Russian Federalism', 16(1) *Post-Soviet Affairs* (2000) 58; Johannes Socher, *Russia and the Right to Self-Determination in the Post-Soviet Space* (2021), at 57.

21 Tomuschat for instance held that Russia would likely face self-determination movements within its border, in regions annexed by Tsarist Russia. See Christian Tomuschat, 'Self-Determination in a Post-Colonial World', in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (1993) 1, at 4. For an analysis of the Tatar and Chechen cases see Socher, *supra* note 20, at 69 et seq.

22 See e.g., Sami Aldeeb Abu-Sahlieh, *Le Droit Des Peoples à Disposer d'eux-Mêmes Étude Analytique de La Doctrine Marxiste-Leniniste et de La Position Soviétique* (1976), at 228; Dieter Heinzig, 'Russia and the Soviet Union in Asia: Aspects of Colonialism and Expansionism', 4(4) *Contemporary Southeast Asia* (1983) 417, at 425.

23 William Partlett and Herbert Küpper, *The Post-Soviet as Post-Colonial: A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire* (2022), at 3.

24 The only people endowed with the right of self-determination in Crimea are Tatars. Nevertheless, most Tatars boycotted the Russian-organized referendum. See Karina Korostelina, 'Crimean Tatars From Mass Deportation to Hardships in Occupied Crimea', 9(1) *Genocide Studies and Prevention* (2015) 33.

determination to fit its interests. This should not be surprising from a State whose official position was that it had a right to militarily intervene in other communist States where the 'achievements of socialism were threatened'.[25] Nevertheless, one must recognise the USSR's legacy is not all dark for it is the USSR that managed to introduce the notion of self-determination within the UN Charter and the two Covenants.[26]

Still, Soviet activism in shaping self-determination incidentally benefitted all continental powers, e.g., the USA and China, over traditional overseas colonial powers such as France the UK.[27] Thence, the USSR's tailored-made self-determination was 'tactical', and aimed at conserving Tsarist and Soviet World War II territorial gains, meaning the USSR 'followed different standards and usages of the right of peoples to self-determination', one for itself and one for others,[28] a practice labelled as an 'extreme hypocrisy'.[29] Self-determination was rather a 'versatile weapon in the Soviet diplomatic arsenal' as the USSR 'not only retained virtually intact all of its annexations made during the Nazi period, but incorporated additional territories as well on the basis of the national aspirations of its Republics'.[30]

Part I will show how the Soviet situation was colonial despite the fact this characterisation has not been broadly recognised so far. To do so, it will analyse the situation of Soviet Republics in the light of the three above-mentioned approaches while further defining these approaches and their fundamentals. The differentiated treatment of the Soviet situation under the three approaches will, in turn, serve to exemplify the intrinsic legal and factual inconsistencies of the 'Territorial' and 'Constitutive' approaches. In any event, as the colonial character of former Soviet Republics has not generally been recognised by States or UN organs, the post-Soviet Republic's practice will be factored in the assessment of self-determination law beyond decolonisation. Thence, part II will evince the self-determination practice of former Republic and post-Communist peoples at the time of proclaiming and obtaining independence. This part will build on this set of practice to show the most convincing approach is the 'National' one. Given there was no official recognition of the colonial nature of Soviet Republics, the Republics 1990s practice remains highly relevant to assess the scope of self-determination beyond decolonisation. Indeed, former Soviet Republics' practice forms a wonderful case

25 Partlett and Küpper, *supra* note 23.
26 Socher, *supra* note 20, at 25-26, 29-30.
27 Paulo Borba Casella, 'Droit International, Histoire et Culture', 430 *RdC* (2023), at 338.
28 Lauri Mälksoo, 'The Soviet Approach to the Right of Peoples to Self-Determination: Russia's Farewell to Jus Publicum Europaeum', 19(2) *Journal of the History of International Law* (2017) 200, at 203-204.
29 Socher, *supra* note 20, at 31.
30 Vernon V. Aspaturian, *The Union Republics in Soviet Diplomacy: A Study of Soviet Federalism in the Service of Soviet Foreign Policy* (1960), at 63.

studies given a closer analysis of their situation simultaneously evinces the flaws of two main self-determination approaches ('Territorial' and 'Constitutive') during the decolonisation period and – given their colonial nature was not recognised – the flaws of the same approaches in the post-decolonisation period.

I. Were Soviet Republics Colonies?

There exists no universal definition of colonialism. Still, it remains important to define this concept to determine what is a colonial people. However, is the characterisation of a people as colonial a *factual* or a *legal* question?

Potential answers depend on the above-mentioned approaches, which all rely to some extent on UN-based criteria. Under the 'Constitutive' approach, colonialism is a question of legal characterisation by the UNGA. Then, pursuant to the 'Territorial' approach colonialism is established by resorting to narrowly interpreted UN-based factual criteria, i.e., 'geographical separation'. Finally, under the 'National' approach, this is a factual determination, again grounded on UN-established criteria.

Reversing the order, it seems apposite to start (I.A) with the last approach as characterising the *factual* situation of peoples living within the former USSR will inform the analysis under the (I.B) 'Constitutive' and (I.C) 'Territorial' approaches analyses. The last (I.D) subsection will offer a partial conclusion as to the Republics' colonial nature.

A. National Approach

Under the 'National' approach, peoples are factually identified by resorting to a list of criteria juxtaposed to the group's common-will. The common denominator to all colonialism definitions is 'subjection […] to alien subjugation, domination and exploitation',[31] i.e., when a people is not in a position to control its territory and social system.

The 'National' approach draws on UN practice without being confined to it. Under Resolution 1514 on the *granting of independence to colonial countries and peoples*, the three faces of colonialism are subjugation, domination and exploitation. Domination is an attenuated version of subjugation; exploitation is a corollary of both. This Resolution's preamble mentions that 'practices of segregation and discrimination are associated' with colonialism.

31 United Nations General Assembly (UNGA) Res. 1541 (XV), 15 December 1960, at 1.

Resolution of 1541 (XV) on the *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* lay down criteria to identify NSGTs which it assimilates to 'territories […] of the colonial type'.

On top of geographical separation, Resolution 1541 Principle IV holds that a territory is colonial when it is 'distinct ethnically and/or culturally' from its metropolis. Principle V mentions elements of an 'administrative, political, juridical, economic or historical nature' may be considered to assess the relationship between the metropolitan State and the territory, i.e., if the latter is in a 'position or a status of subordination'. Relevant UN factors in assessing alien subjugation/domination/exploitation thus include ethnic/cultural distinctiveness, administrative, political, juridical, economic or historical factors, discriminatory practices and geographical separation. The question of geographical separation mentioned in Resolution 1541 will be dealt with in section I.A, as under the 'National' approach, geographical separation is not decisive.

Ethnic/Cultural Distinctiveness:

- There is an ethnic and/or cultural (e.g., linguistic or religious) distinction between non-Russian Republics and the Russian centre. For example, Central Asian peoples are mostly Muslim, and their languages are either Turkic, e.g., Uzbek, or Iranic, e.g., Tadzhik.[32] According to Aspaturian, a renowned Sovietologist, in the USSR, despite the communist egalitarian ideology, the 'rulers and the ruled [were] still separated by race, religion, language and culture'[33] and most Republics, e.g. Ukraine, Georgia, Armenia were 'culturally compact and evolved national community' which possessed at least as much of the 'fundamental prerequisite for self-government, independence and national recognition' than other newly independent nations in Latin America and Africa.[34]

Historical Factors; Domination/Subjugation:

32 Aspaturian, *supra* note 30, at 85. For a full account of nationalities classified per religion and language family, i.e., Slavic, Romance, Baltic, Turkic, Iranic, Mongolian, etc., see Barbara A. Anderson and Brian D. Silver, 'Estimating Russification of Ethnic Identity among Non-Russians in the USSR', 20 *Demography* (1983) 461, at 466.

33 Aspaturian, *supra* note 30, at 90.

34 *Ibid*., at 201-202.

- Soviet peoples lived within territories that were either conquered by Tsarist Russia/USSR[35] or subjugated following the signature of a protection agreement, e.g., in the case of Chechnya or Georgia, protection agreements turned into annexations[36] over three centuries. Wars were waged against Russia's neighbours and, in part, aimed at conquering the nomadic and Islamic peoples who had been a threat to Russia in the past.[37] Most of the empire's population (55%) was non-Russian by the 19th century.[38] Most conquered peoples fought back and attempted to regain independence albeit with limited success.[39] E.g., Ukraine tried to safeguard its 1918 independence but was conquered by Soviet troops in 1919. The same is true for Georgia, despite treaties in force between Georgia and the USSR, and for most Asian peoples who fought unsuccessfully against Russians.[40]
- One face of this domination was settler colonialism. There was a massive influx of ethnic Russian settlers in all Republics,[41] especially in Siberia and Central Asia.[42] As early as 1956, Hayit – who characterised Soviet occupation as colonial – was already decrying the Russification policies within the USSR, the economic exploitation and the massive influx of ethnic Russians and Ukrainians in Central Asia, making native peoples minorities in their Republics.[43] One of the revindications of native movements was to stop Russians from settling within their Republics.[44] The Muslim faith was persecuted by Russians, and native land was expropriated under the 'virgin land program' and handed to Russian and Ukrainian peasants following their 'enormous' influx.[45] In fact, due to those policies, the 'Sovietization of the Central Asian Republics, as far as the natives were concerned, was indistinguishable from colonialism'.[46]

35 For detailed accounts of the Russian and Soviet colonization see generally Hélène Carrère d'Encausse, *L'empire d'Eurasie: Une Histoire de l'Empire Russe de 1552 à Nos Jours* (2005), at 82 et seq; Andreas Kappeler, *La Russie Empire Multiethnique* (1994), at 148 et seq.

36 Marc Ferro, 'Colonialisme russe-soviétique et colonialismes occidentaux: une brève comparaison', 26(4) *Revue d'études comparatives est-ouest* (1995) 75, at 76; Hubert Morelle, *De La Russie à l'URSS: Édification et Écroulement de l'Empire Russe* (*1878-1991*) (2017), at 40.

37 Heinzig, *supra* note 22, at 418.

38 *Ibid*., at 422-423.

39 Carrère d'Encausse, *supra* note 35, at 198 et seq.

40 Heinzig, *supra* note 22, at 429-430.

41 Aldeeb, *supra* note 22, at 219.

42 Hendrik L. Wesseling, *Les Empires Coloniaux Européens: 1815-1919* (2009), at 275.

43 Baymirza Hayit, *Turkestan: im XX.Jahrhundert* (1956), at passim.

44 Kappeler, *supra* note 35.

45 Aspaturian, *supra* note 30.

46 *Ibid*., at 89.

For instance, Kazaks became a minority in their own Republic;[47] in 1989, they only made up 40% of Kazakhstan's population (30% in 1979).[48] Kazakhstan was 'virtually governed as a second Russian Republic since the native Kazaks […] have been rendered to less than a majority in their own Republic'.[49] In 1979, ethnic Russians were more numerous than Kazakhs, but between 1979 and 1989, the Kazak population boomed and Kazakhs became the most numerous group (close to 40%), although still representing less than 50% of Kazakhstan's population.[50]

Juridical/Administrative/Political Factors, Cultural Colonisation and Discrimination:

- Russians, as the majority group, exercised control over the USSR through the utterly centralised Communist Party of the Soviet Union (CPSU) and 'the power relationship [in the Republics] [was] not dissimilar from traditional forms of indirect colonial rule'.[51] Russians were officially 'styled' as the 'core people and generous patrons' of the USSR or as an 'elder brother', and ethnic Russians filled the most important party positions within the Republics.[52] For instance, Turco-Tatar peoples (more than 10% of the USSR's population) were always severely underrepresented during CPSU congresses, which reflected that the communist revolution was overly a Russian project.[53] Accordingly, the 'Soviet Rule' was seen as 'fundamentally alien', especially in the Caucasus and Central Asia.[54]
- There was *de jure* and *de facto* discrimination through a system of internal passports, which listed one's nationality, referred to as the 'fifth point' or category,[55] which gave much more freedom to ethnic Russians, and to a lesser extent to Ukrainians and Byelorussians, than to non-Slavic 'nationalities'. Freedom of movement for many 'nationalities', including Transcaucasians, Jews, or Poles,[56] or from 'punished' peoples such as Chechens or Tatars was limited.[57] Discrimination

47 *Ibid*., at 90.
48 Morelle, *supra* note 36, at 90.
49 Aspaturian, *supra* note 30, at 90.
50 Carrère d'Encausse, *supra* note 35, at 388-389.
51 Aspaturian, *supra* note 30, at 90.
52 Jeff Sahadeo, 'Black Snouts Go Home! Migration and Race in Late Soviet Leningrad and Moscow', 88(4) *The Journal of Modern History* (2016) 797, at 807; Partlett and Küpper, *supra* note 23, at 19-20.
53 Aldeeb, *supra* note 22, at 160.
54 Laura L. Adams, 'Culture, Colonialism and Sovereignty in Central Asia', in Sally N. Cummins and Raymond Hinnebusch (eds.), *Sovereignty After Empire* (2022) 199, at 203; Aspaturian, *supra* note 30, at 89.
55 Sven Gunnar Simonsen, 'Between Minority Rights and Civil Liberties: Russia's Discourse Over "Nationality" Registration and the Internal Passport', 33(2) *Nationalities Papers* (2005) 211, at 213.
56 Leon Boim, 'The Passport System in the USSR', 2(1) *Review of Socialist Law* (1976) 15, at 18.
57 Marc Garcelon, 'Colonizing the Subject: The Genealogy and Legacy of the Soviet Internal Passport', in Jane Caplan and John Torpey (eds.), *Documenting Individual Identity* (2002) 83, at 87.

led many non-Russians, often Caucasians or Central Asians, to bribe officials or marry Russians to ensure their children could opt for the 'Russian' nationality in their internal passports.[58] This system is analogous to European overseas population-control mechanisms; ethnic permits restricted movements within conquered territories.[59]

- Despite the official status of some native languages within Republics, on the federal level, Russian was the sole official language and *lingua franca*. Within Republics, Russian was made a compulsory school subject, mastering Russian was necessary to obtain important positions.[60] Despite ethnic-based distinctions, e.g., internal passports, the Soviet policy was otherwise to culturally assimilate peoples to create one single Russian-Soviet entity through aggressive 'russification' policies, which started during Tsarist times, especially after 1850, and continued until the fall of the USSR.[61] Russians were the 'national' group that gained the most ground until the 1980s within the USSR, even according to conservative estimates.[62]

Economic Exploitation:

- Non-Russian Republics were economically colonised and exploited through extractivist practices.[63] For instance, in terms of 1990 GDP per capita, Tajikistan only made up 46.9%, Uzbekistan 52,1%, Turkmenistan 60.2%, Kirgizstan 61%, Azerbaijan 64%, Georgia 76.8%, Armenia 77.4%, Kazakhstan 77.7%, Moldavia 92.3%; Ukraine 102%, Russia 115/5%, of USSR GDP.[64] All central Asian Republics suffered trade deficits, importing more than exporting (low value of exported goods, importing manufactured goods).[65] Central Asia mostly produced food products and raw materials, e.g., cotton, making up 52% of Central Asia intra-USSR exports in 1985 (reaching 90% in the case of Uzbekistan).[66] The economic structure and extractivism in Soviet Republics,

58 Sahadeo, *supra* note 52, at 806.
59 Garcelon, *supra* note 57, at 84; Partlett and Küpper, *supra* note 23.
60 Staff of the Labor Research Institute, *Soviet Colonialism* (*Soviet-Russian Colonial Expansion in Central-Eastern Europe*) (1999), at 34.
61 Aspaturian, *supra* note 30, at 91; Ferro, *supra* note 36, at 78.
62 Anderson and Silver, *supra* note 32, at 463, 479.
63 Aldeeb, *supra* note 22, at 219.
64 Hubert Morelle, *La Décolonisation de l'Empire Russe* (*1992-2016*)*: Mythe Ou Réalité?* (2017), at 238.
65 *Ibid*., at 239; Marius Peltier, 'L'U.R.S.S. et Le Colonialisme', 88 *Hommes et Mondes* (1953) 350, at 367.
66 Anatoli Vichnevski and Marina Višnevskaja, 'L'Asie centrale post-soviétique: entre le colonialisme et la modernité', 26(4) *Revue d'études comparatives est-ouest* (1995) 101, at 106.

especially in Asia and the Caucasus, were much akin to Western European colonial practices overseas.

*

While European powers had to proceed to decolonisation, the USSR did the opposite as it kept annexing or subjugating countries during the 20th century.[67] A striking example of this double standard is Central Asia. Indeed, tsarist Russia and the UK have been involved in what is called the 'Great Game' for Central Asia.[68] By 1905, 40% of Asia was under Russian control, while the UK controlled 10% of the region,[69] and war often threatened to break out.[70] E.g., Russia conquered what is now Kazakhstan and Uzbekistan between about 1730 and 1895, during the same period the British, French, or Spanish acquired new colonies, including in this region. In fact, the Russian expansion was compared to Portugal's expansion.[71] This difference in treatment between Western colonies in Asia and Russian colonies appears unjustifiable as in both cases 'their formal incorporation into the empire primarily benefitted the British, French or Russian settlers, but not the local populations'.[72] Indeed, the expansion of Russia and later the USSR was as colonialist as that of the Western powers.[73]

Interestingly, even within the USSR, leading figures, eventually becoming death-sentenced dissidents, such as Sultan Galiev, called for the creation of an 'international of colonies' since the Third International was overly Russian.[74] The USSR itself, through its CPSU Report on Stalin's crimes, recognised that mass deportation and exactions against whole peoples were crimes, although the report rejected the entire fault on Stalin.[75]

Finally, some considered only non-Christian Republics to be colonies as Christian peoples were not distinct enough and had a similar development level as Russia.[76] Nonetheless, religion is not the only factor, distinctiveness can also be ethnic or cultural per UN criteria. Finally, a difference in development level is not decisive as less economically advanced

67 Aldeeb, *supra* note 22, at 228.

68 Morgan R. Davis, 'How Central Asia Was Won: A Revival of the Great Game Comment', 36(2) *North Carolina Journal of International Law and Commercial Regulation* (2010) 417; David Fromkin, 'The Great Game in Asia Reconsiderations', 58(4) *Foreign Affairs* (1979) 936; Jaques Piatigorsky and Jaques Sapir (eds.), *Le Grand Jeu: XIXe siècle, Les enjeux géopolitiques de l'Asie centrale* (2009).

69 Heinzig, *supra* note 22, at 424.

70 Carrère d'Encausse, *supra* note 35, at 98-106; Wesseling, *supra* note 42, at 401-403.

71 Marc Ferro, *Histoire Des Colonisations: Des Conquêtes Aux Indépendances XIIIe-XXe Siècle* (1996), at 83.

72 Partlett and Küpper, *supra* note 23, at 8-11.

73 Casella, *supra* note 27, at 325-326.

74 Aldeeb, *supra* note 22, at 161-162.

75 *Ibid*., at 194.

76 Alexandre Bennigsen, 'Colonization and Decolonization in the Soviet Union', 4(1) *Journal of Contemporary History* (1969) 141, at 145. See generally Peltier, *supra* note 65; Jason A. Roberts, 'The Anti-Imperialist Empire: Soviet Nationality Policies under Brezhnev' (2015) (PhD thesis on file at West Virginia University).

peoples have subjugated more advanced peoples in the past, such as the Mongols, or in the same vein, Russia, which maintained an iron grip over the Baltic peoples, which were more industrialised and educated than Russians themselves. In the case of the Soviet Republics, the difference in treatment suffered by non-Russian Republics was 'rather ethnic' as Russian maintained non-Russian peoples under domination while justifying it through the necessity of a civilising mission.[77]

*

Therefore, under the 'National' approach, all Republics were colonies as per history (conquest) and the lack of any political control, in conjunction with settlement policies, assimilation policies (Russian language, Marxism-Leninism) – even in 'advanced' Republics such as the Baltics – and economic exploitation. Of course, all Republics differed; Asian and Caucasus Republics suffered the most. Yet maintaining relatively better-treated peoples under subjection is no less imperialistic.

B. Constitutive Approach

Under this approach, whether a human group is a people follows from a UN decision based on criteria outlined in a suite of resolutions.[78] This approach results from UN Charter Chapter XI, which applies to 'territories whose people have not yet attained a full measure of self-government'. The main difference with the 'National' approach is that regardless of the factual situation, the only determining element is the UN legal characterisation. As the factual elements were dealt with in section I.A, section I.B will only deal with the 'geographical separation' criterion established under Resolution 1541.

The initial UNGA list of criteria is to be found in Resolution 567 (VI), which is divided into two categories depending on whether the referred territories have ceased to be dependent through independence or free association. In the first scenario, independence, the criteria aim to verify whether there is *de facto* and not only *de jure* independence. Other considerations were mentioned. On the one hand, 'geographical considerations', i.e., whether there is '*separation by land, sea or other natural obstacles*', and on the other hand 'ethnic and cultural

77 Marlène Laruelle, 'Le paradigme du colonialisme en Asie centrale postsoviétique', 174 *L'Homme et la société* (2009) 27, at 28; Vichnevski and Višnevskaja, *supra* note 66, at 102-104.

78 UNGA Res. 334 (IV), 2 December 1949.

considerations', i.e., a population's distinctiveness in terms of 'race, language, religion or […] distinct cultural heritage, interest or aspirations'.[79]

The UNGA reused these criteria in Resolution 648 (VII)[80] and then adopted an updated list in Resolution 742 (VIII), which still included '*separation by land, sea or other natural obstacles*' and 'ethnic and cultural considerations'.[81] Resolution 742 distinguished between territories attaining independence, having a separate system of self-governance or having fully integrated their metropolis. This list of criteria was 'b[orne] in mind' by the UNGA when adopting Resolution 1541. This Resolution included, as such, the list of criteria adopted by a UNGA-established special committee. The distinction between independence and self-government/association was then abandoned. Resolution 1541 held that 'Chapter XI should be applicable to territories [known] to be of the colonial type' (Principle I), that there is a *prima facie* 'obligation to transmit information in respect of a territory which is *geographically separate* and is distinct ethnically and/or culturally from the country administering it' (Principle IV).[82] Then, once a *prima facie* case is established, the above-mentioned elements had to be considered, i.e., administrative, political, juridical, economic or historical factors.

The special committee which drafted Resolution 1541 considered Resolutions 648 and 742 as background information.[83] Committee members expressed some reservations, e.g., the UK deemed it was not always possible to achieve 'universal adult suffrage'. Non-committee members, e.g., Haiti, expressed doubts on free integration.[84] Yet, no State expressed concerns about the nature of geographical separation.[85] The committee also noted that the 'Charter is a living document and the obligations under Chapter XI must be viewed in the light of the changing spirit of the times'.[86]

There is no indication that the committee changed its position on the nature of geographical separation. The reshuffled principles rather are a simplification of the criteria contained in Resolutions 648 and 742, which were about 2.5 times longer than Resolution 1541 and rather intricate given their threefold division. The terms 'geographical separation' seem to have

79 Emphasis added.
80 UNGA Res. 648 (VII), 10 December 1952.
81 UNGA Res. 742 (VIII), 27 November 1953. Emphasis added.
82 Emphasis added.
83 UNGA, 'Report of the Special Committee of Six on the transmission of information (Non-Self-Governing Territories)', UN Doc. A/4526, 3 October 1960, at 1 and 7.
84 UNGA, 'Report of the Special Committee Established Under General Assembly Resolution 1467 (XIV)', UN Doc. A/4651, 14 December 1960, at 8.
85 UNGA, *supra* note 83, at 13-15.
86 *Ibid*., at 17-18.

followed the same path and have been streamlined, as 'geographical separation' does encompass 'separation by land, sea or other natural obstacles'.

Few interventions related to geographical separation during Fourth Committee debates on draft Resolution 1541. The two States that criticised the most 'geographical separation' – and Principle IV generally – were Portugal and Spain. Portugal tried to argue ethnic considerations should not matter. Portugal opposed the 'criterion of racial or cultural differences because it [opposed] all discrimination based on race or colour'.[87] Similarly, Spain argued that the criteria in those principles IV and V would put the 'independence, liberty and sovereignty of States [in] jeopardy' while ridiculing the criterion of geographical separation by asking if the width of a strait would be enough or if an ocean was needed.[88] However, others, e.g., the Philippines, asked how the criterion would apply to archipelago States, holding criteria were not entirely clear.[89] On the contrary, Liberia explained that '[t]he concept of geographical separation […] was self-explanatory, despite the doubts cast upon it by [Portugal]'.[90] Liberia insisted a facet of colonialism was the 'imposition of an alien creed or ideology' and that in Portuguese Africa, colonialism led to the 'imposition of ideological principles alien to the custom and ideology of the indigenous inhabitants'.[91] While approving the criteria, Somalia declared that it 'reserved the right to advocate a more general application' thereof.[92]

Many States considered Spanish and Portuguese African territories, including the Canary Islands, were colonies as being geographically separate and ethnically/culturally distinct (which appears doubtful in the case of the Canary Islands, a settler colony).[93] This led Colombia to criticise the 'improvisations of such lists' by the UNGA, as 'highly dangerous'.[94] In the end, those Islands were not mentioned in any resolution, but Resolution 1542 (XV) listed Portuguese territories while mentioning Spain accepted to provide information. Senegal noted, '[t]he legal fiction that Mozambique, Angola and Portuguese Guinea were provinces of Portugal was contrary to geographical and historical reality'.[95]

87 UNGA, '15th Session Fourth Committee 1036th Meeting', UN Doc. A/C.4/SR.1036, 4 November 1960, at 219; UNGA, '15th Session Fourth Committee 1041st Meeting', UNGA, '15th Session Fourth Committee 1041st Meeting', UN Doc. A/C.4/SR.1041, 8 November 1960, at 245.

88 UNGA, '15th Session Fourth Committee 1038th Meeting', UN Doc. A/C.4/SR.1038, 7 November 1960 at 232; UNGA, '15th Session Fourth Committee 1041st Meeting', UN Doc. A/C.4/SR.1041, 8 November 1960, at 245.

89 UNGA, '15th Session Fourth Committee 1039th Meeting', UN Doc. A/C.4/SR.1039, 7 November 1960 at 239.

90 UNGA, '15th Session Fourth Committee 1041st Meeting', UN Doc. A/C.4/SR.1041, 8 November 1960, at 248.

91 *Ibid*., at 249.

92 UNGA, '15th Session Fourth Committee 1037th Meeting', UN Doc. A/C.4/SR.1037, 4 November 1960, at 227.

93 UNGA, '15th Session Fourth Committee 1036th Meeting', UN Doc. A/C.4/SR.1036, 4 November 1960, at 216; UNGA, '15th Session Fourth Committee 1039th Meeting', UN Doc. A/C.4/SR.1039, 7 November 1960, at 236.

94 UNGA, '15th Session Fourth Committee 1047th Meeting', UN Doc. A/C.4/SR.1047, 11 November 1960, at 282.

95 UNGA, '15th Session Fourth Committee 1018th Meeting', UN Doc. A/C.4/SR.1018, 20 October 1960, at 106.

*

In fact, there is no reason to believe that 'geographical separation' is to be construed as being a separation 'by sea' alone, given the reference to 'separation by land, sea or other natural obstacles' in background documents. Indeed, Resolution 1541 did not alter past Resolutions' substance, but underwent a mere streamlining process.

Therefore, under the 'Constitutive' approach, the Soviet Republics should have been considered colonies, since they met the criteria in Principles IV-V as seen in section I.A. In addition, there was separation 'by land' and many natural obstacles, such as mountain chains or the Turkestan desert, which separated Republics from their metropolis.[96] Yet, UN members have not applied the criteria of Resolution 1541 consistently as Soviet Republics were never listed as NSGTs.

The failure to include Soviet peoples on the list shows that as useful as the list has been,[97] it remains a *political* list which, in essence, cannot exhaust the question of which peoples are colonial. Its political nature is evinced by the fact there must be sufficient UN membership support to list a territory. The NSGT list was subject to threefold political hazards. First, some territories were NSGTs, at a point, then withdrawn and added back, such as French Polynesia and New Caledonia. Second, the list has been instrumentalised as territories such as Gibraltar and the Falklands Islands which have nothing to do with decolonisation and are rather the object of territorial disputes have also been added to the list.[98] Likewise, territories strictly inhabited by the metropolitan settlers, e.g., Saint-Pierre Miquelon, were listed for no apparent reason. Lastly, even when listed, colonies could be retained by colonial powers by merely integrating them within their constitutional order. For instance, the US made Alaska an American State in 1959 following a referendum; Alaska was then a UN-recognised NSGT the US had bought from Russia in 1867. However, the census underestimated the number of natives, who were not all given a chance to vote, and in fact, gave the power to decide to an absolute majority of American settlers. Natives were the object of secessionist and discriminatory practices, so harsh they warranted the adoption of an anti-discrimination law in 1945, and were overnumbered by settlers around 1940.[99] The annexation and Alaska's

96 Ferro, *supra* note 71, at 75.

97 Alain Pellet, *Le Droit International à La Lumière de La Pratique: L'introuvable Théorie de La Réalité* (2021), at 103.

98 Calogeropoulos-Stratis, *supra* note 10, at 326-328; Charpentier, *supra* note 8, at 129.

99 James Gregory, *Alaska Migration History 1900-2018* (2018).

withdrawal from the NSGTs list have been considered 'unlawful' by native associations.[100] The same holds for Hawaii. The options in Alaska/Hawaii referenda were only to stay within the US either as a State or as a US territory, not to become independent. Yet, both territories were unlisted in 1959.[101] The same could be said about Greenland (no referendum and sheer incorporation), unlisted in 1954.[102] Yet, there can be colonialism even when a territory is incorporated within the political structure of the metropolis.[103] Therefore, why could the US and Denmark do what Portugal and Spain were – fortunately – prevented from doing? The answer again appears to be internal UNGA politics.

C. Territorial Approach

The 'Territorial' approach posits that there are only two types of peoples: peoples already constituted in States and those living in territories designated in Resolution 1541: Trust Territories, NSGTs and other territories that have not yet attained independence.[104]

This approach is a stricter variant of the 'Constitutive' approach as, in this case, regardless of the UN criteria or determinations, the separation must strictly be 'by sea' following the 'Salt-Water' test[105] or *test de l'eau salée*.[106] For instance, Pazarti affirms the Salt-Water test 'in a sense served to sever the concept of secession from the concept of self-determination'.[107] Trinidad adds that 'saltwater colonialism […] is an important factor in the restrictive application of self-determination as a legal norm'.[108] Conversely, Thornton explains this distinction has solely been made to safeguard continental empires.[109]

Yet, as seen above, the criterion of 'geographical separation' was never meant to mean separation by sea only, and there is no such limitation in Chapter XI, which in fact applies both

100 See Indigenous Peoples and Nations Coalition and Koani Foundation International Council for Human Rights, Center for Reproductive Rights, 'Shadow Report for the Universal Periodic Review of the U.S.', International Council For Human Rights (2014).

101 UNGA Res. 1469 (XIV), 12 December 1959.

102 UNGA Res. 849 (IX), 22 November 1954.

103 Partlett and Küpper, *supra* note 23, at 8.

104 Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (2015), at 46; Kohen, *supra* note 7, at 968; Photini Pazartzis, 'Secession and International Law: The European Dimension', in Marcleo G. Kohen (ed.), *Secession: International Law Perspectives* (2006) 355, at 357. Marcelo Kohen adds that once a State has become independent, this *creates* a new people.

105 Crawford, *supra* note 5, at 611. Summers explains that the 'Salt-Water' test derives from the 'geographical separation' criterion of Resolution 1541 (XV), see Summers, *supra* note 16, at 207.

106 Christakis, *supra* note 6, at 53.

107 Pazartzis, *supra* note 104, at 357.

108 Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (2018), at 12.

109 Archibald Paton Thornton, 'Colonialism', 17(4) *International Journal* (1962) 335, at 344-345.

to colonisation by sea and 'landward expansion'.[110] The only element that *might* support this reading and the 'Territorial' approach is the fact that except for Alaska and Namibia, the UN has limited the NSGTs category 'to overseas colonies' regardless of the factual situation, e.g., conquest and colonisation.[111]

In any event, the UNGA practice is not the only relevant set of practice to assess the geographical separation's nature. When debating Resolutions 1514 and 1541, many States held that the Resolution should *not* be read in a narrow fashion but rather understood that the Resolution would apply to *all* cases of colonialism, including the USSR and China (with reference to Tibet).

Those statements emanate not only from colonial powers denouncing a most favourable and differentiated treatment afforded to the two countries but also from newly independent countries, non-colonialist Western countries and even the Republic of China (*vis-à-vis* the USSR).

The USSR attracted the most criticism.[112] The US, for instance, denounced the USSR's colonialism, which was 'spreading' as the USSR was the 'largest colonial empire in all the world'. According to the US, during debates on Resolution 1514, Soviet colonialism was '*clear[ly]' covered by the resolution as it now* […] *quite rightly speaks out against colonialism 'in all its manifestation"*.[113]

Many delegations denounced Soviet or Chinese colonialism implicitly by referring to the 'iron' or 'bamboo' curtains or other related expressions,[114] given the Soviets made points of order on the ground that calling out the USSR was an illegal interference in its internal affairs.[115] One of the best-known examples is Belgium,[116] which sought to denounce the differentiated treatment afforded to the USSR. While recognising it had to report information on Congo, it held that colonialism had to be condemned 'wherever […] not excepting the USSR'. Belgium denounced the USSR silencing attempts by saying that 'colonial questions are, in principle, internal in character because they relate to territories under the sovereignty

110 See Josef Laurenz Kunz, 'Chapter XI of the United Nations Charter in Action', 48(1) *The American Journal of International Law* (1954) 103.
111 Summers, *supra* note 16, at 24.
112 Alfredsson, *supra* note 17, at 6.
113 UNGA, '15th Session: 937th Plenary Meeting', UN Doc. A/PV.937, 6 December 1960, at 1158. Emphasis added.
114 UNGA, '15th Session: 933rd Plenary Meeting', UN Doc. A/PV.933, 2 December 1960, at 1104.
115 UNGA, '15th Session: 938th Plenary Meeting', UN Doc. A/PV.938, 6 December 1960, at 1177.
116 Crawford calls this the 'Belgium thesis', see Crawford, *supra* note 5, at 607.

of a State' and that there could not 'be two sets of standards' one for Western countries, another for the USSR.[117]

Italy held that 'the historic expansion known as colonialism […] was not confined to […] Europe' and included Tsarist Russia and China, which spread out 'into the very heart of widely different territories and peoples' in Europe, Central Asia and Tibet. Italy deemed these populations peoples and as such, the international community should not 'remain indifferent to the[ir] fates'. Italy likewise stated the USSR proposals were made for its own benefit.[118]

Ireland called for an application to all colonialism, holding that most UN members were:

> concerned to ensure that our resolution [1514] shall be as universal in its application as is the [UDHR]. It is essential that it should not be selective or directed to certain cases or parts of the world [it] *should be applicable to all peoples in all parts of the world, east or west, north or south* [...] *whether the oppressors and the oppressed were of the same race, creeds or colour or of different races*; whether […] many centuries ago like my own country, or in the last century like many countries in Africa, or in recent years like Tibet.[119]

The UK likewise called out the USSR's colonial policies in Central Asia, including the mass deportations and suppression of nationalities, e.g., Tatars, and the colonisation of the Baltic States. It also made clear that it was tragic that UN members could do so little 'to help th[e] people under Soviet domination'.[120] Other colonial powers, such as Spain[121], Portugal[122] and South Africa,[123] denounced the double standard by pointing out Soviet colonialism. Spain also denounced Soviet tactics to stifle any criticism.[124]

The Republic of China (ROC) – then a UNSC member – although heir to a long imperialist tradition gave an anthological speech on the oppression of the USSR peoples. The ROC's strong anti-imperialist positions have been influenced by the unequal treaties imposed by Western powers and colonisation by other Asian peoples. Interestingly, communist China also recognised the principle to self-determination between 1931 and 1937 under the Soviet Chinese Republic Constitution which stated the right of 'all Mongolians, Tibetans […] and all

117 UNGA, '15th Session: 938th Plenary Meeting', UN Doc. A/PV.938, 6 December 1960, at 1177.
118 UNGA, '15th Session: 937th Plenary Meeting', UN Doc. A/PV.937, 6 December 1960, at 1166-1167.
119 UNGA, 'Agenda Item 19: Election of the United Nations high Commissioner for Refugees', UN Doc. A/PV.935, 5 December 1960, at 1138. Emphasis added.
120 UNGA, '15th Session: 925th Plenary Meeting', UN Doc. A/PV.925, 28 November 1960, at 893.
121 UNGA, '15th Session: 944th Plenary Meeting', UN Doc. A/PV.944, 13 December 1960, at 1233.
122 UNGA, '15th Session: 947th Plenary Meeting', UN Doc. A/PV.947, 14 December 1960, at 1280.
123 UNGA, '15th Session: 945th Plenary Meeting', UN Doc. A/PV.945, 13 December 1960, at 1237.
124 UNGA, UN Doc. A/PV.944, *supra* note 121, at 1233.

others living on the territory of China shall enjoy the full right to self-determination' which could be exercised by joining China or by forming 'their own state as they prefer'.[125] The position of communist China nevertheless changed after 1937.

The ROC said underdeveloped nations had 'exercise[d] domination over more developed peoples', e.g., the Mongols who 'conquered China and held it under subjection for almost a century'. Indeed, for the ROC, it is '*not true that only European peoples have practiced colonialism and imperialism*' and that the Europeans had also been victims of the Mongols, the Mores, the Ottomans and themselves, as Europeans have exercised colonialism and imperialism over each other.[126]

China said that '*colonialism changes with time*. *It is as varied as human society itself*'. China added that the opinion of Asian-African countries *vis-à-vis* European colonialism was 'one-sided, distorted, and to a certain degree, non-objective'. The main example of colonialism put forward was the '*overland colonialism of Russia*'. Then China went on with a relatively lengthy history of Russia's colonialism, listing the Russian and Soviet conquests, insisting on the fact their colonial treatment '*differed little from what can be observed today in colonial countries'*.[127] China also showed the domination over Central Asia, which was allegedly justified by the 'cultural backwardness' of those populations, extended to all Republics, e.g., Ukraine, which was poorer and less educated than Russia despite the fact nobody claimed Ukrainian culture was 'backwar[d]'. China also added that 'any attempt to obtain any advantage on Article 17 [on Secession within the USSR Constitution] automatically becomes a serious crime, according to Articles 21 [Uniform citizenship] and 133 [sacred duty to defend the USSR]' and that Russians dominated the CPSU.[128]

China concluded that it was 'against colonialism of any type, shape or origin. *A colony is a colony, whether it is the product of overseas expansion or the product of overland expansion*' and for *this reason*, it would vote for the draft Resolution. It then reiterated the USSR was 'forging ahead against the ideals of the United Nations Charter and the basic yearnings for freedom of people everywhere. This is the problem of colonialism which the United Nations faces today.'[129]

125 Art. 14 Constitution of the Soviet Chinese Republic of 1931 (1931), available at https://www.google.com/search?client=firefox-b-d&q=14+Constitution+of+the+Soviet+Chinese+Republic+of+1931. See Conrad Brandt, Benjamin Schwartz, and John K. Fairbank, *A Documentary History of Chinese Communism* (1952), at 223.

126 UNGA, UN Doc. A/PV.935, *supra* note 119, at 1141-1144. Emphasis added.

127 UNGA, 'Agenda Item 9', UN Doc. A/ PV.869, at para. 207.

128 UNGA, UN Doc. A/PV.935, *supra* note 119, at 1144-1145. Emphasis added.

129 *Ibid*., at 1145. Emphasis added.

Malaya (now part of Malaysia) held that Resolution 1541 'in no way implies that the liquidation of colonialism in all its forms is exclusively the concern of the Asian-African world' and cautioned against the '*dangers of new forms of alien domination*', which included the '*most dangerous of all, ideological domination*'.[130]

Congo-Brazzaville affirmed that 'colonised peoples, subjugated peoples', '*whether African or European' were looking up to the UN, expecting 'positive action to deliver them for all time from the yoke of colonialism*', and this 'even in Europe'.[131]

In addition, Thailand,[132] Argentina,[133] Colombia,[134] Honduras,[135] and the Philippines[136] either called out China or the USSR for being colonial powers. Honduras went as far as to say that 'the nation least morally qualified to propose this item [on decolonisation] is the [USSR]' while referring to Ukrainians, Lithuanians, and other peoples. [137]

*

Pursuant to the so-called 'Salt-Water' test, Soviet Republics would not be colonies given the strict interpretation of 'geographical separation'. This doctrine favoured the USSR – a continental Empire – and disadvantaged European Colonial powers.[138] The USSR promoted this alleged test as it shielded itself and its imperialism from international scrutiny.

Yet, either the 'Territorial' approach is flawed, or it has been applied incorrectly (as under UN criteria, all types of separation must be accounted for). Indeed, on the one hand, as seen in section I.B, there is no indication that geographical separation means 'by sea' only; the criteria also referred to as separation by land or other natural obstacles. On the other hand, about 20 States,[139] including the Permanent Security Council members the US and ROC,colonialist and post-colonial States alike, have made clear that they considered Soviet colonialism covered under Resolutions 1514 or 1541, and that there should be no double-standards. The only reason why the USSR escaped appearing as a power responsible for the administration of NSGTs is political, despite being called out by many States, it secured enough support within the UNGA to avoid such an outcome. However, considering the drafting history of Resolutions

130 *Ibid*., at 1140-1141. Emphasis added.
131 UNGA, '15th Session: 938th Plenary Meeting', UN Doc. A/PV.938, 6 December 1960, at 1179. Emphasis added.
132 *Ibid*., at 1185.
133 UNGA, '15th Session: 927th Plenary Meeting', UN Doc. A/PV.927, 29 November 1960, at 1008.
134 UNGA, '15th Session: 929th Plenary Meeting', UN Doc. A/PV.929, 30 November 1960, at 1040-1041.
135 UNGA, 'Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples (continued)', UN Doc. A/PV.930, 1 December 1960, at 1054-1055.
136 UN Doc. A/PV.933, *supra* note 114, at 1104.
137 UN Doc. A/PV.930, *supra* note 135, at 1054-1055.
138 Mälksoo, *supra* note 28, at 216.
139 Out of 99 UN members at the time.

1514 and 1541, which clearly included like situations, Soviet Republics should have been considered colonies. It thus seems the 'Territorial' approach has been manipulated rather than applied consistently to like situations.

D. Partial Conclusion on the Colonial Nature of Soviet Republics

As seen in section I.A, under the 'National' approach, Soviet Republics were colonies as they were under Russian domination. The same conclusion would apply under the 'Constitutive' approach, had Resolution 1541 criteria to define NSGTs been followed. Nevertheless, this has not been the case on account of UNGA politics. Finally, under the 'Territorial' approach, those were not colonies if one equates this approach with the 'Salt Water' test, which is incorrect when considering the drafting history of Resolutions 1514 and 1541.

Indeed, refusing to characterise those territories as colonies is not in line with a thorough analysis of Resolutions 1514 and 1541 text and drafting history. Its meaning could have evolved, but as seen above, there is insufficient subsequent practice interpreting geographic separation as being restricted to 'sea' which could have modified the scope of this criterion. On the contrary, there are many declarations, including by permanent UNSC members, to the effect that those Resolutions were not limited to overseas territories.

Although the NSGT list was a springboard for many colonial peoples to attain independence, it does not *exhaust* the question of decolonisation for the very reason that it *cannot* do so, being, by nature, a political list. In fact, Chapter XI has no bearing to 'restrict' peoples' rights to self-determination.[140] The fact that Resolution 1514 refers to a residual category englobing 'all other territories which have not yet attained independence' on top of NSGTs and Trust territories also substantiates the fact that the NSGT list does not exhaust the question of which human groups constitute 'peoples', given the inherent (political) limitations of the UN machinery. As Pomerance put it, 'attempts to define 'colonial' and 'alien' so as to rule out 'secession' […] have landed in hopeless tautological bogs'.[141] These 'legal acrobatics' have repeatedly been deemed unconvincing and contradictory.[142]

140 Jaroslav Zourek, 'La Lutte d'un Peuple En Vue de Faire Prévaloir Son Droit à l'autodétermination Constitue-t-Elle Au Regard Du Droit International Un Conflit Interne Ou Un Conflit de Caractère International?', 1 *Diritto Internazionale Storia delle Relazioni Internazionali* (1975) 894, at 899.

141 Michla Pomerance, 'Self-Determination Today: The Metamorphosis of an Ideal', 19(3-4) *Israel Law Review* (1984) 310, at 320.

142 Charpentier, *supra* note 8, at 120.

In casu, the USSR denied having colonies[143] and hid behind its *domaine réservé* to dodge criticism, while European countries that tried arguing their colonies were part of their territory were rightly condemned. Again, why should this defence, unsuccessfully invoked by Spain and Portugal,[144] work for the USSR? From a conceptual perspective, the 'Salt-Water Test' limiting the colonial characterisation to overseas colonies is arbitrary, as pointed out by publicists but also by many States, e.g., the Republic of China holding that '[a] colony is a colony, whether it is the product of overseas expansion or the product of overland expansion'.[145] Summers adds this test is 'somewhat curious at least if colonialism was understood as alien subjugation, domination and exploitation'.[146] In fact, the application of the 'Salt-Water' test would have left '[t]he Hapsburg, Russian, Chinese, Mongol, Persian, Inca, Aztec, Ghanian, Malian and Mughal empires […] unscathed'.[147] For instance, if the Roman Empire still existed, Britannia would have attained independence, but not Germania or Gaul, despite all being home to different peoples.[148] Were the criterion of geographical separation to exclude land separation, South-West Africa (Namibia) would never have been recognised as a NSGT. [149] Thornton, a renowned colonial historian, even rebranded this test as the 'Salt-Water Fallacy'.[150]

What, in fact, matters to identify colonialism is whether a people has a distinct identity 'from the political centre and are subjected to some form of domination', even when adjacent to the colonial power.[151] While the USSR was a '*sui generis*' Empire, its dominance was 'clearly colonial',[152] as it merely 'annexat[ed]' tsarist colonies.[153] For Heinzig, there 'can be no justification for making a distinction between 'continental' and 'maritime' colonialism', a distinction which had been 'cleverly exploited by Soviet propaganda'.[154]

The reason why Soviet or Chinese territories were never listed as NSGTs, and for that matter why the US could make Alaska a US State, is political.[155] Indeed, communists pledged much support to dependent peoples to secure their ulterior support. During the decolonisation era, the USSR was seen as the only counterpower to imperialist forces. At the same time, the USSR

143 Partlett and Küpper, *supra* note 23.
144 Charpentier, *supra* note 8, at 121.
145 Summers, *supra* note 16, at 24, 210.
146 *Ibid*., at 208.
147 *Ibid*.
148 *Ibid*.; Wesseling, *supra* note 42, at 401-402.
149 Summers, *supra* note 16, at 208.
150 Thornton, *supra* note 109, at 344.
151 UNGA, UN Doc. A/ PV.869, *supra* note 127, at para. 192 et seq. See Partlett and Küpper, *supra* note 23, at 8.
152 *Ibid*., at 23.
153 Aldeeb, *supra* note 22, at 228.
154 Heinzig, *supra* note 22, at 424-425.
155 Degan, *supra* note 11, at 225.

hid behind its federal structure to deny any domination over its constitutive peoples and dodge criticism by alleging those questions were part of its *domaine réservé*. Yet, during ICCPR negotiations, proposals to limit self-determination 'in accordance with [States] constitutional processes' and 'with proper regard for the rights of other States and people' were rejected. Many States highlighted these 'might become an insurmountable obstacle to the realisation of' the right to self-determination', as it could amount to a right of veto to the metropolis.[156]

This account has shown that the 'Constitutive' and 'Territorial' approaches have inherent flaws, and are in fact, two faces of the same coin as the latter *de facto* relies on the NSGTs list to determine which territories have separate status. Without denying the role the NSGTs list had in the decolonisation process, the 'Constitutive' approach has been applied inconsistently and arbitrarily.[157] In fact, one wonders why 'Guinea Bissau could become independent but Latvia could not'?[158] This leads to the conclusion that the only valid approach is the 'National' approach using sociological criteria combined with the subjective will of a distinct human group which was, and remains, the only approach capable of ensuring that a people is not under alien subjugation, domination or exploitation.

Under the 'National' approach, the Soviet Republics should have been considered colonies and attained independence (or free association) sooner than the 1990s, as the USSR would have had an obligation to proceed to decolonisation. In any event, one thing is certain: Soviet Republics never appeared on the NSGTs list despite their clear colonial nature and were not deemed colonial by a majority of States. Given most States do not consider the Republics were colonies, their independence practice can also shed light on the issue of self-determination beyond decolonisation.

II. Post-Communist Practice Beyond Decolonisation

The above section concluded that Soviet peoples should have been considered *colonial*, yet apart from some States affirming so in the 1950s-1960s, the Soviet peoples were not generally characterised as such. A set of practice, often ignored or trivialised,[159] that sheds light on the correct approach (Constitutive, National, or Territorial) is the practice of Post-Soviet and Post-Communist peoples who almost all grounded their independence on the right to self-

156 United Nations Secretary General (UNSG), 'Annotations on the Text of the Draft International Covenants on Human Rights', UN Doc. A/2929, 1 July 1955, at 15.
157 Summers, *supra* note 16, at 210.
158 Mälksoo, *supra* note 28, at 216.
159 Kahn, *supra* note 20, at 58-59.

determination, and, in some cases, denounced their colonial treatment. Indeed, under the 'Territorial' and 'Constitutive' approaches, cases of self-determination would now be restricted to the 17 territories[160] which appear on the NSGTs list. Yet, despite not being listed as NSGTs and regardless of other States' (and the USSR) positions, Soviet Republics declared independence on the basis of their inherent right to self-determination.

For many commentators, the self-determination practice of peoples during the 20th century, including Post-Communist peoples (USSR, Czechoslovakia, and Yugoslavia), shows the right of peoples to self-determination goes beyond the realm of existing States and colonial peoples.[161] Others rather deem the practice in Post-Communist peoples were examples of 'secession of non-colonial territories' but not true self-determination exercises.[162] They either affirm communist dissolutions are a mere fact or that secession was justified given the federal States' consent.[163] This last assumption is doubtful since, as described below, save in the case of Czechoslovakia, [164] which appears to confirm the rule, federal authorities were put before a *fait accompli* and consented *ex-post-facto*, which hardly qualifies as consent.

In any event, post-Communist peoples *claimed* and *affirmed* their right to constitute themselves as States on the very basis of the right of peoples to self-determination. [165]

Independence declarations constitute relevant international practice for at least two reasons. First, peoples are IL subjects; their practice can be factored in.[166] Second, referred declarations were original legal documents on which newly independent States rested: these declarations can be assimilated to State practice. Third, most constitutions either refer to the right of peoples to self-determination (e.g., Belarus, Estonia, Latvia, Ukraine) or incorporate by reference their independence declarations (e.g., Belarus, Kazakhstan, Lithuania). The right to self-determination thereby left 'an imprint on post-Soviet constitution-making'.[167] At any rate,

160 As of July 2024.

161 Casella, *supra* note 27, at 416; Matulovic, *supra* note 9, at 267; Summers, *supra* note 16, at 340; Daniel Turp, 'Conclusion', in Daniel Turp and Marc Sanjaume-Calvet (eds.), *The Emergence of a Democratic Right to Self-Determination in Europe* (2016) 264, at 265.

162 Pazartzis, *supra* note 104, at 361; Christian Tomuschat, 'Secession and Self-Determination', in Marcelo G. Kohen (ed.), *supra* note 104, 23, at 30.

163 Ivan Boev, 'De nouveaux aspects du droit à l'autodétermination', in Jean Cristoph Barbato et al. (eds.), *Liber Amicorum Jean-Denis Mouton: transformations et résilience de l'Etat: entre mondialisation* et intégration (2020) 121, at 125; Julia Miklasová, 'Dissolution of the Soviet Union Thirty Years On: Re-Appraisal of the Relevance of the Principle of Uti Possidetis Iuris', in Jorge Vinuales et al., (eds.), *L'ordre Juridique International Au XXIeme Siècle: Ecrits En l'honneur Du Professeur Marcelo Gustavo Kohen* (2023) 105, at 106.

164 Global-Regulation, Constitutional Act 542/1992 of Czechoslovakia, 25 November 1992, available at https://www.global-regulation.com/translation/czech-republic/2037885/on-the-dissolution-of-the-csfr.html.

165 Boev, *supra* note 163, at 124; Summers, *supra* note 16, at 337.

166 Alfredsson, *supra* note 17, at 27; Francine Batailler-Demichel, 'Droit de l'homme et Droits Des Peuples Dans l'ordre International', in Jean Charpentier (ed.), *supra* note 8, at 28.

167 Partlett and Küpper, *supra* note 23, at 65.

federated States' practice would be relevant, *a minima*, regarding Belarus and Ukraine, who were original UN members, although this was a mere façade.[168] Belarus' and Ukraine's membership is incidentally indicative of the USSR's instrumental relationship with colonialism. In Yalta, Stalin asked for sixteen seats to maintain the USSR's weight within the UN and offset the weight of post-colonial States, e.g., British Dominions, the Philippines, or India, considered by the USSR to be under Western control.[169]

The following section (II.A) will successively expound the relevant former USSR Republics declarations, save for Russia. It will then succinctly refer to Croatia, Slovenia, and Slovakia, which had very similar settings. Although one cannot talk of colonialism in those last three cases, their independence took place in the broader setting of the communist bloc implosion and thus needs to be considered alongside Soviet examples when assessing the broader scope of self-determination. The second part (II.B) will briefly examine the practice of third-parties, i.e., other States, who recognised self-determination was at stake. The last part (II.C) will be the occasion to take stock of these practice sets in light of the three above-mentioned approaches.

A. The Self-Determination Practice of Post-Soviet and Communist Peoples

USSR Republics' independence process was two-pronged, with Republics first declaring they were sovereign without cutting all ties with the USSR through 'sovereignty declarations' that declared the laws of Republics were to take precedence over Soviet laws, and then declaring fully-fledged independence a few months afterwards.[170] The first subsection (II.A.1) covers Eastern Europe, while the second subsection (II.A.2) covers the Baltics, the third subsection (II.A.3) covers the Caucasus, the fourth subsection (II.A.4) covers Central Asia. Finally, the last subsection (II.A.5) goes beyond the USSR framework and covers Ex-Yugoslavia and Ex-Czechoslovakia.

1. Eastern Europe

The practice of the two European republics, Ukraine, and Belarus, is particularly interesting as these States were in a *sui generis* position, being simultaneously UN founding members

168 Lauri Mälksoo, *Russian Approaches to International Law* (2015), at 6.

169 Aspaturian, *supra* note 30, at 21-26; Daniel Gorman, 'Britain, India, and the United Nations: Colonialism and the Development of International Governance, 1945-1960', 9(3) *Journal of Global History* (2014) 471, at 477.

170 Carrère d'Encausse, *supra* note 35, at 414; Kahn, *supra* note 20, at 60.

and constitutive USSR Republics. Although since the 1944 Soviet Constitution, republics were supposed to be independent constituent States, Izvestia, an official Soviet newspaper, explained that this change was 'dictated by the interests of the Union as a whole' which included obtaining more UN seats.[171]

Ukraine's 1991 declaration[172] relies on its 'thousand-year tradition of State development' and held that its independence was '*[p]roceeding from the right of a nation to self-determination* in accordance with the Charter of the United Nations […]'. The preamble of the Ukrainian constitution[173] states Ukraine is based on 'the right to self-determination realised by the Ukrainian nation'.

Likewise, the 1990 Belarus Sovereignty Declaration,[174] is 'expressing the will of the people' of Belarus and the respect it has for the 'sovereign rights of all [USSR's] peoples'. Article 1 proclaims Belarus 'is a sovereign State established *on the basis of the realisation by the Belarusian nation of its inalienable right to self-determination*'. It provides those 'inalienable rights' are to be realised 'in conformity with universally recognised norms of international law'. The preamble of Belarus' Constitution[175] states Belarus was founded 'on [Belarusians'] inalienable right to self-determination'.

Moldova's 1991 independence declaration[176] uses similar vocabulary. It first proclaimed the Soviet dismemberment of its national territory was 'contrary to the historical right of [Moldova's] people'. It then reaffirms 'the equal rights of peoples and their right to self-determination, as laid down in the [norms of international law]' and does proclaim Moldova's independence '*in virtue of the right of self-determination of peoples*'. The declaration also incorporates its 1990 Sovereignty Declaration,[177] which recognised the 'right to independence of all peoples'.

2. Baltics

171 Aspaturian, *supra* note 30, at 52.

172 Act of Declaration of Independence of Ukraine, 24 August 1991, *Vidmosti Verkhovnoyi Rady* 1991, #38, 502. Emphasis added.

173 Constitution of Ukraine, 28 June 1996, *Verkohvna Rada of Ukraine* (BVR) 1996, No. 30, Art. 141, as amended on 3 September 2019, BVR 2019. No. 38, Art. 160.

174 Declaration of Sovereignty of the Supreme Soviet of the Republic of Belarus, 27 July 1990, available at https://www.servat.unibe.ch/icl/bo02000_.html. Emphasis added.

175 Constitution of Belarus, 15 March 1994, available at https://www.wipo.int/wipolex/en/legislation/details/6691.

176 Declaration of Independence of the Republic of Moldova, 27 August 1991, available at https://www.constcourt.md/public/files/file/Baza%20legala/Declaratia_en.pdf.

177 Declaration Concerning State Sovereignty of the Republic of Moldova, 23 June 1990, available at https://docs.historyrussia.org/ru/nodes/72301-deklaratsiya-o-suverenitete-sovetskoy-sotsialisticheskoy-respubliki-moldova-23-iyunya-1990-goda.

Baltic countries are a special case as they had been independent for about 20 years before World War II. Baltic States posit their continuity, which is a legal fiction.[178] Without engaging thoroughly with this debate, if one considers that conquest was only prohibited in 1945, given the USSR was a UN founding member despite recent territorial conquests, their annexation seems legal – although tragically inflicted upon Baltic peoples, as is any conquest. The 1944 constitutional change in the USSR, granting sovereign prerogatives to the republics, was done to make their incorporation palatable to the Western world before the adoption of the UN Charter as 'giving the three Republics their own foreign and defense departments, Moscow in effect was re-endowing them with "nominal independence"'.[179] In any event, during the 1960s, Baltic peoples, alongside all other peoples, gained the right to choose their destiny by virtue of the right of peoples to self-determination.

Even if one posits their continuity,[180] their independence declarations remain relevant self-determination practice. Indeed, Baltic peoples in the 1990s declarations referred to the right of peoples to self-determination directly or to their 1918 declarations, which used self-determination as the basis for their independence. In a way, Baltic peoples, like the Finnish, were precursors, as the affirmed self-determination was a right at the beginning of the 20th century.

Estonia's 1988 sovereignty declaration[181] denounced the economic stagnation and Soviet demographic manipulation, i.e., mass immigration of Russians, which was 'unfavourable to *Estonians as the indigenous ethnic group*'. The declaration '*rel[ies]*' on international law and the 'power of the [Estonian people]'. Estonia's 1991 declaration affirms its independence based on its 1918 declaration, which was made '*by virtue of the right of self-determination of peoples*',[182] and the result of the 1991 referendum.[183] This declaration clarifies Estonia has been 'established on the inextinguishable right of the people of Estonia to national self-determination'.

178 Degan, *supra* note 11, at 245.

179 Aspaturian, *supra* note 30, at 52, 79.

180 Lauri Mälksoo, 'Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR', in Lauri Mälksoo (ed.), *Illegal Annexation and State Continuity* (2021).

181 Supreme Soviet of the Estonian Soviet Socialist Republic, *On the sovereignty of the Estonian SSR*, 16 November 1988, available at https://www.riigiteataja.ee/akt/27849 Emphasis added.

182 Council of Elders of the Estonian Provincial Assembly, Declaration of Independence: Manifesto, 24 February 1918, available at https://president.ee/en/republic-of-estonia/declaration-of-independence/index.html.

183 Supreme Council of the Republic of Estonia, *On the national independence of Estonia*, 20 August 1991, available at https://www.riigiteataja.ee/akt/13071519. Emphasis added.

Latvia's 1991 declaration[184] recalls Latvia gained independence through its 1918 declaration and that the 'Latvian Nation's right to self-determination was implemented in April 1920. Latvia's 1918 declaration[185] was made '*on the basis of the right of peoples to self-determination and has been proclaimed by all the democracies of the world*'. It states the Latvian people 'protest[ed] against any attempt to reach peace which would violate the self-determination of peoples' and 'condemn[ed] the falsification of the will of the people under the constraint of occupation and war conditions'. Its constitution[186] recalls Latvia was 'established upon the immutable will of the Latvian nation and *its inextinguishable right to self-determination* […]'.

Likewise, Lithuania's 1990 declaration[187] refers to its original 1918 declaration of independence,[188] which was '*based on the recognised right to national self-determination*'.

3. Caucasus

Like Baltic countries, some Caucasian republics had enjoyed – short-lived – independence before the Soviets reined them in,[189] leading some republics to affirm that their declarations were restoring their independence. The Caucasian people's national sentiment 'r[a]n high' as even during the 1960s the 'separatist feeling [was] still a real political factor'.[190]

Armenia's 1990 declaration[191] 'proceeded from the principles of the [UDHR] and the generally recognised norms of international law'. It posed itself as an '*exercis[e] of the right of nations to self-determination*' and was aimed at '[d]eveloping the democratic traditions of the independent Republic of Armenia established on May 28, 1918'. The preamble of Armenia's Constitution[192] incorporates its 1990 declaration by reference.

184 Supreme Soviet of the Latvian Soviet Socialist Republic, *On the restoration of Independence of the Republic of Latvia*, 4 May 1990, available at https://www.mk.gov.lv/en/media/8819/download.

185 Latvian People's Council, *The proclamation of the Latvian State*, 18 November 1918, available at https://enciklopedija.lv/skirklis/113378.https://enciklopedija.lv/skirklis/113378. Emphasis added.

186 Constitution of the Republic of Latvia, 15 February 1922, as amended on 19 June 2014, available at https://www.saeima.lv/LapasEnglish/Constitution_Visa.htm. Emphasis added.

187 Supreme Council of the Republic of Lithuania, *Act of the Re-Establishment of the State of Lithuania*, 11 March 1990, available at https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=181l7liwom&documentId=TAIS.50850&category=TAD.

188 Council of Lithuania, *The Act of Independence of Lithuania*, 16 January 1918, available at https://www.lrs.lt/pls/inter/w5_show?p_r=5691&p_k=2.

189 Kappeler, *supra* note 35, at 330.

190 Aspaturian, *supra* note 30, at 202.

191 Supreme Council of the Armenian Socialist Soviet Republic, *Declaration on the Independence of Armenia*, 23 August 1990, available at https://www.gov.am/en/independence.

192 Constitution of Armenia, 5 July 1995, as amended on 27 November 1995, available at https://www.president.am/en/constitution-2015/.

Azerbaijan's 1991 declaration[193] refers to its 1918 declaration,[194] which characterised Azerbaijani as a '*people* [...] *bearer of sovereign rights*' and 'henceforth a rightful independent State', as a basis to restore their independence. The 1991 declaration also refers to '*the policy of colonialism [which] was carried out*' by the USSR. Azerbaijan also included a provision prohibiting paying back debts incurred to support coups against Azerbaijan, which implicitly refers to the USSR.[195]

Georgia's 1991 declaration[196] refers to its 1918 declaration of independence[197] as '*Georgia did not join the Soviet Union voluntarily*'. The declaration clarifies it 'fully complies with the Charter of the United Nations, the Helsinki and Vienna Acts, *which recognise and enshrine therein the right of every nation to decide on the political fate of its own country*'.

4. Central Asia

The situation in Central Asia was different from that of the Baltic or Caucasus, as republics had never been independent States and were tossed around from one Empire to another. However, there was already 'national consciousness' among peoples of this region, especially among Uzbeks who already in the 1960s 'flirted with independence'.[198]

While Uzbekistan's 1991 independence declaration does not mention self-determination,[199] its 1990 Sovereignty Declaration, referenced in its 1991 declaration, does so as it was based on the 'historical experience of state building and the established traditions of Uzbek people' and the right of 'every nation' to 'self-determination, legal norms, universal values and principles of democracy'.[200]

193 Supreme Council of the Azerbaijani Socialist Soviet Republic, *Constitutional Act About recovery of the state independence of the Azerbaijan Republic*, 18 October 1991, available at https://cis-legislation.com/document.fwx?rgn=2889. Emphasis added.

194 Azerbaijani National Council, *The Declaration of Independence of Azerbaijan*, 28 May 1918, available at https://axc.preslib.az/en/page/41rUR0xeMH. Emphasis added.

195 Art. 20 Constitution of the Republic of Azerbaijan, 12 November 1995 as amended on 26 September 2016, available at https://president.az/en/pages/view/azerbaijan/constitution. See also Partlett and Küpper, *supra* note 23, at 60, 68.

196 Supreme Council of the Georgian Socialist Soviet Republic, Act of Reestablishment of Independence, 9 April 1991, Gazette of the Supreme Council of the Republic of Georgia, 1991, No 4, Art. 291. Emphasis added.

197 Georgia National Council, Declaration of Independence, 26 May 1918, available at https://civil.ge/archives/242519.

198 Aspaturian, *supra* note 30, at 85.

199 Supreme Council of the Uzbekistan Republic*, On declaring State independence of the Republic of Uzbekistan* 31 August 1991, available at https://kun.uz/news/2022/09/01/ozarxiv-oliy-kengashning-davlat-mustaqilligini-elon-qilish-togrisidagi-qarori-asl-nusxasini-korsatdi?q=%2Fuz%2Fnews%2F2022%2F09%2F01%2Fozarxiv-oliy-kengashning-davlat-mustaqilligini-elon-qilish-togrisidagi-qarori-asl-nusxasini-korsatdi.

200 Supreme Council of the Uzbek SSR, 'Declaration of Sovereignty', 20 June 1990 as quoted in KUN UZ, *Uzbekistan Celebrates 30 Years Anniversary of the Declaration of Sovereignty*, 20 June 2020, available at https://kun.uz/en/news/2020/06/20/uzbekistan-celebrates-30-years-anniversary-of-the-declaration-of-sovereignty.

Kazakhstan's 1991 declaration[201] refers to the 'will of the people of Kazakhstan' and '*reaffirm[s] the right of the Kazakh nation to self-determination*'. Similarly, Tajikistan's 1991 declaration is '*proceeding from the inalienable right of every people to self-determination*' and expresses 'the will of the people of the Republic of Tajikistan'.[202] The preamble of Turkmenistan's constitution[203] is drafted in a slightly similar fashion, and holds that the 'people of Turkmenistan' has an '*inalienable right to determine [its] destiny*'.

5. Ex-Yugoslavia and Ex-Czechoslovakia[204]

These two communist countries faced slightly different circumstances, but their practice appears relevant as, similarly to the USSR and although constitutional provisions existed for the self-determination of constitutive entities, Yugoslav Republics did not follow domestic law procedures and rather declared their independence on the basis of international law, while noting relevant constitutional law in the case of Croatia.

Croatia's declaration[205] refers to its 'right to self-determination', including 'the right to secede, according to previous [Yugoslav constitutions]' while Slovenia based its declaration[206] on '*fundamental principles of natural law*' and principles of international law, which include the '*right of the Slovene nation to self-determination*'.

Slovakia's 1992 declaration[207] affirms the '*natural right of the Slovak nation for self-determination* as embodied [in international law]' and more generally the 'recogniz[ed] the right of nations for self-determination'.

201 Supreme Council of the Republic of Kazakhstan, *On the State Independence of the Republic of Kazakhstan*, 16 December 1991, available at https://adilet.zan.kz/eng/docs/Z910004400. Emphasis added.

202 Supreme Council of the Republic of Tajikistan, Declaration of Sovereignty of the Tajik Soviet Socialist Republic, 24 August 1990, as amended on 9 September 1991. Emphasis added.

203 Constitution of Turkmenistan, 18 May 1992, as amended on 14 September 2016, available at https://www.constituteproject.org/constitution/Turkmenistan_2016. Emphasis added.

204 This article does not deal with the Czech and Serb cases, since they were the dominant peoples within their respective federations.

205 Parliament of the Croatian Republic, *On the declaration of the sovereign and independent Republic of Croatia*, 25 June 1991, available at https://www.sabor.hr/hr/deklaracija-o-proglasenju-suverene-i-samostalne-republike-hrvatske-25-lipnja-1991.

206 Assembly of the Socialist Republic of Slovenia, *Declaration of Independence*, 25 June 1991, available at http://www.slovenija2001.gov.si/10years/path/documents/declaration/#:~:text=On%20the%20basis%20of%20an,all%20its%20chambers%20on%2025.

207 Slovak National Council, *Declaration of Independence of the Slovak Nation*, 17 July 1992, available at https://www.nrsr.sk/dl/Browser/Document?documentId=71565.

B. Third-Party Practice

In addition, another relevant set of practice for self-determination relates to the recognition of the newly independent States, which, although not a constitutive element of statehood, constitutes practice and embodies *opinio juris*.

Using available forces, the USSR federal State tried to avoid its republics' independence. At first, Western governments and parties, e.g., the Bush administration and oppositions, e.g., the Liberal Party of Canada,[208] pledged support to the USSR against its constitutive Republics. Yet, Western powers recognised the new Republics or promised recognition well before the USSR officially ceased to exist.[209] Despite those early recognition, the USSR was not dead yet. For instance, Gorbachev formed the USSR State Council on 5 September 1991 to retrieve the power 'usurped' by Republics after the August 1991 Coup attempt. There was neither consent from the federal State nor were constitutions duly amended; so-called consent only took place *ex-post-facto*.

For instance, Canada promised Ukraine recognition as early as August 1991 and signed a *Declaration on Relations between Canada and Ukraine* on 22 September 1991.[210] Ottawa did recognise Ukraine a day after Ukraine's referendum, on December 2nd, a few hours after Poland, and well before 25 December. Canada's Premier did not seem to mind the Soviet authorities after this referendum, deeming the only thing that mattered was that Ukrainians chose independence in a 'free and democratic' vote.[211] Canada's foreign affairs spokesperson declared in the autumn of 1991 that Canada would recognise all Republics which would secede 'pacifically'[212] and Canada later recognised this independence took place within the context of the 'right of peoples to self-determination'.[213]

In total, 20 countries, including 11 newly independent post-communist States, recognised Ukraine's independence before 25 December. Nonetheless, the bulk of international recognition took place on that date and afterwards. E.g., the US officially recognised Ukraine on 25 December, as it did for most ex-Republics. Nevertheless, it was clear the US would

208 André P. Donneur, 'La fin de la guerre froide : le Canada et la sécurité européenne', 23(1) *Études internationales* (1992) 121, at 137.

209 Between 25 (Gorbachev's declaration) and 26 December 1991 when the Soviet Supreme-USSR's parliament – and the Soviet of Nationalities (rebranded as Soviet of Republics in September 1991 – USSR's Senate – dissolved themselves.

210 Government of Canada and Government of Ukraine, Joint Declaration on the Establishment of Diplomatic Relations Between Canada and Ukraine, 27 January 1992, E100720, available at https://www.treaty-accord.gc.ca/text-texte.aspx?id=100720.

211 Laura Osman, *Le Canada parmi les premiers pays à reconnaître la nouvelle Ukraine : fin des espoirs de Gorbatchev*, 3 December 1991.

212 Donneur, *supra* note 208, at 137.

213 Government of Canada and Government of Ukraine, *supra* note 210.

recognise former Republics many months before the USSR's official end. In early December 1991, following Ukraine's referendum, Secretary of State Baker declared the US was moving towards Ukraine's 'full diplomatic recognition'.[214] Still, in early December 1991, Baker said, 'the end of the Soviet empire turned into a beginning for democracy and economic freedom in [Russia, Ukraine, Kazakhstan, Belarus, Armenia, Kyrgyzstan] and elsewhere across the former Soviet empire.'[215] He acknowledged Republics were already independent, stating 'most [Republics declared] independence and created new authorities with new legitimacy. Now they must determine what that independence means in practice, for both their own peoples as well as for future inter-republic relations'.[216]

Many States recognised Belarus before 25 December (e.g. Austria, Bulgaria or Poland). Other Republics were timely recognised by their 'kin States'; for instance, Romania recognised Moldavia on the day it declared independence, and Turkey recognised Uzbekistan on 16 December 1991. Switzerland recognised all non-Baltic Republics (recognised in August[217]) on 23 December 1991 (with Georgia's independence recognition to be notified later). Switzerland held that their inhabitants constituted 'peoples' before the official demise of the Union.[218]

Baltic countries also enjoyed very early recognition (August) before the USSR recognised the Republics on 6 September 1991 – which can be explained by the fact that some States considered the Baltics had been illegally annexed.

More generally, the European Community (EC) [219] practice is enlightening.[220] Under the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union[221] (16 December 1991), European ministers 'elaborat[ed] an approach regarding relation with new states'. Interestingly, the EC *did* link secessions from the USSR as self-determination cases. EC Ministers confirmed their 'attachment' to the Helsinki Final Act and Charter of Paris '*in particular the principle of self-determination*' and 'affirm[ed] their

214 James R. Gerstenzang, 'US Set to Forge Ties With Ukraine', *New York Times* (1991).

215 James Baker, 'America and the Collapse of the Soviet Empire: What Has to Be Done', 50 *Department of State Dispatch* (1991) 887, at 889.

216 *Ibid*., at 891.

217 See e.g, President of the Swiss Confederation, Letter to the Lithuanian Chairman, 28 August 1991, Doc. DODIS 58482, available at https://dodis.ch/58483.

218 See e.g., Vice-President of the Swiss Federal Council, Telex to the Russian President, 23 December 1991, Doc. DODIS 58185, available at https://dodis.ch/58185?lang=fr.

219 12 States were EC Members at the time.

220 Matulovic, *supra* note 9, at 270.

221 European Community, *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991, available at https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/.

readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which […] *have constituted themselves on a democratic basis*, having accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations'. In the same vein, Post-Soviet States also negotiated and signed in their names the Concluding Document of the Hague Conference on the European Energy Charter on 17 December 1991.

Likewise, the Declaration on Yugoslavia[222] was framed 'in the light of their [above-mentioned Soviet] guidelines', and framed the Republics' independence as a self-determination issue. EC Ministers promised recognition to Republics '*wish[ing] to be recognised as independent states*', who respected the guideline's commitments and accepted extra human rights commitments, given the situation on the ground.

In addition, the Badinter Commission,[223] in Opinion No. 2, situated the Republics' independence within the realm of self-determination, deeming that 'the right of self-determination must not involve changes to existing frontiers at the time of independence, except by agreement between the States concerned'.

C. Legal Consequences to Be Drawn from the Practice of Post-Soviet and Post-Communist Peoples

As seen above, almost all peoples from Post-Communist Republics considered they had the right to become independent on the *basis of* or *proceeding from* the right of self-determination and proclaimed so. The practice of almost 20 newly independent States, especially considering the rarity of independence accessions after the 1970s, cannot be ignored and should properly be factored into self-determination law.

Many republics (e.g., Georgia, Moldova, Latvia, Slovakia or Ukraine) posed the rule on self-determination as a general rule of international law and insisted on the rights of other peoples or 'nations' to choose their future. For instance, Georgia held that international law 'recognise and enshrine therein […] the right of every nation to decide on the political fate of its own country'. As for Republics claiming their independence restoration, they were *avant-garde*

222 European Community, *Declaration on Yugoslavia*, 16 December 1991, available at https://www.dipublico.org/100637/declaration-on-yugoslavia-extraordinary-epc-ministerial-meeting-brussels-16-december-1991/.

223 Conference on Yugoslavia, Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 11 January 1992, 31 ILM 1488, available at https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf, at opinion No. 2; Summers, *supra* note 16, at 340.

since they affirmed their right to self-determination in the early 20th century and recognised the rights of other peoples and Republics to self-determination. In addition, many peoples framed the right to self-determination not only as positive international law but also as a *natural* (e.g., Slovakia, Slovenia) *inalienable* or *inextinguishable* right (e.g., Belarus, Latvia, Turkmenistan), as does the Human Right Committee General comment No. 12 (1984).

In relation to colonialism, it is interesting that Azerbaijan makes references to Russian colonialism in its independence declaration. Indeed, in general, the USSR dissolution 'can be understood' as the 'beginning of a process of decolonisation' although there was no general recognition thereof.[224] Thence, the Post-Soviet Republic's independence was simultaneously an exercise of self-determination and acts of late decolonisation;[225] decolonisation being a self-determination subset.

In any event, since the USSR's colonial nature has never been officially recognised, this set of practice, including all post-communist practice, has either confirmed[226] or 'crystallized […] the content and scope of the principle of self-determination'[227] as a right belonging to *all* peoples as already stated in 'numerous international instruments' and not only to colonial peoples.[228] Formerly 'socialist nations' have implemented self-determination since 1989, and their independence constituted an 'impressive breakthrough in respect of the principle of self-determination'.[229] According to Vukas, post-communist practice and the recognition of the right of these peoples to self-determination 'did not mean a new right to self-determination' but a 'correct interpretation of the right of "all peoples" to self-determination' although this wave of independence indeed 'did represent a change in attitude of the international community in respect of' that right's implementation.[230] Therefore, limiting the right of self-determination to decolonisation only is not 'corroborated' by existing legal instruments and is refuted by the 1990s practice in Europe and the former USSR.[231] Further, according to Degan, decolonisation legal instruments are applicable *mutatis mutandis* to non-colonial peoples, e.g., those living in federations.[232] Indeed, reading the right of self-determination as solely enabling

224 Partlett and Küpper, *supra* note 23, at 16.
225 *Ibid*., at 23.
226 Degan, *supra* note 11, at 225-226; Budislav Vukas, 'States, Peoples and Minorities', 231 *RdC* (1991), at 421.
227 Matulovic, *supra* note 9, at 267-269.
228 Vukas, *supra* note 226, at 408-409, 421.
229 *Ibid*., at 405.
230 *Ibid*., at 421.
231 Degan, *supra* note 11, at 225-226.
232 *Ibid*., at 352.

colonial people to attain independence contradicts the Charter and other instruments, as the right holders are *all* peoples rather than all States.[233]

CONCLUSIONS

All in all, this article dealt with the issues of colonialism and self-determination in relation to Post-Communist peoples, with a particular focus on the Post-Soviet area. The introductory part recalled the main approaches to identify peoples under self-determination law. The 'National' approach posits peoples need to possess some objective characteristic making them distinct coupled with a common will to *be* a people, i.e., to *faire société*. The 'Constitutive' approach posits that only territories listed on the UN list of NSGTs and peoples in existing States can exercise self-determination. The 'Territorial' approach also *de facto* relies on the NSGTs list, while interpreting 'geographical separation' narrowly, i.e., 'by sea'.

The first part dealt with the relationship between those approaches and decolonisation within the context of Soviet Republics. In terms of colonial characterisation, all approaches rely on the UN list of factors (geographical separation, ethnic/cultural difference, historical reasons, discrimination, etc.) to varying degrees. Under the 'National' approach, determining what is a colony depends on the facts, the main question being whether a people is being dominated by another people against its will by assessing the above-mentioned factors. Under the 'Constitutive' approach, if UN-based criteria are to be applied, distinct communities separated from their metropolis 'by land, sea or any other natural obstacles' are colonies, but the determining element remains a positive vote by UN members. The 'Territorial' approach does not significantly differ from the latter in terms of colonialism definition, except for separation that strictly needs to be 'by sea'. This last approach is the only one insisting on the 'Salt Water' test which does not appear to be supported by relevant instruments and State practice as shown above.

This part concluded that Soviet republics were colonies from a factual standpoint, including the history of domination (conquest, annexation, etc.), the discrimination suffered by non-Russians, economic exploitation, and so forth. This conclusion appears certain under the 'National' approach criteria and should have been the same under the 'Constitutive' approach given there was separation by land or other natural obstacles. Nevertheless, the 'Constitutive' approach did not apply consistently the criteria laid down in UN Resolutions, in fact, making

233 Calogeropoulos-Stratis, *supra* note 10, at 198.

it akin to the 'Territorial' approach. The 'Constitutive' approach, although not inherently flawed, has been shown to be arbitrary and inconsistent on account of UNGA internal politics. Indeed, the best example, out of many, of such inconsistency is the failure to consider Soviet Republics were NSGTs. This conclusion does not call into question the usefulness of UN decolonisation bodies, which yielded more than respectable results. This article rather shows that although the NSGTs had a tremendous impact, it can neither exhaust the question of self-determination nor decolonisation given its intrinsic political nature. Had Soviet Republics been recognised as colonies, they would likely have attained independence earlier than in the 1990s, as did most NSGTs, i.e., during the 1960s and 1970s.

Then, under the 'Territorial' approach equated with the 'Salt-Water' test, former Republics were allegedly not colonies. Nevertheless, this approach is equally flawed. Indeed, based on the drafting history of relevant UN Resolutions and State practice within the UN, the 'Territorial' approach lacks any support as there has not been enough converging subsequent practice to modify the scope of UN instruments, which do not contain any basis for the 'Salt-Water' test. In addition, the USSR, although a strong proponent of the Salt-Water 'test', supported Bangladesh's (East-Pakistan) self-determination process, which was separated by land and not by sea from Western-Pakistan.[234] This again shows the inconsistency and instrumentalisation of self-determination by the USSR.

The corollary to these conclusions is that, in light of the failure to factor in the situation of Soviet Republics, the only valid approach in terms of decolonisation appears to be the 'National' approach. Indeed, legal rules must be applied consistently to fulfil the minimum requirements of law and justice,[235] requirements which have not been met by the two other approaches. Indeed, as the ROC representative once said '[a] colony is a colony, whether it is the product of overseas expansion or the product of overland expansion'.[236]

The second part further showed that the 'National' approach is also the only valid approach to assess self-determination claims beyond decolonisation in view of the practice of post-Soviet/Communist peoples in the 1990s. Indeed, as those peoples were not recognised as colonial, their practice generally sheds light on self-determination. The declarations of sovereignty, independence, and constitutions of about 20 post-Communist States during the 1980s-1990s show those peoples and newly independent States considered they had the *right*

234 Summers, *supra* note 16, at 347.
235 Rousseau, *supra* note 19, at 74.
236 UNGA, UN Doc. A/PV.935, *supra* note 119, at 1144-1145.

to secede as per the right of peoples to self-determination. The international community's reaction corroborates this as many States acknowledged the republics' fight for freedom and recognised their independence before the USSR's official demise. The EC, in particular, explicitly considered those independences were taking place within the realm of self-determination. At any rate, an important number of countries considered those independences were proceeding from this right. At the same time, it must be acknowledged that the vast majority of (less-interested) States remained indifferent.

As put by Degan and Vukas in their respective Hague Academy Courses, the sum of these sets of practice *confirms* that a correct interpretation of the right of self-determination entails that *all* peoples possess this right beyond decolonisation. It is now clear that the right of self-determination goes beyond peoples constituted in States and peoples deemed colonial by the UN. Hereunto, another – sadly topical – example of a self-determination struggle beyond the strict realm of decolonisation is Palestine.[237] Indeed, for Judge Higgins, there is 'substantial doctrine and practice on' self-determination beyond decolonisation, including the fact Palestinians are recognised as a people.[238] In addition, other peoples' practice beyond Europe and the Middle East also sheds light on the scope of self-determination, e.g., that of Bangladesh mentioned above.[239]

This understanding is consistent with the fact international instruments refer to *all* peoples. If the term 'people' had a special 'legal' meaning restricting them to the populations of existing States and colonial entities, it would need to be explicit. Yet, during ICCPR negotiations, States decided not to define the term 'people', which, following the UNSG's interpretation of debates[240] 'should be understood in its most general sense' and that 'no definition was necessary' despite proposals to define it further. Some States suggested defining the substance of self-determination, e.g., indicating that it could lead to an 'independent State', but no further definition was provided 'for it was thought that any enumeration of the components of the right of self-determination was likely to be incomplete'. In the end, an abstract definition 'was thought to be preferable' and a reference to 'all nations' was 'added in order to emphasise the universal character of the right'. The UNSG summarising the debates thus held that the definition of self-determination, despite some opposition, was 'very comprehensive' and that

237 See e.g., UNGA Res. 78/192, 19 December 2013.

238 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 136, Separate Opinion of Judge Higgins, 207, at paras. 29-30, See also Summers, *supra* note 16, at 353.

239 Zourek, *supra* note 140, at 914.

240 UNSG, *supra* note 156, at 14.

'[e]very people or nation should be free to establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution without the interference of other peoples or nations'.[241]

Despite this conclusion, it remains important to recall the 'National' approach is not perfect as it relies to a certain extent on self-identification. Nonetheless, it does not entirely rely on self-identification, as not all human groups constitute peoples. On the one hand, objective criteria must be met, i.e., differences in terms of culture/language/ethnicity/religion, and there must be a relatively well-delineated territorial unit, where a people, in principle, forms the majority.[242] On the other hand, minorities should not be conflated with peoples. The distinction seems rather easy despite convoluted explanations in the doctrine. Minority rights come from European historical territorial development where many national groups were – and still are to some extent – residing in other States' territory. Minorities are human groups with a distinct identity from the majority residing in their State of residence and whose national identity is congruent with a 'parent' State. I.e., ethnic/cultural Hungarians living in Slovakia or Romania who have a 'homeland' where they form the majority, i.e., Hungary.[243] As the Permanent Court of International Justice (PCIJ) held, whether one belongs to a minority and whether there is a minority is not a question of subjective appreciation but must be factually assessed.[244] Minority treaties aimed to protect historical communities associated with one State, the 'parent' State, within another State; e.g., the Treaty of Lausanne provides for the protection of non-Muslims (Greeks) in Turkey and the obligation to treat them on an equal footing with other Turkish and imposes the same obligation on Greece *vis-à-vis* Muslims (Turks) (Articles 38-45).[245] In fact, the definition of community by the PCIJ, although antiquated, appears to be the definition of what we would now call a *people*.[246] Yet, subsets of peoples will be characterised as minorities when having an existing 'homeland' but having historically lived in communities elsewhere.

In any event, it must thus be recalled that the right to self-determination is essential to furthering universal peace in the UN Charter and as a precondition for exercising all individual human rights contained in the two international Covenants.[247] There is often an emphasis on

241 *Ibid.*

242 Calogeropoulos-Stratis, *supra* note 10, at 347.

243 Antonio Remiro Brotóns et al., *Derecho internacional: curso general* (2007), at 187.

244 Permanent Court of Justice (PCIJ), *Rights of Minorities in Upper Silesia* (*Minority Schools*), Judgment, 26 April 1928, Serie A, No 12, at 34.

245 Treaty of Peace, signed at Lausanne, 24 July 1923, XXVIII LNTS 12, at 13.

246 PCIJ, *The Greco-Bulgarian "Communities"*, Advisory Opinion, 31 July 1930, Series B, No 17, at 21.

247 Calogeropoulos-Stratis, *supra* note 10, at 105. See also Office of the High Commissioner of Human Rights, *CCPR General Comment No. 12: Article 1* (*Right to Self-determination*), 13 March 1984.

potential negative aspects of self-determination, e.g., in terms of international stability. Those risks cannot be minimised, yet it is also important to reminisce about the threat to peace and international stability that *arose* and could arise from the negation of peoples' right to self-determination. This includes colonisation, which, one must recall, was perfectly legal and regulated by positive international law (although allegedly not under *natural* law).[248] Indeed, mistreating peoples and national minorities can threaten international peace and security as ignoring revindications or repressing them can lead them to seek external support or protection, or even cause a civil war, e.g., in Ireland, which can all increase tensions and threaten international peace and security.[249]

Finally, in the context of the current war between Russia and Ukraine – although this paper did not directly deal with this issue – it must be recalled that international law prohibits modifying the ethnic composition of territories hosting peoples holding the right to self-determination.[250] When States do so, it is with the design to prevent peoples from exercising self-determination, as is the case in New Caledonia, Palestine, Tibet, or Western Sahara, as the massive arrival of settlers aims to lock out the possibility of the 'autochthonous' people to decide its future. Russia's predecessor was a tragic expert in this field as it expelled many peoples from their regions of origin. For instance, Crimea's Tatars were expelled to Central Asia following WWII, and Crimea settled with ethnic Russians.[251] This, in turn, enabled Russia to gain local support when annexing the region in 2014, showing that violations of the right of self-determination can have dire repercussions in the future. The international community should thus pay special attention to any ethnic-modification attempts by Russia in Ukraine. Post-Soviet history nevertheless provides us with inspiring examples: when peoples manage to gain freedom, e.g., in Kazakhstan – where Kazaks relegated to a minority managed to become again a majority in their own country following independence – they can reverse even deep-rooted trends and assume their destiny and development.

In closing, this article constitutes a call to consider further the right of self-determination so as to avoid its denaturation and instrumentalisation, as has been the case in Crimea, Ukraine more generally, the whole USSR historically and elsewhere. One must go beyond this apparent paradox, i.e., the USSR was a self-determination flagbearer while maintaining whole peoples

248 Casella, *supra* note 27, at 361.
249 Zourek, *supra* note 140, at 919.
250 ICJ, *supra* note 238, at paras. 120 and 133.
251 Socher, *supra* note 20, at 151 et seq.; Carrère d'Encausse, *supra* note 35, at 370.

The final publication is available at: https://doi.org/10.3790/gyil.2024.373904

under its yoke, and apply the applicable norms similarly to like situations, wherever they may take place as imperialism knows no geographical, cultural, or ethnic borders.