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The Tyranny of the Majority
**Partition and the Evolution of Self-Determination in
International Law 1492-1994**

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Thesis submitted for the degree of PhD

2011

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Declaration for PhD thesis

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Abstract

This thesis examines the evolution of nationhood in international law through the prism of partition. It argues that partition broadly refers to the division of a nation that is undertaken without obtaining the prior consent of that nation. In part one of the thesis the origins of partition is traced back to the 1698 and 1700 partition treaties when the word “partition” was first used in an international treaty. These treaties are then compared to the treaties that partitioned Poland (1772, 1793, and 1795) in order to explain how the idea of self-determination emerged, which arose out of the opposition expressed to those partitions, to suppressing revolution, and to acquiring territory by conquest. Part two of the thesis then examines the manner in which self-determination was applied in the Age of Imperialism to non-European territory and how a distinction was made between European and non-European peoples. In this era the idea of numerical self-determination was explicitly ruled out. A nation had to attain certain standards before it would be deemed ready for independence. The third part of the thesis examines partition in the Age of Decolonization when self-determination was applied for the first time to non-European peoples. However, in those colonies where Europeans inhabited non-European territory, the colonial power tended to self-identify with the European community and proposed partition to safeguard the national identity of that community. This led to the Third World advancing an understanding of self-determination that was based on majority rule in order to prevent self-determination from being applied to minorities.

Acknowledgements

I would like to start by thanking my brothers Ashraf (“Ash”) Hoque, Igor (“Frocio”) Cherstich, Judge Mansour Talebpour, and sister Maria Federica (“Marica”) Moscati, for warmly welcoming me to their home in “Mordor”, when I needed to find a home from home to write up and research my PhD at SOAS. Mordor, for the inquisitive, is a room located in the roof of the SOAS Language Centre at 22 Russell Square where few dare to venture due to the sheer number of stairs one needs to climb (there is no elevator). I often heard visitors, when they were only halfway up the stairs, refer to Mordor as being equivalent to climbing Everest, but without the snow and vistas of course. Spending two and a half years with two chain-smoking anthropologists and two lawyers in a tiny room packed with five computers was an experience in itself and one I will not forget. At least there was a balcony with a sash window that had to be opened whatever the weather whenever anyone made it up the stairs due to the perspiration one acquired climbing and the need for air. The vast majority of this thesis at least until the viva stage was written safely in the confines of Mordor, where mention must also be made of Arash Sedhighi and “Gonzo” who provided additional entertainment. Football, cricket, smoking (outside on the balcony of course), Christmas parties, political debates—Mordor was where it all happened. And few who visited Mordor could forget the “beautiful” artwork that decorated its walls.

Extra special mention must also be made of the LSE’s very finest, the Fantastic Mr. (Stephen) Fox. Always a source of useful advice and entertainment, Stephen was always quizzing me about partition. Forever teasing me, (which he was very good at), this incorrigible Irishman from the Falls Road would distract me at any opportune moment to talk about the Irish question and the Israel-Palestine conflict, the latter which was the topic of his own doctorate, which I hope and pray he will complete one day. Stephen always asked the tough questions, as a good lawyer does, which was of great help when it came to writing up my research. Stephen also reminded me of the limitations of the academic world and cautioned me “to keep it real”. I appreciated his earnestness, his interest, and sincerity, and for the time he spent with me in deep discussion, and occasionally in quite trivial discussions, often in the presence of complete strangers, something that Stephen was prone to do, on the streets, in coffee shops, usually in the vicinity of the Brunswick Centre. Other Irishmen who I often had occasion to banter with about Irish history, British imperialism, and international law, included Dr. Michael Kearney, Dr. David Keane, John Reynolds, and on one occasion Professor Bill Kissane; many thanks to them all.

It was in the Sheraton Hotel in Pretoria that I first had occasion to meet Michael and John when we were working on a project together for South Africa’s oldest NGO the Human Sciences Research Council. The project has recently come to fruition in the form of a book edited by Dr. Virginia Tilley, which is entitled *Beyond Occupation: Apartheid, Colonialism, and International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012). It was whilst I was doing my research for that project in which I was asked to undertake research on South Africa’s Bantustans that I came across a copy of the Tomlinson Commission’s report in the library at SOAS, and became aware of the striking parallels between the apartheid government’s racial policies and earlier British colonial policy in Africa and elsewhere. Professor John Dugard chaired the project, and I thank him for looking over my section on South Africa and reassuring me that it was good. He was also kind to reply to my emails and to offer helpful advice for further reading. My research on the history of South Africa’s Bantustans is undoubtedly the better for it.

At the University of the Pacific in Sacramento, I was fortunate to be able to stay with my dear friend Professor Omar Dajani who hosted me on my visit to California, and who explained to me before my visit not to expect beautiful vistas since the university is actually nowhere near the Pacific. It was over dinner one evening that I met Professor Brian Landsberg, Omar's colleague at the McGeorge School of Law. I explained to Professor Landsberg, who had spent 22 years working for the U.S. Department of Justice's Civil Rights Division, that I had come across some information when I was going through the British and US archives that prompted me to ponder whether the Cold War had any impact on the 1960s human rights revolution in the U.S. He was able to confirm that it did and he told me about the active role played by the U.S. State Department during the civil rights era in producing amicus briefs before the Supreme Court to overcome Jim Crow, which was related to the detrimental impact that Communist propaganda was having on US foreign policy. Here was a clear example of ideology affecting state practice, and the development of domestic and international law. Professor Landsberg then drew my attention to a book by Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (New Jersey: Princeton University Press, 2000), which I promptly ordered on Amazon and which I have referenced in Part Three of this study.

My attention was drawn to the darker side of the Enlightenment during a conversation I had with Professor Brian Klug on the train to the University of Southampton where I had been invited to give a seminar on the history of the Israel-Palestine conflict. Brian, who I count among my friends, and who is a world authority on anti-Semitism and philosophy at Oxford University, drew my attention to the writings of Voltaire on the Jewish question, which prompted me to investigate the way Jews and other minorities were stigmatized by the *philosophes*. Some of the results of that inquiry are produced in Part Two, which some readers may find the most controversial part of my thesis. But I believe the evidence I discovered is overwhelming, and cannot, and should not, be ignored by scholars, even if some of them may consider my approach teleological or tendentious. Had my thesis not been limited to 100,000 words by the University of London's PhD regulations, I could have devoted far more space and evidence to European racism and the impact that this had on the subsequent development of nationalism in Ireland, in Israel/Palestine, in India/Pakistan, in South Africa, and elsewhere. It seems inconceivable to me that any serious scholar who investigates partition should neglect the impact that racism had on the evolution of British imperial policy towards minorities and the "lower classes".

My other friends who deserve special thanks include Emilie Kronfli at Law Exchange Ltd for translating the treaties that partitioned Poland in the eighteenth century from old French and Russian into superb English for me. This is the first time that these treaties have been translated into English, and I may consider publishing them separately one day, as only brief mention is made of a few clauses in this study. Dr. Amrita Shodhan at SOAS who invited me to address her students in her seminar on the history of the partition of India and Palestine, kindly looked over my section on the partition of British India. I thank her for her excellent comments and suggestions for further research and reading. Coffee at Carluccios and nourishment at the Hare and Tortoise in the Brunswick Centre on Saturday afternoons with "Frocio" provided a welcome respite from the confines of Mordor. Igor always had interesting things to say about Marxism and religion, which were his areas of expertise, both in his personal and professional life, and as an Italian he often pointed out some of the eccentricities and peculiarities of the English way of life. Thanks are also due to Ayan Shome for drawing my attention on one of these afternoon forays to Carluccios to the

writings of Professor David Cannadine on the way the British viewed their Empire, through which I discovered his other excellent book on the decline and fall of the British aristocracy, which were real eye openers for me, and made me draw the connections I do between domestic British politics and Britain's approach to international law questions in the late nineteenth and early twentieth centuries.

Professor Matthew Craven was my supervisor. I want to thank him for believing in my project and for supporting my application to study at SOAS in 2007. It was through him that I was awarded a scholarship from the Arts and Humanities Research Council to pursue my research for three years. Despite his heavy workload as the Dean of the Law Faculty for the entire time I spent studying for my PhD at SOAS, Matthew made time to see me in which he offered intriguing insights into intricate aspects of the history of international law. He also encouraged me to steer away from a conventional legal account of partition and to embrace history in all its aspects. I appreciated his hands-off approach, which allowed me to develop my own space for personal study, thought, and reflection, and which I believe has made the thesis all the more original. Dr. Catriona Drew, my other supervisor, who unfortunately did not find time to read my thesis, nonetheless deserves thanks for inviting me to teach her students on her course on international law at the Centre for International Studies and Diplomacy at SOAS. This made me appreciate the subject holistically and kept me up to date with current developments. It was also nice to take a break from studying to engage with inquisitive students who found the subject very perplexing. I must also thank profusely Professor Tony Carty and Professor Bill Bowring, my PhD examiners, for giving me a hard time during the viva, and for their suggestions in the form of minor corrections on how I could improve my introduction and conclusion, which, as a result, I believe reads much better now, than it did before.

Finally, I cannot find adequate words in the English language to express my love and thanks to my parents William and Josephine Kattan to whom this study is dedicated for all their love and support, over the course of my entire life, both emotionally and financially, even though they have spent 27 years of my 32 years on this planet living abroad in Sudan, Vanuatu, the Turks and Caicos Islands, and Bermuda. Their support was crucial especially during my fourth year of study when most of this thesis was written. Unfortunately, AHRC's scholarships no longer cover the fourth year of study that they used to, and I needed more than three years to complete this project. In more ways than one, this study could not have been completed without their support. I am very fortunate to have such loving parents, and growing up in two former and two current British colonies undoubtedly gave me insights into the history of British imperialism that I would not otherwise have. It was in my final year at SOAS that I met Dr. Amrita Suri (a real doctor), my girlfriend, who despite the long hours she had to spend at her general practice, still managed to find the time to read over my thesis in its entirety to check for typos, spelling mistakes, and grammatical irregularities. I also appreciated the support of Nadia Hijab at Al-Shabaka who was very understanding and who gave me time and space from my day job in the fifth year of my study to complete my PhD corrections.

Victor Kattan, April 2012

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I. INTRODUCTION

In keeping with my general outlook as a lawyer, I shall, however, also try to go *beyond* the realm of law. Indeed, a modern doctrinal account [of self-determination] should not closet itself in the lawyer's hermetically sealed chamber. This study is therefore committed to a *contextual approach* to law in which history, politics, and jurisprudence are all employed in the service of legal elucidation.

The case for a historical approach is easily made. A still photograph of the current state of law would be incomprehensible – how could one understand the way the law is today if one does not study its evolution into its current state? Can we understand a human being without delving into his or her biography? Can we understand a polity without exploring its history?

Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 2-3 (emphasis in original).

Throughout the vicissitudes of history partitions have ruptured the delicate fabric of international relations— cultural, economic, and social—between existing states and those communities struggling for recognition. In the process these partitions have uprooted and displaced millions of peoples: men, women, and children, the poor, the rich, the meek, the indignant. They have been the cause of numerous wars and insurrections and have brought untold miseries to all those who lost their homes, their loved ones, and ultimately their homelands where their very identities and sense of being had been forged and rooted in the soil where it had been inculcated in the collective memory of time and place. Out of these struggles, beginning with the partitions of Poland in the eighteenth century, a new notion of the nation was born as dislocated revolutionary émigré communities in America, France, and Russia conspired to recreate very different visions of international society. These struggles would continue against the British Empire, the biggest European Empire of its day, and was expressed in opposition to the partitions of Ireland, India, Palestine, Cyprus, and in the British colonies dotted throughout southern Africa. Decolonization marked the high point of imperial decline and decay but it was also out of that struggle that the modern doctrine of self-determination was born, which was in itself a revolution.

Whilst I wholeheartedly agree with the view expressed by the late Antonio Cassese (in the quotation above), in that I believe that history is integral to understanding the evolution of self-determination, I do not agree with all the conclusions that he reached in his study. The cause of my disagreement is not legal.

It is historical. For I do not believe that self-determination was primarily a twentieth century phenomenon as Cassese seemed to assume, since he only devoted three pages in his book to its pre-twentieth century history. And it is primarily due to his neglect of certain aspects of self-determination's history, and his attempt to mould that history into the lexicon of international law that his conclusions appear hollow. Self-determination has never really been about the law, even if it may interest many international lawyers who have given it considerable attention. Rather self-determination is the primordial principle of international relations, which forms the bedrock upon which an edifice can be constructed in the form of the state where the law can then be enforced within the polity. Ultimately, self-determination masks competing and distinguishing *ideologies*, whose prospects for the peoples that invoke it, will always ebb and flow, depending on the dominant political ideology of the day.

It is principally due to the lack of international lawyer's engagement with history that the reader will not find many references to the numerous international law studies of self-determination in the text that follows. This is not because I have ignored them. Rather, it is because I found it very difficult, if not impossible, to engage with studies that have either ignored self-determination's pre-twentieth century history, or that have focused excessively on the decisions of the International Court of Justice, which whilst interesting, do not tell us that much. To say that self-determination is a customary norm of international law is very well, but is it not striking that Western international lawyers only felt comfortable saying this towards the tail end of decolonization in the 1960s when the destruction of colonialism had already become inevitable? Nor is UN practice, examined in isolation, or divorced from its political context, very useful, without looking at the subject from a very broad vantage point—for reasons, which will become clearer later in this study. The fact that hardly any international lawyers have even remotely touched on the subject of partition, despite its repeated reappearance over three centuries, may make the sources I have had to resort to, appear rather “unconventional”. But since the purpose of this study is to examine the relationship between partition and self-determination, I had little choice but “to go *beyond* the realm of law”, as Cassese so succinctly expressed it.

Although the word “self-determination” as a political slogan only came into popular usage in the late nineteenth century, when it was first invoked by European socialists, it began its life as a neologism, as almost all concepts do. Nonetheless, it

would be wrong to assume that the ideas, which give it cohesion, did not exist before then. Similarly, the concept of “the people” or “the nation” that was destined to exercise this right did not suddenly emerge in the late nineteenth or twentieth century. For “the people” or “the nation”, and I use the terms interchangeably, as they have themselves been used, have existed for centuries, although the relationship between these communities (however described) and public authority has changed considerably. Moreover, as a rhetorical device, “the people” or “the nation” can refer to almost anything. These terms hide racial, religious, and class divisions in the form of an all-encompassing rubric. Accordingly, political ideologies that promote differing conceptions of society, in other words, differing conceptions of the people or the nation which are entitled to invoke or exercise this right, will self-evidently have an impact on the course of international relations, and thus the course of international law.

In this connection, I chose to title this thesis “the tyranny of the majority” because one of the major political ideologies that altered the course of international law and relations promoted a particular view or understanding of the people or the nation. This particular vision of the people or nation brought it into conflict with another political ideology, which rather than fearing “the tyranny of the majority”, embraced it. In other words, the latter ideology did not view vesting political authority in the masses as a form of tyranny. I am, of course, referring to the contrasting ideologies generally referred to as *liberal* democracy when I refer to the ideology that fears the majority, and I am referring to *social* democracy, when I refer to the ideology that embraces the majority. Whilst these labels did not exist in the centuries preceding the twentieth, the visions that they promote of sovereignty and society, did, of course, exist long before then, even though they were expressed in different tongues. I say more about these contrasting and competing ideologies later, but the point is that these differing visions had major consequences for those communities that were subject to the authorities of differing ideological systems, and that when they clashed, they had an impact on the ground in the political geography through which these differing ideologies found expression. Ultimately, the primary political prerequisite before self-determination can even be conceived or become meaningful in any way is ascertaining “the people” or “the nation” that is entitled to exercise it. Usually this right is expressed in the constitutional structure of the state.

The Tyranny of the Majority

Preventing majority rule, or “the tyranny of the majority” was a central concern of America’s Founding Fathers when they first put pen to paper to establish the foundations of the Republic over two hundred years ago.¹ This was because the Founding Fathers associated majority rule with rule by “the lower sort of people”, which it was feared would lead to corrupt and inefficient government.² Similar considerations preoccupied British constitutionalists who resolved that the King, Lords, and Commons, would respectively represent the different socio-legal estates in England and Wales, and after 1707 in the United Kingdom. It was believed that men of leisure who had the time to contemplate the complexities of life would be better placed to rule and to choose their rulers from their peers.³ In this regard, the American Revolution that began in 1776 and during which the constitutional link with Britain was severed should not be analogized to the French Revolution, which was an altogether very different endeavour.⁴ What the American revolutionaries objected to was taxation without their consent and rule by a hereditary aristocracy and Monarchy from distant shores, which had led to arbitrary rule in the Americas.⁵ It did not

¹ See *The Federalist No. 10. The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued)*, *The Daily Advertiser*, 22 November 1787 [James Madison].

² And of course, the Constitution took no position on the basic institution of slavery, since slaves were considered the private property of their owners. See Earl M. Maltz, “Slavery, Federalism, and the Structure of the Constitution”, 36 *The American Journal of Legal History* (1992), pp. 466-498.

³ This is why Rousseau who endowed the majority with unlimited power, provided they acted for the common good, went almost unnoticed in the public deliberations of the first American constitutions, who instead used the concept of a Bill of Rights to curtail the General Will. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: The University of North Carolina Press, 1980), pp. 144-145.

⁴ See J.L. Talmon, *The Origins of Totalitarian Democracy* (London: Sphere Books, 1970), p. 27. See also, David Armitage and Sanjay Subrahmanyam (eds.), *The Age of Revolutions in Global Context, c. 1760-1840* (New York: Palgrave Macmillan 2010), p. xv. In this connection, it is disconcerting how some international lawyers have referenced both the American and French Revolutions as the starting points for their histories of the self-determination without distinguishing them. They were very different revolutions. I am not going to list references here for the international lawyers that have indiscriminately referenced these revolutions because it would take half a page. Intriguingly, I have yet to come across an international lawyer make reference to the 1649-1660 Commonwealth in Britain or the 1688 Revolution as the starting point of their histories of self-determination even though these revolutions influenced in different ways both the American and French Revolutions.

⁵ They also objected to the corrupt colonial courts, dishonest sheriffs, and the Quebec Act of 1774, which had recognized Catholic rights in Quebec, and extended British Canada’s frontiers into Ohio, Indiana, and Illinois, territories full of Native Americans, which the American settlers regarded as their land and enemies. The settlers in North Carolina also opposed British attempts to thwart their ambitions to occupy and annex native territory to the west in Tennessee. In other words, the American struggle

amount to a wholesale rejection of British values.⁶ On the contrary: “For many of the most learned and articulate Americans, it was the perversion of the English constitution, complained of by opposition thinkers in England as well as in America, which had caused the oppression; their revolution was ‘not against the English constitution, but on behalf of it’”.⁷ In other words, the American revolutionaries sought to create a constitution that would remedy the defects (as they saw them) inherent in Britain’s “unwritten” constitution as well as to adapt that constitution to provide for a good government comprised of men of property in the Thirteen Colonies.

At the Constitutional Congress, Madison—the principal author of the 1787 Constitution, *The Federalist*, and of the constitutional amendments, warned of the possible threat posed to property rights in a democracy where under an equal suffrage “power will slide into the hands of the [indigent]”.⁸ As a result of his experience in the Virginia Assembly, Madison had come to realise that “not all legislators were going to be like him or Jefferson; many of them did not even appear to be gentlemen”.⁹ In order to resolve majority tyranny and rule by “the lower sort”, the men who drafted the American constitution created an elaborate federal system of checks and balances, with power being vested in both a Senate and a House of Representatives, as well as in the State legislatures, and in an executive that was elected by a separate electoral college. In the United States, the legislature could not be internally divided as it was in Britain between the commons and the nobility, because America had expressly abolished titles of nobility.¹⁰ Instead, a Senate (modelled on Rome) was established in which the senators would be “representatives of representatives; they are selected by the best, by those whom the people of the state have already chosen as their best,—they are, suggests Madison...a republican aristocracy of merit. The age and residence qualifications for senators are more demanding, their term of office longer, and their elections staggered. All of these qualities make it a more conservative body and less

for Independence was not undertaken for the high-minded principles that it is often credited. See Richard Gott, *Britain’s Empire: Resistance, Repression and Revolt* (London: Verso, 2011), pp. 57-67.

⁶ See Jack P. Greene, “Empire and Liberty” in Jack P. Greene (ed.) *Exclusionary Empire: English Liberty Overseas* (Cambridge: Cambridge University Press, 2010), p. 13.

⁷ Iain Hampsher-Monk, *A History of Modern Political Thought* (Oxford: Blackwell, 1992), p. 204.

⁸ Hampsher-Monk, *ibid*, p. 219, footnote 103.

⁹ Jack N. Rakove, “The Madisonian Theory of Property Rights”, 31 *William and Mary Law Review* (1989-1990), p. 245 at p. 251.

¹⁰ See Article 1, Section 9—Limits on Congress, The United States Constitution. (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State”)

immediately responsive to the ‘passions’ associated with popular opinion”.¹¹ Madison additionally sought to establish safeguards for the smaller states against the larger ones, and to protect its citizen’s minority rights—although he did not consider slaves as citizens and only men of substantial means could qualify to vote and hold office.

The reason why I have opened this study by making reference to American constitutional history is to draw attention to a striking similarity to the English system of government in which a central concern was also to prevent rule by the masses. What I term “the Anglo-American tradition” had a major impact on the evolution of a particular form of self-determination, which in the Age of Empire, and during decolonization, contributed to the partitions that I consider in this study, and which had in common a restricted notion of the social contract. This was very different to the ideas that inspired the men of the French Revolution who sought to establish a system of government that would be more representative and would attempt to disperse political power more widely among the populace by enfranchising more of its citizens and by abolishing the aristocracy. In France, prior to the French Revolution, there had emerged a huge social gap between the rich and the poor to the extent that France appeared to be divided between two separate cultural spheres. This was reflected in the great *Encyclopédie* of Denis Diderot and Jean d’Alembert who commented, in reference to the peasantry, “many [educated] people see little difference between this class of men and the animals they use to farm our lands”.¹² The men of the French Revolution like Robespierre and Saint-Just sought to tackle the attitudes that were expressed by the aristocracy towards the vast majority of Frenchmen and which had led to the inequalities associated with the *ancien régime* by abolishing the aristocracy and enfranchising more men. In time, their ideas and struggles gave inspiration to Marxists and socialists alike who in their quest to abolish the inequalities associated with the *ancien régime*, articulated a new understanding of self-determination that imputed majority rule in the sense of a numerical majority in which each citizen would have a vote and therefore a say in choosing their leaders.

In this connection, it is striking that the issues of class and social inequality have generally been overlooked in most historical accounts of international law, including accounts of the history of self-determination. Could this be due to the fact

¹¹ Hampsher-Monk, *A History of Modern Political Thought*, supra n. 7, p. 249.

¹² See David A. Bell, “Culture and Religion” in William Doyle (ed.) *Old Regime France 1648-1788* (Oxford: Oxford University Press, 2001), pp. 78-104, at p. 82.

that men of high social standing have dominated the profession of international law? If so, such men would have strived to preserve the cultural, economic, and political status quo, which would explain why the clamour for equality and majority rule has been a thoroughly Marxist notion that has been repeatedly invoked by the Left.¹³ By majority rule the Marxists meant rule by the majority of citizenry without distinctions of any kind, which was considered an anathema to the men who ruled Britain, and who in common with the Americans were preoccupied with preventing political power from being vested in the majority of its inhabitants, which invariably would have meant vesting political power in the lower classes since the poor will always form the majority of the populace in a capitalist society. This would also explain why there was no mention of equal rights in the American Bill of Rights.¹⁴ As the late Louis Henkin observed: “The Bill of Rights had notorious lacunae. It did not abolish slavery or guarantee freedom from slavery or from involuntary servitude in the future. It did not forbid the federal government to practice racial or other invidious discrimination”. He added, “the commitment to equality, prominent in the Declaration of Independence, was not in the Constitution of 1787 and was not in the Bill of Rights.”¹⁵ I would add that the commitment to equality in the Declaration of Independence (“that all men are created equal”) was a peculiar kind of equality at that, and (as was apparent from Jefferson’s ownership of slaves) was not to be taken literally.¹⁶ “All men are not, and never can be equal”, would be a more appropriate motto to describe the Anglo-American approach to self-determination, which as explained in the following pages, was based upon a negation of the idea of equality.

This is because in England, during the Glorious Revolution (1688) a political system was created by the ruling aristocracy which ensured that England remained a Protestant country by vesting sovereignty in the King-in-Parliament, which in reality meant vesting power in an arrangement that was akin to an oligarchy, with the sovereign lord forming the apex of this intricate and aristocratic relationship. In other words, the idea of self-determination developed initially in England after two

¹³ And because it is impossible to give expression to the masses, a dictatorship or a revolutionary vanguard was established in which they determined what was in the interests of the masses. See Talmon, *The Origins of Totalitarian Democracy*, supra n. 4, pp. 6-7.

¹⁴ Intriguingly, even today, Israel’s Basic Laws do not explicitly protect the right to equality.

¹⁵ Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), p. 114.

¹⁶ Neither, as Richard Gott ruefully noted, was the injunction “no taxation without representation” to be taken at face value since the American revolutionaries had no intention of allowing representation to their black slaves or to the Native Americans. See Gott, *Britain’s Empire*, supra n. 5, p. 58.

revolutions (1640-1660) and (1688), and after 1707 in the United Kingdom, from the theory of a social contract, in which the ruling classes were to be comprised of an exclusive club of elite individuals. This had important ramifications. This is because ultimately the social contract is about the ability to participate in a community of like-minded individuals. Accordingly, there was an implicit assumption that a people who did not think alike could not possibly participate in the social contract. In seventeenth century England this would have excluded a lot of people. Moreover, unlike the US constitution with its elaborate system of checks and balances, and the dispersal of power between the states and the federal government, the British constitution is based on the notion of parliamentary supremacy—although some of the excesses of that majoritarian system (to the extent that it affects minority rights) have been limited to some extent by the passage of the Human Rights Act (1998).¹⁷ It is of the utmost importance to remember that prior to the Parliament Acts of 1911 and 1949, the House of Lords was vested with considerable powers. Indeed, prior to the 1911 Act the Lords could prevent the passage of legislation approved by the Commons. In other words, at the height of British imperialism, Britain was ruled by the monarchy, the aristocracy, and the state church that dominated Parliament, a “parasitic caste” or “squirerarchy” as Trotsky liked to call it, in which the majority of the population of Britain was expressly precluded from the franchise or from holding public office.¹⁸

These restrictions had important ramifications in the Age of Empire, especially because a common attribute of imperialism is the reproduction of constitutional arrangements that the imperial power is familiar with. In other words, when Britain ruled its colonies, it reproduced a system of government that was similar to its own. Thus, there was a tendency in the British colonies to recreate a system of government in which kings, queens, and tribal leaders were appointed to do business with specially appointed advisers. As Britain incrementally devolved power to its colonies, first to the dominions of “white” settlement (Canada, Australia, New Zealand, South Africa), and later to the colonies that would be ruled by non-Europeans (such as India, Malaya, Jamaica), it established an aristocratic elite (invariably educated at Oxbridge or the London universities) who would dominate the judiciary and the parliamentary assemblies. Because the British system of government was not devised for

¹⁷ Although not completely. See Tom Bingham, *The Rule of Law* (London: Penguin 2011), pp. 160-170.

¹⁸ See Leon Trotsky, *The History of the Russian Revolution* (London: Victor Gollancz, 1965), p. 119 (reflecting on the history of British government and its role in imperial affairs).

heterogeneous societies, the operation of government was often impeded due to differences between various parliamentary factions in the colonial legislatures. Similar problems had also affected the British system of representative government in its earliest days which is why the franchise was restricted to the upper classes and to Protestants. The Penal Laws in Ireland that disenfranchised Catholics were employed by Britain in order to prevent political power on that island from passing into the hands of the Catholic majority, and which prevented Catholics from voting, holding office, becoming lawyers, or even receiving a good education.¹⁹ Having perfected that system in Ireland, similar systems of legal disenfranchisement would be employed across the rest of Empire from the United States to South Africa, and from India to Palestine. Accordingly, in the Age of Empire, Britain created an imperial system based on indirect rule, whereby indigenous populations were given administrative authority within a stratified social hierarchy that developed haphazardly, because the social contract was never thought to be inclusive. Consequently, in contrast to the other empires, most notably the French with their *mission civilisatrice*, those who ruled the British Empire did not seek to make everyone the same.²⁰ Instead, colonial communities were allowed to maintain their separate identities on the strict understanding that they were different, whether this difference was manifested in terms of that community's class, colour, or creed.

In the British context partition principally arose during decolonization when political power was being passed from the empire to the colony, and when it became necessary to devolve power to a competent authority or authorities in case of internal discord. In heterogeneous societies there would often be a competition for political power between rival factions when it became apparent that the colonial power was set to depart. This is the usual explanation advanced by most historians to justify the partitions of Ireland, India, and Palestine, which are invariably described as a clash of nationalisms—although it is often not explained why these nationalisms evolved under British rule and why they outwardly took the form of religious movements. As I explain in the following pages, there is something more to partition than the

¹⁹ The experience of the young Edmund Burke in Ireland is worth noting. See Conor Cruise O'Brien, *Edmund Burke* (London: Vintage 2007), pp. 1-41.

²⁰ On French colonial policy see Raymond. F. Betts, *Assimilation and Association in French Colonial Theory 1890-1914* (New York: Columbia University Press, 1961); and Stephen H. Roberts, *The History of French Colonial Policy, 1870-1925* (London: Franck Cass, 1963), pp. 95-123.

simplistic notion that it was a result of a clash of nationalisms or even the impossibility of reconciling competing interests in a single parliamentary assembly based on majority rule due to opposition from a significant minority preventing the passage of legislation. I suggest that this had something to do with a clash between the Anglo-American and the Social Democratic / Marxist conception of self-determination, which both advanced very different visions of international society.

The state of the literature

In 1984, the Irish historian T.G. Fraser produced the first (and only) comparative history of partition in Ireland, India, and Palestine, noting that, “all of them were part of the British system”. He distinguished these partitions (as this study does) from those in Germany, Korea, and Vietnam, explaining that they originated in international tension rather than communal aspirations or conflict.²¹ Fraser explained that it was only in the eighteenth century that the term “partition” came to assume a political meaning. As he observed, it was during the three partitions of Poland in 1772, 1793, and 1795, that partition “became firmly fixed in English political usage”.²² He did not, however, draw any conclusions from this usage or make connections between those partitions and the partitions of Ireland, India, and Palestine, as this study does. Instead, he concentrated—as a good historian does—on the debates and views of the major actors involved in those partitions, and thus missed the bigger picture, which can only be fully appreciated if one adopts a broad view of history. This is because political ideas often evolve over substantial periods of time in which they often mutate, which may make them appear to be different to us today. Thus, Fraser concluded—in my opinion erroneously, or at least incompletely—that partition “was agreed to by weary men desperate to see a way out of seemingly intractable bloody struggles”.²³ My approach to partition is very different to Fraser’s and I do not quite subscribe to his view that partition was seen as a way out of nationalist strife, although I understand how that might be perceived if one focuses in

²¹ See T.G. Fraser *Partition in Ireland, India and Palestine: Theory and Practice* (London: MacMillan, 1984), p. 2.

²² Fraser *Partition in Ireland, India and Palestine*, *ibid.*, p. 4.

²³ Fraser *Partition in Ireland, India and Palestine*, *ibid.*, p. 196.

detail on the minutiae of diplomatic correspondence over a relatively short historical period, which is what Fraser does. What Irish, Indian, and Palestinian nationalists were demanding above all were the establishment of states based on the principle of majority rule, and which was related to a particular understanding of self-determination and government that Britain had implacably opposed for centuries.

With the exception of Fraser's study and a few studies in political science and political geography, which are largely ahistorical, it is rather surprising that so little has been written on partition in both the literature on nations and nationalism, and in the specialist international law literature. This is surprising when one considers how much interest partition has attracted in popular literature, history, and film.²⁴ As Joe Cleary observed, "[t]he subject of partition receives little attention in the remarkable corpus of writing on nations and nationalism that has emerged over the past two decades or so. In the now canonical works of Benedict Anderson, Ernest Gellner, Eric Hobsbawm, Etienne Balibar, and Immanuel Wallerstein, Tom Nairn, Anthony D. Smith, Miroslav Hroch, and Liah Greenfeld, the topic never emerges as an issue for serious reflection".²⁵ Cleary also notes that partition is virtually ignored in the influential works on anti-colonial and postcolonial nationalism.²⁶ Indeed, the literature that does exist on partition tends to focus on individual case studies, with the overwhelming majority of works devoted to the 1947 partition of British India.

Within international law, the situation is even bleaker. The word partition does not even appear as a category in any of the editions of the Max Planck's Encyclopaedias of Public International Law, including in its most recent online incarnation.²⁷ Nor does partition feature much in the general textbooks on international law and self-determination.²⁸ A typical example is Tom Franck's

²⁴ For instance, there is Richard Attenborough's Academy Award winning biographical film on the life of Gandhi who is played by Ben Kingsley, which addresses partition, as does a lesser well-known film by Jami Dehlavi on the life of Mohammed Ali Jinnah who is played by Christopher Lee. There is a university course on the idea of partition and literary representations from India/Pakistan, Israel/Palestine, and Ireland/Northern Ireland at York University as well as a course on the Histories of Partition: India and Pakistan at the School of Oriental and African Studies, University of London.

²⁵ Joe Cleary, *Literature, Partition and the Nation-State: Culture and Conflict in Ireland, Israel, and Palestine* (Cambridge: Cambridge University Press, 2002), p. 15.

²⁶ Cleary, *ibid*, p. 15 mentioning Partha Chatterjee, Homi Bhabha, James M. Blaut, and Basil Davidson.

²⁷ Partition does not appear on the Encyclopaedia's complete list of all planned articles, including those not yet published at << http://www.mpepil.com/pdf/full_article_list.pdf >>

²⁸ There is no mention of partition in the subject indexes to *Oppenheim's International Law*; Brownlie's *Principles of Public International Law*, Dugard's, *International Law: A South African Perspective*; Akehurst's *Modern Introduction to International Law*, or Shaw's *International Law*.

Fairness, which merely devotes a paragraph to describing its application to British India.²⁹ Even Hurst Hannum, who wrote an entire book on self-determination, merely observed that despite the repeated affirmations by the United Nations on the necessity of respecting the national unity and territorial integrity of a colonial territory at the time of its accession to independence, partition has not been uncommon.³⁰ He did not, however, elaborate. The only author to have mentioned partition at all is Rigo Sureda in a book he published on self-determination in 1973.³¹ However, he did not treat it as a separate juridical or political phenomenon. This general neglect of partition in the mainstream literature on international law has not gone unnoticed. A 2005 book entitled *Partitions: Shaping States and Minds*, made the same observation,³² although it was promptly criticised by the political geographer Victor Prescott and by the international lawyer Gillian Triggs in a jointly authored book on boundaries, when they wrote: “It seems bizarre that the army of academics from various disciplines who have studied and are still studying borderlands, frontiers, boundaries and enclaves, should be accused of neglecting these topics”.³³ However, Triggs and Prescott failed to note that the passages they criticised from the book were about partition specifically, as well as differing approaches to self-determination, and not boundaries as such. In this respect, one must not confuse partition with boundary delimitation and demarcation. This is because partition involves an evaluative judgment by a third agency as to the geographical arrangement in which one or more national groups will be allowed to exercise self-determination in the form of establishing an independent state. As a result, partition often involves drawing a boundary through someone else’s homeland. On these accounts the authors of *Partitions: Shaping States and Minds* are right to highlight the dearth of scholarship on partition in historical and legal scholarship. This is perhaps underlined by the fact that the word “partition” does not even appear in the index to the Triggs and Prescott

²⁹ Thomas M. Franck, *Fairness in International Law and Institutions*, (Oxford: Oxford University Press, 1995, paperback edition, 2002), p. 151. See also, J.E.S. Fawcett, *The Law of Nations* (Harmondsworth, Penguin, 1971), pp. 53-54 (mentioning the partition of India).

³⁰ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, (Philadelphia: University of Pennsylvania Press, 1992), p. 36.

³¹ A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Leiden: A.W. Sijthoff, 1973).

³² Stefano Bianchi, Sanjay Chaturvedi, Rada Iveković, and Ranabi Sammdar (eds.), *Partitions: Shaping States and Minds* (Abingdon: Frank Cass, 2005), p. 3.

³³ Victor Prescott and Gillian D. Triggs, *International Frontiers and Boundaries: Law, Politics, and Geography* (Leiden: Martinus Nijhoff, 2008), pp. 75-76.

book. The one major exception to this general ambivalence in the international law literature is Anthony Carty's book on the conquest of Ireland where he does examine the rationale and method of the 1920 partition of Ireland and the Boundary Commission that was established pursuant to the 1921 Anglo-Irish Treaty.³⁴ However, because his focus was limited to Ireland, he was not in a position to explore the wider linkages between the partition there, and elsewhere. Thus, the very concept of partition, the rationale behind it, its history, and development, the role of third actors in implementing it, and its international legal consequences, have been overlooked.

International law and its histories

The history of international law is still in its infancy. The books that have been written on its history in the English language over the past two hundred years would probably struggle to fill a single bookcase.³⁵ The last decade, however, has seen an outpouring of books and journals that have taken the history of international law seriously and critically.³⁶ In 1999, the *Journal of the History of International Law* published its inaugural issue. This was the first journal dedicated to the history of public international law. Since then, several serious monographs have been published. In 2000, Wilhelm Grewe's *The Epochs of International Law* was published for the first time in the English language followed three years later by the translation and publication of Carl Schmitt's *The Nomos [Order] of the Earth*.³⁷ The better-known examples of the histories of international law that have been published in English have

³⁴ See chapter 7 in Anthony Carty, *Was Ireland Conquered? International Law and the Irish Question* (London: Pluto Press, 1996), pp. 135-166.

³⁵ Until relatively recently, histories of international law have been largely the province of German international lawyers. See Peter Macalister-Smith and Peter Haggemacher's review essay of Wilhelm Grewe's *The Epochs of International Law* in 3 *Journal of the History of International Law* (2001), p. 242 at p. 244 ("A good knowledge of the German language is almost a precondition for historians working in the field of public international law... The contribution of German writers in international law can hardly be ... ignored. Recourse to original German sources, both primary documentary materials and academic resources, cannot be avoided by serious researchers".)

³⁶ See Matthew Craven, "International Law and its Histories" in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds.), *Time, History, and International Law* (Leiden: Martinus Nijhoff, 2007), pp. 2-3.

³⁷ See Wilhelm G. Grewe, *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000). This is a translation of the 1984 edition published in German. Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003). This is a translation of the second German edition that was published in 1974.

included the late David Bederman's *International Law in Antiquity* (2001), Martti Koskenniemi's *Gentle Civilizer of Nations* (2001), Gerry Simpson's *Great Powers and Outlaw States* (2004), and Antony Anghie's *Imperialism, Sovereignty and the Making of International Law* (2005), all published by Cambridge University Press.³⁸

Intriguingly, in a review of Gerry Simpson's *Great Powers and Outlaw States*, Randall Lesaffer critiqued Simpson's claim that his book was a work of legal history, arguing instead that "it is a brilliant work of theory of international law, drawing on history as is so often done".³⁹ The question of the "boundaries" of international legal history, and what is law, what is politics, and what is history, has plagued international law since its founding. The truth is that international law engages with all three disciplines, as well as others, and whether a work emphasises one discipline to the exclusion of another, will depend on the subject and the questions the author seeks answers to. This is especially when writing history. Take partition as an example. If I had to rely on purely legal sources, I would not be able to write a thesis on partition because the international lawyers have on the whole overlooked it. As Lesaffer writes elsewhere, "studying historical international practice is a multidisciplinary endeavour... if one wants to take the context of the legal practices one studies into account, one needs to take diplomatic history on board. The reasons behind a certain clause in a treaty or a certain justification for a war are almost always at least partly of a political or diplomatic nature. This in itself multiplies the sources international legal historians will have to deal with". He added: "Next to the strictly legal sources, diplomatic and political sources such as diplomatic instructions and correspondence, the reports of political debates in government councils and parliamentary assemblies as well as private letters will in many cases have to be perused by the international legal historian".⁴⁰ This is a view I completely concur with. In fact, I would include in addition to the list of sources that Lesaffer references studies produced by other academic disciplines in order to provide a more complete account. In my opinion it is

³⁸ See David J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001), Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004); and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

³⁹ See Randall Lesaffer, 7 *Journal of the History of International Law* (2005), p. 255 at p. 259.

⁴⁰ Randall Lesaffer, "International Law and Its History: The Story of an Unrequited Love" in Craven (ed.) *Time, History, and International Law*, supra n. 36, pp. 27-41 at p. 33.

wrong to try to categorise a historical work as either legal or theoretical, since a good historian of international law will invariably engage with both theory and practice. The Western proclivity for categorising academic and human subjects is a peculiar product of Enlightenment thinking as exemplified by the notion of positivism and by d'Alembert's and Diderot's vast *Encyclopédie* which tried to categorise and ascribe meaning to all subjects (even the most mundane) as well as the imperial project of categorizing and defining its colonial subjects in order to include certain peoples in the colonial polity, whilst excluding others, to perfect the task of divide and rule.

Matthew Craven has identified at least three different ways in which the relationship between international law and history may be conceived. First, there is a history mapped out in terms of its trajectory or teleology; a history written in narrative form that provides a story about its origins, development, progress or renewal. Second, there is history in international law, that is, a history that places historical events or persona within substantive discussions of law, and of the role they play in arguments about law itself. And third, there is international law in history, of understanding how international law, or international lawyers have been engaged, or have engaged themselves in the creation of history outside international law.⁴¹ Of course, it is possible to engage with all three ways of writing histories of international law that Craven has identified, and one need not confine oneself to a specific approach. Thus, for example, this study has taken two ideas: partition and self-determination and has traced their interaction in history through 500 years. In the process of undertaking this teleology, historic events such as the English, American, French, and Russian Revolutions have been dispersed with substantive discussions of the development of self-determination. And finally, I have addressed the extent to which international lawyers engaged in debates on self-determination through a discursive analysis of the arguments they advanced for and against certain partitions. But because the professionalization of international law did not happen until the late nineteenth century as Koskenniemi explains in *The Gentle Civilizer of Nations*,⁴² I could only engage with what international lawyers thought about partition in Part Three of my thesis which addresses the partitions of the twentieth century. In the United Kingdom

⁴¹ Craven, "International Law and its Histories", supra n. 36, p. 7.

⁴² Koskenniemi's thesis is essentially that the professionalization of international law began from 1869 onwards when the first meetings of the *Institut de droit international* met, and came to an end in 1960 when the reformist sensibility of international law could no longer enlist political enthusiasm.

it was not until 1886 that a full-time legal adviser, W.E. Davidson, was appointed to serve within the Foreign Office.⁴³ Accordingly, in Parts One and Two of this study I combined what jurists said about the law of nations with that of the *philosophes*. I also engaged with the ideologies of the statesmen who determined state practice because as, I explain, political leaders, not international lawyers, determine state practice. This is because a Foreign Office or State Department Legal Adviser's advice can always be dismissed, ignored, overruled, or questioned by his political superior.

Finally, a word should be said about evolutionary history to prevent any misunderstandings. The word "evolution" that I have employed in the subtitle to this study should not imply that the work that follows presents history in terms of "an enlightenment narrative of progress" or employs "historical material in terms of some smooth evolution from past to present".⁴⁴ Inevitably, in any work one will have to break down the past into some schema in order to present something intelligible for the reader, and I say more about this later in explaining my methodology. The point I want to make is that the world evolution does not necessarily imply some linear narrative. Ideas—like people—evolve differently, according to time and place. Whether one sees history as a story of "continuity, progress, and inclusion" or whether, on the contrary, one sees history as a story of "change, regress, and exclusion", will all depend on the topic that one is studying. If one is studying genocide, slavery, ethnic cleansing, and partition, it will be very difficult (unless one is morally inept) to present it as a story of continuity or progress. In fact, the historian need not take a position for the facts will in most cases speak for themselves without the need for embellishment.

The approach chosen: the longue durée

The approach that I have adopted for my study of partition is similar to Braudel's *longue durée* in which he objected to the notion that history should be condemned to the study of well-walled gardens.⁴⁵ As Braudel explained, the *longue durée* is "a

⁴³ See Geoffrey Marston, "The Evidences of British State Practice in the Field of International Law", in Anthony Carty and Gannady M. Danilenko (eds.), *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law* (Edinburgh: Edinburgh University Press, 1990), p. 39.

⁴⁴ Craven, "International Law and its Histories", supra n. 36, p. 9, and p. 16.

⁴⁵ Fernand Braudel, *On History* (Chicago: The University of Chicago Press, 1980), p. 4.

history to be measured in centuries...the history of the long, even of the very long time span".⁴⁶ This approach to history is particularly apt to this study in which I trace partition to the dawn of modern international relations. In this regard, I chose 1492, the year Columbus discovered the Americas, when Western colonialism can be said to have begun, which may seem a rather conventional date to begin my study.⁴⁷ But the date is appropriate since it coincided with the success of the *Reconquista* when the Moors and later the Jews were expelled from the Iberian Peninsula—and which in many respects presaged later attempts to get rid of “disloyal minorities”.⁴⁸ The land that was recovered from the Muslims and Jews was known as *realenga*, royal land, to be recognised as the property of the king, and which was redistributed to Christian soldiers and farmers.⁴⁹ Britain would adopt a very similar model of territorial acquisition until it was challenged during the American War of Independence.⁵⁰

I chose a less conventional date to end this study, the year that apartheid collapsed in South Africa in 1994, and which amounted to a complete negation of the Anglo-American liberal approach to self-determination (as it was originally conceived) and the triumph of the social democratic model of self-determination which provided for a multicultural society in place of minority rule. In this connection it is intriguing that many leaders of the apartheid government used to justify their policies by arguing that what they were doing was no different to what Britain and America had employed to resolve their “minority problems”, and of course they were right; it was just that the emergence of human rights law after World War II, and the civil rights movement in 1960s America had caused complexities that the apartheid government was unable or

⁴⁶ Braudel, *ibid*, p. 27.

⁴⁷ Carl Schmitt, Wilhelm Grewe, and Antony Anghie also began their histories of international law with reference to the European discovery of the Indies. Schmitt put it most succinctly: “The first attempts in international law to divide the earth as a whole according to the new global concept of geography began immediately after 1492”. See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003, first published 1950), p. 87.

⁴⁸ See Josep R. Llobera, *The Making of Totalitarian Thought* (Oxford: Berg, 2003), pp. 17-26.

⁴⁹ The notion of *realenga* would be transferred to the Americas, first to Hispaniola and then to Cuba, where the island’s lands were declared the property of the King of Spain. See Richard Gott, *Cuba: A New History* (New Haven: Yale University Press, 2004), pp. 16-17.

⁵⁰ This coincided with what some have called the First British Empire. See Frederick Madden and David Fieldhouse (eds.), *The Classical Period of the First British Empire, 1689-1783: The Foundations of a Colonial System of Government* (London: Greenwood Press, 1985), p. 190. (“Two propositions had been established long before the Revolution [1688]: that settled colonies enjoyed the benefit of the ‘law of England’; and that ceded or conquered colonies retained their own law until it was changed by the Crown as conqueror”. See also, the *Constitutions of the Carolinas* that is referenced in Part Two of this study for an example of early English colonial policy in North America.

unwilling to address.⁵¹ With the end of the cold war and the triumph of liberal democracy, partition is a phenomenon that is unlikely to make a comeback unless another ideology emergence to challenge liberal democracy. The division of Bosnia in 1995 by the inter-entity line, which divides Republika Srpska from Bosnia Herzegovina, was not really a partition, and it was significant that the division was only marked by an internal boundary that did not affect Bosnia's territorial integrity.⁵²

In order to explain why I have adopted the *longue dureé* approach to study the history of partition and self-determination, consider the extract I reproduce below from an article that Malcolm Shaw, the well-known international lawyer, wrote:

The gradual evolution of self-determination resulted in a breaking of the link between overseas colony and metropolitan power in so far as the principle of territorial integrity was concerned. But this was accomplished in a way that preserved the now separate territorial integrity of the colonial unit. Self-determination, therefore, ensured the distinct identity of the colony and its decolonization, but on the basis of accepting the existence of a discreet territorial unit under international law. It did not operate as a general rule as a means whereby each group within the territory had the right in international law to determine its own future up to and including separate statehood.⁵³

When Shaw wrote these words in 1997 he was undoubtedly correct. The state practice of the period that he considered (1970-1997) supported his assertion that self-determination did not grant a group within a territory the right to separate statehood. If he had wanted he could have referenced the non-recognition of North Cyprus and South Africa's Bantustans to support his claim as well as the decision of the Canadian

⁵¹ As I explain in Part Two Britain had no problem transferring political power to the white minority when it passed the Government of South Africa Act in 1909. Nor did Britain have any qualms with the referendum that took place in Rhodesia in 1922 when only Europeans were allowed to vote whether they wanted to join the Union of South Africa. There were 34,000 Europeans in Rhodesia in 1922, and they voted 8,774 to 5,989 to remain separate. The black majority was ignored. See Ralph Zacklin, *The United Nations and Rhodesia: A Study in International Law* (New York: Praeger, 1974), p. 12.

⁵² On Bosnia, see Radha Kumar, *Divide and Fall? Bosnia in the Annals of Partition* (London: Verso, 1999). For a different perspective, see Richard Holbrooke, *To End a War* (New York: Random House, 1998). See also, the General Framework Agreement for Peace in Bosnia and Herzegovina (The Dayton Peace Accords), 14 December, 1995, 35 *International Legal Materials* (1996), p. 112.

⁵³ Malcolm N. Shaw, "Peoples, Territorialism, and Boundaries", 8 *European Journal of International Law* (1997), pp. 478-507 at p. 481.

Supreme Court in the Quebec case.⁵⁴ But his characterisation of this as some gradual evolution of the international law of self-determination is questionable. For had Shaw taken the period from 1945 to 1970 he may have been more circumspect as British India was partitioned by an Act of the British Parliament in 1947, the UN General Assembly had recommended the partition of Palestine in 1947, and Britain had attempted to partition Cyprus in 1957. Nor could he have written that with respect to state practice during the interwar years (1918-1939) when Ireland was partitioned by an Act of the British Parliament (1920). In every one of these cases the colonial power had expressly recognised and provided the mechanism through which a group within the territory of the colonial unit had the right to determine its own future in a separate state. But of course Shaw was not writing a history of international law but an article on contemporary practice, so he rightly considered the most relevant period.

My point is that it is sometimes necessary to have regard for the very long time span (the *longue durée*) if one wants to understand how ideas have evolved. As Braudel observed, ideas and words, like Chinese whispers, “are constantly on the move from one language to another, from one author to another. The word is tossed back and forth like a ball, but when it comes back the ball is never quite the same as when it left”.⁵⁵ This is particularly the case with a topic like self-determination. This is because what self-determination meant in 1918 was different to what it meant in 1945, and was different to what it meant in 1960 and after 1989, and so on. In fact, as I argue below, the ideas that underpin self-determination existed long before the word “self-determination” entered the international lexicon in the late nineteenth century.⁵⁶

Epochal history and inter-temporal law

Mindful of the unfortunate omissions and the criticisms that Martti Koskenniemi rightly levelled at *The Epochs of International Law* when it was first published in

⁵⁴ *Reference re Secession of Quebec*, Aug. 20, 1998, p. 66, para. 111.

⁵⁵ Braudel, *On History*, supra n. 45, p. 181.

⁵⁶ Although self-determination only became a principle of international politics after the reunifications of Germany and Italy, and during the re-establishment of Poland in 1918, it would be a mistake to discard the role played by national sentiment and patriotism during the ancien régime. See C.G. Roelofsen, “The Right to National Self-Determination in the 18th and 19th Century: An Emerging Principle of Public International Law?” in Neri Sybesma-Knol en Jef Van Bellingen (eds.), *Naar een nieuwe interpretatie van het Recht op Zelfbeschikking?* (Brussels: VUB Press, 1995), p. 109.

English in 2000,⁵⁷ I nevertheless agree with the German diplomat's central thesis that the history of international law has been marked by specific epochs in which a single power or powers dominated and whose ideas and concepts became prevalent:

The international legal order of any particular period emerges out of the struggle between the political and international ideas and postulates of rival powers. The political and international legal programmes of the modern European states were all, however, expressions of ideologies of national expansion. The stronger the leading position of the particular predominant power, the more that state marked the spiritual vision of the age, the more its ideas and concepts prevailed, the more it conferred general and absolute validity on expressions of its national expansionist ideology.⁵⁸

This argument is particularly relevant to the particular topic of this thesis concerned as it is with partition and self-determination, which evolved through the imperial system. As Koskenniemi observed Grewe's thesis was strikingly similar to the arguments that were popular in Germany when he first wrote that book during the Second World War, and in particular attuned to the views of Hans Morgenthau, Max Weber, and Carl Schmitt.⁵⁹ Grewe broke his epochs down into different ages arguing that Spain was the predominant power in the international system from 1494-1648, France from 1648-1815, Britain from 1815-1919, the Anglo-Americans from 1919-1944; and the American Soviet rivalry and the rise of the Third World from 1945-1989.⁶⁰ One does not have to agree with the exact dates that Grewe uses for particular epochs to see the utility of his approach (for instance, many historians would argue that the decline of France as a great power began with its defeat during the Seven Year's War of 1756-1763). The reader will note that the vast majority of partitions that are covered in this study occurred close to the epoch that Grewe claims the Anglo-Americans were the

⁵⁷ See the book review by Martti Koskenniemi in 51 *International & Comparative Law Quarterly* (2000), pp. 746-751, at p. 747 (noting that Germany's destruction of European Jewry during the Second World War is glossed over, and that the Nuremberg tribunal is presented as Victor's justice).

⁵⁸ Grewe, *The Epochs of International Law*, supra n. 37, p. 23.

⁵⁹ Koskenniemi, book review, supra n. 57, p. 747.

⁶⁰ Of course, Grewe's methodology can be criticised for being Eurocentric, but I would argue that his thesis is sound and would also apply to a non-European power should it become a superpower, and that the focus on European states is justified by the historical period that Grewe covers in his Epochs.

predominant powers, although most historians cite the aftermath of Suez in 1956 as marking the end of the British Empire, when America became the ascendant power.⁶¹

Dividing the history of international law into epochs associated with great powers is useful, because state practice is largely influenced by the ideas and practices of great powers. Accordingly, it is often the case that the ideology of a great power will have greatest significance in the epoch when it is at the peak of its powers, when it can influence the policies of the other powers, which influences state practice, which once combined with *opinio juris*, the psychological element or *mentalité* of state practice, can contribute to the formation of customary international law. And of course, this influence need not be military; indeed it is often cultural. Few would disagree with the view that the cultural, political, economic, and military powers of the Anglo-Americans over the past century has been considerable, and has shaped the trajectory of the international economic and political system that we are familiar with today. And because one of the defining features of imperialism is the reproduction of systems of imperial control that the great powers are familiar with that partition, which I argue was a phenomenon peculiarly associated with the Anglo-Americans, occurred mostly in the twentieth century, and was related to their conception of the social contract, which took the form of minority rule and racially exclusive politics. This limited understanding of the social contract influenced the Anglo-American approach to self-determination for most of the twentieth century, and which was not successfully challenged until the Cold War confrontation during decolonization in the 1960s. It was as a result of the ideological competition between the USA and the USSR and their rival camps, that their differing approaches to self-determination resulted in the human rights revolution encapsulated in the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The adoption of these Covenants coincided with the civil rights movement in America, in Ireland, in South Africa, and elsewhere, after which support for the traditional Anglo-American approach to self-determination

⁶¹ For a recent critique, see A.J. Stowell, "Suez 1956 and the Moral Disarmament of the British Empire" in Simon C. Smith (ed.), *Reassessing Suez. 1956: New Perspectives on the Crisis and its Aftermath* (Aldershot: Ashgate, 2008), pp. 227-238.

became untenable.⁶² Instead, from that moment, they articulated a new approach to self-determination, which incorporated the social democratic principle of equal rights.

Support for epochal history comes from other German giants of legal history. Thus, Wolfgang Preisler argued “that writers of the history of international law must also be allowed to apply the intellectual principle of order called categorization by period which is utilized by all historians, irrespective of specialization, when they perceive their task to be the comprehension retrospectively of an uninterrupted flow of events. It is regrettable that a living process should be thus divided into chronological and locational sections; yet, taking our limited powers of absorption into consideration, it cannot be avoided”.⁶³ It should be added that an additional and important advantage of adopting an epochal approach to the history of international law by breaking it down into digestible periods of time, is that the narrative becomes consistent with the all-important rule of inter-temporal law, according to which the law must apply as it exists at the time a dispute is to be settled and not as the law subsequently develops.⁶⁴ It is this rule that prevents Irish, Palestinian, and Indian nationalists from challenging the legality of the partitions of their homelands, and prevents anti-imperialists from challenging the colonial legacy, and which has prevented claims for compensation for slavery, and for the restitution of ancient artefacts that were looted in the imperial age.

A further advantage of taking this approach is that in examining partitions that have taken place in different historical epochs one is provided with a broader understanding of the evolution of self-determination since the relationship between the sovereign and the individual has undergone a fundamental transformation over the past five centuries. Although this has resulted in an approach to history, which is both generalised and sweeping, in approaching the history of international law through the prism of partition it has been possible to penetrate the identity of the state to examine the basic political philosophy and super structure that gives it sustenance. Admittedly, law may not govern either the coming into existence or the disappearance of states,

⁶² On the Cold War struggle and American civil rights see Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (New Jersey: Princeton University Press, 2000),

⁶³ Wolfgang Preisler, “History of the Law of Nations”, Volume Two, *Encyclopedia of Public International Law* (Amsterdam: Elsevier, 1999), pp. 716-722, at p. 721.

⁶⁴ In the words of Max Huber, “a juridical fact must be appreciated in the light of the law contemporaneous with it, and not of the law in force at the time such dispute in regard to it arises or falls to be settled”. See *Island of Palmas Case 2* United Nations Reports of International Arbitral Awards (1949), p. 845.

but it does interact with politics particularly in the areas of sovereignty and self-determination, which ultimately underpin the entire international legal order.⁶⁵

Mentalités and opinio juris

When writing a history of international law, the historian of international law needs to be cognizant of the broader political and historical contexts through which particular principles of law were articulated and formed. This is because words and phrases can mean different things to different people depending on how they are interpreted and understood at a specific historical moment. We should not take colonial or historical documents at face value. They are a product of time, place, and circumstance, and reflect the prejudices of their authors. Moreover, as Howard Zinn reminds us, “there is no such thing as a pure fact, innocent of interpretation. Behind every fact presented to the world ... is a judgement”.⁶⁶ This is why it is ultimately important to focus on the judgements of the men who were responsible for making the decisions they did when they ruled the Empire, for not only did they contribute to the development of international law, but they also influenced the evolution of self-determination.

In this respect I have been influenced by what some scholars have called cultural history, which has an older tradition in France where it is known as *l’histoire des mentalités*.⁶⁷ This emerged from the French school of history known as the *Annales*.⁶⁸ Cultural history is broadly understood to refer to an approach to the past that focuses upon the ways in which human beings made sense of their worlds, which places human subjectivity and consciousness at the centre of cultural enquiry.⁶⁹ *Mentalités* looks at what is distinctive about the thought processes or sets of beliefs of groups or of whole societies, in general or in particular periods of time, and describes

⁶⁵ Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986), pp. 2-5.

⁶⁶ Howard Zinn, *Voices of a People’s History of the United States* (New York: Seven Stories Press, 2004), p. 25.

⁶⁷ For a classic exposition of this in English, and for a thoroughly good read see Robert Darnton, *The Great Cat Massacre and Other Episodes in French Cultural History* (New York: Vintage, 1985), p. 3.

⁶⁸ See Anna Green, *Cultural History* (New York: Palgrave MacMillan, 2008), p. 6.

⁶⁹ Green, *Cultural History*, *ibid*, p. 4. See also, Peter Burke, *What is Cultural History?* (Cambridge: Polity, 2008). The many names associated with this field have included Karl Marx, Sigmund Freud, Jacob Burckhardt, Marc Bloch, Lucien Febvre, Michel Foucault, and Edward Said.

the changes or transformations that such processes or sets of beliefs have undergone.⁷⁰ In essence, it is concerned with a state of mind, a way of feeling, a disposition, a pattern of mental, and emotional elements similar to those engendered by religion.⁷¹ *Mentalitiés* differ from other registers of history because it utilises the longer time frame associated with Braudel's *longue durée*.⁷² This makes sense since the philosophy of an age or of different ages is not that of a single philosopher, (or even of a particularly enlightened public international lawyer), or group of intellectuals, or even a broad section of the masses, but a combination of all of these elements, which culminate in an overall trend, in which that culmination becomes a norm of collective action.⁷³ This is why it is necessary to give a sense of perspective and proportion to what, for instance, a certain philosopher was saying at a certain moment in time, and to place his views on contemporary issues in the light of the world as he knew it. This is why I have sought to give life to the lives of the philosophers, and to contextualise their views on sovereignty and society, since they influenced the men who in later ages would make certain assumptions and decisions that heralded the age of Empire. And some of these cultural assumptions had horrific and long-lasting consequences.⁷⁴

It goes without saying that the men who ruled the empire assessed the challenges posed by nationalism and self-determination in the context of their times, and not ours. This is why at certain points in this study I have provided biographical information of certain key statesmen to give life to their views on self-determination. As G. N. Uzoigwe reminds us, “any historical explanation which separates the historical actor from the act, the man from the politician, is bound to be sterile, without life, without colour, without substance, and consequently without meaning”.⁷⁵ Accordingly, in this study, I sought to investigate the way in which statesmen understood what self-determination entailed at the turn of the twentieth century as expressed and formed through the language they employed. Ultimately, international law is formed through language. But it is not the language of the common man, or even the language of the international lawyer furiously working from behind a desk in

⁷⁰ G.E.R. Lloyd, *Demystifying Mentalities* (Cambridge: Cambridge University Press, 1990), p. 1.

⁷¹ Talmon, *Origins of Totalitarian Democracy*, supra n. 4, p. 11 (explaining his methodology).

⁷² Michel Vovelle, *Ideologies and Mentalities* (Cambridge: Polity Press, 1990), p. 8.

⁷³ See Antonio Gramsci on “Problems of Philosophy and History” in *Selections from the Prison Notebooks* (London: Lawrence and Wishart, 2007, originally written between 1929 and 1935), p. 345.

⁷⁴ For specific examples, see Part Two of this study.

⁷⁵ G.N. Uzoigwe, *Britain and the Conquest of Africa: The Age of Salisbury* (Ann Arbor: The University of Michigan Press, 1974), p. 3.

the numerous ministries of Foreign Affairs around the world that contributes to the formation of international law. Rather, it is the language employed by those who make the key foreign policy decisions. And language, as Edward Said noted, “is a highly organized and encoded system, which employs many devices to express, indicate, exchange messages, and information”.⁷⁶ This is why in writing a history of international law, (which by its very essence involves a top-down approach to history, since international law is still made by, and for states, without regard for the masses), it is important for us to pay close attention to the language of *imperial decision makers*. Although the masses have no role in making international law, this does not, however, mean we should ignore their interests altogether, or write them out of history.

This is especially as state formation is often a violent process, which is often forged through revolution, when the masses seek to alter the orientation of the state, and when a new notion of the nation is forged. And during this process, the source of its legislation and its political institutions are prescribed *and written into* the constitutional structure of the state. This is why, as I explain in Part Three, the key individual in terms of the formation of Marxism-Leninism was Lenin, not Karl Marx or Karl Kautsky, because as the founder of the USSR, he was in a position to influence state practice. Similarly, Stalin, Trotsky, and other Soviet leaders like Nikita Khrushchev were just as important in terms of the formulation of later Soviet foreign policy. This is why an individual like Kautsky, whilst he was undoubtedly the leading Marxist theoretician of his day, and who also played an important political role in Austria after the First World War, was not in a position to influence state practice to the extent that the leaders of the USSR were, through their allies and proxies during the Cold War struggle against the capitalist bloc, which determined the course of decolonization. Those statesmen responsible for partition, also influenced state practice, many of whom were familiar with the politics of international law, because they studied and practiced law, and thus knew how to articulate nationalist demands in the language of international legality, for instance, by demanding recognition as a nation, rather than as a minority. This undoubtedly influenced Carson who favoured maintaining the Union with the United Kingdom and Jinnah when he articulated his demand for Pakistan in the 1940s.⁷⁷ Both these men were skilled lawyers who trained

⁷⁶ Edward Said, *Orientalism* (London: Penguin, 2003), p. 21.

⁷⁷ See Part Three of this study.

at the English Bar and they knew exactly what they were doing when they articulated their demands for partition. And the British Government perfectly understood the demands that they were making, especially men like Balfour (and even Professor Woodrow Wilson) who were philosophers and academicians in their own right.

In this respect, the notion of *mentalités* is a particularly useful technique in which to assess the mindset of these men and of British imperialists, more generally. In terms of international law, the mindset or thinking of state actors is crucial in determining *opinio juris* – which along with state practice is central to the formation of custom in international law. Whilst custom is notoriously difficult to prove, and it is not the purpose of this thesis to argue that partition was a customary rule of international law, it is nonetheless a useful device to try to get to grips with the relationship between partition and self-determination. Therefore, the focus in the thesis that follows is on the mindset of key decision makers or influential thinkers that contributed or led to the decisions that state actors made in particular instances, rather than what their legal advisers may have advised them, since states, not international lawyers, make international law.⁷⁸ Admittedly, it is useful to know what a legal adviser may have advised and whether the government followed that advice because this allows us to understand the circumstances and motivations of a particular decision. As Sir Cecil Hurst, the British Legal Adviser explained in a 1920 memorandum:

What makes international law is the practice of governments, and to know in any particular case not merely what the Government did but why it did it, i.e. the particular circumstances of the case on which its view is based, is what makes the precedent valuable as a guide for the future.⁷⁹

What is significant about this admission, as Carty explains, is that “legal advice only becomes the position of the government when the government actually follows it”. Nonetheless, “where the government has heard legal suggestions but not followed them, that fact can indicate a great deal about the political character of the state

⁷⁸ Indeed, this is one criticism that could be levelled at Koskenniemi’s *Gentle Civiliser of Nations*, apart from its Eurocentricity, in that it was not a history of international law, as such, but rather a history of what international lawyers thought international law was—and a very good one at that. This study takes an altogether different approach and tries to assess the mindset of the key decision makers who altered the course of history through state practice and thus the course of self-determination.

⁷⁹ Marston, “The Evidences of British State Practice” in Carty, *Perestroika*, supra n. 43, p. 40.

decision, even where it cannot be said that the state has acted legally”.⁸⁰ I would add that whether or not a government follows the advice of its legal adviser, its interaction and reaction to that advice, tells us a lot about the *mentalité* of the decision maker. This is why the work that follows places emphasis on those men whose ideas (whether or not they were any good) had the greatest influence on the subjects of this study; namely self-determination and partition. So the writings of Gentili, Hobbes, Grotius, Locke, Pufendorff, Wolff, Rousseau, Vattel, Voltaire, Burke, Gentz, Jefferson, Marx, Lorimer etc. are interspersed with references to Cromwell, Pitt, Catherine II, Louis XVI, Robespierre, Disraeli, Salisbury, Balfour, Lloyd George, Wilson, Lenin, Stalin, Trotsky, Churchill, Carson, de Valera, Nehru, Jinnah, Dr. Verwoed, Arafat, etc.⁸¹

A Summation of the thesis: partition and competing conceptions of self-determination

This brings me to my thesis, the purpose of which is to inquire into what the history of partition tells us about the evolution of self-determination in international law and relations. In this connection, I argue that partition represented a fissure, rupture, schism, or fault line between two competing and diametrically opposed views of self-determination. This was often manifested in the form of a new boundary that was established that did not previously exist in the territory that was being divided, and which led, or purported to lead, to a change of sovereignty in a part of, or in all of, the territory concerned. This may have led either to the complete subjugation of the state or it may have lead to a situation whereby one part of the population and territory seceded. Partitions have often been unilateral, externally imposed by a third agency, which has usually taken the form of an imperial power. In this connection, those communities, peoples, or nations, who believed that their homeland was despoiled through its division often castigated it as a “partition”. Thus, it was *the lack of consent*, from the majority of those over whose homeland it was proposed to partition, or which was actually being partitioned, which is crucial to the understanding how partition came into being and became a pejorative term. For if the arrangement was

⁸⁰ Anthony Carty and Richard A. Smith (eds.), *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office 1932-1945* (The Hague: Kluwer Law International, 2000), p. 2.

⁸¹ Unfortunately, women are not represented on this list, but one cannot change history. Women were not given the vote in most countries until well into the twentieth century, and in France as late as 1946.

consensual then it is unlikely to have been opposed or viewed as a partition, and it would not have acquired its sinister reputation. As Brendan O’Leary colourfully puts it, what is protested about partition is “the freshness, the novelty, the brutality, and the artificiality of dividing a ‘national’ territory, a homeland, and a province”. Quoting Chatterji, O’Leary notes that opponents of partition often used medical metaphors: “an operation, an amputation, a dismemberment or vivisection”.⁸² Partition thus appeared as a rupture or schism between diametrically opposed views of self-determination because only one of the communities—usually the community that formed a majority of the population—viewed the division as a partition because it viewed the entirety of the territory that was subject to division as its own; whereas, the community that benefitted from the partition i.e. the community that obtained its national independence as a result of the secession, did not view it in this negative light.

The first view of self-determination that I consider in this study, I term the Liberal view, which is associated with representative government and constitutional democracy, and the second I term the social view or Social Democracy, which for most of the twentieth century was almost exclusively associated with Marxist-Leninist political theory. The Liberal approach to self-determination born in seventeenth century England and eighteenth century America, pre-dated the social democratic approach, and in many ways, can be described as its antithesis. The liberal approach to self-determination was based on a limited form of politics, which required the pre-existence in the territory of a cohesive, collective, and organised community, united in aptitude, political belief, and ideological outlook. This meant that the community had to be comprised of a highly cultured and educated elite, which had some prior experience of self-government in a society whose economy could be described as capitalist. Accordingly, the economy of such a society expanded through the acquisition of colonies in which it only recognised sovereign rights in lands that were cultivated and privatised in the Western tradition. In essence its system of government amounted to an aristocratic oligarchy. In contrast, the Marxist-Leninist approach to self-determination espoused an inclusive form of mass politics in which

⁸² See Brendan O’Leary, “Analysing Partition: Definition, Classification, and Explanation”, Working Paper 27, 2006, produced as part of the project on Mapping frontiers: plotting pathways: routes to North-South cooperation in a divided island, Centre for International Borders Research, Institute for British-Irish Studies, at p. 2, available online at <<<http://www.qub.ac.uk/researchcentres/CentreforInternationalBordersResearch/Publications/WorkingPapers/MappingFrontiersworkingpapers/Filetoupload,175428,en.pdf>>>

no fetters were to be placed on a people's right to independent national existence, which was to be granted immediately and unconditionally, irrespective and regardless for whether the peoples who were to assume power had acquired the attributes necessary to assume the burden of self-government.⁸³ The economy of such a society was based on the abolition of private property and it was opposed to colonialism and imperial expansion. In essence, its system of government was democratic dictatorship or the dictatorship of the proletariat in the sense that the oligarchy that assumed power claimed to do so in the name of the people, and set out to abolish the capitalist class and all remaining vestiges of inequality. In this respect, what I term the non-aligned approach to self-determination in Part Three of this study is, in many ways, an offshoot of social-democratic and Marxist-Leninist thought that had already articulated a theory attacking imperialism and supporting self-determination for non-European peoples up to and including the right to create a state. What the non-aligned approach stressed in conjunction with the Marxist-Leninist political theory was majority rule—which was specifically articulated in order to prevent the colonial power from vesting self-determination in minorities (think South Africa) because the imperial power considered the minority to have reached a stage of cultural, economic, and political development, which the majority had yet to reach. I argue that these differing approaches to self-determination originated in the eighteenth century, principally in reaction to the very different American and French revolutions, and the reactions of the “liberals” and the “socialists” to the three partitions of Poland. I also explain how the American Revolution was inspired by the 1688 revolution in England, whereas the French Revolution took the 1649-1660 Commonwealth as a model, although it turned out to be a very different revolution that went through various mutations and stages (the constitutional revolution, the great terror, the Directory). And of course, the French Revolution—and especially the events associated with Robespierre's rise and fall, influenced the men behind the Russian Revolution.⁸⁴

⁸³ See G. Starushenko, *The Principle of National Self-Determination in Soviet Foreign Policy* (Moscow: Foreign Language Publishing House, 1962), pp. 50-51.

⁸⁴ See Trotsky, *The History of the Russian Revolution*, supra n. 18. See also, the strong critique of the Russian Revolution with specific references to the Terror in the French Revolution by Karl Kautsky, *Terrorism and Communism: A Contribution to the Natural History of Revolution* (London: George Allen & Unwin Ltd, 1920). Kautsky's critique infuriated Lenin who called him a “renegade”, and especially upset Trotsky, who responded by writing a pamphlet of his own. See Leon Trotsky, *Terrorism and Communism: A Reply to Karl Kautsky* (London: Verso, 2007, first published 1920).

The first international lawyer to draw attention to these two major schools of thought on self-determination was Koskenniemi.⁸⁵ This is how he summed them up:

The self-determination which identifies the nation as the State could be called the classical, or Hobbesian, conception of self-determination. It starts from the assumption that the authentic expression of human nature in primitive communities is something essentially negative—that unless it can be channelled into formally organised States, whatever natural bonds exist will not prevent a *bellum omnium*. Nations, according to this conception, are artificial communities, collections of individuals who are linked principally by the existence of statal decision-procedure which makes it possible for them to participate in the conduct of their common affairs within the State. For this liberal view, the presence or absence of those procedures and their proper functioning is the core of national self-determination. Anything else is destructive, irrational passion.

The secessionist sense of self-determination builds upon a romantic or a *rousseauesque* approach. It tried to look deeper into nationhood as something more basic, more fundamental than mere decision-processes. For this view, the crucial question is less *how* popular will is exercised, more to what end it is exercised, whether it participates in the natural life-form appropriate for each nation as an authentic (and not artificial) community. For it, the primitive is good, something that was tragically lost in the political struggles that organised themselves into the State and that must now be

⁸⁵ The only other international lawyers in the West who have made the connection to the two schools of thought that I have come across is Joshua Castellino, although Koskenniemi evidently influenced him. See Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (The Hague: Martinus Nijhoff Publishers, 2000), pp. 9-10. See also, Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), pp. 77-83. Much of this thesis was written before I came across Koskenniemi's article, but it was a delight to come across it, even in retrospect, as it supports one of my central arguments. Whilst Cassese mentions Lenin and Wilson's differing approaches to self-determination he failed to connect the historicity of their differing approaches which were in gestation long before the wars of the twentieth century. See Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 14-23. And yet, the two theories approach to self-determination in its *specific historic context* was always understood to exist by the Communists. See Starushenko, *The Principle of National Self-Determination*, supra n. 83, pp. 13-14: "There are two theories concerning the national question, one for each of the class camps in the world today—the Marxist historic and economic theory expressive of the scientific views of the working class, and the idealistic, psychological theory expressive of the views of the bourgeoisie".

resuscitated so as to escape the legitimation crisis of the modern State and the malaise of (Western) civil society.

The legal problem of the subject of the right of self-determination seems puzzling because neither of these opposing notions can fully overrule the other.⁸⁶

Whilst, legally, these opposing notions of self-determination could never fully overrule the other, they did clash, and when they did so, they produced schisms in the international system in the form of partition. This is because during the birth of the nation-state, which I argue corresponded to the birth of self-determination, a *choice* had to be made about the system of government that would prevail. Then, as now, this choice has tended to be articulated in one of two ways: as aristocracy or democracy, capitalism or socialism, or the right or the left. Partition was the result of schisms or ruptures in these differing conceptions of how society should be oriented. Whilst Koskenniemi astutely identified the two principal theoretical approaches to self-determination, he did not trace their genealogies to explain how these differing theories actually affected state practice, which is what this study does. And it is clear that even during the three partitions of Poland in the eighteenth century, there was a clash of ideas that were related to differing conceptions of self-determination, between what we would today call a liberal approach predicated on a limited and elitist form of politics, that preserved the rule of law, and the status quo, in opposition to an approach that was outwardly egalitarian and that sought to abolish existing inequalities within the state and alter the constitutional framework through armed struggle and revolution.

In this connection, it is important to realise that men like Hobbes, Grotius, Locke, Wolff, Voltaire, Rousseau, Marx, and others, were not just theoreticians or “men of letters” but actually played a direct role in domestic and international politics, and often suffered the consequences for doing so; thus, Locke, Wolff, Voltaire, and Rousseau had to flee persecution, and Grotius was even imprisoned. Marx, of course, was in England as an exile or émigré. In other words, these men sought to put their principles into practice whilst they were still alive, let alone influence events after their demise. And these men’s differing political philosophies were reflected in the

⁸⁶ Martti Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice”, 43 *International and Comparative Law Quarterly* (1994), p. 241 at pp. 249-250 (footnotes suppressed).

way they understood history and viewed modern civilization. Those men who were more critical of modern society, became associated with the social democratic revolutionary school of thought, whereas those who thought that modernity was inevitable and benevolent tended to assail liberal imperialists and of course capital and the market. For the latter, man needs to be restrained by laws and regulations since he is by nature prone to mischief, whereas for the former, man in nature is inherently good; it is modern society that has corrupted him, and that has made him fall from grace.⁸⁷ In many respects, the men who espoused mass politics, tended to belong to the lower classes, and those from the nobility, the gentry, and the bourgeoisie, did all they could to prevent power from passing out of their hands. Thus, Freud thought it entirely understandable “that the attempt to establish a new, communist culture in Russia should find psychological support in the persecution of the bourgeois”.⁸⁸

As Koskenniemi rightly identified, Rousseau is the ideological godfather of the social democratic revolutionary school of self-determination.⁸⁹ In his *Discourse on the Origins of Inequality* (1754), which he wrote prior to his *Social Contract* (1762) Rousseau had argued that human society or modernity was the cause of inequality; and therefore society had to take responsibility for eradicating this evil, that is, the evil of inequality. This entailed a re-organization of society along patriotic lines as Rousseau had advised with regards to reforming the constitutions of Corsica and Poland. As Lucio Colletti explained in his brilliant analysis of Rousseau’s political thought, his ideas were strikingly similar to those of Marx, and later of Lenin, and the entire Third World Communist bloc from Castro to Ho Chi Minh.⁹⁰ For Rousseau, the social contract, rather than abolishing the state of competition and inequality, confirmed and reinforced it with the power of law.⁹¹ This is why the whole system had to be abolished and rebuilt.⁹² Thus, Colletti argued that Marx and Lenin added

⁸⁷ On the differing approaches to the state of nature see Kautsky, *Terrorism and Communism*, supra n. 84, pp. 121-127 (in which Kautsky rejects Rousseau’s thesis about the state of nature and so implicitly accepts the Hobbesian worldview; but he agrees with Rousseau and Marx that human development does not always lead to social improvement.) See also, Sigmund Freud, *Civilization and its Discontents* (London: Penguin 2002, first published 1930), pp. 49-50 (critiquing the Communist view of the state of nature by explaining that aggression was not created by property; it prevailed in primitive times, when property was very scanty, and existed in the nursery where property existed in “its original anal form”.)

⁸⁸ Freud, *Civilization and its Discontents*, ibid, p. 51.

⁸⁹ See also, Roth, *Governmental Illegitimacy*, supra n. 85, pp. 84-93.

⁹⁰ See Lucio Colletti, *From Rousseau to Lenin: Studies in Ideology and Society* (London: Monthly Review Press, 1972), pp. 143-193.

⁹¹ Colletti, ibid, p. 165.

⁹² Colletti, ibid, p. 184.

nothing to Rousseau, except for the analysis of the economic bases for withering away the state.⁹³ Whether or not one agrees with Colletti is immaterial; the point is that the critique of modernity, of inequality, of aristocracy, and of the state, can all be found in the writings of Rousseau, which all preceded the writings of Marx and of Lenin.

This is important because my argument is that the *idea* of self-determination did not originate with Marx or Lenin, despite the fact that the word “self-determination” was first used by the London International Socialist Congress in 1896, and later by Lenin in 1917, but was born in seventeenth century during the Interregnum (1649-1660) when Charles I was executed (1649) and replaced by the Commonwealth that was run by Oliver Cromwell and the army.⁹⁴ This was a cataclysmic event that sent shockwaves throughout Europe, much in the way the execution of Louis XVI in 1793 did, and the execution of Nicholas II and his family in 1918. Thus, as I explain in Part One of this thesis, Puffendorf after expressly referring to the Interregnum, explained that it was possible for sovereignty to be vested in “the fatherland” rather than in the body of a king, queen, or prince, which was quite a radical proposition to make in his day, when transfers of sovereignty customarily took the forms of dynastic successions. Of course, Hobbes and Grotius had said similar things, although Grotius backtracked in his later writings, a point that was not lost on Rousseau. Later, after the Restoration, there was a second revolution (1688), this time, a parliamentary revolution, during which the concept of Parliamentary sovereignty emerged, which largely influenced the writings of Locke, which in turn influenced the work of Montesquieu and other Liberals. This provided the theoretical foundations for the American Revolution, which was profoundly different to the French Revolution. It goes without saying that the word “self-determination” was not used in this era.

⁹³ Colletti, *ibid*, p. 185.

⁹⁴ J.L. Talmon makes a similar argument in *The Origins of Totalitarian Democracy*, *supra* n. 4, in which he argues that totalitarian democracy (which he describes as a dictatorship resting on popular enthusiasm) was not an invention of the Marxists but came out of the French Revolution and was influenced by Rousseau and his political and theoretical disciples. I agree with this view to the extent that I agree that the second phase of the French Revolution was a revolution of the Left. But of course, Rousseau was himself influenced by the Commonwealth that was established in England under Cromwell. That revolution was his benchmark, and not the French Revolution, which of course he never lived to experience. Thus I argue that the *idea* of self-determination was born the moment that Charles I was executed in 1649, and along with it the myths associated with the divine right of Kings, including the idea that only Kings had a right to rule by way of dynastic succession. Self-determination thus provided the right of a *community* to create a new political unit, the state, in place of the previous political system of government, which for most of European history had taken the form of a kingdom.

Instead, the form of government that sought to divest power from the King and disperse it more widely among the populace was referred to as “popular sovereignty”.

A principal criterion of popular sovereignty was that government was only legitimate if it ruled with the *consent* of the people. What “the people” that had to give its consent meant, prior to the reforms of the early twentieth century, was the consent of a legislative assembly comprised of white men of property. Additionally, in seventeenth and eighteenth century England, these men had to be Protestants because Catholics were declared enemies, and were expressly barred from holding office or voting. This was also the case in the Thirteen American Colonies where prior to the revolution the laws of England applied.⁹⁵ Thus, the Anglo-American tradition that I referenced in the Introduction was born as an elite system of government in which a small cabal, akin to a court society, made the political decisions and who did not conceive of the whole population that was subject to their laws as belonging to the same body politic. Although the American revolutionaries had abolished monarchical rule, and re-established themselves as a Republic, they created the position of a President who acted as the executive in Britain, although s/he was also subject to Congressional oversight. My point is that although the American revolutionaries created new political *institutions*, no attempt was made to change the *structure* of pre-revolutionary America until Reconstruction after the American Civil War, and even then it was not until the civil rights movement at the height of the Cold War that these rights were enforced. Instead, a slave-owning creole elite ruled America in the eighteenth and nineteenth century and for a good part of the twentieth century; most of the population—African Americans, Native Americans, poor whites, indentured labourers, and women—remained legally and politically disenfranchised. Therefore, for most of its history, America was strikingly alike apartheid South Africa in the twentieth century. I suspect Britain would have looked the same had it had a significant slave population in the metropolis, something it avoided establishing by ensuring that the slave trade occurred far from its shores. Britain also perfected a system of “transportation” so that its “undesirables”, that is, the poor, petty criminals, Irish rebels, Jews, Africans, prostitutes, and socialists, were sent to the colonies.⁹⁶

⁹⁵ See A. Berriedale Keith, *Constitutional History of the First British Empire* (Oxford: At the Clarendon Press, 1930), pp. 3-7.

⁹⁶ France had instituted a similar policy during the Monarchy. For instance, Voltaire was famously banished from a number of leagues from the city of Paris. I suspect that the institution of deportation is

The French Revolution, in contrast, was a more radical experiment. In 1789, an attempt was made to convert an absolute monarchy into a constitutional monarchy, similar to the system that then prevailed in Britain. Additionally, the different Estates of the Realm (the clergy, the aristocracy, and everyone else) were abolished and instead in its place was established the notion of the “active” and “passive” citizen. The Declaration of the Rights of Man and of the Citizen that proclaimed freedom and equality epitomised the process France was going through. The notion of a constitutional monarchy in France inspired developments in Poland, which followed suit by drafting a constitution that would have provided a similar system of government for their King and the Polish nobility. This was considered too much for the despots of Central and Eastern Europe who promptly divided up chunks of Poland between themselves, leaving only a small part intact. This was followed by a second even more radical phase to the French revolution, which peaked in the years 1793-4, after Louis XIV and his wife were beheaded, and when France was resurrected as a Republic under Robespierre. Under his rule, a new constitution was drafted that would have provided for universal suffrage for all adult males with no property qualifications had it entered into force.⁹⁷ For Robespierre self-determination was equivalent to Rousseau’s General Will in that it was associated with man’s struggle for dignity, freedom, and equality.⁹⁸ Thus, to Robespierre, the British system was “a fraud and a plot against the people”.⁹⁹ This second, more radical, and more violent phase of the revolution, also inspired events in Poland, during which an attempt was made to abolish serfdom (in a country dominated by the nobility) resulting in the insurrection of 1794 that was crushed by the Russian army. Thus, Poland, which was militarily weaker than France, was partitioned for the third time, and wiped off the map.

This is why the three partitions of Poland in 1772, 1793, and 1795, are central to understanding how the principle of self-determination evolved in the nineteenth century, and are the missing link between the American and French Revolutions, and

linked to Monarchy and to the notion of aristocracy. The British penchant for deportation today that one occasionally hears in the gutter press, for instance, over the deportation of Abu Qatada is probably a hang up from a very old British practice. If Jordan refuses to accept Qatada or give “assurances” they will not torture him, perhaps Britain could send him to Saint Helena? As I explain in Part Two, one of the first acts that the American revolutionaries did after independence was to insist that Britain stop its practice of unceremoniously “dumping” undesirable persons in what had been the Thirteen Colonies.

⁹⁷ See Malcolm Crook, *Elections in the French Revolution: An Apprenticeship in Democracy, 1789-1799* (Cambridge: Cambridge University Press, 1996) p. 79, and p. 192.

⁹⁸ See Talmon, *The Origins of Totalitarian Democracy*, supra n. 4, pp. 90-94.

⁹⁹ Talmon, *ibid*, p. 92.

the articulation of that principle by Lenin and Wilson in 1917-1918. And of course, Lenin and Wilson approached the principle of self-determination from very different philosophical vantage points. For Lenin, self-determination was a revolutionary right that was to be granted to all oppressed nations unconditionally, which included the right to secession; namely, separate statehood. For Wilson, self-determination amounted to self-government; namely, government by consent. The partitions of Poland breached both men's principles; in the case of Lenin, because it was subjected to an autocratic despotic regime that subjugated the Poles; and in the case of Wilson, because Poland was an integral part of the European family that had been partitioned in the eighteenth century three times without the consent of its Parliamentary institutions. Moreover, Wilson had come to view the Poles (like the composer Chopin) as a cultured people, and was impressed by their struggle for freedom. As explained in Part Two, it was no coincidence that Poland was the only state mentioned in Wilson's Fourteen Points speech that was to be established as a state after the First World War.

And yet at the same time that Poland gained its freedom vast swathes of territory in Africa and Asia were re-colonized by the victors of the war and administrated in the form of A-, B-, and C- mandates, with each class being dependent on the stage of development that the men who sat on the League of Nations Council thought that the people of each territory had reached. Prior to the war, as Lenin explained in his critique of capitalism and imperialism, vast swathes of Africa, Asia, and the Pacific were colonised, and partitioned by the great European powers, including by America.¹⁰⁰ Unlike the Poles, the peoples of these territories were not viewed as cultured according to European standards and they lacked the parliamentary institutions that Wilson so admired. And of course, since African Americans lacked political rights in America, it was hardly surprising that Africans in Africa were not perceived to be ready for self-government by the Americans and the Europeans. Instead political power was only transferred to European Africans even if they were a minority. Thus, Britain granted political rights to the European settlers in Southern Africa after Westminster passed the Government of South Africa Act in 1909. In other words, the foundations of separate development or what I like to call "separate

¹⁰⁰ See V.I. Lenin, *Imperialism: The Highest Stage of Capitalism* (New York: International Publishers 1939), pp. 76-87.

self-determination” as later manifested in the Bantustans, pre-dated the 1948 election victory of the national government that established the formal period of apartheid.

In the colonies, the Anglo-American approach to self-determination was not based on any notion of there being equal rights or majority rule or on any notion or pretence of maintaining the integrity of the colonial unit that was arbitrarily drawn up during the scramble for the world’s resources in the high age of imperialism (1870-1914). Rather, that approach to self-determination focused on the identity of the subjects seeking self-determination and whether they had met the standards that were deemed necessary by the colonial power to participate in the social contract. One of the consequences of the theory of a social contract was that geography, whether it took the form of “natural borders” such as rivers, lakes, and mountains, or even an ocean, were irrelevant.¹⁰¹ This is why Hobbes and Locke could describe the government of small families in the Americas as a society that was linked to the motherland irrespective of the vast quantities of water in the form of the Atlantic Ocean that straddled New England from the “Real England”. The same logic applied to English sovereignty in Hanover after the Act of Settlement (1701) despite its location in Lower Saxony. Britain’s purported link to Ireland was also unaffected by geography despite the fact that the Irish Sea separated Ireland from Britain. As A.J. Balfour argued when he was justifying the decision to partition that island in the Government of Ireland Act: “The only people who will grumble [about the partition] are those who imagine that this scheme deprives Ireland of a unity to which she had a historic claim. But these people ignore the fact that such unity as Ireland possesses is mainly the work of England, and that she has never in all the centuries, been a single, organized, independent state *and that if she were not surrounded by water*, no human being would ever think of forcing the loyal and Protestant North into the same political mould as the disloyal and Roman Catholic south [emphasis added]”.¹⁰²

In the Age of Imperialism a people who claimed to be entitled to self-determination had to be a “nation”, which proved to be a particularly problematic

¹⁰¹ Of the men associated with British liberalism, the only major theorist who did believe that geography played an important role in the formation of a collective identity was Edmund Burke. See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999) pp. 146-152.

¹⁰² See Catherine B. Shannon, *Arthur J. Balfour and Ireland 1874-1922* (Washington, D.C.: The Catholic University of America Press, 1988), p. 250 quoting from Balfour’s memorandum on Ireland, 25 Nov. 1919, Cabinet Records, CP 193, CAB 24/93. See also, Fraser, *Partition in Ireland, India and Palestine*, supra n. 32, p. 27.

notion, and perhaps intentionally so.¹⁰³ This is because the standards deemed necessary to be a nation, and therefore to be potential bearers of sovereignty, in order to participate in the social contract, were very similar to the standards that the Anglo-Americans expected of their own subjects who participated in the social contract at home. Accordingly, the qualities the Anglo-Americans looked to before they would even contemplate conferring the right to self-government upon a non-European people included the qualities of nationhood they themselves valued highly. The qualities that they valued were often inculcated in childhood, in the Church, in Sunday school, or in public school, and later refined at Oxbridge or at an Ivy League institution. And of course, access to these institutions up until the education reforms in the twentieth century was restricted to the traditional elites, that is, wealthy white men of property.

As I explain in Part Two, European society at the height of the Enlightenment was not only run by an elite preoccupied with social hierarchy in which the majority of the population were disenfranchised and poor, but it was also a society that was intolerant of religious minorities, especially if those minorities were poor. This is why the treaties that partitioned Poland only protected the religious rights of Christian minorities, but ignored the rights of Jews who were instead confined to the Pale. Similarly, the treaties concluded between the Russian and Ottoman Empires, only

¹⁰³ In the social sciences there is an abundance of literature in the field of ethnicity and nationalism studies dominated by the debate between “primordialists”, “modernists”, and “ethnists”. Primordialists like Hugh Seton-Watson trace the emergence of nations back to the Middle Ages and late antiquity. Modernists like Benedict Anderson, Ernest Gellner, and Eric Hobsbawm argue that the nation is a modern phenomenon dating approximately back to the era of the French Revolution. Ethnists like A.D. Smith argue that nations are modern inventions closely related to the pre-existence of ethnic sentiment and community. These ways of understanding the nation, although very interesting, are not particularly useful to international lawyers, who in accordance with the strict positivist notion of international law, ought to by necessity focus on state practice and *opinio juris* i.e. what states do and why they do it, irrespective of whether what they do is right, wrong, good, bad, sensible, stupid, or completely irrational. This is because it is not the nation as an abstract entity as defined and understood by anthropologists and historians that matters legally, but what states *think*. It was rarely anthropology or science that determined what a nation was in the eyes of states, but geopolitics and prejudice. Politicians would pick and chose those theories (like social Darwinism) that purportedly supported their political ideologies, personal predilections, and prejudices, with often-disastrous consequences. Prior to World War II states customarily referred to nations as the unit of self-determination. However, and in the aftermath of the Nazi Holocaust and the UNESCO study criticising the concept of race, international lawyers have instead adopted the word “peoples” to refer to the community that is entitled to self-determination. This is encapsulated in common article one to the two human rights covenants of 1966: “All *peoples* have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. The word “nation” has been dropped in favour of “people” precisely in order to avoid having to engage with controversies over the precise meaning and origin of the nation that has so preoccupied the social scientists. Moreover, because we cannot re-write history, the historian of international law cannot avoid using the language that was used by state actors in the past to describe the unit of self-determination, even if this terminology was, and is, highly problematic, if not manifestly dangerous.

protected Christian minorities; Muslims were not protected. The religious intolerance displayed towards non-Christians was also prevalent amongst many of the *philosophes*, even amongst those who espoused egalitarian values. It was also prevalent amongst jurists like Hugo Grotius who wanted to convert the Jews to Christianity, because in his vision there was no place for non-Christians in Europe; instead he argued for their “return” to Palestine.¹⁰⁴ These prejudices are worth emphasising because they had a major influence on the way in which nationalism developed at the height of imperialism in the metropolis and in the overseas colonies contributing to partition.

This is because by making distinctions between communities on the basis of their alleged innate religious differences, either by disenfranchising them, or by favouring one community to the detriment of the other, these communities were never able to vote or interact as citizens of a common state. Instead, a gulf emerged between Catholics and Protestants in Ireland; Jews and non-Jews in Palestine; Muslims and non-Muslims in British India; Christians and Muslims in Cyprus, and Christians and non-Christians throughout Southern Africa. In time, these religious differentiations were also manifested in terms of national affiliation. Thus, the conflict in Ireland was one between Nationalists and Unionists; in Palestine between Zionists and Arabs; in India between the League and Congress; in Cyprus between Greek Cypriots and Turkish Cypriots; and in South Africa between Europeans and non-Europeans, which was manifested most graphically by the colour bar as a dispute between Whites and Blacks. Additionally, in each of these cases, one of the communities was a minority.

Being a minority posed a problem in a political system that avowedly favoured majorities in the sense of a majority of those participating in the electorate. And the Westminster model of government was such a system, which was reproduced in various forms in all British colonies that were granted a form of self-government (as opposed to Crown Colonies, where the Governor had his Council had authority, rather than the Legislative Assembly). This is why the Anglo-American system of government deployed the law to segregate the populace so only a minority could vote e.g. white men of property. This was, as I explained in the Introduction, developed in order to prevent majority rule or the tyranny of the majority of the lower classes. In

¹⁰⁴ This was also the view of John Locke. In 1622, Grotius composed a treatise that was entitled *The Truth of Christian Religion* in which he made the case for converting those Jews (and Muslims) who lived in Europe to Christianity. See Nabil I. Matar, “John Locke and the Jews” 44 *The Journal of Ecclesiastical History* (1993), p. 45 at p. 50 citing the 1680 English translation by Simon Patrick.

other words, in the parliamentary system of government, the majority never referred to the majority of the entire population of the state but only to the political classes, which were in fact a minority. So only a majority of the minority, that is, the miniscule electorate that had been pre-determined by the ruling classes, could ever hope or aspire to influence government policy at the ballot box, by joining or forming a political party, or by standing as a candidate in an election for a political party. This was the situation for many centuries in England and Wales and later in Scotland and Ireland. It was also the case in America after the Revolution until the 1960s. When this political system was transferred to the colonies, the result was the same: the minority was enfranchised or given preferential treatment over the majority.

This is why for many centuries in Ireland and America only Protestants could vote and hold public office even though they were only a minority of the total population, and why in Southern Africa only the Europeans could vote and hold public office even though they were a minority. A similar situation prevailed in Palestine where Arabs were prevented from influencing government policy to prevent the establishment of a Jewish homeland and were disenfranchised despite forming the vast majority of the population. The result was that only Jews participated in a governmental agency (the Jewish Agency) that was created by the League of Nations to provide for their welfare.¹⁰⁵ In British India, Muslims were given preferential treatment over the Hindus, Christians, and the other communities and castes in British India, by voting in a separate electorate. In Cyprus, Britain favoured the Turkish Cypriots by promoting them to important influential positions in the colonial government and by using Turks in the police force to crack down on the Communist

¹⁰⁵ Britain had proposed to establish an Arab agency in Palestine, which was to occupy a position exactly analogous to that, accorded to the Jewish agency, under Article 4 of the Mandate. See Palestine: Proposed Formation of an Arab Agency, Correspondence with the High Commissioner for Palestine, XXV Parliamentary Papers (1923), para. 7. However, this offer was unanimously declined by the Arab leaders of the day on the grounds that they desired the establishment of a government that would recognise the majority status of the Arabs, who in 1917, when Britain occupied Palestine, formed 93 per cent of the population. The leaders of the Palestinian Arab community contended that an Arab agency would not be representative of the Palestinian people because it included nominated British officials. They argued that to participate in any council, no matter what its form, would indicate on their part an acceptance of the Mandate and the Constitution, which provided for the establishment of a Jewish national home in Palestine, which the Palestinian Arabs declined to accept. Under the proposed Legislative Council the elected members would have no powers and so it could at any time be outvoted by the Government and by Jewish votes. See Mogannam E. Mogannam, "Palestine Legislation under the British", 164 *Annals of the American Academy of Political and Social Science* (Nov. 1932), pp. 48-49; and also the views of Jamaal Bey Hussein, "The Proposed Palestine Constitution" 164 *Annals of the American Academy of Political and Social Science* (Nov. 1932), p. 24.

inspired EOKA insurgency. The British decision to partition each of the territories (or in the case of Cyprus to attempt to partition it) was a method of preventing majority rule for the whole of the population of the colonial unit. Instead, a new majority would be established after the new boundary had been drawn through the territory leading to the creation of a new political unit, that is, a new subject of international law. Hence it was hardly surprising that Irish, Indian, Palestinian, Greek, and South African nationalists were attracted to left-wing politics and political theories that espoused social democracy because these theories articulated a vision of society in which the majority ruled, in which only the majority had the right to form a state.

The consequences of this history and its importance to the subsequent development of international law, is that at the height of the Cold War struggle during decolonization, partition was outlawed by the United Nations. Instead, as Professor Shaw correctly pointed out, when I quoted him earlier in this study, self-determination today (but perhaps not tomorrow) ensures “the distinct identity of the colony and its decolonization...on the basis of accepting the existence of a discreet territorial unit under international law”. This is because self-determination does “not operate as a general rule as a means whereby each group within the territory had the right in international law to determine its own future up to and including separate statehood”.¹⁰⁶ This is why South Africa’s Bantustans were never recognized by any other state apart from South Africa. It also explains why the Turkish Republic of Northern Cyprus has never been recognised by any other state other than Turkey. This is because the contemporary law of self-determination is equated to majority rule, which is supposed to prevent the division of a self-determination unit from being recognised. The issue for the future is whether this will remain the law in light of geopolitical change or whether the spread of liberal democratic systems of political thought and of government since 1989, will likely lead to new partitions elsewhere.

A final word on the structure of this study

Due to the ambitious scope of this study, I found it necessary to divide the core content into three parts, in chronological order, which I categorised under these

¹⁰⁶ See Shaw, “Peoples, Territorialism, and Boundaries”, supra, n. 53, p. 481.

headings: 1. The law of nations in the ancien régime. 2. European public law in the age of imperialism. 3. International law in the age of decolonisation. The first and the third part of this study analyse specific partitions, whereas the second part focuses on the way in which jurists, the *philosophes*, and political theorists justified the colonisation of non-Europeans lands, and explains how they deliberately connived to cast aside non-Europeans from the body politic. This was thought necessary in order to give some background to the ideas, which led to the partitions in the twentieth century. As I explain national conflict did not suddenly emerge when Britain decided to withdraw from its colonies. Rather these conflicts had evolved under British rule.

Since the idea of partition in modern international relations began with the partition treaties that were negotiated in 1698 and 1700, this is the first instance of partition that I consider in this study. Prior to this I explain the old system of international relations, which was predicated on maintaining a balance of power between the Christian princes of Europe. The analysis of the partition treaties are closely followed by, and contrasted with, the partitions of Poland in the eighteenth century. The age of imperialism, which criss-crossed and paralleled these developments, reached its nadir in the late nineteenth century, when the seeds of partition were sown, although imperialism had begun as early as 1492, and ended in the 1940s-60s during decolonization, when the better known partitions took place.

In the headings I have used the old terminology “law of nations” and “European public law”, rather than “international law”, because the latter term only came into existence in the late eighteenth century when it was coined by Jeremy Bentham to refer to the relations amongst established states.¹⁰⁷ To ease the flow of the text I have used both terms—the law of nations and the international law—interchangeably, and I use the term international law in the title. As the relationship between a people and its territory has undergone a fundamental transformation over the past 500 years, each part of this study is preceded by a short “scene setter”, which is designed to provide some perspective so that the evolution of self-determination in international law can be appreciated in its historical, political, and social context.

¹⁰⁷ See M.W. Janis, “Jeremy Bentham and the Fashioning of “International Law”, 78 *The American Journal of International Law* (1984), p. 405.

Part One

THE LAW OF NATIONS IN THE ANCIEN RÉGIME

If there was a nation of gods, it would be governed democratically. So perfect a government is unsuited to men.

Jean-Jacques Rousseau, The Social Contract (1762), Wordsworth Edition 1998, p. 68.

To establish an equality of duties between men, and to destroy those distinctions necessary in a well-ordered monarchy, would soon lead to disorder (the inevitable consequence of absolute equality). The result would be the overthrow of civil society, the harmony of which is maintained only by the hierarchy of powers, authorities, pre-eminences, and distinctions which keeps each man in his place...

The Parlement of Paris (1776) remonstrating against an attempt to create a universal road tax in France. Quoted in William Doyle, Aristocracy and Its Enemies in the Age of Revolution (Oxford: Oxford University Press, 2009), pp. 43-44.

You decided the Republic by a mere majority, you changed the whole history of the nation by a mere majority, and now you think the life of one man too great for a mere majority; you say such a vote could not be decisive enough to make blood flow. When I was on the frontier the blood flowed decisively enough.

Georges Danton, 1793, on the vote to execute the King, quoted in Hilaire Belloc, Danton: A Study (London: James Nisbet & Co. Ltd., 1899), pp. 201-202.

The very essence of democratic government consists in the absolute sovereignty of the majority; for there is nothing in democratic states that is capable of resisting it.

Alexis de Tocqueville, Democracy in America (1835), Wordsworth 1998, p. 98.

Historians often refer to the period prior to the French Revolution of 1789 as the “ancien régime” i.e. “the old system”. It is used here in connection to the law of nations, as it existed in Europe, prior to the political changes brought about by that revolution, which originated in the concept of *Respublica Christiana*. These Christian origins did not, however, preclude relations with non-Christian powers such as the Ottoman Empire, which was recognised by the law of nations in a relationship of relative equality until the changes wrought by revolution and social Darwinism in the mid-nineteenth century. Nonetheless, Europe’s Christian identity was forged through its fear of “the other” when “Suleyman the Magnificent”, the sultan of the Muslim Ottoman Empire, reached the gates of Vienna in 1529.¹ What characterized the law of nations during Protestant Reformation (1517-1648), when Luther attacked the authority of the Pope, was that it was predicated on a horizontal relationship much in the manner international law applies today, rather than in a vertical relationship with the Pope at the centre of the universe.² The difference then, was that little or no account was given to the national identities of those who served in a sovereign’s army, or administration, or who inhabited the territories placed under its sovereignty.

The Reformation resulted in the elimination of the Church’s control over everyday life, and the substitution of a new form of control for the previous one.³ In attempting to assert a new form of control the Reformation contributed to a nascent form of nationhood expressed in the form of *religious* identity and difference. Thus, King Henry VIII initiated the break from Rome in the 1530s to establish a Church of England, which directly challenged the authority of the Pope. Then there was the Dutch Revolt against Spain (1555-1609), which half a century later was followed by the English Civil Wars (1641-1651), and the creation of a republic in Britain (1649-1660), which led to the formation of an alliance between the Protestant Maritime Powers in opposition to the Catholic powers, France, Spain, and Portugal. This was further buttressed by the Glorious Revolution of 1688, when William and Mary became the sovereigns of England in Parliament to ensure that it remained a Protestant country. It was during the struggle between the Maritime Powers and the Catholic Kingdoms that many of the founding principles of international law were formed

¹ Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (London: Routledge 1992), p. 177.

² John Witte, JR. *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), p. 2 quoting Luther (“I shit on the law of the Pope, and of the emperor, and on the law of the jurists as well”).

³ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (London: Routledge, 2002) p. 4.

during the contest for predominance over the trade routes to the Indies.⁴ It was also during this period that religion would contribute to the formation of national identity, which would have a profound impact on British colonial policy in the age of imperialism, as explored in Part Two, leading to partition, as explained in Part Three.

Although it has been argued that “a certain national sentiment”⁵ was beginning to weld together the populations of each kingdom as early as the Renaissance in Italy, European territory was still not associated in terms of national identity beyond an individual’s chosen faith. Rather, an individual’s identity in the ancien régime tended to be accorded recognition only in terms of its relationship to the Christian religion in contradistinction to non-Christian religions. Hence the Peace of Westphalia in 1648 concluded between France, the Holy Roman Empire, and their respective allies, while confirming the rule of *cuius regio, eius religio* (“whose realm, his religion”) set out in the Religious Peace of Augsburg of 1555, only provided safeguards for the *Christian* minorities in Europe.⁶ Accordingly, Christian minorities could choose the religious denomination of their sovereign in order to practise their faiths, which pleased the Protestant princes who could be assured of their subject’s loyalty—which led to extensive transfers of populations within Germany.⁷ In other words, in the ancien régime a subject tended to be identified by the sovereign by his or her religion, and not just their residence, since an individual’s chosen faith affected their allegiance.

Accordingly, distinctions were made within Europe between specific Christian denominations whether these denominations were Catholic, Protestant, or Orthodox as epitomised by the treaties that partitioned Poland.⁸ And yet the rights of non-Christians (e.g. Jews who were particularly numerous in Poland) were not recognised. Similarly those treaties the European powers concluded with the Sublime Porte

⁴ See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003, first published 1950), pp. 86-138; Wilhelm Grewe, *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000, first published 1984), pp. 137-162; and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), pp. 13-31.

⁵ Watson, *The Evolution of International Society*, supra n. 1, p. 163.

⁶ See Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p. 28.

⁷ Watson, *The Evolution of International Society*, supra n. 1, p. 173.

⁸ On the status of Christian minorities in Poland see Clause V of the Partition Treaty between Austria and Poland (1773) which safeguarded the rights of “the Dissident and the Non-united Greeks”; Clause V of the Partition Treaty between Russia and Poland (1773) which safeguarded the rights of Roman Catholics; and clause VII of the Partition Treaty between Prussia and Poland (1773) which also safeguarded the rights of Roman Catholics. See the Treaty between Austria-Hungary and Poland; Treaty between Poland and Prussia; and Treaty between Poland and Russia, all signed at Warsaw, 18 September 1773, in Clive Parry (ed.) 45 *The Consolidated Treaty Series (1772-1775)*, pp. 235-265.

preserved Christian religious liberties and rights of worship in Western Asia, but this was not reciprocated for Muslims who lived in the European continent.⁹ Non-Christians such as Jews and Muslims were seen as an alien presence in Europe, as presumably were those persons who worshipped another deity. Stereotypes of Jews and Muslims (“the Turk”) were particularly widespread in reformation Europe, which Luther invoked in his writings to make a distinction between “insiders and outsiders”.¹⁰ These stereotypes also affected the policies of the Catholic kingdoms that supported the Crusades against the “infidels” from as early as 1095. The alleged “alien identity” of Jews and Muslims within a Christian Europe was marked most graphically in Spain with the expulsions of the Jews and the Moors after the *Reconquista* in 1492, when King Ferdinand and Queen Isabella unified their Catholic Kingdom.¹¹ It was also manifestly clear from the Inquisition, which Voltaire had famously mocked, that heretics were not considered to be a part of the body politic.¹²

In addition to matters of religion, European identity was also forged through the education and learning that had been inspired by the Renaissance, which coincided with the Reformation, widely believed to have originated from Niccolò Machiavelli’s (1469-1527) hometown of Florence. As Johann Bluntschli (1808-1881), the Swiss jurist, observed, it was the Renaissance, which had ushered into most parts of Europe a new form of art, thought, and intellectual outlook that “broke through the bounds of medieval scholasticism and monastic theology”.¹³ From then on a trend had begun whereby a coterie of well-educated men would determine the conduct of foreign policy by appealing to human considerations as opposed to theocratic orthodoxy.¹⁴ The essence of the Renaissance was humanism, in which God was no longer viewed as the measure of all things as the scholastics had tended to believe. Accordingly, scholars of the humanist variety tended to look to the ancient Greeks and Romans for inspiration as the achievements of man took precedence “through the diffusion of a

⁹ See e.g. The Treaty of Koutchouk-Kainardji (1774) which provided for ministers of the Imperial Court of Russia to make representations in favour of the Orthodox religion, mentioned in Thornberry, *Rights of Minorities*, supra n. 6, p. 33.

¹⁰ Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Anglo-American Law* (Oxford: Hart, 2010), p. 41.

¹¹ See Josep R. Llobera, *The Making of Totalitarian Thought* (Oxford: Berg, 2003), pp. 17-26.

¹² See Voltaire, *Candide* (Penguin Popular Classics, 2007, first published 1759), which is still a good and amusing read (if not “politically incorrect”) two and a half centuries after it was written.

¹³ Johann Kaspar Bluntschli, *The Theory of the State* (New York: Libraries Press, 1971, first published 1895), p. 48.

¹⁴ Bluntschli, *ibid*, p. 48.

liberal spirit of inquiry”.¹⁵ In making the ancient Greeks and Romans an object of study and inspiration, the humanists, whether wittingly or unwittingly, cast aside the knowledge that existed and was available to them from within contemporary and ancient non-European cultures, such as Arabic, Indian, Sino-Japanese, etc. Indeed, when in 1723, Christian Wolff (1679-1754), then Professor of Mathematics and Natural Philosophy at the University of Halle, and a notable jurist, expressed admiration and emphasised the importance of the teachings of Confucius in a lecture there, he was ordered by the Prussian Royal Cabinet to leave within 48 hours “under pain of the halter”.¹⁶ The intolerance displayed towards non-Christian and non-European cultures indelibly affected the way European statesmen would relate to the rest of the world at the height of imperialism, as we shall come to see in Part Two.

The common refrain “By the Grace of God” that appeared in treaties and official correspondence between foreign courts gave expression to the belief that the monarch had a divine right to rule over his subjects and that in his person was an emanation of the state itself.¹⁷ The doctrine of the divine right of kings provided that the monarch was subject to no earthly authority, deriving his right to rule directly from the will of God. The king was thus not subject to the will of his people, the aristocracy, or any other estate of the realm, including the church. The doctrine implied that any attempt to depose the king or to restrict his powers ran contrary to the will of God and could constitute heresy—a theory that was closely connected to the idea of sovereignty devised by Jean Bodin (1530-1596), the French jurist and political philosopher. In his *Six Books of Commonwealth* published in 1576 he argued that the monarch possessed the right to impose law generally on all subjects regardless of their consent.¹⁸ James I of England/Scotland went a stage further by insisting that “Kings are not onely GODS Lieutenants vpon earth...but even by GOD himselfe they are called

¹⁵ Watson, *The Evolution of International Society*, supra n. 1, p. 153.

¹⁶ For the story, see the introduction by Otfried Nippold in Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Oxford: Clarendon Press, 1934, first published in 1764), translated by Joseph H. Drake, at pp. xvii – xviii.

¹⁷ See e.g. the way Louis XIV is referred to in the Treaty of Peace between Great Britain and France, Concluded at Ryswick, September 10/20th, 1697, in Frances Gardener Davenport (ed.), *European Treaties Bearing on the History of the United States and its Dependencies*, Vol. II, 1650-1697 (Washington, D.C. Carnegie Institution of Washington, 1920), p. 360. (“Louis par la grace de Dieu, roy de France et de Navarre”).

¹⁸ See the chapter on Jean Bodin (1530-96) in James Brown Scott, *The State and the International Community* (New York: Columbia University Press, 1939), pp. 324-5.

Gods...Kings exercise a manner or resemblance of Divine power on earth”.¹⁹ By evoking the notion of a “divine right” James I could occupy a position of spiritual authority equivalent to the Pope to buttress his source of temporal authority.²⁰

One of the outcomes of this peculiar theory of divine right was that any breach of the law was analogous to a personal attack on the body of the sovereign. Since the law represented the will of the sovereign, a breach of the law was a breach against him, as though he had been attacked personally, and thus the force of the law was the force of the sovereign, which was customarily and cruelly wrought on the body of the guilty.²¹ This partly explains why executions for treason were dealt with especially harshly and in public, amidst pomp and ceremony. During the trials of the regicides in 1660, counsel for Kings Charles II took the theory of divine right to its absolute apotheosis when he argued that “the King can do no wrong” because he was “above the law”. This was because “the King is immediate from God and has no superior – he is our sovereign Lord, and sovereign means he is supreme”.²² This notion of supremacy and divine right was epitomised in England when the regicides were hung, drawn, and quartered at Charing Cross in 1660. Even those regicides already deceased by this date such as Oliver Cromwell, had their bodies exhumed, and hanged in their shrouds at Tyburn, before their skulls were impaled at Westminster Hall. In France, the notion that the body of the King was “sacred” and could not be touched was epitomised by the infamous execution of Damiens the regicide in 1757.²³

It was during the English revolution and the trial of Charles I that the theory of a social contract was first spelled out in order to challenge the notion of divine right and to quell the abuses it inevitably caused, which would be picked up by contemporary writers such as Thomas Hobbes (1588-1679), before being refined by later scholars, including John Locke (1632-1704), Samuel von Puffendorf (1632-1694), Emmerich de Vattel (1714-1767), and Jean-Jacques Rousseau (1712-1778). These scholars challenged the view that a King could be divine and above the law. They argued that by virtue of his position the sovereign had entered into a bond or trust with his people. If he violated this trust then his people could remove him. This

¹⁹ James I, “A Speech to the Lords and Commons of the Parliament at White-Hall” in Charles McIlwain (ed.), *The Political Works of James I* (Cambridge: Harvard University Press, 1918), p. 307.

²⁰ Darian-Smith, *Religion, Race, Rights*, supra n. 10, p. 60.

²¹ See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin 1991), pp. 32-69, especially p. 47.

²² See Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (London: Vintage, 2005), pp. 194-195. See also the comment by Robertson in note 14, p. 407.

²³ For a description of this gruelling execution see Foucault, *Discipline and Punish*, supra n. 21, pp. 3-6.

was a theory that gave inspiration to revolts and revolutions from Corsica (1755), to the Thirteen American Colonies (1775-1783), Ireland (1782-1784), Belgium (1787-1790), Holland (1783-1787), Poland (1791-1794), and France (1789-1799). It must, however, be noted that the so-called Glorious Revolution, which took place in England in 1688, was an aristocratic revolution. Power became vested in the aristocrats and the King-in-Parliament. In contrast, the other revolutions were organised by the upper middle classes or “the Bourgeois” to use Marxian language. In contrast to the American Revolution, during the French Revolution an attempt was made to alter social structure. And unlike the English revolution in 1649-1658, which had likewise sought limited social change, the French Revolution was a success.

Before the identification of a people with the nation-state, let alone before the establishment of the nation-state, a people were not considered “nationals” since the very idea of nationality laws, which provided the juridical link between the individual and the state did not exist. It was only after the establishment of the nation-state that an individual’s nationality was determined in relationship to that state rather than in terms of one’s loyalty to the body of a divine and munificent sovereign. This understanding of nationality was linked to nationhood, which in later years would come to be associated with the principle of national self-determination, rather than obedience to a sovereign. Being a national in a nation was a very different concept to being a subject in a monarchy or a citizen in a republic, in that both were much older concepts, which were not linked to an individual’s identity, however that identity was manifested, whether in terms of birth, language, or blood lineage.²⁴ In *Calvin’s Case* (1608), which was the leading authority on matters of citizenship in the seventeenth century, it was merely held that noblemen were subjects of the English King to whom they owed allegiance.²⁵ In other words, there was no conception of belonging to, or being a part of, a larger body politic, which was independent of the sovereign-subject relationship. This was because during the Reformation an individual’s identity depended on their place of birth as well as their status at birth, and whether or not they belonged to the nobility. In England an individual’s status depended upon whether one was a “gentlemen”, that is, a peer or a member of the gentry, or whether one was

²⁴ See Aristotle, *The Politics*, Book III (London: Penguin 1992), pp. 167-169.

²⁵ In *Calvin’s Case* (1608), Lord Coke held that the subjects of Scotland born after King James VI became James I of England could hold land in England as well as in Scotland, because both Scots and Englishmen owed allegiance to the same king. See *Calvin v Smith*, 77 Eng. Rep. 377 (K.B. 1608).

a commoner.²⁶ The religious authority that one paid homage to by Church attendance was also taken into consideration. Thus, Catholics were assumed to owe allegiance to the Pope in Rome who was viewed by many Englishmen as a meddling foreigner, which is why Protestants tended to refer to them disparagingly as “papists”. This was because many Englishmen associated the Papacy with arbitrary government and monarchical tyranny on the continent, and with societies that appeared to be composed of a few great lords and a mass of impoverished peasants, who lacked the freedoms they believed were the inheritance of Englishmen.²⁷ Protestants, in contrast to Catholics, demanded a separation between the realm of the spirit, and the order of secular society.²⁸ They therefore demanded the creation of a nationalised Church whose prayer book would be articulated in a language that they could understand.

Prior to the French revolution and the emergence of nationalism, advisers, counsellors, diplomats, and professors, including those who wrote on what was then called the law of nations, were not bound to serve their country or nation because the concept of the “nation” as a cohesive, homogenous, and loyal unit did not exist as such. Thus, the Prussian statesman Friedrich von Gentz (1764-1832) could be employed in the service of Austria despite his “national” origins, the international lawyer Vattel of Switzerland, could be employed in the service of Prussia, and the great writer Voltaire (1694-1778), served Frederick II of Prussia as his chamberlain for three years, even though he hailed from France. Hugo Grotius (1583-1645) was for a time Ambassador of the Crown of Sweden at the French court, despite his Dutch roots, and Rousseau, who was from Geneva, spent a year employed as the secretary to the Comte de Montaigne, when he was the French Ambassador to the Republic of Venice, a century before modern Italy would be created. With the sole exception of Rousseau; Gentz, Grotius, Locke, Vattel, and Voltaire, moved within aristocratic circles, and came from wealthy families, who were close to the ruling elite in their respective countries of origin, or else were in their employment.²⁹ In the eighteenth century, a French monarch ruled Spain, a Hanoverian ruled Britain, and Francophiles ruled Prussia and Bavaria. However, whilst the rule of this international aristocracy

²⁶ See Brian Manning, *Aristocrats, Plebeians, and Revolution in England 1640-1660* (London: Pluto Press, 1996), p. 6.

²⁷ Manning, *Aristocrats, Plebeians, and Revolution*, *ibid*, p. 15.

²⁸ See Daniel Philpott, “The Religious Roots of Modern International Relations”, *52 World Politics* (2000), pp. 206-245, at p. 223.

²⁹ Voltaire, for instance, was a very wealthy man, wealthy enough to lend substantial sums of money to royalty, at an appropriate high rate of interest, and to invest in the *Compagnie des Indes*. See Ian Davidson, *Voltaire in Exile: The Last Years, 1753-78* (New York: Grove Press, 2004), pp. 3-5.

brought like minded people together, it also created the illusion of an international feudal civilisation, which floated above the rural masses of people, who were deeply rooted to the soil, often illiterate, traditional, and living in isolation from one another.

Prior to the rise of nationalism, borders were porous and indistinct, and sovereignties faded imperceptibly into one another.³⁰ Territory was then viewed as little more than the personal appendage of the sovereign much in the way real estate is considered today, except that his heirs, who were not subject to taxation, could inherit it. As opposed to territorial expansion overseas, within Europe, sovereigns expanded not only through conquest but also by “sexual politics”.³¹ Finding a suitor for the next in line was particularly important, as it was a guaranteed way of extending a sovereign’s power without having recourse to war. And it did not matter where that territory might be. Hence, the Emperor of Austria was also the King of Hungary, of Bohemia, of Dalmatia, Croatia, Slavonia, Galicia, Lodomeria, Jerusalem, etc.³² And George I was King of Great Britain and Ireland, the Duke of Hanover, and Archtreasurer and Prince-electoral of the Holy Roman Empire. The fact that George I hardly spoke any English or that Hanover was located in central Germany and separated from Britain by parts of France, the Netherlands, and the English Channel, did not seem to make much difference to the legality of this personal union over which the King was the sovereign.³³ This age of dynastic cosmopolitanism was also reflected in military matters in that most of the continental armies contained large numbers of foreign troops such as the Scots brigade in the Dutch army, and the Irish brigade of France.³⁴ Accordingly, these soldiers could serve any sovereign that could afford to pay for their quarters and upkeep. The cosmopolitan nature of the European ruling classes influenced and moderated the appeal to arms which was viewed as a contest between professional standing armies, during which the civilian population were to be as little affected as possible.³⁵ The aristocratic and cosmopolitan approach to warfare and territorial expansion acted as a moderating factor and contributed to a system in which warfare was less devastating and destructive than it is today.

³⁰ Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 2006), p. 19.

³¹ Anderson, *Imagined Communities*, *ibid*, p. 20.

³² See the example Anderson provides in *Imagined Communities*, *ibid*, p. 20.

³³ See John Clarke and Jasper Ridley, *The Houses of Hanover and Saxe-Coburg-Gotha* (London: Cassell & Co. 2000), p. 6 (George I remained German and made no great effort to Anglicize himself”).

³⁴ Michael Sheehan, *The Balance of Power: History and Theory* (London: Routledge, 1996), p. 98.

³⁵ Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), p. 88.

Accordingly, in the ancien régime the very idea of sharply delineated and demarcated boundaries was largely a misnomer when notions like nationalism and sovereignty were underdeveloped in Europe or were considered alien by non-European cultures. There was also little need to draw sharply defined boundaries when mass migrations between Europeans—let alone between non-Europeans—could not take place because of poor standards of transportation. The only use of demarcating boundaries prior to the rise of nationalism was to delineate the extent of a sovereign’s authority in order to distinguish it from the competition and to provide a geographic area for taxation.³⁶ Before modern map-making skills came into use the extent of a sovereign’s authority was often described in relation to geographic features such as rivers, lakes, and mountains. For instance, many a sovereign of France genuinely believed that its “natural frontiers” to its East, South, and West, corresponded to the Rhine, the Atlantic, and the Pyrenees, and Alps respectively.³⁷ Before nationalism, borders had a specific strategic nature to delineate buffer zones, and to act as compensation for territorial losses and acquisitions. It was only after the Congress of Vienna in 1815, when there was a threat from nationalist uprisings that boundaries were sharply delineated and demarcated on a large scale.³⁸ As populations multiplied and coalesced, it became necessary for governments to define the extent of their sovereignty in order to preserve the character and identity of the state.

³⁶ See e.g. Peter Sahlins, *Unnaturally French: Foreign Citizens in the Old Regime and After* (Ithaca: Cornell University Press, 2004), p. 161.

³⁷ See Peter Sahlins, “Natural Frontiers Revisited: France’s Boundaries since the Seventeenth Century”, 95 *The American History Review* (1990), pp. 1423-1451.

³⁸ See Edward Hertslet, *The Map of Europe by Treaty: Showing the Various Political and Territorial Changes which have taken place since the General Peace of 1814, with numerous maps and notes* (London : Butterworths, 1875-91).

II. The Three Partitions of Poland: The Birth of National Self-determination

1. Introduction

Reflecting back on events in the eighteenth century, the American jurist Henry Wheaton referred to the partitions of Poland as “the most flagrant violation of natural justice and international law” which had occurred “since Europe first emerged from barbarism”.³⁹ This was a view with which William Hall concurred, calling the partition an “immoral act of appropriation” whilst Thomas Lawrence thought it was “so full of evil” that it found “no warrant in international law”.⁴⁰ In France, Henry Bonfils and Paul Fauchille held a similar view, calling the partitions “ce grande crime politique”.⁴¹ Robert Redslob also condemned the partitions of Poland and referred to them as a bloody assault on the rights of man and as an insult which had been characterized by a spirit of cynicism.⁴² As these views might indicate it would be difficult to find an international lawyer writing in the centuries following those partitions who held a favourable view of what happened. And yet in the eighteenth century few had complained during the attempt to partition the Spanish Empire or when Poland was first partitioned. What brought about this change in opinion?

In order to have a better understanding of the historical context in which the partition treaties that purported to divide the Spanish Empire, and when Poland was partitioned three times over a period of thirty years (1772, 1793, and 1795), it is necessary to remind ourselves of the manner in which jurists wrote of the law of nations in the century of those partitions as well as in the centuries preceding those partitions. Only in so doing can those partitions be placed in the context of the law as it was understood to apply then. The law of nations in the eighteenth century was predicated on maintaining a balance of power amongst a multitude of sovereigns on the European continent. This explains why an earlier attempt at partition in the eighteenth century, which invoked the balance of power as being its principal justification, proved to be uncontroversial when contemporary jurists referred to it in

³⁹ Henry Wheaton, *History of the Law of Nations in Europe and America* (New York: Gould, Banks & Co. 1845), p. 269.

⁴⁰ William Edward Hall, *A Treatise on International Law* (Oxford: Clarendon Press, 1924), pp. 143-144. T.J. Lawrence, *The Principles of International Law* (London: MacMillan, 1895), p. 129.

⁴¹ Henry Bonfils, Paul Fauchille, *Manuel de Droit International Public* (Paris: Arthur Rousseau, 1908), p. 43.

⁴² Robert Redslob, *Histoire Des Grands Principes du Droit Des Gens* (Paris: Librairie Arthur Rousseau, 1923), p. 237.

their writings. Thus, when assessing the legality of the partitions of Poland most jurists writing in that era would have assessed it against this understanding of European law. In other words, their concern would have been whether the conflict that had been waged against Poland was just and if so whether acquiring sovereignty over parts of its territory was a genuine necessity to maintain the balance of power.

Whilst international lawyers writing in the nineteenth and early twentieth century also expressed their views on the balance of power, the way in which it was applied prior to the French Revolution differed in many fundamental respects from after 1789. This is because at the heart of the debate was the matter of “popular sovereignty”, which, in various guises, would later be recognized as “national self-determination”, and which was no longer contested in the mid-nineteenth century to the extent that it had been a century earlier. Generally, those who favoured partition to preserve the balance of power in the eighteenth century, tended to hail from the upper classes, and derided those who praised popular government, who in turn tended to hail from the middle classes. The latter despised the partitions of Poland and thought that the balance of power system needed reform because it provided a system that justified conquest. The inklings of such a critique began to emerge as early as the English Revolution in 1649, but because of the subsequent Restoration in 1660, these views did not garner wide support until the mid eighteenth centuries, particularly after the Thirteen American Colonies succeeded in breaking their chains with Britain. As the idea of conquest is in diametrical conflict with the idea of popular sovereignty, which by definition necessitates obtaining consent from the vanquished in order to obtain legal title to territory, conquest justified by reference to the balance of power, which required no such consent, acquired a sinister reputation. Essentially the balance of power justified a system of warfare that recognised title acquired by conquest when peoples were treated no better than chattels, which was opposed to the very idea that man had “natural rights”, or a right to preserve the integrity of his territory.

Prior to the Congress of Vienna in 1815, there was an absence of nationalism as a determining factor in foreign policy.⁴³ With the exception of Portugal and the Dutch Republic, the Austrian, Prussian, Russian, and Spanish Empires were multinational. In other words, they were large sprawling political entities whose boundaries encompassed peoples of varied ethnic, religious, and linguistic

⁴³ Michael Sheehan, *The Balance of Power: History and Theory* (London: Routledge, 1996), p. 98.

backgrounds. Thus, the decision for or against allying with any particular state in a balance of power arrangement was uninfluenced by nationalism. Accordingly, any historical account of the emergence of nationhood in international law must take into account the fundamental change in the structure of international relations that was still associated with the balance of power and with a political system, which in many respects, resembled “a kind of perpetual stately waltz”.⁴⁴ This necessitates a historical inquiry that takes into account the structural transformation of international relations between 1713, when the balance of power found expression in the Treaty of Utrecht, during which the Spanish Empire was divided, when little account was taken of national aspirations, and the Congress of Vienna in 1815, that ended the Wars of the French Revolution in which ideas associated with nationhood were deliberately suppressed. The Treaty of Utrecht ended a war of succession, that is, a war fought between dynasties, kings, queens, princes, and regents, whereas the peace negotiated at Vienna sought to end a war, which had been fought by a collectivity of monarchs against a country that claimed to represent the nation or the homeland (*patrie*).⁴⁵

My analysis in this chapter is limited primarily to the first era because it was only in the era of “genteel and pragmatic politics” associated with the eighteenth century that conquest, the balance of power, and territorial redistribution in the form of indemnities, went hand in hand. It was also in this era that Poland was partitioned thrice although there was a distinction between the first, the second, and the third partitions of Poland. The second and third partitions of Poland (1793 and 1795) differed from the first partition of Poland (1772) in that they were connected to the French Revolution (1789). Accordingly, the first partition was justified on various grounds relating to balance of power machinations whilst the latter two were designed to suppress revolution. Moreover, in contrast to the first partition of Poland the second and third partitions, which effectively wiped Poland off the European map for 123 years, provoked an outcry in Poland and beyond. Poland, it was argued, was a nation, and thus any attempt to divide it even if it was avowedly necessary to preserve the balance of power, was manifestly “contrary to the law of nations”. And yet at the time of the partitions there were voices of support from Edmund Burke and Frederick von Gentz who argued in favour of the partitions as a necessary evil to thwart the

⁴⁴ Neff, *War and the Law of Nations*, supra n. 35, p. 90.

⁴⁵ In this respect, scholars of the balance of power usually divide its history into two eras: The first from 1700-1815 and second from 1815-1914. See e.g. Chapter 5 (1700-1815) and Chapter 6 (1815-1914) in Sheehan, *The Balance of Power*, supra n. 43, pp. 97-120, and pp. 121-144 respectively.

genie of popular sovereignty in order to contain and to suppress revolution. These gentlemen who were close to the aristocratic upper classes feared the prospect of popular sovereignty because they associated it with “mob rule” i.e. majority rule.

In order to understand what led to this dramatic transformation in legal and political opinion it is necessary to revisit the central justification advanced for the partitions; namely, that partition had been necessary to maintain the balance of power in opposition to the prospect of popular sovereignty. Or to put it another way, partition sought to maintain the status quo, in opposition to majority rule. What this really meant was preserving a system that was convenient to the ruling minority elite. Whilst most legal scholars take 1776 or 1789 as their starting point for the origins of self-determination, they do not differentiate them or place them in context. 1776 was a revolution in name only. It was influenced by the 1688 revolution in England and it did not seek to tinker with social structure. Thus, it maintained the system of representative government. 1789 was a different matter altogether. That revolution was influenced by the 1649 revolution in England, when Charles I was beheaded. The French Revolution sought to abolish feudalism, and to disperse political power more widely. 1688 and 1776 were constitutional revolutions and gave inspiration to British imperialists the world over, whereas 1649 and 1789 gave inspiration to socialism.⁴⁶ Representative government was the system promoted in all British colonial territories, including in Ireland, India, Palestine, and throughout Southern Africa. In contrast, socialism gave inspiration to the Marxists, who devised a system of political thought, which claimed to represent all people, to grant equality to all. It was because of the tensions inherent in these two schools of thought that partition arose in the twentieth century. Those who favoured partition looked to the history of representative government in England and America for inspiration, whilst those who opposed partition looked to the French Revolution, and to the 1917 Bolshevik Revolution in Russia, as explained in Part Three. The partitions of Poland fit into this framework because they occurred in the twilight of the Enlightenment after the Declaration of the Rights of Man and of the Citizen had been proclaimed in Paris. The partitions of Poland were justified to suppress a revolution, which sought to vest political power in the body of the nation. Thus the partitions of Poland and the subjugation of that country throughout the nineteenth century involved the continued suppression of a

⁴⁶ See Christopher Hill, “The English Civil War Interpreted by Marx and Engels”, 12 *Science & Society* (1948), p. 130.

nascent national movement, a violation of sovereignty, and of territorial integrity. It is the connection between a people, its identity, and its territory, which is central to understanding how the partitions of Poland contribute to our understanding of self-determination. For a basic supposition of nearly all self-determination claims is that a people who inhabit a territorial unit *which other states view* as having a legitimate claim to it, are entitled to have the sovereignty and integrity of that territory respected.

Poland was not merely an example of a revolution that was “nipped in the bud” as the revolutions in England, Corsica, and Ireland had been. Rather, what happened in Poland was that a nation was completely subjugated. The partitioning power even had the audacity to attempt to wipe out its name from history.⁴⁷ And yet Poland revolted, again and again. Thus the partition of Poland not only contributed to our understanding of self-determination by attempting to thwart the notion of popular sovereignty. The partitions of Poland also contributed to the notion that self-determination was associated with “alien subjugation, domination and exploitation”, by providing an early example of such an instance, although this discourse was only incorporated into the corpus of international law in the twentieth century. In this connection the partitions of Poland are central to understanding how the principle of self-determination developed in the nineteenth century and early twentieth century as they are the missing link between the American (1776) and French (1789) Revolutions and Lenin (1917) and Wilson’s (1918) championing of the principle after the First World War, which had a major impact at the Paris Peace Conference in 1919.

2. The balance of power and title by conquest

Although the term “balance of power” has not receded from international discourse and is still used by political scientists today, the way in which it was originally conceived in the sixteenth century meant that it could only operate in a time when conquest was not prohibited.⁴⁸ This is because the balance of power differed

⁴⁷ See “Article séparé et secret de la convention conclue entre S. M. l’Empereur de toutes les Russies et S. M. Prussienne, concernant la suppression pour toujours du nom de Royaume de Pologne”, 26 (15) Janvier, 1797, Saint-Pétersbourg, in Karol Lutostański, *Les Partages de la Pologne et La Lutte pour L’indépendance* (Paris: Bureau Polonais D’Études et de Publications Politiques, Librairie Payot, 1918), pp. 229-230.

⁴⁸ International relations scholars like Hans Morgenthau, Inis Claude, Hedley Bull, and John Mearsheimer, have a tendency to understand the balance of power as a balance of forces. For instance, this is the sense in which Mearsheimer uses the term in *The Tragedy of Great Power Politics* (New York: W.W. Norton & Co. 2001), where he frequently uses phrases like “balance-of-power logic”,

substantially from the modern concept of collective security as encapsulated in Chapter VII UN Charter, in that it provided for exchanges of peoples and territories in the form of annexations, territorial indemnities, and land swaps, and was intimately linked to the notion of conquest, which is prohibited by contemporary international law. At the end of the Middle Ages, however, when political and military power was associated with the size of a sovereign's population and territory, any inordinate increase in the population and territory of a particular sovereign was considered threatening.⁴⁹ A combination would then be formed, to prevent the acquisition by that sovereign of even more population and territory to "redress the balance".

The preeminent example of this was the European coalition combined against France during the War of the Spanish Succession (1701-1714), which broke out after France reneged on its agreement to the Partition Treaties (described below). That war was concluded by the Treaty of Utrecht (1714), which explicitly made reference to the balance of power, although it was not, as some scholars have suggested, the first treaty to explicitly do so.⁵⁰ At Utrecht the map of Europe was reconstituted and reconfigured as if it were some sort of giant jigsaw puzzle by reallocating populations and their territories between the ratifying parties without any consideration whatsoever being given to the "wishes of the people" who were for all intents and purposes "invisible". Whilst Christian minorities were recognised in some of the treaties concluded in this era and were given rights of worship, and freedom to practice their religion, these were a far cry from modern civil and political rights.⁵¹ And obviously these rights applied to Christians only. Thus, the Treaty of Utrecht that ceded Gibraltar to Britain specifically excluded the Moors and Jews of protection.⁵²

In the eighteenth century, and earlier, interventions to preserve "the balance of power" were often referred to in official correspondence and treaties as "conserving the publik peace", "preserving the publik quiet", "maintaining the general tranquillity of Europe", "preserving the peace of Christendom", "maintaining the European

"offshore balancing", "buck-passing strategy" etc. This is a different way in which the balance of power was originally interpreted and invoked in the sixteenth, seventeenth, and eighteenth centuries.

⁴⁹ See Norman Hill, *Claims to Territory in International Law and International Relations* (London: Oxford University Press, 1945), p. 36.

⁵⁰ The first to explicitly mention the balance of power are the Partition Treaties referenced below.

⁵¹ See e.g. the Treaty of Oliva (1660), Austro-Ottoman Treaty (1615), and the Treaties of Koutchouk-Kainardji (1774), which protected the rights of religious minorities. See Thornberry, *Rights of Minorities*, supra n. 6, pp. 25-37.

⁵² See Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: The MacMillan Co., 1954), p. 126.

equilibrium”, and “the balance of Europe”.⁵³ All these phrases provided a common reference point which sovereigns could collectively invoke in order to justify military interventions as necessary to maintain what effectively amounted to the territorial status quo. In this regard the balance of power is probably best described as a rudimentary form of collective security that provided a justification for the external intervention by military means by a sovereign or a group of sovereigns in the affairs of another sovereign to prevent it becoming all-powerful and a threat to the others. The terminology that was then employed to negatively describe a monarch that was actively seeking to acquire such power was “universal monarchy”.⁵⁴ Thus wars were waged in order to maintain the balance sought to prevent a monarch from aspiring to a position of omnipotence that would imperil the interests of other sovereigns. In an age before the common man was perceived to have political rights, conquest was considered a sufficient basis to acquire legal title to territory, since the idea of self-determination as a legal right, which would have prohibited this, did not yet exist. Accordingly, when sovereigns spoke of maintaining the balance of power they were thinking of maintaining a balance of power in relations between themselves only; not between themselves, and all of their subjects, irrespective of their statuses in society.

The notion of acting pre-emptively to thwart the ambitions of a sovereign seeking universal empire was justified by reference to the balance of power, and found wide support in humanist scholarship in the sixteenth century. This was in opposition to the scholastics who took a more restricted view of the right to embark on wars of conquest.⁵⁵ The humanists (mostly Protestants from England, Holland, and Italy) had a tendency to invoke ancient Greek and Roman authors to expound their international legal theories, which included justifying pre-emptive strikes. That the humanists took

⁵³ These various terms were routinely used in the treaties that are discussed later in this chapter. See e.g. the draft secret treaties concerning the Wars of the Spanish and Polish Successions, where in private instructions, King George II instructed James Earl Waldegrave, his Ambassador to France, to inform the King of France that should he refuse to consent to the terms of his peace plan then war between France and the maritime powers would become inevitable. (“...the Carrying on the War, on the side of Germany, or in the Empire, (especially considering the conquests, already made, in those Parts by France) must affect, to such a degree, the Balance of Power in Europe, that it is scarce to be expected, that the Maritime Powers (when the Emperor shall have agreed to the Terms proposed by them) can sit still, and see such extraordinary measure pursued, without any other Security for the Equilibre...”.) See the draft secret treaties on the Spanish and Polish Succession SP 78/207, Paris, 12 January 1735, available at The National Archives UK.

⁵⁴ See Franz Bosbach, “The European Debate on Universal Monarchy”, in David Armitage (ed.), *Theories of Empire, 1450-1800* (Aldershot: Ashgate, 1998), pp. 81-98.

⁵⁵ See the contrasting perspectives on war of the humanists and scholastics in the first two chapters of Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001), at pp. 16-50 and pp. 51-77 respectively.

a more relaxed approach to armed conflict is perhaps not surprising when we remember that Englishmen like Sir Francis Drake (1540-1596) had acquired a certain reputation attacking Spanish ships laden with bullion from the Indies. It was also not surprising in light of the Spanish Armada (1588) when England faced the prospect of being invaded by one of the largest assembled fleets in human history. Accordingly, it made sense for the humanists to argue that Britain need not wait until the armada had landed before resorting to the use of force but could strike the Spanish ships on the open waters before they actually attacked British territory. The scholastics, by contrast, were mostly of Spanish or Italian origin, and trained as Catholic theologians (of the Dominican and Jesuit orders) who naturally looked to Rome for inspiration and to the Papacy for guidance. As most of them were in the position of defending an empire one can perhaps understand why they did not champion pre-emptive strikes.

It was the humanist tradition that would have the greatest impact on international legal scholarship, which arose out of the struggle between the English, the French, and the Dutch, against the Portuguese and Spanish monopolies in the Far East and in the Indies. By formulating a view of the world associated with *raison d'état*, pre-emptive strikes, self-defence, and the balance of power, the humanists sought to provide parity in a community of competing, inter-dependent, and pluralistic states. The humanist tradition provided a rational view of international politics, which rejected the idea that the Pope was the lord of the world, although many of the Protestants who formulated these views were very serious about their religion. Thus the humanists tended to focus on the separate identity of Christian Europe as the equivalent of a *Respublica*.⁵⁶ One of the consequences of making the *Respublica Christiana* the object of loyalty was that the loyalty of those who did not profess Christianity was questioned. As Andrea Alciato (1492-1550) explained in his *Opera*, the *Respublica Christiana* excluded from citizenship “those who in Asia, Africa and other provinces do not profess the faith of CHRIST...when war is declared against Turks and Saracens...those taken in war become the property of the captors. But it is otherwise among Christians, for under the law of CHRIST all men are brothers”.⁵⁷

⁵⁶ Tuck, *The Rights of War and Peace*, *ibid*, p. 28.

⁵⁷ Tuck, *The Rights of War and Peace*, *ibid*, pp. 28-29 quoting *Opera*, I (Basle, 1571) col. 274.

The first expression of the idea of maintaining a balance was expounded in *Storia d'Italia*⁵⁸ written by Francesco Guicciardini (1483-1540), Machiavelli's friend and Florentine colleague, which he used to justify the priority of state interest over private morality and religion.⁵⁹ Guicciardini greatly influenced Alberico Gentili (1552-1608), an Italian Protestant, who fled Italy and sought refuge in England and who had a profound impact on humanist scholarship, on the balance of power, and the laws of war. Gentili was appointed the Regius Professor of Civil Law at the University of Oxford from 1587-1605 and he frequently cited Guicciardini in his *De Iure Belli Libri Tres*.⁶⁰ It was Gentili who first introduced the concept of pre-emptive strikes that underpinned the balance of power from his native Italy, where it was maintained amongst the Princes "under the constant care of Lorenzo de' Medici", to his students who it is believed included John Selden (1584-1654) and Thomas Hobbes.⁶¹ Gentili was also said to have influenced the Earl of Essex and Francis Bacon⁶² (1561-1626), a close friend of his, who played a leading role in the creation of British colonies, especially in Virginia, the Carolinas, and Newfoundland. In his *Considerations touching a War with Spain* (1624) Bacon gave as one of the reasons justifying the quarrel that a just fear is a good cause for a just, preventative war.⁶³ He referred with approval to the "good days of Italy" in which Princes kept an eye on one another, and recalled the watchfulness of monarchs who would make them react to any taking of territory so as to "set the balance of Europe upright again".⁶⁴

Clearly, Bacon had been influenced by Gentili's ideas, which also provided the foundations for Grotius, Hobbes, and other scholars who sought to justify colonial expansion in order to open up the trade routes to the New World. In his writings Gentili described the state as an autonomous agent governed by an extremely thin set

⁵⁸ See Francesco Guicciardini, *The History of Italy*, translated by Sidney Alexander (New Jersey: Princeton University Press, 1984, first published as *Storia d'Italia* by Presso Giorgio Angelieri in 1540).

⁵⁹ See, for example, Guicciardini's use of language in his *Dialogues* in Alison Brown (ed. & trans.), *Guicciardini: Dialogue on the Government of Florence* (Cambridge: Cambridge University Press, 1994, first published 1527), p. 159.

⁶⁰ See Alberico Gentili, *De Iure Belli Libri Tres*, translated by John C. Rolfe (Oxford: At the Clarendon Press, 1933, translation of the edition of 1612).

⁶¹ Gentili, *De Iure Belli Libri Tres*, *ibid*, p. 65 (referring to the Medici) and Tuck, *The Rights of War*, *ibid*, p. 17 (referring to the possibility that his students may have included Selden and Hobbes).

⁶² See Tuck, *The Rights of War and Peace*, *supra* n. 55, p. 17.

⁶³ Bacon also cited Thucydides with approval in his *Considerations* that was drafted for King Charles in which he urged England to break its treaties and make war with Spain. See Bacon Works, Spedding (London 1874), p. 474.

⁶⁴ Alfred Vagts and Detlev F. Vagts, "The Balance of Power in International Law: A History of an Idea", 73 *The American Journal of International Law* (1979), p. 555 at p. 559, note 15 referring to 2 *Works of Francis Bacon*, B. Monatgu ed. 1859, p. 199, 205.

of moral requirements, which was in sharp contrast to the views of the scholastics like Francisco de Vitoria (1492-1546) and Luis de Molina (1535-1600) for whom wars in pursuit of glory, or pre-emptive strikes were utterly forbidden.⁶⁵ Gentili's religion and history of persecution undoubtedly affected his outlook.⁶⁶ He strongly supported going to war pre-emptively to deter the pretensions of an ambitious sovereign before it was too late to stop him⁶⁷ whereas Molina had been influenced by the Dominicans, the most notable critics of Spain's conquest and colonisation of the New World.⁶⁸

In *De Iure Belli*, Gentili who lived through the experience of the Spanish Armada's attempt to invade Britain, argued that it was just for a sovereign to go to war based upon the mere *fear* that it might be attacked. "[W]e ought not to wait for violence to be offered us, if it is safer to meet it half-way" he wrote.⁶⁹ To elucidate, Gentili paraphrased "the excellent saying" attributed to Philo, that we should "kill a snake as soon as we see one, even though it has not injured us and will perhaps not harm us. For thus we protect ourselves before it attacks us".⁷⁰ Suspicion was not enough however. A just cause for apprehension was necessary before a sovereign could act pre-emptively, but it was not necessary to await an armed attack. Whilst Gentili tempered this conclusion by arguing that "the lust for dominion is condemned", which included wars made for the sake of extending one's power, he was nonetheless of the view that "it is beyond doubt that lands and other possessions may be acquired under the title of war not less than by any other title whatsoever".⁷¹ Richard Zouche (1590-1661), one of Gentili's successors at Oxford, concurred, in defending the right of Queen Elizabeth I to come to the aid of the Dutch against the Spaniards.⁷² In the days of Gentili and Zouche, the Spanish and Turkish Empires posed the greatest threat to the European order because they were "planning and

⁶⁵ Tuck, *The Rights of War and Peace*, supra n. 55, pp. 51-52.

⁶⁶ Noel Malcolm takes issue with Tuck's argument that Gentili's humanism led him to separate theology from politics. In his study of Gentili, Malcolm concluded that his "commitment to a strongly Biblical protestantism remained an active element in his whole pattern of thought". See Noel Malcolm, "Alberico Gentili and the Ottomans", in Benedict Kingsbury and Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010), pp. 127-145, at p. 145.

⁶⁷ Tuck, *The Rights of War*, supra n. 55, p. 18.

⁶⁸ Tuck, *The Rights of War*, *ibid*, pp. 68-77.

⁶⁹ Gentili, *De Iure Belli Libri Tres*, supra n. 60, p. 61.

⁷⁰ Gentili, *De Iure Belli Libri Tres*, *ibid*, p. 61.

⁷¹ Gentili, *De Iure Belli Libri Tres*, *ibid*, p. 304.

⁷² See Richard Zouche, *Iuris et Iudici Fecialis, sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio* (1650), Vol. II, translated by J.L. Brierly in *The Classics of International Law* by James Brown Scott (Washington: Carnegie Endowment for International Peace, 1911), p. 114.

plotting universal dominion”.⁷³ Thus, Gentili and Zouche were essentially advocating the forging of alliances, to deal with what was perceived to be a common threat to the European order, under the rubric of what Bacon had called the “balance of Christendom”,⁷⁴ which in later centuries would commonly come to be called the balance of power, to provide for the peace and stability of Europe. In Gentili’s eyes Europe was a Christian commonwealth, which is why he was strongly opposed to the forging of alliances between Christian powers and infidels.⁷⁵ In light of the threat posed by the Turks to Europe, Gentili argued that “there is always a just cause for war against the Turks”.⁷⁶ And as Zouche explained, it was an essential part of the law of nations that a cardinal consequence of a just war, which was fought to preserve the European equilibrium, was that “universal ownership over things and persons, that is to say, over territories and peoples, is acquired by surrender and by victory”.⁷⁷

Similarly, like Gentili and Zouche, Grotius also justified title to territory obtained by conquest and even went so far as to claim that “to every man it is permitted to enslave himself to any one he pleases for private ownership”.⁷⁸ Grotius, who argued that an individual in nature was morally identical to a state, and who had achieved international notoriety by publishing a treatise justifying the Dutch wars in the Indies, explained that “just as private property can be acquired by means of a war that is lawful ... so by the same means public authority, or the right of governing, can be acquired, quite independently of any other source”.⁷⁹ In Grotius’s view treating a single individual as private property could also apply to an entire population as well: “when a people is transferred this is not, strictly speaking, a transfer of the individuals but of the perpetual right of governing them in their totality as a people”. Despite Grotius’s view on conquest he did have something interesting to say about popular sovereignty, to which we turn to next, which got him into a spot of trouble at home.

⁷³ Gentili, *De Iure Belli Libri Tres*, supra n. 60, p. 64.

⁷⁴ See James Spedding (ed.), *The Letters and the Life of Francis Bacon*, Vol. VII (London: Longmans, Green, Reader, and Dyer, 1874), p. 125, where Bacon refers to the importance of those parts of Germany to “the balance of Christendom” in acting as “the bulwark of Christendom against the approaches of the Turk”.

⁷⁵ See Malcolm, “Alberico Gentili and the Ottomans”, in Kingsbury and Straumann, *Alberico Gentili and the Justice of Empire*, supra n. 66, pp. 138-145.

⁷⁶ Malcolm, “Alberico Gentili and the Ottomans”, *ibid*, p. 127.

⁷⁷ Zouche, *Iuris et Iudici Fecialis*, supra n. 72, p. 41.

⁷⁸ Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, (Oxford: At the Clarendon Press, 1925, first published 1646, translated by Francis W. Kelsey), p. 103.

⁷⁹ Grotius, *De Jure Belli Ac Pacis Libri Tres*, *ibid*, p. 105.

Indeed, his subsequent volte-face provoked the anger of Rousseau a century later, when he singled out Grotius for specific disapproval in his most famous work.

3. Representative government and the question of consent

During the seventeenth century, some watershed moments in European history took place, which led to a fundamental restructure of international relations. This led some jurists and scholars to challenge the previous opinions expressed by scholars regarding the right of conquest by introducing the argument that consent was necessary to legitimise any acquisition of sovereignty. Although this shift in opinion did not have an immediate impact on the general law of nations, these ideas did progressively over time, in line with state practice, have a major impact on the subsequent development of international law. This might explain why the partitions of Poland provoked an outcry, whereas previous partitions had provoked little discontent. In this regard, before examining the partitions of Poland in detail, opinion regarding the right to acquire title by conquest, and especially the argument that consent was necessary to validate legal title ought to be explored first in the context of developments that took place in Europe in the seventeenth century. This set the tone for the debate on Poland.

One year after Westphalia (1648), England, which was not party to that treaty, and did not partake in the Thirty Year's War, beyond stationing troops in the Low Countries, put King Charles I on trial and had him executed. The trial was the first of its kind in European history. Never before had a sovereign been tried as being beholden to the law, since it was always assumed that the sovereign was above the law. And Charles I was charged *whilst he was still King* as being "a tyrant, traitor, murderer and a public and implacable enemy to the Commonwealth of England". Charles I, among numerous other crimes and misdemeanours was charged with having damaged "the nation". And John Cooke, the prosecutor, who was tasked with charging him with these high crimes, claimed that he was acting "on behalf of the people of England".⁸⁰ As Cooke argued in *King Charles, His Case*,⁸¹ which he

⁸⁰ Robertson, *Tyrannicide Brief*, supra n. 22, pp. 148-9.

⁸¹ John Cooke, *King Charles His Case Or An Appeal to All Men concerning His Tryal at the High Court of Justice for the Most Part That Which Was Intended to Have Been at the Bar If the King Had Pleaded to the Charge and Himself upon a Fair Tryal. With an Additional Opinion the Death of King James the Lots of Rochel and of Ireland 7, 1649*. For the historical background to the case and this pamphlet see Robertson, *Tyrannicide Brief*, ibid, pp. 190-192.

published a week after the King's execution, and which contained the closing speech he had intended to deliver, had Charles entered a plea against the charges:

By the fundamental law of this Kingdom, by the general Law of all Nations, and *the unanimous consent of all rational men in the world*...when any man is instructed with the sword for the protection and preservation of his people, if this man shall employ it to their destruction, which was put into his hand for their safety, by the Law of that Land he becomes an enemy to that people, and deserves the most exemplary and severe punishment that can be invented: And this is the first necessary fundamental law of every Kingdom, which by intrinsical rules of Government must preserve itself: and this Law needed not be express, that if a King become Tyrant, he shall dye for it...⁸²

Just after 2 o'clock on Tuesday, 30 January 1649, Charles I was publicly beheaded.⁸³ This momentous event not only amounted to a wholesale attack on the notion that kings were divine and above the law, and not only provided a precedent for later instances of regicide and revolution, but it also provided one of the first instances of the "common man" overthrowing a tyrannical regime. Cooke's pamphlet, which was addressed to "all rational men", was not only an appeal to common sense and reason; it was also an appeal to the general public, i.e. to the wider nation, for most Puritans, including John Cooke, came from what we would today describe as poor working class families. Significantly, by invoking the discourse of "the nation", and requiring the "consent of all rational men", the trial and execution of Charles I also contributed to the idea of nationhood and self-determination.⁸⁴ Although Oliver Cromwell (1599-1658) was from the poorer side of a well-to-do family and who accumulated substantial sums of money in his later years,⁸⁵ he had to rely on the "middling sort"⁸⁶

⁸² John Cooke, *King Charles His Case*, *ibid*, pp. 22-23 (emphasis added).

⁸³ None of the officers charged with supervising the execution wanted to sign the order for the actual beheading, so they brought their dispute to Cromwell who signed it. See Ian Gentles, *Oliver Cromwell: God's Warrior and the English Revolution* (New York: Palgrave Macmillan, 2011), p. 82.

⁸⁴ One reason that might explain why the proceedings of trial have been overlooked in much international legal scholarship to date is because the proceedings of the trial are not easily accessible as Robertson explains in *Tyrannicide Brief*, *supra* n. 22, pp. 373-377. For instance, the King's trial is totally omitted from Phillipps' *State Trials*, although it includes all the treason trials against the King as well as the trials of the regicides, including that of John Cooke. See Samuel March Phillipps, *State Trials; or a collection of the most interesting trials, prior to the revolution of 1688, reviewed and illustrated* (London: W. Walker, 1826). Evidently, the King's Trial (1649) was not considered "a most interesting trial" even though it took place before the revolution of 1688.

⁸⁵ Despite the money that Cromwell made, he preserved a relatively modest style of life, and was not motivated by money. See Gentles, *Oliver Cromwell: God's Warrior*, *supra* n. 83, pp. 135-143.

⁸⁶ The "middling sort" has been described by Brian Manning as "a substantial middle rank in the population between the wealthy aristocrats and the impoverished masses". This expression refers "not only to the bigger peasants and richer craftsmen but also to the general body of small producers in agriculture and industry who had sufficient resources to live without having to work for wages". See Manning, *Aristocrats, Plebeians, and Revolution in England*, *supra* n. 26, p. 4 and p. 10.

of people and lower ranking officers in his New Model Army to defeat the armies of Charles I in the Civil Wars.⁸⁷ As the English historian Christopher Hill observed, “the men who came to power in December 1648, and who were responsible for the execution of Charles I, were men well below the rank of the traditional rulers of England”.⁸⁸ In addition to promoting “commoners” to the upper echelons of the army, Cromwell had forged an alliance with political and religious radicals in order to present a unified front against Charles. However, Cromwell would cast aside these allies in his later, more “aristocratic” years, when they became a nuisance to him, and when he was considering whether or not to accept the Crown.⁸⁹ For Cromwell had always been closer to the upper echelons of English propertied society. He strenuously opposed vesting political power in the lower classes, as the Levellers had desired.⁹⁰ Indeed he suspected that were “the people” to be sovereign they would reinstate the monarchy.⁹¹ Since the mass of the population was unsophisticated politically, and under the influence of their landlords and parsons, it was feared that giving them the vote would strengthen the conservatives. As Milton, pointedly asked, what would the Commonwealth do if the mob demanded Charles II be restored to the kingdom?⁹²

Nonetheless, whilst Cromwell’s Commonwealth was not a radical revolution by modern standards it was still a revolution. Indeed, the creation of a Commonwealth in England in the aftermath of Charles I’s execution, albeit one that was relatively short lived, is one of the earliest instances of a people in the modern age assuming political power and taking control of its political destiny. As the Act declaring England to be a Commonwealth stipulated: “the authority ... that *the people of England*, and of all the dominions and territories ... hereby constituted, made, established, and confirmed, to be a Commonwealth and Free State, and shall from henceforth be governed as a Commonwealth and Free State by the supreme authority of *this nation*, the representatives of *the people in Parliament*, and by such as they shall appoint and constitute as officers and ministers under them *for the good of the*

⁸⁷ Here I am primarily relying on my reading of Christopher Hill’s, *God’s Englishman: Oliver Cromwell and the English Revolution* (London: Penguin 1990).

⁸⁸ Hill, *God’s Englishman*, *ibid*, p. 97.

⁸⁹ He did not accept the Crown in the end. See Hill, *God’s Englishman*, *ibid*, p. 165-191.

⁹⁰ Hill, *God’s Englishman*, *ibid*, p. 139.

⁹¹ Gentles, *Oliver Cromwell: God’s Warrior*, *supra* n. 83, p. 58.

⁹² Hill, *God’s Englishman*, *supra* n. 87, p. 198-199.

people, and that without any King or House of Lords”.⁹³ The Revolution established much greater unity within the British Isles that had hitherto existed, especially since it was also accompanied by the conquest of Ireland and Scotland. Ultimately, Cromwell’s republican regimes of the 1650s established a strong centralised regime for naval, commercial, and colonial power, which was more profitable for the leading sections of the “middle sort of people” than the weak central government and strong local democracy that was advocated by the Levellers.⁹⁴ Thus, the idea of self-determination ultimately emerged in English political thought in order to replace the political void created by the removal of the previous sovereign, which in an age associated with dynastic absolutism, had tended to be vested in a hereditary monarch.

One of the consequences of replacing a hereditary monarch with a government that based its authority through the representation of the people in Parliament was that the juridical connection between the King and his realm was severed. Thus, the Act that abolished the Office of the King in 1649, declared that “all the people of England and Ireland, and the dominions and territories thereunto belonging, of what degree or condition soever, are discharged of all fealty, homage, and allegiance which is or shall be pretended to be due unto any of the issue and posterity of the said late King, or any claiming under him”.⁹⁵ The “fealty, homage, and allegiance” which had previously been owed the King was now transferred to “the Commonwealth of England”.⁹⁶ Accordingly, the notion of representative government was inherently linked to the idea of consent because it was only by obtaining the consent of Parliament that an individual’s right to rule became legitimate. In later years, the idea of representative government became associated with the emergence of democracy because this was the only system of government, which could fairly claim to represent the people.

This is why it is important to revisit the relationship between the sovereign and his subjects in the ancien régime to provide context to the issue of consent. For if it is necessary to obtain consent from “the nation”, rather than from the sovereign, then one must inquire as to what the nation that must consent to any change of sovereignty

⁹³ “An Act Declaring England to be a Commonwealth”, 19 May, 1649, in Samuel Rawson Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford: At the Clarendon Press, 1906), p. 388 (emphasis added).

⁹⁴ Manning, *Aristocrats, Plebeians, and Revolution in England*, supra n. 26, p. 138.

⁹⁵ “The Act Abolishing the Office of the King”, in Gardiner (ed.), *Constitutional Documents of the Puritan Revolution*, supra n. 93, p. 385.

⁹⁶ “Engagement to be Taken by All Men of the Age of Eighteen”, in Gardiner (ed.), *Constitutional Documents of the Puritan Revolution*, *ibid*, p. 391. (“I do declare and promise, that I will be true and faithful to the Commonwealth of England, as it is now established, without a King or House of Lords”).

amounts to. In the ancien régime, “the nation” tended to reflect the interests of the knights, esquires, and the propertied classes. Prior to the eighteenth century representative governments were few and far between and the word “democracy” was associated with “mob rule” and considered a dirty word. Hence Hobbes assimilated democracy with “anarchy”, for want of government.⁹⁷ It was only as more subjects entered the working force during the Industrial Revolution and were increasingly taxed, that they demanded more political rights, which gradually, and after much struggle, led to the broadening of the franchise as explained in Part Two, which contributed to a broadening of the political and social base of the nation, which contributed to the notion of self-determination. This may also provide an explanation as to why Poland, which was partitioned thrice with little regard for its parliamentary institutions, provoked the greatest opposition in the US, Britain, and France, in the nineteenth century, where representative government was most developed.

The Question of Consent

In the seventeenth and eighteenth centuries jurists began to increasingly write about “the nation”, and obtaining “the consent of the people”, to validate territorial changes obtained by way of conquest, which had been almost absent in the language employed by jurists writing in earlier centuries. Unlike in the fifteenth and sixteenth centuries when jurists had tended to display excessive deference to monarchical authority, including the right to wage war in order to maintain the balance of power, by the eighteenth century one can begin to detect a change in the discourse in the opposition that was expressed to obtain title to territory by means of conquest. One can detect this change in discourse most clearly in the writings of the Calvinists on the issue of popular sovereignty, although it had first emerged within Catholic scholarship when scholastic theologians at the Sorbonne adapted the Roman law theory of corporations to defend a thesis of popular sovereignty within the Roman Catholic Church.⁹⁸

As early as 1517, Erasmus argued in his *Adagiorum Chiliades*, “that authority over men and beasts is not of the same order; that all power and authority over people

⁹⁷ See Thomas Hobbes, *Leviathan*, edited and with an introduction by J.C.A. Gaskin, (Oxford World’s Classics, Oxford: Oxford University Press 2008, first published 1651), p. 123 (in this edition), Chapter 19, p. 95 (in original numbering), para. 2.

⁹⁸ See Quentin Skinner, *Visions of Politics* (Cambridge: Cambridge University Press, 2002), pp. 245-263.

rests on their consent, and that title by conquest is a fallacy”.⁹⁹ But who were “the people” that Erasmus was referring to from whom one needed to obtain consent in order to validate title obtained by conquest? We can detect that Erasmus had a rather limited understanding of “peoplehood” in the sense of the people who would be vested with political authority from his other writings where he had complained that France was “infected with heretics, with Bohemian schismatics, with Jews, with half-Jewish marranos” as well as Turks, Europe’s archenemies.¹⁰⁰ Of course, Erasmus was not alone in harbouring such prejudices. For many of the great philosophers who articulated theories in favour of popular sovereignty as opposed to monarchical authority, and who advanced arguments against conquest between civilised European states, also had a very limited conception of which peoples within Europe held political rights, which will be addressed when we examine their views in Part Two.

As explained in the previous pages, Gentili, Grotius, and Zouche all justified wars of conquest expressing little concern over the question of consent, so long as the war was just, and so long as the territorial changes did not adversely affect the balance of power in Europe. It was only after the English Civil Wars (1642-1651), after the trial and execution of Charles I (1649), and after the establishment and demise of Oliver Cromwell’s Commonwealth (1649-1660), that one can begin to detect a change in the scholarship, which first emerged most clearly in the writings of Hobbes, Puffendorf, Locke, Wolff, Rousseau, and Vattel. Although there were some fundamental differences of opinion between these scholars, with the exception of Vattel, on specific issue of the necessity of obtaining consent in order to validate a lawful conquest, they were in surprising agreement. Indeed as the eighteenth century progressed some of these writers such as Wolff, Puffendorf, and Rousseau, began to also express scepticism of those wars that were justified in order to maintain the balance of power. However, Vattel did not go so far, and was willing to accept that in some instances conquest could be justified if it was genuinely necessary to maintain the balance of power. As Richard Tuck explained, Vattel’s views on pre-emptive strikes and sovereignty were closer to the views of Gentili, Grotius, Hobbes, and

⁹⁹ Cited in Sarah Wambaugh, *A Monograph on Plebiscites: With a Collection of Official Documents* (New York: Oxford University Press, 1920), p. 3.

¹⁰⁰ Quoted in Tuck, *The Rights of War and Peace*, supra n. 55, p. 30. Erasmus made these comment when he was appointed a counsellor to Prince Charles of Burgundy, in which he urged seeking peace with France.

Locke,¹⁰¹ rather than to Puffendorf or Wolff, which is rather surprising when we bear in mind Vattel's claim that he had "resolved to facilitate for a wider circle of readers a knowledge of the brilliant ideas" contained in Wolff's *Jus Gentium*.¹⁰² Vattel's views are rather intriguing because they stand out from what others writing in his generation had to say about the balance of power, and they differ radically from what they had to say about the issue of consent. Perhaps it was because of this tension between his views on pre-emptive strikes, sovereignty, and consent that during the debates on Poland his views were cited by both those who opposed and supported the partitions.

It is usually a good idea to begin tracing the roots of sovereignty and consent in the history of international relations with Hobbes because as Quentin Skinner has explained, it is with Hobbes that a new understanding of the state was articulated for the first time.¹⁰³ In this connection it is worth recalling that Hobbes published his celebrated *Leviathan* (1651), which he wrote safely from the confines of Paris,¹⁰⁴ a year before he returned to London (1652), from which he had fled (in 1640), during which time Cromwell had established himself as the Lord Protector of the Commonwealth of England, Scotland, Ireland, and the dominions, after the civil wars.¹⁰⁵ In *Leviathan*, Hobbes, perhaps wanting to curry favour with the new regime, conveniently provided a justification for a Protectorate when he wrote: "The sovereign of a commonwealth, be it an assembly, or one man, is not subject to the civil laws. For having power to make, and repeal laws, he may when he pleaseth, free himself from that subjection, by repealing those laws that trouble him, and making of new".¹⁰⁶ This provided ample justification for Cromwell's institution of government, which was to "reside in one person, and the people assembled in Parliament",¹⁰⁷ although Cromwell could only rule and pass legislation with the *consent* of his council

¹⁰¹ See Tuck, *Rights of War and Peace*, *ibid*, pp. 226-234.

¹⁰² E. de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Volume 3, Translation of the Edition of 1758 by Charles G. Fenwick (Washington: Carnegie Institution, 1916), Preface, pp. 6a-7a.

¹⁰³ Quentin Skinner, "The State", in Terence Ball, James Farr, and Russell L. Hanson, *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), p. 121.

¹⁰⁴ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *supra* n. 97, pp. xvi-xvii.

¹⁰⁵ On Hobbes's exile see Richard Tuck, *Hobbes* (Oxford: Oxford University Press, 1989), pp. 24-31.

¹⁰⁶ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *supra* n. 97, p. 176 (in this edition), Chapter 26, p. 138 (in original numbering), para. 6.

¹⁰⁷ See Article I, "The Instrument of Government" in Gardiner, *Constitutional Documents of the Puritan Revolution*, *supra* n. 93, p. 405.

and Parliament.¹⁰⁸ It is telling that the Instrument of Government, which established Cromwell as Lord Protector, used the word “consent” at least a dozen times.¹⁰⁹

In addition to articulating a secular theory of power that would reverberate down the ages, Hobbes argued that the people of Britain had an obligation to obey and submit themselves to the newly established Commonwealth, which had abolished the House of Lords, because according to the Act that Abolished the House of Lords, the Lords “is useless and dangerous to the people of England”.¹¹⁰ In other words, Hobbes argued that there was a duty to obey what in Royalist eyes amounted to a usurping power which had executed the King “in the open street”.¹¹¹ Hobbes’s thesis was not unique, in this regard, as many other supporters of Cromwell, including John Milton in his *Tenure of Kings and Magistrates* (1649), had argued that the origins of lawful government lay in a decision by the people to consent to its establishment, thereby justifying the removal of tyrant and reasserting the people’s rights. What was unique was that Hobbes was the first scholar to give expression to these arguments in a systematic manner.¹¹² Thus it was no wonder he lost many of his royalist friends. He was endorsing the same principles held by the men who had executed the King.¹¹³

Skinner explains that it was in these circumstances that Hobbes wrote in *Leviathan* that any political power with the capacity to protect its citizens is a justifiable political authority, regardless of whether that authority was vested in a monarchy or a republic.¹¹⁴ “The obligation of subjects to the sovereign, is understood to last as long, and no longer, that the power lasteth, by which he is able to protect them”.¹¹⁵ Hobbes explained that it was only when this protection discontinued because the Commonwealth dissolved that the obligation of obedience to the sovereign came to an end.¹¹⁶ In other words, political authority was based on a compact between the sovereign and his subjects. Hobbes argued that consent was necessary to validate conquest since “conquest is not the victory itself; but the acquisition by victory, of a

¹⁰⁸ Articles II, IV, V, VI, VIII, “The Instrument of Government”, *ibid*, p. 406.

¹⁰⁹ See “The Instrument of Government”, *ibid*, pp. 405-417.

¹¹⁰ See “An Act Abolishing the House of Lords”, *ibid*, p. 387.

¹¹¹ See “The Death Warrant of Charles I”, *ibid*, p. 380.

¹¹² See Quentin Skinner, “Conquest and Consent: Thomas Hobbes and the Engagement Controversy” in G.E. Aylmer (ed.) *The Interregnum: The Quest for Settlement 1646-1600* (London: MacMillan, 1974), pp. 79-98.

¹¹³ See Tuck, *Hobbes*, *supra* n. 105, p. 29.

¹¹⁴ Skinner, “Conquest and Consent” in Aylmer (ed.) *The Interregnum*, *supra* n. 112, p. 96.

¹¹⁵ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *supra* n. 97, p. 147 (in this edition), Chapter 21, p. 114 (in original numbering), para. 21.

¹¹⁶ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *ibid*, p. 221 (in this edition), Chapter 29, p. 174 (in original numbering), para. 23.

right over the persons of men”.¹¹⁷ Thus it was clear that Hobbes was arguing that only through consent, whatever form this took, whether it was express or tacit, could a free subject acquiesce to live under another’s sovereignty.¹¹⁸ He concluded by saying, “conquest is the acquiring of the right of sovereignty by victory. Which right, is acquired, in the people’s submission, by which they contract with the victor, promising obedience, for life and liberty”.¹¹⁹ This was a theory of sovereignty and consent that differed substantially from what the Calvinists had been arguing in that rather than being based on scripture, it was based on the political nature of man.¹²⁰

Hobbes’s theory of consent was also striking in that it bore an uncanny resemblance to the argumentation employed by the Court which had adjudged that Charles I “as tyrant, traitor, murderer and public enemy to the good people of this nation, shall be put to death by the severing of his head from his body”.¹²¹ As Geoffrey Robertson observed, the Court that sentenced Charles I to death had articulated a theory of sovereignty that predated the “social contract” philosophers by several decades.¹²² In that case, both Judge Bradshawe and John Cooke, who was the prosecutor, argued that a contract and bargain had been made between the king and his people based on a trust that Charles I had violated. In violating this trust, that is, the bond of protection he owed his subjects, Charles had released the bond of subjection that was due from his subjects. Accordingly, Charles I had ceased to be sovereign and could be sentenced. According to Hobbes’s biographers, Hobbes wrote *Leviathan* between 1648 and 1651, and published it three years after the trial had ended and been widely disseminated.¹²³ Thus one can logically deduce that Hobbes’s theory of sovereignty was probably influenced by what was said in that trial.

Puffendorf, who frequently referred to Hobbes in *De Jure Naturae et Gentium Libri Octo*,¹²⁴ which was published in the same year as the English Revolution of 1688, was also likely influenced by that trial. Although Puffendorf’s theory differed

¹¹⁷ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *ibid*, p. 468 (in this edition), “A Review, and Conclusion”, p. 390 (in original numbering), para. 6.

¹¹⁸ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *ibid*, p. 469 (in this edition), “A Review, and Conclusion”, p. 391 (in original numbering), para. 7.

¹¹⁹ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *ibid*, p. 471 (in this edition), “A Review, and Conclusion”, pp. 391-392 (in original numbering), para. 7.

¹²⁰ Skinner, “Conquest and Consent” in Aylmer (ed.) *The Interregnum*, *supra* n. 112, p. 94.

¹²¹ Robertson, *Tyrannicide Brief*, *supra* n. 22, pp. 186-187.

¹²² Robertson, *Tyrannicide Brief*, *ibid*, p. 185.

¹²³ Gaskin (ed.), Thomas Hobbes, *Leviathan*, *supra* n. 80, p. xvi (introduction by Gaskin).

¹²⁴ Samuel Puffendorf, *De Jure Naturae et Gentium Libri Octo*, (trans. and ed. by C.H. Oldfather and W.A. Oldfather, Oxford: Clarendon Press, 1934, first published by Andream ab Hoogenhuysen in 1688).

with Hobbes in the sense that he presupposed the existence of a double contract by which men agree to unite to regulate their safety and preservation by common consent, after which they transfer this power to the sovereign, he took what Hobbes wrote about conquest and consent, a stage further, by introducing the concept of *legitimacy*.¹²⁵ Puffendorf argued “since men are by nature all equal, and so no one is subject to another’s sovereignty, it follows that mere force and seizure are not sufficient to constitute legitimate sovereignty over men, but that there is need of some other additional title”.¹²⁶ In Puffendorf’s opinion this “additional title” amounted to the consent of the subjects in a situation where territory had been seized in a just war.¹²⁷ Puffendorf described as “arrant nonsense” the argument attributed to Hornius that sovereignty could only be vested in God and not in the people.¹²⁸ Perhaps thinking of the despotic rule of Charles I in England, Puffendorf expressed his opinion that “if a new monarch, after altering a state in a violent manner, abuses and mistreats its citizens, I should scarcely feel that the citizens are under any intrinsic obligation to him”.¹²⁹ He considered the case, where in monarchical states already established, the monarch died without his successor being appointed, which in many respects was similar to the situation that prevailed in England during the Interregnum (1649-1660):

It is an easy manner to understand what form should be assigned a state during an interregnum, if one considers the bonds which hold together a complete state. That is, since the intrinsic completeness of a state and supreme sovereignty arise through the latter pact entered into between king and citizens, it follows that, with the passing of the proper subject of sovereignty, the kingdom slips back into an incomplete form, so that it holds together only by that original pact of states, whereby each individual is understood to have agreed with every other to the establishment of a single group. Although no little firmness for the binding together of citizens during an interregnum is added to that pact by the thought of a common fatherland...¹³⁰

It was this “common fatherland” that held the state together in times of crisis, which “is the reason why a state that falls into an interregnum still holds together more firmly than an army which has lost its general, especially if the latter be composed of

¹²⁵ The *pactum societatis* was the contract that men agreed to be common consent whereas the *pactum subjectionis* was the contract that, after their agreement, they transferred to the sovereign.

¹²⁶ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, supra n. 124, Chapter VII, p. 1085, para. 3.

¹²⁷ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, ibid, p. 1085, para. 3.

¹²⁸ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, ibid, p. 1086, para. 4.

¹²⁹ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, ibid, p. 1087, para. 4.

¹³⁰ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, ibid, p. 1089, para. 7.

mercenaries, the most of whom ‘have no fatherland...’.¹³¹ Puffendorf added, and again he may have been thinking of England, that “any interregnum has regularly the appearance and nature of a temporary democracy, in so far, at least, that for a time the administration of common affairs must be decided upon, and a new king crowned with the consent of all, unless they prefer to introduce another form of government”. In other words, whilst agreeing that consent was necessary to validate any change of sovereignty, in addition to this, it was necessary, especially in a situation of an Interregnum, for there to be a sense of community, amongst those tasked with holding together the fatherland, until a new sovereign was appointed or elected. Intriguingly, Puffendorf was prepared to acknowledge that monarchy was not the only form of government recognised by the law of nations, but that it was possible “to introduce another form of government”, which is precisely what happened in England in 1649.

In this connection it is well established that the trial of Charles I influenced the intellectual thought of Locke who was born in the same year as Puffendorf and who articulated a theory of consent which justified the replacement of one sovereign by another. Logically, the theory of consent that Hobbes formulated in order to justify the establishment of Cromwell’s Commonwealth, and which Puffendorf argued was a prerequisite in order to constitute legitimate sovereignty over men, could also be applied to the replacement by the Commonwealth with another sovereign, even if that sovereign took the form of the King-in-Parliament. And this is precisely what Locke accomplished in formulating his theory of consent during the revolution of 1688 when the Catholic King James II was removed from power during the Dutch invasion that made the Protestants William of Orange and his wife Mary the sovereigns of England in conjunction with Parliament.¹³² Locke, like Hobbes, had fled England for safety, when the accession of James II became inevitable, although unlike Hobbes he chose exile in the Protestant United Provinces, rather than in Catholic France.¹³³ From the Netherlands he played a prominent, if distant role, in the intellectual debates that led to the flight of James II.¹³⁴ Locke, whose father was a captain in the New Model

¹³¹ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, ibid, p. 1090, para. 7.

¹³² James II was the brother of Charles II, the son of Charles I, who had been reinstated during the Restoration. Because James was a Catholic his succession to the throne aroused intense opposition amongst Protestants.

¹³³ See the editor’s introduction in C.B. Macpherson (ed.) John Locke, *Second Treatise of Government* (Cambridge: Hackett Publishing, 1980, originally published 1690), p. ix.

¹³⁴ See Lois G. Schwoerer, “Locke, Lockean ideas, and the Glorious Revolution”, 51 *Journal of the History of Ideas* (1990), pp. 532-533.

Army that fought with Fairfax on the side of Parliament¹³⁵ in the civil wars against the armies of Charles I, played a role in the drafting of the English Bill of Rights (1689).¹³⁶ Influenced by the Levellers, Locke argued that the divine right of kings was a myth, that kings were fallible human beings who received their authority from the free consent of their subjects; if the king abused their consent then he could be overthrown as attested by Charles I's regicide and the flight of James II.¹³⁷ In his *Two Treatises of Government* published a year after the revolution, Locke argued that there was a fiduciary relationship between the king and his people.¹³⁸ If the monarch violated the trust, then it was only natural that the people could remove him.¹³⁹

In this connection Locke disapproved of Hobbes's argument that the sovereign had absolute power. Instead Locke argued that the supreme power was vested in the legislature, although this was only fiduciary, in the sense that the supreme power was still vested in the people, who could remove, or alter the legislature, when they found a legislative act contrary to the trust they had bestowed upon it.¹⁴⁰ More specifically on the matter of conquest and consent, Locke argued that in an unjust war conquest could never give title to the conqueror because it lacked the consent of the conquered population.¹⁴¹ Regarding just wars, a conqueror only obtained power over those persons who concurred or consented to the unjust use of force against them.¹⁴² Moreover, although the conqueror had an absolute right over the lives of those persons who *fought* against him in a just war, this did *not* extend to their possessions.¹⁴³ The right of conquest, argued Locke, only extended to the lives of those who joined in the war, not to their estates, which could only be requisitioned to make reparations.¹⁴⁴ Locke also disapproved of title obtained by conquest compelled by duress, although, as explained in Part Two, Locke did make a distinction between rights of cultivated, and non-cultivated land, in the Americas, to justify the latter's colonisation.¹⁴⁵

¹³⁵ See the editor's introduction in Macpherson (ed.) John Locke, *Second Treatise*, supra n. 133, p. viii.

¹³⁶ Schwoerer, "Locke, Lockean ideas, and the Glorious Revolution", supra n. 134, pp. 543-544.

¹³⁷ Lawrence Stone, "The Results of the English Revolutions of the Seventeenth Century", in J.G.A. Pocock (ed.), *Three British Revolutions: 1641, 1688, 1776* (New Jersey: Princeton University Press, 1980), pp. 35- 36.

¹³⁸ Schwoerer, "Locke, Lockean ideas, and the Glorious Revolution", supra n. 134, p. 535.

¹³⁹ Schwoerer, *ibid.*

¹⁴⁰ See Macpherson (ed.) John Locke, *Second Treatise*, supra n. 133, pp. 77-78.

¹⁴¹ Macpherson (ed.) John Locke, *Second Treatise*, *ibid.*, pp. 91-92.

¹⁴² Macpherson (ed.) John Locke, *Second Treatise*, *ibid.*, p. 93.

¹⁴³ Macpherson (ed.) John Locke, *Second Treatise*, *ibid.*, pp. 93-94.

¹⁴⁴ Macpherson (ed.) John Locke, *Second Treatise*, *ibid.*, p. 95.

¹⁴⁵ Macpherson (ed.) John Locke, *Second Treatise*, *ibid.*, pp. 96-97.

Locke's attack on the divine right of kings and his argument in favour of a right of resistance provided the philosophical pretext for replacing one king by another. Although it was professedly written in order to justify the 1688 revolution, the same principle could of course be applied elsewhere. Indeed during the American, French, and Polish Revolutions, Locke's theory was refined and developed further so that a king could be replaced, not by another monarch, but by a government constituted by and for the people. This paved the way for the development of popular sovereignty and the eventual emergence of the idea of self-determination. Louis XIV's recognition of William as King of England in the Treaty of Ryswick (1697) fortified the Protestant succession there and introduced "a new doctrine of legitimacy, contractual instead of prescriptive".¹⁴⁶ The Treaty of Utrecht (1713) provided further recognition of the Protestant succession by the Act of Settlement (1701), which applied to Scotland after the Acts of Union (1707) were ratified. Thus, at the stroke of a quill, argued Martin Wright, "the English had imposed upon Europe a principle of national sovereignty against Louis XIV's doctrine of dynastic legitimacy".¹⁴⁷ And indeed this new doctrine would come to haunt the French monarchy, when Louis XVI and his wife Marie Antoinette came face to face with the guillotine in 1793.

The balance of power and the theory of popular sovereignty

As the eighteenth century progressed, balance of power arrangements between competing sovereigns, in which there was a change of territorial sovereignty, faced criticism from those jurists sympathetic to the notion of popular sovereignty. This was because such rearrangements assumed a feudal relationship between the sovereign and his subject. Rather than the relationship being based on consent, which entailed the citizen being granted certain rights in exchange for agreeing to certain duties, the feudal system was based on obedience to a common sovereign. This meant that the sovereign was supreme throughout his realm and upon a change of sovereignty the subject was required to swear an oath of allegiance, homage, or fealty to the new sovereign. There was no notion that the population undergoing territorial change had any political rights independent of that relationship. This would only take

¹⁴⁶ Martin Wight, *Systems of States* (Leicester: Leicester University Press in association with the London School of Economics and Political Science, 1977), p. 159.

¹⁴⁷ Wight, *Systems of States*, *ibid*, pp. 159-160.

place when the connection between the sovereign and his realm was severed during a revolution when sovereignty was “popular”, in that it was vested in the people. Absent revolutions, traditional changes in territorial sovereignty were regulated by the laws of succession in which sovereignty could only be transferred in an arrangement that ensured the line of succession was vested in a sovereign of royal blood.

In the eighteenth century, the balance of power (which was commonly referred to by Prussian writers in the native vernacular as *das Gleichgewichte der Völcker*, or “the equilibrium of peoples”) was intimately linked to the notion of a just war.¹⁴⁸ Puffendorf, for instance, in his *De Jure Naturae et Gentium Libri Octo*, divided wars into just and unjust ones and was one of the first scholars to explicitly mention the balance of power prior to it finding expression in the Treaty of Utrecht. Puffendorf who Tuck explains “lived in the group of European states which felt themselves most at risk from the kind of militarist and imperialist expansion in which the Dutch and English writers gloried”¹⁴⁹ expressed scepticism that an “over-balance of power” amongst one’s neighbours could ever amount to a just cause of war.¹⁵⁰ Rather, he thought it “unpardonably impudent” as it gave too greater leeway for the strong to oppress the weak. The fact that Puffendorf lived in a state that felt at risk from “militarist and imperialist expansion” may, as Tuck has suggested, explain why Puffendorf was more sceptical regarding the rights obtained by wars of conquest which were justified as being necessary to preserve the balance of power.

However, there may also be another explanation, which may be related to Puffendorf’s views on popular sovereignty and the matter of obtaining consent to validate a lawful conquest. As explained previously, Puffendorf wrote about the concept of legitimacy alongside that of necessity to validate changes in territorial sovereignty during a just war. In *De Jure Naturae* Puffendorf also devoted more space to the notion of democracy and the rights of the majority than any other jurist who was writing in his generation.¹⁵¹ One might therefore surmise that his critique of conquest, justified on the basis of preserving the balance of power, was also related to his views on popular sovereignty, in which consent was a key aspect of validating changes in territorial sovereignty. As Puffendorf wrote: “The rights which belong to

¹⁴⁸ See e.g. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, Volume 2, (Oxford: at the Clarendon Press, 1934, Joseph H. Drake translation of the 1764 original.), p. 330.

¹⁴⁹ Tuck, *The Rights of War and Peace*, supra n. 55, p. 142.

¹⁵⁰ Puffendorf, *De Jure Naturae*, Book VIII, supra n. 124, p. 90.

¹⁵¹ Puffendorf, *De Jure Naturae*, ibid, p. 975, p. 988, pp. 1028-1030, and p. 1050.

one person over another person, since they are acquired only with the latter's *consent* ... may not be understood as acquired with a person, even though the one to whom they belonged may have fallen into the hands of enemies. Thus when a king has been captured by his foes, it is not supposed that his kingdom has also become theirs, nor does the capture of a husband or father give power immediately over the wife or children".¹⁵² It seems there was a connection between those scholars who argued that consent was necessary to validate conquest, their views on popular sovereignty, and their caution towards territorial changes justified by reference to the balance of power.

This might explain why Christian Wolff, another Prussian, who had acquired fame as a scientist and philosopher, as well as notoriety for praising Confucius, and who wrote on a wide range of issues including metaphysics, in addition to law, shared Puffendorf's scepticisms. Regarding the balance of power Wolff expressly rejected Gentili's view that a sovereign could go to war under the faintest pretext without being injured in some way. "[F]ear alone of a neighbour's power", Wolff emphatically wrote, "is not a just cause of war".¹⁵³ Even the building of fortifications by an enemy on one's territory or the planning for war in peacetime would not, according to Wolff, trigger any imminent right to go to war.¹⁵⁴ On the matter of acquiring sovereignty, Wolff made a sharp and clear distinction between just and unjust wars. According to Wolff a sovereign who waged a just war could occupy the territory of the enemy, and any other property, in order to persuade the enemy to end the war. Wolff wrote: "It is self-evident that the *consent* of each of the belligerents is needed to end the war".¹⁵⁵ Accordingly, only if the vanquished consented to the seizure could sovereignty pass over it otherwise "the things which have been occupied or seized are in your hands without any reason".¹⁵⁶ However, if the war was waged for an unjust cause, then the sovereign was "bound by nature to return both captured property and persons".¹⁵⁷

There was nothing original in the argument that conquest only conferred lawful title in a just war argued Vattel.¹⁵⁸ Real property in lands, towns, and provinces became the property of the enemy who took possession of them in a just war although it was only by the treaty of peace or by the entire subjection and

¹⁵² Puffendorf, *De Jure Naturae*, *ibid*, p. 1312 (emphasis added).

¹⁵³ Wolff, *Jus Gentium*, *supra* n. 148, p. 329.

¹⁵⁴ Wolff, *Jus Gentium*, *ibid*, p. 329.

¹⁵⁵ Wolff, *Jus Gentium*, *ibid*, pp. 406-7 (emphasis added)

¹⁵⁶ Wolff, *Jus Gentium*, *ibid*, pp. 406-7.

¹⁵⁷ Wolff, *Jus Gentium*, *ibid*, pp. 458-459.

¹⁵⁸ Vattel, *The Law of Nations or the Principles of Natural Law*, *supra* n. 102, p. 307.

extinction of the state that the acquisition of the captured towns and provinces was completed and the ownership rendered permanent and absolute.¹⁵⁹ Thus Vattel agreed with Puffendorf, and Wolff, that conquest gave title in a just war, although significantly he differed with these scholars in that he did not think consent was necessary to give title. All that was necessary was to conclude a treaty of peace, in which the victor could coerce the vanquished to cede sovereignty since there was no prohibition in the eighteenth century on concluding treaties obtained by duress. In this connection, it is astonishing that nowhere in Vattel's chapter on "Acquisition by War, and Conquest in Particular" does the word "consent" appear.¹⁶⁰ This is intriguing when we bear in mind Vattel's claim that he had endeavoured to bring to light the views of Wolff to a wider readership, since he evidently did not share the Baron's views on the matter of obtaining consent in order to validate an act of conquest in a just war. Vattel was evidently aware of the works of Locke and Puffendorf, although he chose not to mention them at all in his entire treatise.¹⁶¹ It would seem as though this was a conscious decision by Vattel to dissociate his work from theirs, and if so, it marked a significant departure. Nonetheless, consent or no consent, Vattel was not a supporter of conquest, where peoples were subjected to the most terrible tyranny.¹⁶²

As Tuck explained, Vattel published *Le Droit des Gens* a year after Frederick II of Prussia had invaded Saxony and precipitated the Seven Years War—during which Vattel was appointed Privy Counsellor to the Elector of Saxony.¹⁶³ It is likely that Vattel's views on conquest and consent were related to his experience of the wars being waged all around him. "We know only too well from sad and frequent experience", wrote Vattel, "that predominant states rarely fail to trouble their neighbours, to oppress them, and even to subjugate them completely, when they have an opportunity of doing so with impunity".¹⁶⁴ "Must we await the danger?" he asked rhetorically. "Must we let the storm gather strength when it might be scattered at its rising? Must we suffer a neighbouring state to grow in power and await quietly until

¹⁵⁹ Vattel, *The Law of Nations or the Principles of Natural Law*, *ibid*, p. 308.

¹⁶⁰ Vattel, *The Law of Nations or the Principles of Natural Law*, *ibid*, pp. 307-312.

¹⁶¹ Locke is only mentioned by Albert de Lapradelle in his introduction to the English translation of Vattel's *Law of Nations* published by the Carnegie Institution of Washington in 1916. At p. xxix Lapradelle writes that "in 1774 Adams, and in 1775 Hamilton, quote or praise Grotius, Puffendorf, Locke; neither mentions Vattel." One possible explanation for this could be because of Vattel's views on the balance of power, on conquest, and on the legitimacy of monarchical rule, which were not matters the founding fathers were interested in highlighting during the War of Independence.

¹⁶² Vattel, *The Law of Nations or the Principles of Natural Law*, *supra* n. 102, p. 310.

¹⁶³ Tuck, *The Rights of War and Peace*, *supra* n. 55, p. 191.

¹⁶⁴ Vattel, *The Law of Nations*, *supra* n. 102, p. 248.

it is ready to enslave us? Will it be time to defend ourselves when we are no longer able to?" On the one hand Vattel agreed with Wolff that, "the sovereign who by inheritance, by a free election, or by any other just and proper means, united new provinces or entire kingdoms to his states, is merely acting on his right, and wrongs no one".¹⁶⁵ On the other hand he disagreed with Wolff's cautious references to the balance of power in that he thought a sovereign who "gave evidence of injustice, greed, pride, ambition or a desire of domineering over its neighbours", would become an object of suspicion, which the other sovereigns of Europe should guard against.¹⁶⁶ Accordingly, Vattel explained that "the surest means of preserving [the] balance of power would be to bring it about that no state should be much superior to the others, that all the states, or at least the larger part, should be about equal in strength".¹⁶⁷

Intriguingly, Vattel's views on the balance of power marked a radical departure from the views expressed by his fellow Prussians, which may be explained by his experience of warfare. Yet this would not account for the reason why Vattel played down the matter of consent and popular sovereignty. And it was on such issues that Vattel was engaged in a bitter dispute with Rousseau in his feeble attempt to critique the latter's *Discourse on the Origin of Inequality* (1754).¹⁶⁸ Vattel's view of sovereignty was rather conservative, although it was an advance of the view that had been earlier expressed by Grotius in which he argued that sovereignty could *never* be vested in the people.¹⁶⁹ In reaching this conclusion, Grotius had contradicted his earlier scholarship¹⁷⁰ in advancing the argument that there was a general presumption against private wars and a right of rebellion under the law of nations¹⁷¹ unless it could be justified in certain limited instances.¹⁷² This abrupt volte-face had provoked the ire of Rousseau who noted disparagingly that Grotius's later views on sovereignty and the right of rebellion had been influenced by his newfound dependence on the French

¹⁶⁵ Vattel, *The Law of Nations*, *ibid*, p. 248.

¹⁶⁶ Vattel, *The Law of Nations*, *ibid*, p. 249.

¹⁶⁷ Vattel, *The Law of Nations*, *ibid*, p. 251.

¹⁶⁸ Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, (New York: Dover, 2004) originally published as "Discourse Upon the Origin and the Foundation of the Inequality of Mankind" in *French and English Philosophers: Descartes, Rousseau, Voltaire, Hobbes*, Volume 34 of *The Harvard Classics* by P.F. Collier & Son, New York, in 1910. On the tussle between Vattel and Rousseau see Tuck, *The Rights of War and Peace*, *supra* n. 55, p. 191 and p. 197.

¹⁶⁹ Grotius, *De Jure Belli Ac Pacis Libri Tres*, *supra* n. 78, pp. 103-111.

¹⁷⁰ Grotius had earlier defended the right of rebellion when he argued that Holland was engaged in a just war against the rule of the Portuguese over the Indies trade and against the Spanish 'occupiers'. See *De Indis*, which was entitled *De iure praedae* by its nineteenth-century editor. See Tuck, *The Rights of War and Peace*, *supra* n. 55, p. 81.

¹⁷¹ Grotius, *De Jure Belli*, *supra* n. 78, Book1, Chapter IV, pp. 139-148.

¹⁷² Grotius, *De Jure Belli*, *ibid*, Book1, Chapter IV, pp. 156-161.

monarch for his pension and diplomatic status.¹⁷³ Indeed, it is striking that in *The Social Contract* (1762), Rousseau dedicated half a page to specifically single out Grotius and his translator Barbeyrac for criticism arguing that his concept of sovereignty was inconsistent, and reflected the vested interests he had to conciliate:

Everyone can see, in chapters III and IV of the first book of Grotius, how that learned man and his translator Barbeyrac become entangled and embarrassed in their sophisms, for fear of saying too much or not saying enough according to their views, and so offending the interests that they had to conciliate. Grotius, having taken refuge in France through discontent with his own country, and wishing to pay court to Louis XIII, to whom his book is dedicated, *s pares no pains to despoil the people of all their rights and, in the most artful manner, bestow them on kings*. This also would clearly have been the inclination of Barbeyrac, who dedicated his translation to the king of England, George I. But unfortunately the expulsion of James II, which he calls an abdication, forced him to be reserved and to equivocate and evade, in order not to make William appear a usurper. If these two writers had adopted true principles, all difficulties would have been removed, and they would have been always consistent; but they would have spoken the truth with regret, and would have paid court only to the people. Truth, however, does not lead to fortune, and the people confer neither embassies, nor professorships, nor pensions.¹⁷⁴

Rousseau was referring to the “Glorious Revolution of 1688”, when the British monarch James II, who was accused of bestowing favouritism on his Catholic subjects, was removed by a Dutch invasion in support of the Protestant elite, and replaced by William and Mary, who were made sovereign in his stead. Rousseau castigated Grotius and Barbeyrac for what he perceived as their faulty analysis by concealing that what had happened was effectively a “coup” by the aristocrats, rather than an “abdication”. The latter explanation was essentially an excuse created by William’s royalist supporters so as to maintain the fiction that the sovereign will had been unaffected and remained vested in the monarchy. But if Grotius and Barbeyrac had been really honest, thought Rousseau, then they should have reached the conclusion that what took place was a continuation of the old order in a different guise, with political power being shared between the King and the aristocrats in Parliament. 1688 was emphatically *not* a “peoples” revolution, as it was during the

¹⁷³ Grotius would dramatically change his opinion on sovereignty during the Dutch revolution when the Calvinists seized power, and he was imprisoned in Loevestein Castle, from which he escaped, and fled to France, where he found service with the King. See Tuck, *The Rights of War and Peace*, supra n. 55, pp. 94-102.

¹⁷⁴ See Jean-Jacques Rousseau, *The Social Contract*, (Ware: Wordsworth Classics, 1998, first published, 1762), Book Two, Chapter 2, p. 28 (emphasis added).

Interregnum from 1649-1660 when the “middle sorts” asserted themselves.¹⁷⁵ Although the reforms they accomplished during the Interregnum would not be considered very radical or revolutionary by modern standards, they should not be downplayed. For unlike the French and Russian revolutionaries, the English revolutionaries had no example to emulate.¹⁷⁶ Nonetheless, what they did was still remarkable for the seventeenth century: a supposedly divine King was executed in the open street, the House of Lords was abolished, and seats were redistributed in the House of Commons in a way that followed the distribution of taxable wealth. The latter measure was undertaken in the hope that the view of economically independent men would prevail over those men that were dependent on great lords and barons.¹⁷⁷

Vattel, like Grotius, was also close to the powers he served and was thus not prepared to concede that sovereignty could be continuously vested in the people and in them alone, so that only with their continued consent could a monarch’s rule be deemed legitimate—which was Rousseau’s view. Rather, in Vattel’s opinion, “sovereignty is the public authority which commands in civil society and which regulates and directs what each member must do to attain the end of society”.¹⁷⁸ Vattel noted that often the sovereign authority took steps to confide sovereignty “to a senate or to a single person. This senate or that person then becomes the sovereign”.¹⁷⁹ This was the situation in Vattel’s day in the United Kingdom where the King-in-Parliament was sovereign, and it remains the case today. But this view of sovereignty was sacrilegious to Rousseau for whom sovereignty could not be vested anywhere except for in the body of the people. As he wrote in *The Social Contract*: “...sovereignty, being nothing but the exercise of the general will, can never be alienated”.¹⁸⁰ The sovereign power was “a collective being”, which could only “be represented by itself alone”.¹⁸¹ Although Vattel was of the opinion that “the right to alienate the State can never belong to the sovereign unless it is expressly given to him by the whole people”,¹⁸² Rousseau disagreed, since he thought that sovereignty was

¹⁷⁵ See Brian Manning, *The English People and the English Revolution 1640-1649* (London: Heinemann, 1975), who argued that the civil war was precipitated by popular risings of a “middling sort” against sections of the nobility and gentry. See also, Manning, *Aristocrats, Plebians, and Revolution in England*, supra n. 26.

¹⁷⁶ As observed by Hill in *God’s Englishman*, supra n. 87, pp. 202-203.

¹⁷⁷ See Hill, *God’s Englishman*, ibid pp. 200-201.

¹⁷⁸ Vattel, *The Law of Nations*, supra, n. 102, p. 20 (emphasis in original).

¹⁷⁹ Vattel, *The Law of Nations*, ibid, p. 20 (emphasis in original)

¹⁸⁰ See Rousseau, *The Social Contract*, supra n. 174, Book Two, Chapter 1, p. 25.

¹⁸¹ See Rousseau, *The Social Contract*, ibid, Book Two, Chapter 1, p. 25.

¹⁸² Vattel, *The Law of Nations*, supra, n. 102, p. 34.

both inalienable, and *indivisible*, which meant that it could never be alienated or divided.¹⁸³ In Rousseau's view those who ruled were merely agents of the general will—but they were not the sovereign. This put him on a collision course with Vattel who saw the ruler as sovereign in his capacity as the representative of the people's sovereignty.¹⁸⁴ In other words, Vattel argued that the people transferred the competence to govern in favour of the juridical person of the state, albeit in a benevolent relationship between the king and the aristocrats, whereas Rousseau was of the opinion that the people continually hold this power, which was crystallized in a *volonté générale* (“general will”), which must be followed by the ruler or Parliament, which merely acted as an agent of the people.¹⁸⁵ Thus, Rousseau argued that the ruler had to take into account the interests of the people at all times in governing the country because they commanded the general will which was at once both inalienable and indivisible. What this meant, explained Talmon, was that the general will could only be discerned if *the whole people*, and not just a part of it, were to make the effort.¹⁸⁶ In effect the general will referred to the general will of the nation.¹⁸⁷ The ramifications that this line of reasoning would have for the subsequent development of self-determination were, of course, beyond Rousseau's mental horizons in 1762 (the year he published *The Social Contract*). But it was not lost on the men of future revolutions. For Rousseau had provided the philosophical basis for the theory that self-determination was nothing other than the right of the whole people to exercise sovereignty.¹⁸⁸ Moreover, as Hannah Arendt observed, “the very attraction of Rousseau's theory for the men of the French Revolution was that he apparently had

¹⁸³ In practice Rousseau conceded that the will need not always be unanimous. See Rousseau, *The Social Contract*, supra n. 174, Book Two, Chapter 2, p. 27, note.

¹⁸⁴ As noted by Francis Stephen Ruddy, *International Law in the Enlightenment* (New York: Oceana Publications, 1975), pp. 135-136.

¹⁸⁵ See Stephane Beaulac, “Emer de Vattel and the Externalization of Sovereignty”, 5 *Journal of the History of International Law* (2003), p. 237, at p. 255, note 99.

¹⁸⁶ J.L. Talmon, *The Origins of Totalitarian Democracy* (London: Sphere Books, 1970), p. 43.

¹⁸⁷ Conor Cruise O'Brien, “Nationalism and the French Revolution”, in Athena S. Leoussi and Steven Grosby (eds.) *Nationality and Nationalism*, Vol. II (London: IB Taurus, 2004), p. 187, at p. 195.

¹⁸⁸ The argument that sovereignty could only be exercised by the whole people also has striking parallels with the provision in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations that was annexed to GA Res. 2625, 24 Oct. 1970. This provided that self-determination—however some peoples and states may have wanted to construe it—did not authorise or encourage “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government *representing the whole people* belonging to the territory without distinction as to race, creed or colour” (emphasis added).

found a highly ingenious means to put a multitude into the place of a single person; for the general will was nothing more or less than what bound the many into one”.¹⁸⁹

This dispute between Vattel and Rousseau on the source of sovereignty was relevant to interventions justified to preserve the balance of power since those interventions took little account of the aspirations or interests of the peoples most affected by territorial change. Since sovereignty, according to Rousseau, was vested, at least in principle, in the male population of the state alone, regardless of whether they were members of the aristocracy or not, he was of the opinion that any transfer of territory from one sovereign to another was illegitimate where it lacked the consent of the body of the people directly affected. How that consent was ascertained was left to the political institutions of each country to determine but it was better suited to the republican system of government. Such a proposition, of course, directly conflicted with a balance of power arrangement between kings where no such consent by “the people” was deemed necessary. On the contrary, once a king conquered territory and absorbed it into his kingdom the people situated there owed him allegiance irrespective of their “national sentiments”. Indeed, Rousseau argued that any territorial change, which did not take into consideration the interests of the sovereign or “the slave”, (that is, the king’s people prior to their attainment of sovereignty), was “contraire au droit naturel”. As he explained: “Mais qu’on puisse à son gré faire passer les peuples de maître en maître, comme des troupeaux de bétail, sans consulter ni leur intérêt ni leur avis, c’est se moquer des gens de la dire sérieusement”.¹⁹⁰ As Carl Schmitt understood, Rousseau’s use of the word “slave” had a consequential meaning attached to the construction of the cohesive democratic state. This was because for Rousseau the general will could only exist where the people are so homogenous (in their views, if not their customs) that there is essentially unanimity. Slavery signified that those who do not belong to the people did not participate in the compact and were therefore excluded from exercising sovereignty.¹⁹¹ This had serious consequences for the development of self-determination that I address in Part Two.

¹⁸⁹ Hannah Arendt, *On Revolution* (London: Penguin 2006), p. 67.

¹⁹⁰ See C.E. Vaughan (ed.), *The Political Writings of Jean Jacques Rousseau* (Cambridge: at the University Press, 1915), vol. 1, pp. 340-341. (“It is to make fools of people, to tell them seriously that one can at one’s pleasure transfer peoples from master to master, like herds of cattle, without consulting their interests or their wishes”).

¹⁹¹ See Carl Schmitt, *Preface to the Second Edition, The Crisis of Parliamentary Democracy, (1926): On the Contradiction between Parliamentarism and Democracy*, in Carl Schmitt, *The Crisis of Parliamentary Democracy*, translated by Ellen Kennedy (Cambridge: The MIT Press, 1986), pp. 13-14.

4. The partition treaties and the first partition of Poland

During the eighteenth century, a clear gulf had emerged between those jurists who expressed caution regarding the rights acquired through conquest and those who did not. Paralleling this caution was a general distrust of those wars that were avowedly waged to preserve the balance of power. Locke, Puffendorf, Wolff, and Rousseau, all emphasised the importance of obtaining consent to validate a transfer of territorial sovereignty in a just war, whereas for Gentili, Grotius (at least in *De Jure Belli*), and Vattel, this was immaterial so long as the war was just. However, it was not until after Rousseau published *The Social Contract* that the notion of popular sovereignty gained both legitimacy and popularity, which might explain why the partition treaties that were negotiated in 1698 and 1700, and which sought to divide and apportion the Spanish Empire between England, France, and the United Provinces, without the consent of the Spanish king, aroused comparatively little opposition, when compared to the partitions of Poland that did. Clearly, in the intervening century something had changed. Through his writing and his astute understanding of the political scene, Rousseau had managed to tap in to an emerging national consciousness, which came into being through the seething discontent and frustration that the peasants and the bourgeoisie (the Third Estate) felt towards the corrupt and despotic rule of Louis XIV's Court, as well as the aristocracy, and the Church, who, unlike the great majority of Frenchmen, were exempt from most taxes, even though they controlled the lion's share of the kingdom's resources, and owned the majority of its agricultural land.¹⁹² The fact that France was in an acute financial crisis, and that hunger and starvation was spreading throughout the countryside could hardly have helped matters.¹⁹³

When a monarch had no obligation to consult the peoples of a territory undergoing a change of sovereignty to obtain their consent, conquest was a relatively uncontroversial matter. Usually a process of consultation would only take place in matters of succession. Although title to territory obtained by way of succession differs to title obtained by way of conquest, they are in many ways analogous since there is a transfer of sovereignty in both cases. But even in instances of succession it

¹⁹² See Gail Bossenga, "Society", in William Doyle (ed.), *Old Regime France 1648-1788* (Oxford: Oxford University Press, 2001), pp. 54-58. Paradoxically, despite having to pay very little in the way of tax, the Church had the privilege of collecting the tithe from the peasantry, which was not likely to make them popular in a time of austerity. The peasants also had to pay their lords a number of taxes.

¹⁹³ See Simon Schama, *Citizens: A Chronicle of the French Revolution* (London: Penguin 1989), pp. 256-273.

was not “the people”, in the modern sense of the term, as members of a national and political community, who were consulted. Rather, it was those who served the King’s Court, the jurists and theologians, and members of the royal family, whose opinions were most often sought, as well as the authority of the Pope in the case of Catholic kingdoms. As Zouche, a descendent of old nobility, an academic, and an English judge,¹⁹⁴ noted in his *Exposition*, Phillip II of Castille ejected King Antony from the Kingdom of Portugal on the basis that his election had been disapproved by the Pope, by every other member of the Royal family, and that “the people had no right to choose a king so long as any of the royal blood survived”.¹⁹⁵ Whilst in France, the King would occasionally consult his ministers and advisers through the provincial estates and the Estates-General; there was no obligation upon him to do so.¹⁹⁶ In any event, in those institutions, the clergy (the First Estate), and the aristocracy (the Second Estate) were consulted in separate chambers as separate orders or corporate bodies, in line with their privileges, which were extensive when compared with the remainder of the population (the Third Estate).¹⁹⁷ This was the state of European political society in the eighteenth century when Poland would be partitioned thrice.¹⁹⁸

Although the attempted partition of the Spanish Empire at the turn of the seventeenth century was an attempted succession, the threat of conquest was inherent in the Partition Treaties. In the event that the line of succession was not altered in a manner conducive to preserving the maritime power’s conception of the balance of power, then they were prepared to alter the succession by armed force. Whilst various pretexts were advanced to justify the first partition of Poland, including that it had been necessary to acquire Polish territory in order to preserve the balance of power in central and eastern Europe, this in effect masked what was to all intents and purposes an outright act of conquest. The similarity between the Partition Treaties and the first partition of Poland is that in neither case was any serious attempt made to obtain the consent of “the people”. In the case of the Partition Treaties the only person consulted

¹⁹⁴ See Nussbaum, *A Concise History of the Law of Nations*, supra n. 52, p. 165.

¹⁹⁵ Zouche, *Iuris et Iudici Fecialis*, supra n. 72, p. 132.

¹⁹⁶ Schama, *Citizens*, supra n. 193, pp. 235-236.

¹⁹⁷ See Bossenga in Doyle, *Old Regime France*, supra n. 192, p. 58.

¹⁹⁸ Unsurprisingly, many Frenchmen were aghast and exasperated when Louis XVI convened the Estates-General in 1788 exactly according to the forms of 1614 with its separate orders and chambers. Even in the early months of the French Revolution, some nobles still argued that a separate noble order was a necessary bulwark against the corruption of propertied money. Whilst some nobles conceded that the Third Estate should have a representation at least equal to the other two estates combined, this would still have preserved the influence of the first two Estates, which was out of all proportion to their proportion of the population. See Schama, *Citizens*, supra n. 193, pp. 249-250.

about altering the succession was the French King, whilst the Spanish King who was the sovereign of his Empire, was deliberately kept in the dark. In the case of Poland, the members of Parliament were coerced to consent to partition under duress.

*The Partition Treaties*¹⁹⁹

Ten years after the Glorious Revolution, Britain and Holland sought to prevent the outbreak of a European war by attempting to rearrange the succession of the Spanish Empire in a manner that would not threaten the balance of power by negotiating the partition treaties. The idea behind the treaties was to redistribute Spanish territory in the event that Charles II, the Spanish Monarch, died before he could nominate an heir, since by default his population and territory would be vested in the King of France, Louis XIV, rendering him virtually omnipotent. Accordingly, it was thought that it would be wise to press upon the French King the importance of yielding the bulk of his inheritance and equitably redistributing it amongst the other powers for the sake of preserving the balance of Europe, since if he acquired too much territory by means of succession he might aspire to establish a universal monarchy. This was an absolute anathema to the Maritime Powers, who would not hesitate to declare war against France in order to deter the Dauphin's pretensions of becoming a universal monarch.

In a word, the Maritime Powers wanted to safeguard the balance of power as it existed at the conclusion of the Treaty of Ryswick (1697) that had brought an end to the last major European war (the "Nine Year's War") when France had fought a Grand Alliance comprised of England, Spain, the Holy Roman Empire and the United Provinces. The treaties were negotiated in an era when it was accepted that for the sake of the balance of power, a prince could be compelled to renounce a lawful

¹⁹⁹ See the French King's Treaty made with the King of England, relating to the Settlement of the Succession of Spain on the Electoral Prince of Bavaria, on Condition that Naples, Sicily, Guipulcoa, & be granted to the Dauphin (which is commonly called, The First Treaty of Partition) concluded August 19, 1698; and the Treaty between the most Christian King, the King of Great Britain, and the States General of the United Provinces, for Settling the Succession of the Crown of Spain, in case his Catholic Majesty die without issues, commonly called the Second Treaty of Partition. These treaties are reprinted in *A General Collection of Treatys, Declarations of War, Manifestos, and Publik Papers, Relating to Peace and War*, in Four Volumes, Vol. I, Second Edition, London, 1732, p. 386 (the First Partition Treaty) and p. 407 (the Second Partition Treaty). This collection can be accessed electronically at the British Library on their database Eighteenth Century Collections Online. For literature on the partition treaties see Lord Macaulay, *The History of England: From the Accession of James the Second, Volume III*. (London: Longman, Green, Longman, Roberts, & Green, 1864), pp. 264-270 and Andreas Osiander, *The States System of Europe, 1640-1990: Peacemaking and the Conditions of International Stability* (Oxford: Clarendon Press, 1994), p. 90-99.

inheritance. As François Fénelon (1651-1715), the tutor of the French princes, and the leading theorist of French absolutism, explained in his *Examen de la conscience sur les devoirs de la royauté*: “A particular right to inheritance or donation has to yield to the law of nature protecting a multitude of states. In other words, nothing can be lawful which destroys the balance of power and tips the scales in favour of a universal monarchy, even if it is based on the written laws of a particular country”.²⁰⁰ There were two partition treaties because the first partition treaty had to be renegotiated after the King of Spain heard word of it on his deathbed. He was not predisposed to having his Empire apportioned between his rivals without his consent. When he was informed²⁰¹ of the negotiations he appointed an heir who, as misfortune would have it, would subsequently die, which is why a second treaty had to be negotiated.

The treaties could be described as a conflict-solving device in that they sought to anticipate and resolve a looming conflict before it transpired to preserve the balance of power by apportioning territory equitably between competing sovereigns. As the Spanish monarch was not being consulted about the distribution of territory that he had sovereignty over the treaties were initially negotiated with the French King in secret in Loo. The point of both treaties was to avoid the prospect of a new European war, which was likely if the Catholic King’s (that is, Charles II’s) vast territories in Europe, the Indies, and the Americas, were vested in the Dauphin alone (Louis XIV’s heir). Accordingly, the Protestant maritime powers persuaded the French King that it was in his interest to prevent a union that would upset the balance of power:

III. And whereas the two Kings and the States-General desire, above all things the preservation of the publik quiet, and the avoiding of a new war in Europe, by accommodating the disputes and differences that might arise on account of the said succession, or by reason of the umbrage from too many Dominions being united under one Prince; they have thought good to take before-hand the necessary measures for preventing the calamities which the said accident of the death of the Catholic King without issue might produce.²⁰²

This was a forward-looking treaty. It sought to prevent an event that had not yet occurred. To this end the parties sought to redistribute the Spanish territories in such a manner that the European balance of power and “the general tranquillity of Europe”

²⁰⁰ Quoted in Grewe, *The Epochs*, supra n. 4, p. 338 citing *Oeuvres de Fénelon*, Vol. 3, 1835, p. 361.

²⁰¹ Macaulay, *The History of England*, supra n. 200, p. 270. (“Quiros, the Spanish Ambassador at the Hague, followed the trail [of the partition negotiations] with such skill and perseverance that he discovered, if not the whole truth, yet enough to furnish materials for a dispatch which produced much irritation and alarm at Madrid”.)

²⁰² The First Treaty of Partition, supra n. 200, p. 388.

would not be disturbed.²⁰³ Britain and the Netherlands feared that should the Catholic King, Charles II of Spain, die “without issue” his vast territories in Europe and the Americas would by means of succession be vested in the Dauphin, rendering Louis XIV, the “Sun King”, all-powerful. Accordingly, to avoid this prospect, Britain and the States-General sought to pre-empt the outbreak of a new war by entering into an agreement with Louis XIV which reads today as though it were an estate in a personal will being administered by sovereign states writ large. It had dawned upon Louis XIV that if he did not agree to the partition scheme then his opponents would declare war against him and that as a consequence “his life’s work would be at stake”.²⁰⁴

Exhausted by war, with peace having only been established the previous year in 1697, which had settled the Nine Year’s War, France was required to agree to renounce all its “rights and pretensions to the said Crown of Spain”.²⁰⁵ As a form of territorial compensation, France was to be awarded the Kingdoms of Naples and Sicily, and the adjacent islands Sancto Stephano, Porto Hercole, Orbitello, Telemone, Porto-longon, Piombina, situated on the coast of Tuscany, and the province of Guipulcoa, including the towns of Fontarabia, St. Sebastian, and the port of Passage. As regards the Province of Guipulcoa, Navarre, Alava and Biscay, it was to be “shared between France and Spain in such a manner, as that there shall remain as much of the said passages and mountains to France on her side, as there shall remain to Spain on hers”.²⁰⁶ At a time when territory and population were associated with political and military power, sovereigns kept a constant check on the territorial acquisitions of their competitors in case they were in a position to augment their political power, which would affect the balance amongst the rest. Had Charles II, appointed Louis XIV as his heir, noted Vattel in *Le Droit des Gens*, “it would have meant, according to all the rules of human foresight, nothing less than delivering all Europe into servitude, or at least putting it in a most precarious condition”.²⁰⁷

This explains why it was thought necessary to reorganise the map of Europe as a preventative measure and why Britain and the Netherlands sought to persuade France to agree that the remainder of the Spanish Empire would be assigned to the

²⁰³ The phrase ‘the general tranquility of Europe’ appears in Art. II., The First Treaty of Partition, *ibid* p. 388.

²⁰⁴ See Osiander, *The States System of Europe, 1640-1990*, *supra* n. 199, p. 91.

²⁰⁵ Art. IV., *supra* n. 199, p. 390.

²⁰⁶ Art. IV, *ibid*.

²⁰⁷ Vattel, *The Law of Nations*, *supra* n. 102, p. 249.

eldest son of the Elector of Bavaria rather than to the Dauphin.²⁰⁸ In exchange, the Elector was required to “renounce ... as soon as he shall come of age, all rights and pretensions to the portion assigned to the Dauphin, and to that which is to be assigned to the Archduke Charles by the following Articles”. The Duchy of Milan was to be given to Archduke Charles of Austria²⁰⁹ and in exchange he was also required to “renounce, at the time of the decease of his Catholic Majesty, and the Archduke Charles, as soon as he shall come of age, all other rights and pretensions to the Crown of Spain, and to the other kingdoms, islands, states, countrys and places ... which compose the shares and portions ... assigned to the Dauphin, and the Electoral Prince of Bavaria”.²¹⁰ As Vattel explained, “the right of self-preservation” would have justified the actions of England and Holland in preventing Louis XIV from making “such a formidable addition to his power” had he not agreed to the partition treaties.²¹¹

It was for this reason that Article VIII of the treaty stipulated that “His Imperial Majesty, the King of the Romans, and the said Elector”, were “invited to approve” of the arrangement. Should the Prince and Archduke have refused to abide by the agreement, then they were to be presented with a *fait accompli*, which was to take the form of partition.²¹² The parties had no compunction about resorting to force to put partition into effect. Charles II, the Spanish monarch, was resolutely opposed to the treaty because it sought to dismember his Empire without consulting him. He responded by naming the Electoral Prince of Bavaria, as his sole heir to the whole of the Spanish Empire, and not just those parts that Britain, France, and the Netherlands, had unilaterally decided to divide and redistribute by the first partition treaty. However, when Elector suddenly died, and when it became apparent that Charles II was dying, a Second Treaty of Partition was negotiated.²¹³ As with the First Treaty of Partition, the aim of the Second Treaty of Partition was, in the words of the preamble, “to prevent, by taking timely measures, those events which may raise new wars in Europe”, but ultimately the maritime powers failed in their attempt to prevent the outbreak of war because on 16 November 1700, in direct contravention of the treaty, Louis XIV publicly announced that his second grandson, Philip, the Duke of Anjou,

²⁰⁸ Art. V., The First Treaty of Partition, *supra* n. 199.

²⁰⁹ Art. VI., *ibid*, p. 391.

²¹⁰ Art. VII., *ibid*, p. 390.

²¹¹ Vattel, *The Law of Nations*, *supra* n. 102, p. 249.

²¹² Art. X., The First Treaty of Partition, *supra* n. 199.

²¹³ The Second Treaty of Partition, *ibid*, p. 407.

was to succeed Charles II of Spain as the ruler of all the latter's dominions.²¹⁴ Six months later, Britain, the Holy Roman Emperor, and the Netherlands, declared war against France, and thus began the War of the Spanish Succession (1701-1714).

It may seem paradoxical that partition was invoked by the great powers in the name of the “balance of power”, and the “general tranquillity of Europe” as a method to avoid conflict, since the parties were quite prepared to go to war in order to maintain the equilibrium. Indeed, the threat of war as a deterrent was always inherent in the partition treaties. Secrecy was also a necessity due to the fact that the parties to the Partition Treaties sought to dispense with, and redistribute, territories over which they had no sovereignty.²¹⁵ This was an era when territory was viewed as the private property of the monarch, when conquest was considered lawful, and when the great powers saw through territorial compensations a means of preserving the peace and redistributing political power. It is clear from the text of the treaties that there was no conception of there being a wider body politic. If the succession did not proceed according to plan, then in order to put into effect the partition conquest was the means they would forcibly invoke to secure an exchange of sovereignty, without obtaining the consent of either the French or Spanish King or the peoples directly affected.

*The First Partition of Poland*²¹⁶

Seventy-three years after the negotiations for a second partition treaty collapsed Poland would be partitioned for the first time. Officially, Poland was known as “the Commonwealth of the Two Nations, the Polish and Lithuanian”. It was a personal, dynastic union between the “Crown” of the Polish Realm, and the Grand Duchy of Lithuania that had existed since 1386. In 1569 the Commonwealth was converted into a constitutional union, in which the two provinces of the Crown and Lithuania enjoyed

²¹⁴ M.A. Thomson, “Louis XIV and the Origins of the War of the Spanish Succession”, 4 *Transactions of the Royal Historical Society*, (1954), p. 111.

²¹⁵ See the French King's ratification of a Secret Article relating to the Elector of Bavaria and the ratification of the Secret Article concerning the Duchy of Milan, The First Treaty of Partition, in *A General Collection of Treatys*, supra n. 199, p. 398 and p. 402.

²¹⁶ On the first partition of Poland I have in addition to the treaties relied on the following: Albert Sorel, *The Eastern Question in the Eighteenth Century: The Partition of Poland and the Treaty of Kainardji* (London: Methuen & Co, 1898, translated by F.C. Bramwell); Richard Lodge, “The Extinction of Poland 1788-97”, in vol. VIII, *The Cambridge Modern History* (Cambridge: At the University Press, 1904); D.B. Horn, *British Public Opinion and The First Partition of Poland* (Edinburgh: Oliver and Boyd, 1945); Herbert H. Kaplan, *The First Partition of Poland* (New York: Columbia University Press, 1962); Andrina Stiles, *Russia, Poland and the Ottoman Empire 1725-1800* (London: Hodder & Stoughton, 1991); Jerzy Lukowski, *The Partitions of Poland 1772, 1793, 1795* (London: Longman 1999); and Norman Davies, *God's Playground: A History of Poland, Vol. 1, The Origins to 1795* (Oxford: Oxford University Press, 2005).

a common parliament.²¹⁷ By the eighteenth century, Poland had acquired a reputation for being unstable due to its peculiar constitution, and especially the *liberum veto* that allowed any noble to veto legislation on any ground, which led to anarchy.²¹⁸ Poland was also prone to foreign plots and was always dominated by its larger neighbour to the east. Geographically, the Commonwealth spanned the territorial sphere between two emerging powers—Prussia and Russia—who would repeatedly clash in Poland. The first partition was undertaken “In the Name of the Most Holy and Indivisible Trinity” and was subsequently approved of by several further treaties, that were concluded, initially, between the partitionists and Poland, and finally with the disappearance of the Polish state in 1795, only between themselves.²¹⁹ The first three treaties legitimised a *fait accompli*. This was because by 1773, when the treaties were ratified, the first partition had already been put in place the year before by recourse to armed force.²²⁰ The partition was not complete, however, as the borders still had to be “settle[d] definitely and with greater exactitude” by the commissaries especially appointed to determine the exact limits of their respective acquisitions.²²¹

In essence, each of the partition treaties sought to legitimise Poland’s dismemberment by obtaining “approval” from the *Sejm* (the Polish Parliament) for the transfer of sovereignty over the territories to each of the partitioning powers, which is consistent with the views expressed by Puffendorf that title by conquest was only an inchoate title. Nonetheless, according to historians this consent had been obtained by duress and therefore it could be questioned whether the Polish nation had really consented to its dismemberment. Indeed it would seem that the theory of consent which had first been raised during the trial of Charles I by Bradshawe and Cooke and advanced by Hobbes, Puffendorf, Locke, Wolff, and Rousseau was being completely disregarded in Poland. Hence Senator Solytk resigned his office in protest. “I would rather sit in a dungeon and cut off my hand than sign the sentence passed on my

²¹⁷ Lukowski, *The Partitions of Poland*, *ibid*, p. 1.

²¹⁸ See Lodge, “The Extinction of Poland 1788-97”, *supra* n. 216, p. 521; Davies, *God’s Playground*: *supra* n. 216, pp. 386-387.

²¹⁹ See Treaty between Austria-Hungary and Poland; Treaty between Poland and Prussia; and Treaty between Poland and Russia, all signed at Warsaw, 18 September 1773, all reproduced in old French in Clive Parry (ed.) 45 *The Consolidated Treaty Series* (1772-1775), pp. 235-265. The final treaty that led to Poland’s destruction was concluded by the partitionists alone. See Treaty between Austria, Prussia and Russia for the Partition of Poland, signed at St. Petersburg, 12 (24) October 1795, in Clive Parry (ed.) 53 *The Consolidated Treaty Series* (1795-1797), pp. 3-8 (in French and Russian).

²²⁰ Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), p. 75.

²²¹ See Art. II common to all three treaties, *supra* n. 219.

fatherland” he wrote to Staeckelberg. “A Pole who permits the partition of his country would be sinning against God. And we senators ... would become perjurers”. Tadeusz Retjan (1746-80), envoy of Nowogródek, went even further in his protest. Having begged the members in vain to reject the partition, he rent his clothes and threw himself on to the floor of the chamber: “On the blood of Christ, I adjure you, do not play the part of Judas; kill me, stamp on me, but do not kill the fatherland”.²²² These statements of protest at the partition, although they were dismissed by the partitioning powers, provide an indication that the Polish nation existed, which was in the process of being despoiled in a non-consensual arrangement. As historians have been at pains to point out, the confederated *Sejm*, which met to ratify the partition treaties, had been “sweetened by foreign money, and surrounded by foreign troops”.²²³ Prussia took 36,000 square kilometres with 580,000 inhabitants; Austria 83,000 square kilometres with 2,650,000 inhabitants; and Russia 92,000 square kilometres with 1,300,000 inhabitants. As a result of the first partition Poland lost approximately 30 per cent of its territory, and one third of its population.²²⁴ The partition was no consensual arrangement; if the Poles did not cooperate, Prussia and Russia threatened to seize further territories. Consequently, the *Sejm* had little choice but to ratify the three partition treaties, although perhaps significantly no vote was taken.

In an age when there was no prohibition on concluding a treaty which had been procured through the threat or use of force, and when peoples were treated little better than chattels, the partitioning powers were able to coerce the Poles to agree to the following identical provision, common to all three treaties:

His Majesty the King of Poland and the Orders and Estates of the Kingdom of Poland and of the Grand-Duchy of Lithuania hereby cede to His Majesty the King of Prussia, [Her Majesty Empress of Hungary and Bohemia, and Her Majesty the Empress of all the Russias], [their] Heirs and Successors, all of the aforesaid Territories, with full propriety, sovereignty and independence, and with all towns, fortresses and villages, all havens, harbours and rivers, and all vassals, subjects and inhabitants, whom they hereby release at the same time from their bonds of homage, and from the oaths of allegiance they have sworn to His Majesty and to the Crown of Poland, with all civil, political and spiritual rights and generally with all that attends the sovereignty of these countries; and

²²² See Davies, *God's Playground*, supra n. 216, p. 397 and Stiles, *Russia, Poland and the Ottoman Empire*, supra n. 216, p. 83.

²²³ Stiles, *Russia, Poland and the Ottoman Empire*, *ibid*, p. 83.

²²⁴ Stiles, *ibid*, pp. 83-84.

hereby vow never to stake, under any pretext, any claim to the Provinces ceded by virtue of this Treaty.²²⁵

As this provision indicates, the partition treaties were akin to treaties of cession in a time when the law of nations placed few fetters on a state's discretion to go to war. Moreover, there was no notion that the Polish people had any political rights other than the bonds of homage and the oaths of allegiance they had sworn to the King of Poland. As with the Partition Treaties, there was no conception of there being a wider body politic in Poland that was independent of the sovereign-subject relationship. Instead, as this provision made clear, the connection between the sovereign and his realm was being transferred to another sovereign. In this sense the partition was similar to the situation of an *enforced* succession but instead of sovereignty being transferred to a royal of Polish blood it was being transferred to the royals of Austrian, Prussian, and Russian blood. It would appear that this provision was precisely the reverse of what the republicans had accomplished in England in 1649, when they had abolished the Office of the King, which had discharged all the bonds of fealty, homage, and allegiance that the people of England had formerly owed their king.

The international reaction

The international reaction to the first partition was ambivalent. "The partitioning powers", wrote Sharon Korman, "had rightly calculated that Europe would remain unmoved by the disappearance of Poland from the political stage".²²⁶ She quoted Acton who observed: "By a series of treaties it had condoned the seizure of Silesia. It was too late to complain of the dismemberment of Poland".²²⁷ In a private and confidential dispatch to Lord Stormont, the British diplomatic representative in Vienna, Lord Suffolk, described as "extraordinary" and without elaboration the "acquisition of territory and resources" by "the aggrandizement" of the three partitioning powers "obtained by a division of a country carved out and settled".²²⁸ George III drew up a memorandum on the partition in which he emphasized the subversion of the balance of power and the damage done to the commercial interests

²²⁵ Identical provision appeared in Article II of each of the three treaties. See *supra* n. 219.

²²⁶ Korman, *The Right of Conquest*, *supra* n. 220, p. 76.

²²⁷ Korman, *The Right of Conquest*, *ibid*, pp. 76-77 quoting Acton.

²²⁸ Horn, *British Public Opinion*, *supra* n. 216, p. 5.

of Britain, the United Provinces, and France.²²⁹ Lord Rochford described the partition as “arbitrary and tyrannical” in a private memorandum for the use of Lord Sandwich at the Admiralty.²³⁰ However, reaction in Parliament was muted. In a characteristic letter “to a Prussian gentleman” Burke mocked: “Poland was but a breakfast”.²³¹ Voltaire concurred, writing as soon as he heard news of the partition to his friend and close confidant King Frederick, that it was assuredly “a truly kingly cake”.²³²

In contrast to the reaction in Europe, the reaction to the first partition of Poland in the Thirteen Colonies was very different. Indeed there is much circumstantial evidence to suggest that the American Declaration of Independence (1776) was issued prematurely in order to deal with the perceived threat that the founding fathers feared of a plot to partition North America by the colonial powers as they had just condoned in Europe.²³³ The Americans did not believe that their colonial status would protect them from partition, which they thought a distinct possibility in the aftermath of the French annexation of Corsica, and the partition of Poland.²³⁴ The following opinion contained in a letter by Richard Henry Lee, the US Senator for Virginia, who played an indispensable role in the issuance of that Declaration, to Patrick Henry, the Governor of Virginia, expressed these fears with the utmost clarity: “A slight attention to the late proceedings of many European Courts”, he wrote, “will sufficiently evince the spirit of partition, and the assumed right of disposing of Men & Countries like live stock on a farm, that distinguishes this corrupt age...Corsica, & Poland indisputably prove this”.²³⁵ In the words of Tom Paine (1737-1809): “There was reason to believe that Britain would endeavour to make a European matter of [the question of American independence], and, rather than loose the whole [of North America], would dismember it, like Poland, and dispose of her several claims to the highest bidder”.²³⁶

²²⁹ Horn, *British Public Opinion*, *ibid*, p. 7 citing *Papers of George III*, ed. Fortescue, vol. ii, p. 428.

²³⁰ Horn, *British Public Opinion*, *ibid*, p. 8 citing *Sandwich Papers*, ed. Barnes and Owen (Navy Records Society). Vol. I, pp. 30-31.

²³¹ Horn, *British Public Opinion*, *ibid*, p. 13 citing *The Works and Correspondence of Edmund Burke* (1852), vol. I, pp. 399-403.

²³² Sorel, *The Eastern Question*, *supra* n. 216, p. 220.

²³³ See James H. Hutson, “The Partition Treaty and the Declaration of American Independence”, 58 *The Journal of American History* (1972), p. 877, for the full story. See also, David Armitage, “The Declaration of Independence and International Law”, 59 *The William and Mary Quarterly* (2002), p. 39, at p. 47.

²³⁴ Huston, *ibid*, p. 886, and Armitage, *ibid*, p. 47.

²³⁵ Huston, *ibid*, p. 892 quoting James Curtis Ballagh, ed., *The Letters of Richard Henry Lee*, I, 176-78.

²³⁶ Huston, *ibid*, p. 895 quoting Moncure Daniel Conway, ed., *The Writings of Thomas Paine*, I, 204-05.

5. The second and third partitions of Poland

In order to have a proper understanding of the second and third partitions of Poland we need to be aware of international developments in France, the rest of Europe, and overseas, particularly in America. For there was a twenty-one year gap between the first and second partitions of Poland, and only a two year gap between the second and third partitions. This is because the two partitions of 1792 and 1795 were connected, and directly influenced by events in France, whereas the first partition in 1772 amounted to a brazen act of conquest, whereby the theories of consent and popular sovereignty advanced by Hobbes, Puffendorf, Locke, Wolff, and Rousseau were set aside. It was only during the American War of Independence in 1776, and the French Revolution in 1789, that their theories regarding consent and sovereignty were put to the test. Unlike the English revolution in 1649, the American independence struggle and French Revolution were successful, and their consequences long lasting.

Accordingly, it is necessary to revisit the changes brought about by these revolutions as they dramatically affected events in Poland. This is because it marked the moment when the idea of popular sovereignty—the precursor to national self-determination—first emerged in full fashion enshrined in the revolutionary constitutions which posited that sovereignty was collectively and exclusively vested in the nation. In the words of the *Déclaration des Droits de l'Homme et du Citoyen de 1789*: “The source of all sovereignty is located in essence in the nation; no body, no individual can exercise authority which does not emanate from it expressly”.²³⁷ The theory of popular sovereignty was different from every other theory of government which had hitherto existed: “It is a theory according to which those who exercise power, and those over whom it is exercised, are one and the same”.²³⁸ And this is precisely what the French revolutionaries did. As soon as they seized power they amended the French Constitution and inserted a section entitled “Popular Sovereignty”. Article 7 of that Constitution provided that “[t]he sovereign people comprises *all French citizens*”.²³⁹ Two years later this provision was amended under the new heading “Constitution”. Article 1 provided: “The French Republic is one and

²³⁷ Declaration of the Rights of Man and of Citizen, 26 August 1789.

²³⁸ Alfred Cobban, *In Search of Humanity: The Role of the Enlightenment in Modern History* (New York: George Braziller, 1960), p. 189.

²³⁹ See Doc. 95. The Constitution of 24 June, 1793, in John Hall Stewart, *A Documentary Survey of the French Revolution* (New York: Macmillan Co. 1951), p. 459.

indivisible”. Article 2 provided: “The *totality* of French citizens is the sovereign”.²⁴⁰ Popular sovereignty meant that all French citizens were sovereign, not just the bishops and aristocrats, i.e. not just those who comprised the First and Second Estates.

It was the prospect of popular sovereignty or “mob rule” that provoked the aristocrats to turn a blind eye to the partitions of Poland. In particular, men like Burke and Gentz, who were both in the pay of aristocrats, and therefore beholden to their paymasters, supported the partition, not out of any hatred towards the Poles or the Polish nation, but because they feared that the idea of popular sovereignty would spread.²⁴¹ And they had good reason to fear the contagion. As Paine recognised in the introduction to *Rights of Man* (1792), which he had dedicated to his friend the Marquise de Lafayette: “As revolutions have begun ... it is natural to expect that other revolutions will follow”.²⁴² Paine drew a link between events on both sides of the Atlantic noting that a by-product of those revolutions was opposition to the notion of conquest, which had “dispossessed man of his rights”.²⁴³ The revolutionaries not only opposed monarchical rule, they also opposed the ideas, which sustained such rule, including divine right, conquest, and the balance of power. By justifying the partitions of Poland the aristocrats were sending a clear message that they would not tolerate these new ideas. They preferred monarchies with their hereditary lineages, ecclesiastical hierarchies, and rigid class systems, where everyone knew his place.

The emergence of patriotism and popular sovereignty in Poland

After the first partition, the fear of further violations of Polish sovereignty by Austria, Prussia, and Russia, contributed to the formation of Polish patriotism and a need for self-preservation.²⁴⁴ Rousseau, in his *Considérations sur le gouvernement de la*

²⁴⁰ See Doc. 123. The Constitution of the Year II, 22 August 1795, in Stewart, *A Documentary Survey*, *ibid*, p. 574.

²⁴¹ I say more about Burke later. For the only biography that I have come across of Gentz in English see Golo Mann, *Secretary of Europe: The Life of Friedrich Gentz, Enemy of Napoleon* (Archon Books, 1970, first published by Yale University Press in 1946).

²⁴² Thomas Paine, *Rights of Man, Part the Second. Combining Principle and Practice* in Mark Philip (ed.) *Thomas Paine, Rights of Man, Common Sense, and Other Political Writings* (Oxford: Oxford University Press, Oxford World Classics, 2008), p. 212.

²⁴³ Paine, *Rights of Man*, *ibid*, pp. 212-213.

²⁴⁴ Andrzej Walicki, *The Age of Enlightenment and the Birth of Modern Nationhood: Polish Political Thought from Noble Republicanism to Tadeusz Kosciuszko*, (Notre Dame: University of Notre Dame Press, 1989), pp. 11-12.

Pologne (hereafter “*Considérations*”),²⁴⁵ published posthumously, had advised the Poles to “spare no efforts” to gain the support of the Ottoman Sultan in a defensive alliance aimed at safeguarding their mutual territorial integrity,²⁴⁶ which is what subsequently transpired.²⁴⁷ Rousseau was one of the first *philosophes* to recognize the close correlation between resistance to “alien occupation” and the emergence of patriotism. “You will never be free as long as a single Russian soldier remains in Poland” Rousseau boomed in his advice to the Poles.²⁴⁸ In his *Considérations*,²⁴⁹ which was translated into Polish in 1789, (*The Social Contract* having been translated into Polish in 1778)²⁵⁰ Rousseau advocated political reform in Poland that had a direct impact on the politics of that country culminating in the Constitution of 3 May 1791.

In the words of that Constitution, it was desired, “to take advantage of the season in which Europe finds itself and of this dying moment that has restored us to ourselves, free of the ignominious dictates of foreign coercion, holding dearer than life, than personal happiness the political existence, external independence and internal liberty of the people whose destiny is entrusted to our hands”.²⁵¹ The Poles had clearly heeded Rousseau’s advice and had amended their Constitution, which enshrined Roman Catholicism as “the dominant national religion”, whilst assuring the Polish nobility and peasantry that their interests would not be adversely affected.²⁵² The Constitution further proclaimed the principle of popular sovereignty when it affirmed that: “All authority in human society takes its origin in the will of the people”.²⁵³ As a leading Polish historian explained, “it was [Rousseau’s] ideological achievement to turn Polish republican thought from passivity to action”.²⁵⁴

Writing two decades before the French Revolution, Rousseau saw education and politics as intertwined and his advice to the Poles sought to preserve the natural political energies of the Polish people and preserve the identity of the Polish nation in

²⁴⁵ See Jean-Jacques Rousseau, “Considerations on the Government of Poland and on its Proposed Reformation” (Completed but not published April 1772), translated and edited by Frederick Watkins in *Rousseau: Political Writings* (New York: Nelson, 1953).

²⁴⁶ Rousseau, “*Considérations*”, *ibid.*, p. 269.

²⁴⁷ See the “Proposed Polish-Ottoman defensive and commercial treaty”, 4 October 1790, in Dariusz Kołodziejczyk, *Ottoman-Polish Diplomatic Relations* (Leiden: Brill, 2000), pp. 650-659.

²⁴⁸ Rousseau, *Considérations*, *supra* n. 245, p. 268.

²⁴⁹ Rousseau, *Considérations*, *ibid.*, pp. 159-274.

²⁵⁰ See Jerzy Lukowski, *Liberty’s Folly: The Polish-Lithuanian Commonwealth in the Eighteenth Century, 1657-1795* (London: Routledge, 1991), p. 232.

²⁵¹ Preamble to The Constitution of May 3, 1791, <<<http://www.polishconstitution.org/index1.html>>>

²⁵² See Arts. II and IV, The Constitution of May 3, 1791, *ibid.*

²⁵³ Art. V The Constitution of May 3, 1791, *ibid.*

²⁵⁴ Jerzy Lukowski, “Recasting Utopia: Montesquieu, Rousseau and the Polish Constitution of 3 May 1791”, 37 *The Historical Journal* (1994), p. 65, at p. 71.

Europe. Rousseau's radical political philosophy is best illustrated in the following extract in which he critiqued the old system of diplomacy based on the balance of power, and encouraged the Poles to seek out their freedom independently:

... you will always be in danger of losing your freedom as long as Russia interferes in your affairs. But if you succeed in forcing her to deal with you as one power with another, and no longer as protector and protectorate, then profit by the exhaustion into which the Turkish war will have thrown her to accomplish your task before she is able to disturb it ... [But] do not waste your energies in vain negotiations; do not bankrupt yourselves on ambassadors and ministers to foreign courts; and do not account alliances and treaties as things of any moment. All this is useless to the Christian powers, who recognise no other bonds than self-interest. When they find it advantageous to fulfil their obligations, they will fulfil them; when they find it advantageous to break them, they will do so; such promises might as well not be made at all ... it is almost never reasons of state that guides them; it is the momentary interest of a minister, of a mistress, of a favourite ... What assurance can you have in dealing with people who have no fixed system, and who are led only by chance impulses? Nothing could be more frivolous than the political science of courts. Since it has no certain principles, no certain conclusions can be drawn from them; and all this fine theorising about the interest of princes is a child's game which makes sensible men laugh.²⁵⁵

A year after the French Revolution had broken out in 1789, a Polish-Ottoman Treaty was concluded, which provided in its first article that its principal purpose was "the mutual right of sovereignty, the removal of any kind of meddling or interference by the foreigners, and the right of sovereignty and independence of the Polish republic". In the event of conflict both parties agreed to furnish either side with financial aid, munitions, and troops. An amendment to that treaty then made an intriguing observation: "It is known by experience from a series of consecutive acts how great was the damage inflicted on the European balance, which should be observed, and how great was the harm that was instantly caused to the high state and to the Polish Republic by the immoderate rise of the Russians, entirely originating from setting their feet on and extending their hands to grasp some lands of the high state and the Polish Republic".²⁵⁶ Accordingly, to redress the balance and to deal with the immoderate rise of the Russians his most exalted Sultanate and the Polish Republic were to coordinate their movements and inform each other of their preparations for

²⁵⁵ Rousseau, *Considérations*, supra n. 245, pp. 268-269.

²⁵⁶ See the "Proposed amendments to the Polish-Ottoman treaty for an offensive pact", 4 October 1790, in Kołodziejczyk, *Ottoman-Polish Relations*, supra n. 247, p. 658.

military movements against the Russian Empire. Thus, Rousseau's advice was taken very seriously by the Poles (as well as by the Turks) and put into practical action.

It is no coincidence that the writings of Rousseau, as well as Diderot, Machiavelli, and Voltaire, were banned by the very same powers that had partitioned Poland.²⁵⁷ This is because it was clearly evident that the writers of the Enlightenment were idolized by the Poles, and not just by the American and French revolutionaries. Indeed, there was a direct link between the philosophers of the Enlightenment and the peoples who fought in revolutions of the late eighteenth century particularly between France, the Thirteen United States, and Poland. For instance, the Polish patriot Tadeusz Kosciuszko (1746-1817) valued Rousseau's views over those of the other *philosophes*,²⁵⁸ founded West Point,²⁵⁹ was a close friend of Thomas Jefferson (1743-1826), and fought alongside him in the American War of Independence.²⁶⁰ He was also granted honorary French citizenship²⁶¹ and sought support in France just after the outbreak of the revolution where a bust of Rousseau with a copy of his *Social Contract* was installed in the Assembly Hall in October 1790.²⁶² After a special service in the Convention on 14 September 1794, a copy of *The Social Contract* was carried to the Pantheon on a velvet cushion along with a statute of its author that was pulled in a cart carried by twelve horses on the orders of the Thermidorians.²⁶³ The bodies of Rousseau and Voltaire, once intellectual arch-rivals, were "posthumously resurrected" and placed in the Pantheon, where today they lay opposite one another. Those who were alive during the revolutionary era such as Jeremy Bentham, Thomas Paine, and William Wilberforce, were granted honorary French citizenship.²⁶⁴ Not only was Maximilien Robespierre a disciple of Rousseau, but after his execution in 1794, the Girondists interned Rousseau's corpse from its original resting place in

²⁵⁷ See Martyn Lyons, *Post-Revolutionary Europe, 1815-1856* (New York: Palgrave MacMillan, 2006), p. 42 (Austria banned the works of Rousseau, Goethe and Schiller), p. 45 (Lombardy-Venetia banned the works of Rousseau, Diderot, Voltaire, Macchiavelli, Alfieri and Foscolo), and p. 53 (a cultural quarantine was imposed on Russia to prevent Western ideas from "contaminating" the minds of Russians).

²⁵⁸ See Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 2005), p. 217, citing several Polish sources.

²⁵⁹ Nabulsi, *Traditions of War*, *ibid.*, p. 213. There is a statue of Kosciuszko on a pedestal at the United States Military Academy at West Point, New York. Kosciuszko designed the defences of the West Point garrison.

²⁶⁰ Nabulsi, *Traditions of War*, *ibid.*, pp. 213-214.

²⁶¹ Lukowski, *Liberty's Folly*, *supra* n. 250, p. 256.

²⁶² François Furet, "Rousseau and the French Revolution", in Clifford Owen and Nathan Tarcov (eds.), *The Legacy of Rousseau* (Chicago: The University of Chicago Press, 1997), p. 168.

²⁶³ See Cruise O'Brien, "Nationalism and the French Revolution", *supra* n. 187, p. 195.

²⁶⁴ See Patrick Weil, *How to be French: Nationality in the Making since 1789* (Durham: Duke University Press, 2008), p. 15.

Ermenonville to the Pantheon in Paris amid much fanfare. *The Social Contract*, which prior to the French Revolution went through only one edition, was republished thirteen times between 1792 and 1795, and one of those editions “was appropriately issued in pocket Bible size for the use of the soldiers defending *la patrie*”.²⁶⁵ General George Washington had also ordered that the writings of Tom Paine be read out aloud to his troops to inspire them in their battles with the British.²⁶⁶ There was thus clearly an intellectual kinship between the American, French, and Polish revolutionaries that would have been seen as extremely subversive by the aristocrats many of whom felt they had little choice but to flee for their lives to the safety of England and Prussia.²⁶⁷

The Schism: the impact of the French Revolution

One of the most vocal critics of the French Revolution was the brilliant British parliamentarian Edmund Burke (1729-1797). Burke was born to an Irish Catholic family in the Blackwater Valley, Co. Cork when the Penal Laws were still in full force, which is why he had to covert to Anglicanism and conceal his Catholicism in his later years.²⁶⁸ Burke’s vehement opposition to the French Revolution may seem paradoxical, because he was an Irishman at heart where revolution and revolt against British rule had been commonplace. I say paradoxical because Irish nationalism as it evolved over the centuries against British rule was also anti-aristocracy. And yet Burke, who struggled for most of his life for recognition from his British peers, was adamantly against the French Revolution that had impressed so many Irish (and some British) radicals, including many in his party The Whigs. Burke’s rhetorical crusade against the French Revolution as encapsulated in his most famous pamphlet

²⁶⁵ See Hector McNeil, “The Cult of Rousseau and the French Revolution”, 6 *Journal of the History of Ideas* (1945), pp. 197-212 at p. 206.

²⁶⁶ Darian-Smith, *Religion, Race, Rights*, supra n. 10, p. 98.

²⁶⁷ In this period, many Jacobins were put on trial in England such as Horne Tooke, who desired a government with annual parliaments based on universal suffrage, with the exclusion of parties, and unanimous votes. See Talmon, *The Origins of Totalitarian Democracy*, supra n. 186, p. 46. According to Doyle 17,589 nobles either emigrated or were condemned in the Terror. He believes these numbers could be doubled if parents of émigrés or interned suspects are added. See William Doyle, *Aristocracy and its Enemies in the Age of Revolution* (Oxford: Oxford University Press, 2009), p. 295.

²⁶⁸ Burke’s father, who was a lawyer, had also converted to Protestantism. Intriguingly, his mother refused to do this even though it would have advanced her social status. See Conor Cruise O’Brien, *Edmund Burke* (London: Vintage, 1997), p 1.

Reflections on the Revolution in France,²⁶⁹ is all the more intriguing since he shared that revolution's ideological critique of imperialism, which he had condemned during the trial of Warren Hastings.²⁷⁰ However, Burke's critique of British imperialism was not based on the social contract theories of Hobbes and Locke. Nor did Burke think much of Rousseau's philosophy either. Burke thought that a people's attachment to territory, instead of being based on the social contract, was something intrinsic, natural, and organic—one might almost say, emotional. For Burke, a people's homeland was a collective personal and political identity that was based on a shared sense of belonging, and not on social contract theories, which Burke noted Britain had invoked to divest the Irish, the Indians, and the Native Americans, of political authority over their homelands, in favour of the Anglo-Saxons who displaced them.²⁷¹ For Burke, a territory or homeland anchored both individual and collective identity, not just from the narrow instrumentality of rule or control, but in the psychologically deeper sense in which identity draws on entrenched feelings and memories.²⁷² Burke opposed British imperialism because it sought to alter the pre-existing social structures and patterns of human behaviour that existed in India before the British arrived. In this sense, what the British colonists were doing in India was analogous to what the French revolutionaries were doing to France: they both sought to unsettle the existing customs, honour, laws, ranks, rights, usages, and social habits.²⁷³ For Burke, social order was a requisite for individual liberty, which the British were destroying through company rule in India, and which the French revolutionaries were destroying in France.²⁷⁴ In both cases, a class of individuals who were dislocated, young, restive, and rootless, were afflicting upon the societies they touched a similar contagion.²⁷⁵

For Burke the French Revolution was dangerous because its architects sought to alter the natural course of human development. The anti-Catholic aspects of the

²⁶⁹ *Reflections on the Revolution in France and on the Proceedings of Certain Societies in London in a Letter intended to have been sent to a Gentlemen in Paris* (London: Printed for J Dodsley, in Pall-Mall, 1790).

²⁷⁰ See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999), and pp. 153-189.

²⁷¹ I say more about these theories in Part Two. For Burke's opposition to imperialism, particularly in India, and for his views on homeland and territory see Mehta, *Liberalism and Empire*, *ibid*, pp. 115-152.

²⁷² Mehta, *Liberalism and Empire*, *ibid*, p. 123.

²⁷³ Mehta, *Liberalism and Empire*, *ibid*, pp. 172-173 and p. 186.

²⁷⁴ Mehta, *Liberalism and Empire*, *ibid*, p. 174.

²⁷⁵ For Burke, the young men sent to India governed "without society, and without sympathy for the natives...they have no more social habits with the people than if they resided in England". See Mehta, *Liberalism and Empire*, *ibid*, pp. 171-172,

French Revolution obviously did not endear him to its principles, especially when his fellow Whigs analogised it to the anti-Catholic and anti-Irish English Revolutions of 1649-1660 and 1688. But his dislike of the French Revolution was more than personal, for Burke disliked its abstract principles that sought to seduce people into believing that what he called “absolute speculative liberty” could be achieved merely by writing beautiful prose on a piece of paper, in a society without order, and without security. But above all Burke feared the violence of the mob, which Rousseau had galvanized with his attacks on inequality and his talk of an indivisible and inalienable general will. In a vitriolic onslaught on Rousseau, Burke attacked the men in the French National Assembly for trying to see who could best imitate “the vain” Rousseau whose heart “was incapable of harbouring one spark of common parental affection”.²⁷⁶ Ultimately, for Burke, the French Revolution went contrary to his vision of nature, where human gradations were natural. It was in this context that Burke referred to the *natural* aristocracy, which in his view provided the dynamic element in society. It was the dynamism provided by the aristocracy through their philanthropy, the promotion of the arts and sciences, and through their administration of law and justice, as well as through trade, education, and good breeding that provided the stability that was necessary in any civil society. Man had to be *taught* these qualities from birth, as they did not come to man naturally or by osmosis.²⁷⁷ In Burke’s view, the men of the French Revolution sought to undo the natural order of things by vesting political authority in angry men from humble origins who came to power not by virtue (as they claimed) but at the violent hands of the Parisian mob.

One of the men that provoked Burke’s wrath was Maximillien Robespierre (1758-1794), a shy young lawyer who would be thrust into the forefront of French politics, and whose name is forever associated with the Terror.²⁷⁸ Born to humble origins in the French town of Aras, Robespierre won a scholarship to study at Louis-Le-Grand, the elite Collège in Paris (next to the Academy of France) on the Rue St Jacques. It has been suggested that the young Robespierre first read Rousseau during his time at the Louis-Le-Grand, which provided him with ideological inspiration for

²⁷⁶ This was clearly a reference to Rousseau’s decision to send his children to the foundling hospital where they most likely perished. See O’Brien, *Edmund Burke*, supra n. 268, p. 243.

²⁷⁷ See extracts from Burke’s writings in O’Brien, *Edmund Burke*, ibid, pp. 252-253.

²⁷⁸ My reading on Robespierre is mostly informed by Ruth Scurr’s recent biography, *Fatal Purity: Robespierre and the French Revolution* (London: Vintage, 2007).

the remainder of his life.²⁷⁹ In this respect, Robespierre would certainly have identified with Rousseau whose personal life was not too dissimilar to his own: both men lost their mothers prematurely from complications following childbirth, and spent their lonely childhoods reading sentimental novels, and philosophical tracts.²⁸⁰ These similarities may have explained the rumour that Robespierre slept with a copy of *The Social Contract* under his pillow.²⁸¹ For Robespierre was passionately opposed to any attempt by the French deputies to divide or alienate the general will, which comprised the totality of the French nation. This would have accounted for the passionate opposition that Robespierre expressed in the National Assembly against a law that sought to divide the French nation into active and passive citizens, and in the process exclude 39 per cent of the male population—the poor, vulnerable, and disadvantaged whom Robespierre was destined to help. Robespierre argued that the legislation, which was eventually passed in 1790, contravened the provisions on equality that had already been articulated in the Declaration on the Rights of Man and Citizen of 1789. If Robespierre had got his way then, he would not only have prevented the passage of such legislation, but he would also have extended the suffrage so that it also included, in addition to poor males; actors, Jews, and West Indians living under colonial rule.²⁸² Indeed, once he was able to, Robespierre successfully argued for a new law abolishing the distinction between active and passive citizens in favour of a universal male franchise, which would have become the most democratic constitution of its time.²⁸³

Although Robespierre was no atheist, he was suspicious of the Catholic clergy, who he thought were behind all counter-revolutionary plots, which undoubtedly contributed to his sense of paranoia. Burke thought likewise. But obviously Burke hoped the Catholic clergy would succeed in suppressing the revolution, whereas Robespierre sought to harness the power of religion to his revolutionary cause, by creating an alternative religious ideology that was independent of the clergy.²⁸⁴ As Alexis de Tocqueville (1805-1859), the son of a French aristocrat,²⁸⁵ explained in his

²⁷⁹ Scurr, *Robespierre and the French Revolution*, *ibid*, p. 23.

²⁸⁰ Scurr, *Robespierre and the French Revolution*, *ibid*, pp. 21-22.

²⁸¹ Scurr, *Robespierre and the French Revolution*, *ibid*, p. 210.

²⁸² Scurr, *Robespierre and the French Revolution*, *ibid*, pp. 107-108. See also, On Voting Rights for Actors and Jews, 23 December 1789, translated and reprinted in Slavoj Žižek (ed.), *Robespierre: Virtue and Terror* (London: Verso, 2007), pp. 3-4.

²⁸³ Scurr, *Robespierre and the French Revolution*, *ibid*, p. 203, and p. 246. However, as soon as the new Constitution came into existence it had to be suspended due to the security situation and the war.

²⁸⁴ Scurr, *Robespierre and the French Revolution*, *ibid*, pp. 163-164. In addition to his new religion of the Supreme Being, Robespierre came up with an entirely new calendar. See Scurr, p. 263.

²⁸⁵ He was the grandson of M. de Melershebes, Louis XIV's chief lawyer.

popular history of the French Revolution, it was opposition to the Catholic Church in France that unified the revolutionaries, not because they were ardent atheists, but because the Church to which their fury was directed was comprised of “landed proprietors, lords of manors, tithe owners”.²⁸⁶ The Church had a leading part in secular affairs and “it occupied the most powerful, most privileged position in the old order that was now to be swept away”. The Church’s vast estates certainly did not endear the clergy to Robespierre or his friend Saint-Just who recognised that the wealth of the nation was to be found in the main in the hands of the enemies of the revolution. This was perhaps why it was under Robespierre that a series of decrees were issued which included a forced loan of a milliard francs on the rich, as well as a demand for fixed prices for corn and flour in a public market, in what amounted to an abolition of the corn trade. All bakers were turned into state employees, and a maximum price was fixed on commodities and wages. A further law put an end to freedom of trade and secrecy of commerce in all commodities except luxury articles.²⁸⁷ It was thought that certain commodities like food concerned the people’s right to preserve their existence; freedom of trade in these commodities would have a detrimental impact on the health of the nation, whereas the hoarding of luxury goods would not affect their livelihoods or means of survival. This is why Robespierre argued that private property was not a natural right, but was a social convention.²⁸⁸

When we consider what the Robespierrists were trying to accomplish, and the means in which they deployed to that end (such as Saint-Just’s injunction to raze to the ground the houses of speculators, and to redistribute 5000 pairs of shoes and 15000 shirts from the rich in Strasbourg for war widows and orphans), we can perhaps understand why men like Burke were worried.²⁸⁹ The execution of Marie Antoinette, who Burke had personally met, and the fact that the proportion of nobles guillotined rose from 6 per cent to 20 per cent during the Terror could hardly have caused him to have second thoughts.²⁹⁰ Indeed the French abolition of feudalism and of nobility occurred whilst Burke, who spent much of his public career as the pensioner or

²⁸⁶ Alexis de Tocqueville, *The Ancien Régime and the French Revolution*, trans. by Stuart Gilbert (Manchester: Fontana, 1976, first published 1856), p. 38.

²⁸⁷ Talmon, *The Origins of Totalitarian Democracy*, supra n. 186, pp. 152-153.

²⁸⁸ Talmon, *The Origins of Totalitarian Democracy*, ibid, p. 156.

²⁸⁹ Talmon, *The Origins of Totalitarian Democracy*, ibid, p. 154.

²⁹⁰ On Burke’s meeting with Marie Antoinette see O’Brien, supra n. 268, pp. 218-222 and p. 264. On the statistics for noble executions see Doyle, *Aristocracy and its Enemies*, supra n 267, p. 292.

placemen of wealth English peers, was writing his *Reflections*.²⁹¹ As Tom Paine noted, there was no fundamental difference between the British social elite and the French nobility; both claimed to be descended from the Normans.²⁹² Nor would Paine have endeared himself to Burke and the other counter-revolutionaries, when he proclaimed: “It is not difficult to perceive, from the enlightened state of mankind, that hereditary Governments are verging to their decline, and that Revolutions on the broad basis of national sovereignty, and Government by representation, are making their way in Europe, it would be an act of wisdom to anticipate their approach, and produce Revolutions by reason and accommodation, rather than commit them to the issue of convulsions”.²⁹³ As Hobsbawm perceptively observed, “every genuine revolution tends to be ecumenical”.²⁹⁴ Thus men like Burke feared that the ideology of the French Revolution could not be contained, which would have a profound impact on events in Poland. For when faced with the prospect of popular sovereignty, the abolition of feudalism, and the removal of inherited privilege gaining currency, the successive partitions of Poland were seen as the lesser of two evils.²⁹⁵ That those who divided Poland were absolute monarchies was significant since they would have of necessity opposed the principle of popular sovereignty, which if put into practice in their own countries, would have divested them of their patronage and power. Whilst Burke had accepted that the first partition of Poland in 1772 was “the first very great breach in the modern political system of Europe”, he was likewise prepared to overlook the second and third partitions of Poland, because he perceived the French Revolution to be a source of greater danger—far more dangerous than the American Revolution had been.²⁹⁶ For, as Gentz had noted, unlike the French Revolution, the American struggle for independence did not affect the European balance of power.²⁹⁷

Nor did the American revolutionaries seek to abolish serfdom or confiscate the properties of the aristocrats since America did not have any aristocrats in the

²⁹¹ As noted by Doyle, *Aristocracy and its Enemies*, *ibid*, p. 281.

²⁹² Doyle, *Aristocracy and its Enemies*, *ibid*, p. 283.

²⁹³ Paine, “Rights of Man”, in *Rights of Man, Common Sense and Other Political Writings*, *supra n.* 242, pp. 196-197.

²⁹⁴ Eric Hobsbawm, *The Age of Revolution: Europe 1789-1848* (London: Phoenix Press, 2000), p. 65.

²⁹⁵ On the abolition of feudalism see Article 1, “The August Decrees”, in John Hardman (ed.), *The French Revolution Sourcebook* (London: Arnold Publishers 1999), p. 111.

²⁹⁶ See “The Annual Register for the Year 1772: The History of Europe, Chap. I” in *The Annual Register, or a View of the History, Politics, and Literature, for the Year 1772* (London: Printed for J. Dodsley, in Pall-Mall, 1773), p. 2.

²⁹⁷ See Friederich von Gentz, *The Origin and Principles of the American Revolution, Compared with the Origins and Principles of the French Revolution*, translated by John Quincy Adams (New York: Scholar’s Facsmiles & Reprints, 1977, first published by A. Dickens, Philadelphia, 1800), p. 59.

European sense.²⁹⁸ Hence it was hardly surprising that Paine's *Common Sense*,²⁹⁹ which he wrote in defence of the American revolution, and which repeatedly railed against the "evils" of monarchy and hereditary rule,³⁰⁰ was promptly described by Gentz, as "a pamphlet just as contemptible, almost throughout just as remote from sound human sense, as all others, by which, in later times, he has made himself a name".³⁰¹ In contrast to the situation in North America, Gentz forcefully argued that the French revolutionaries had no legal pretext "to suspend the constitution, dethrone the King, or to assume to themselves, in the name of the people, the power of calling a National Convention to proclaim the republic, with fewer formalities, than a man would use to change his dress".³⁰² Since Gentz feared that popular sovereignty might prove contagious, he was prepared to overlook the destruction of Poland. As he argued Poland was partitioned in an arrangement sanctified by treaties and enshrined in public law, which in his opinion, was consistent with the balance of power.

Thus, at the heart of the arguments over the partitions of Poland was the dispute over where sovereignty lay. Accordingly, a transformation occurred around the time of the French Revolution and in the following decades, from absolute sovereignty associated with wars of conquest and the balance of power, to the sovereignty of the people associated with popular sovereignty, and wars of "national liberation", as legitimised through the French revolutionary device of the plebiscite. As the nineteenth century progressed the consent of the people who inhabited a particular territorial sphere was repeatedly raised as a necessity to legitimise a claim to territory in international discourse, dispute settlement, and great power negotiation. It was this opposition to conquest that led to the emergence of the plebiscite and consent became necessary to legitimise conquest. This reached its height between 1848 and 1870 when plebiscites were convened under international supervision in Moldavia and

²⁹⁸ Although a number of American revolutionaries did attempt to create a hereditary order in the form of the Society of the Cincinnati, which still exists in some US States today. See Doyle, *Aristocracy and its Enemies*, supra n. 267, pp. 99-118.

²⁹⁹ See *Common Sense; Addressed to the Inhabitants of America* (New Edition, with Appendix, Philadelphia: R. Bell, 14 February 1776) in Mark Philip (ed.) *Thomas Paine, Rights of Man, Common Sense, and Other Political Writings*, supra n. 243.

³⁰⁰ Paine, *Common Sense*, *ibid*, p. 15. ("To the evil of monarchy we have added that of hereditary succession Hereditary right ... is one of those evils, which when once established is not easily removed ...")

³⁰¹ von Gentz, *The Origin and Principles of the American Revolution*, supra n. 297, note at p. 56.

³⁰² von Gentz, *The Origin and Principles of the American Revolution*, *ibid*, p. 41.

Wallachia.³⁰³ The fact that plebiscites were being organised throughout western Europe in nearly all the territories that fell to revolutionary rule from the Batavian Republic to the Helvetic Republic was significant. The principle was never applied to Eastern Europe, and no plebiscites were organised prior to the partitions of Poland or to justify its ex-post-facto dismemberment. For Austria, Prussia, and Russia were still playing by the old rules of diplomacy. Conquest was sufficient to confer title.

The partition treaties of 1792 and 1795 in context

The second and third partitions of Poland were also accomplished by way of treaty, but only Prussia and Russia took part in the second partition, since Austria was distracted by its war with the France, which had begun a year earlier in 1792. With the third partition in 1795, Austria was brought back into the fold, and it signed a single treaty with Prussia and Russia that collectively provided for the “total partition” of the Polish state. As the three partitioning powers explained, they had been “convinced by experience of the absolute inability of the Republic of Poland to provide itself either with a firm and rigorous government or to live peacefully under the law while preserving any form of independence, in their wisdom and love of peace and the happiness of their subjects have decided on the unavoidable necessity of resorting to ... a total partition of this republic between the three neighbouring powers”.³⁰⁴ In contrast to the second partition, the third had come about as a direct result of a republican revolution *within* Poland that had been directly influenced by events in America and France. Since the *Sejm* had been abolished, it could hardly be called to ratify the treaty.³⁰⁵ On 3 January 1795, Coblenz, Osterman, Bezborodko, and Markov met in St Petersburg and signed two declarations that had “the force, value and obligation” of “the most formal and most solemn treaty” and which provided for the third and final partition of Poland.³⁰⁶ Thus, it was arguably through an act of international law that Poland was eliminated from Europe. A secret article concluded

³⁰³ Alfred Cobban, *The Nation State and National Self-Determination* (London: Collins, Fontana, 1969, which is an updated edition of his work *National Self-Determination* first published by Oxford University Press for the Royal Institute of International Affairs, 1945), p. 42.

³⁰⁴ ‘Déclaration concernant le troisième partage de la Pologne’, 23 December 1794, 3 January 1795, preamble, CTS LII, pp. 287-8, quoted in Lukowski, *The Partitions of Poland*, supra n. 216, pp.179-180.

³⁰⁵ Lukowski, *The Partitions of Poland*, ibid, p. 180.

³⁰⁶ ‘Déclaration concernant le troisième partage de la Pologne’, 23 December 1794, CTS LII, pp. 285-97, in Lukowski, *The Partitions of Poland*, ibid, p. 176.

two years after the 1795 partition stipulated that it had been necessary “d’abolir tout ce qui peut rappeler le souvenir de l’existence du Royaume de Pologne”.³⁰⁷

In this connection it was no coincidence that the second partition of Poland coincided with the decision by Britain to join the European coalition against France. This resulted in Britain siding with the kingdoms of Austria and Prussia which had both participated in the first partition of Poland. One of the consequences of this realignment was that Russia, once she had concluded peace with Sweden and Turkey, was in a position to turn her attention west to events in Poland where a new constitution had been proclaimed doing away with the *liberum veto*. With Austria, England, and France at war, Russia had a free hand in Poland as did Prussia after it withdrew from the war with France. Conveniently, both Prussia and Russia cited the fear that French revolutionary ideas might spread to Poland as the pretext for partition. “For Catherine II, ‘the mob of Warsaw’ had ‘outdone all the follies of the Parisian National Assembly’. The new Polish order was insupportable: a potential military threat to Russia and a centre for social revolution, infected with the pernicious maxims of the French”.³⁰⁸ And as soon as Austrian Hapsburgs were distracted by the French revolutionaries who declared war on Austria in 1792, Prussia and Russia pounced on Poland.³⁰⁹ As one scholar remarked, “Russia and Prussia could never have found a situation more extraordinarily favourable than that of 1793 for perpetrating a great act of international rapine without hindrance from the other Powers”.³¹⁰

Thus, Austria was left out of the second partition, which left one-third of the realm independent with the remainder of Poland being partitioned between Prussia and Russia.³¹¹ France had long been a staunch ally of Poland but the distractions of the French revolution upset the balance of power and provided the perfect opportunity for Prussia and Russia to expand into Poland.³¹² Therefore, by joining the coalition, the British Government was seen by many as being largely indifferent to the fate of Poland, although the decision to adopt a position of strict neutrality in the affair did

³⁰⁷ Lutostański, *Les Partages de la Pologne*, supra n. 47, pp. 229-230.

³⁰⁸ Lukowski, *Liberty’s Folly*, supra n. 250, p. 253.

³⁰⁹ See Richard Lodge, “The Extinction of Poland 1788-97”, supra n. 216, p. 531.

³¹⁰ Robert Howard Lord, *The Second Partition of Poland: A Study in Diplomatic History* (New York: AMS Press, 1916, first published in Cambridge, 1915), p. 440.

³¹¹ Geoffrey Brun, “The Balance of Power During the Wars, 1793-1814”, in C.W. Crawley (ed.), Volume IX, *The New Cambridge Modern History* (Cambridge: At the University Press, 1965), pp. 253-4

³¹² Brun, “The Balance of Power During the Wars, 1793-1814”, *ibid*, pp. 251-254.

cause a ruckus in Parliament.³¹³ Fox argued that Britain should not join in the coalition against France because this would involve becoming parties with Austria, Prussia, and Russia, who he thought had disgraced themselves by partitioning Poland, an act which “had violated all the rights of nations, all the principles of justice and of honour”.³¹⁴ Indeed, Fox thought that the partition of Poland was “a greater and more contemptuous violation of the law of nations” than the French revolution had been guilty of.³¹⁵ He explained that it was only after Prussia had been foiled by the French revolutionary armies that the King of Prussia turned on “defenceless Poland” to indemnify himself for his losses. Fox and the New Whigs were appalled at the British Government for its Janus-faced foreign policy when it claimed that it needed to go to war against France to preserve the European balance of power whilst ignoring events which affected central Europe. Charles Grey agreed with Fox and argued that the balance of Europe was as much endangered by the aggression against Poland as by the aggrandizement of France.³¹⁶ He drew a parallel between the Polish attempt to establish a constitutional monarchy and the political system of Britain, and complained that “His Majesty’s ministers, with apparent indifference and unconcern, have seen her become the victim of the most unprovoked and unprincipled invasion; her territory overrun, her free constitution subverted, her national independence annihilated, and the general principles of the security of nations wounded through her side”.³¹⁷ The parallel that Grey drew between Poland’s attempt at constitutional reform and the British political system was particularly significant. Many British MPs would have readily self-identified with Poland because it was a Christian country, because it was in Europe, and also because it shared the “same values”, i.e. Poland had a similar political system to Britain after it had attempted to establish a constitutional monarchy in 1791. Despite a sentimental attraction to the Polish cause amongst the revolutionaries in France, the First Committee of Public Safety under Georges Danton (1759-1794) abandoned the “system of cosmopolitanism idealism, armed propaganda, and universal revolution, by which the Girondists had so aroused

³¹³ See *The Parliamentary History of England, from the Earliest Period to the Year 1803. From which last-mentioned Epoch is continued downwards in the work entitled, “The Parliamentary Debates”, Vol. XXX. Comprising the period from the Thirteenth of December 1792, to the Tenth of March 1794* (London: T.C. Hansard, Peterborough-Court, Fleet-Street, 1817).

³¹⁴ “*The Parliamentary Debates*”, Vol. XXX, *ibid*, cols. 425-6.

³¹⁵ “*The Parliamentary Debates*”, Vol. XXX, *ibid*, col. 430.

³¹⁶ “*The Parliamentary Debates*”, Vol. XXX, *ibid*, col. 440.

³¹⁷ “*The Parliamentary Debates*”, Vol. XXX, *ibid*, col. 456.

the fears of sovereigns and the hopes of peoples, and instead [fell] back on a policy based exclusively upon the practical needs and material interests of France”.³¹⁸

The French Revolution and the constitutional revolution that took place in Poland were inadvertently viewed as being linked, and provided the perfect ruse for the latter’s territorial dismemberment.³¹⁹ Indeed, both Prussia and Russia justified their intervention to put down the Polish “revolution” of 3 May 1791, which they avowedly considered akin to some kind of Jacobin conspiracy. For instance, the preamble to the Polish-Prussian treaty expressly referred to “the illegal revolution of 3 May 1791, the disturbances that have unceasingly torn at its fabric since that fateful time”.³²⁰ The treaty squarely placed the blame for the Prussian intervention and subsequent partition of Poland on the Polish people for “having forced His Majesty the King of Prussia and Her Majesty the Empress of all the Russias to form an entente and seek consultation with neighbouring powers on the means of safeguarding their own states from the imminent danger”.³²¹ The preamble to the Polish-Russian treaty likewise referred to “the revolution which took place on 3 May 1791 in an arbitrary and violent manner, within its former government, and which continued to foment and spread to the point that despite all efforts that Her Majesty the Empress of all the Russias has taken to calm and stifle it, a manifest danger has resulted for the peace and safety of the bordering states”.³²² It was little consolation to the Poles that there was no truth to this since, as soon as Russia acquired its share of Polish territory, it banned French newspapers from being distributed and imposed tight censorship. Newly accredited French diplomats were expelled and a systematic search for “Jacobins” was undertaken.³²³ “None were found”, notes Jerzy Lukowski, “but the notion that the Commonwealth was riddled with the ‘philosophical spirit’ was one which Catherine and the *Targowica* [Polish notables opposed to constitutional reform and loyal to Russia] found convenient to entertain and hard to shake off”.³²⁴

³¹⁸ Lord, *The Second Partition of Poland*, supra n. 310, p. 451.

³¹⁹ Lukowski, *The Partitions of Poland*, supra n. 216, p. 161.

³²⁰ See the preamble to the Treaty between Poland and Russia “celebrated in Grodno on 25 September in the year 1793”, supra n. 219.

³²¹ See the preamble, Treaty between Poland and Russia, *ibid*.

³²² See the preamble to Treaty of Cession and Limits of Poland and Russia Celebrated in Grodno on 11/22 July 1793 (and read at the first assembly and conference with the delegation, on 13 July 1793), *ibid*.

³²³ Lukowski, *Liberty’s Folly*, supra n. 250, pp. 254-255.

³²⁴ Lukowski, *Liberty’s Folly*, *ibid*, p. 255.

One can imagine that if the Polish Revolution of 3 May 1791, a constitutional revolution, which would have kept the Polish monarchy and nobility intact, was considered enough of a pretext for its second partition by Prussia and Russia, then the Polish Republican Revolution in 1794, which sought to abolish the monarchy altogether, would have been viewed as even more abhorrent. Indeed Kosciuszko had travelled to Paris in January 1793 to plead the Polish case, “in which he promised to abolish serfdom, episcopacy, aristocracy, the monarchy, to extend the *szlachta*’s rights and liberties to the rest of the populace, and to deploy the rebuilt Polish army against all three partitioning powers”.³²⁵ Whether or not these demands were realistic, Kosciuszko’s Act of Insurrection of 24 March 1794 is all the more remarkable than the Constitution of 3 May 1791, which was adopted by the *Sejm*, because it was a fusion of Polish peasant religious imagery with the popular revolutionary language of the day. Kosciuszko stood before Krakow’s city square and swore before “God and the innocent Passion of His Son ... not to use the power entrusted to him for any personal oppression, but only ... for the defence of the integrity of the boundaries, the regaining of the independence of the nation and the founding of universal freedom”.³²⁶ Kosciuszko held back from adopting *liberté, égalité, fraternité* as the uprising’s motto and instead proclaimed “Liberty, Integrity, and Independence” as the supreme aims of the insurrection.³²⁷ If the insurrection was a success and Polish freedom was regained, the Act provided that “the nation assembled by its representatives” would “decide its future prosperity”.³²⁸ By combining the “struggle” for the “independence” and “freedom” of the Polish “nation” in defence of its territorial “integrity”, to “decide its future”, Kosciuszko was inadvertently prescribing and prefiguring national self-determination as it would come to be known over a century later. Six weeks after his speech in Krakow, Kosciuszko abolished serfdom in Poland in the hope of creating a mass uprising that further antagonised the *szlachta* (the privileged class in Poland) as well as agrarian Russia in his Proclamation of Połaniec dated 7 May 1794.³²⁹

³²⁵ Lukowski, *The Partitions of Poland*, supra n. 216, p. 164. Lord, *The Second Partition of Poland*, supra n. 310, p. 450.

³²⁶ Quoted in Miecislaus Haiman, “American Influences on Kosciuszko’s Act of Insurrection”, 3 *Polish-American Studies* (1946), p. 1.

³²⁷ Lukowski, *Liberty’s Folly*, supra n. 250, p. 258.

³²⁸ Haiman, “American Influences on Kosciuszko’s Act of Insurrection”, supra n. 326, p. 3.

³²⁹ For the text of the Declaration see James S. Padua, *Thaddeus Kosciuszko: The Purest Son of Liberty* (New York: Hippocrene Books, 1999), p. 307. See also, Lukowski, *The Partitions of Poland*, supra n. 216, p. 167.

Whilst the first partition of Poland left a body politic that still contained the elements essential to continued national life, the second partition marked the death sentence for the Polish state.³³⁰ The third partition effectively sealed the republic's fate. In this connection the signatories to the third partition treaty did not even go through the trouble to provide a pretext for the destruction of Poland by mentioning Kosciuszko's revolt. Instead it was concluded merely so that the partitioning powers could "more fully understand one another" with a view to defining "more precisely the borders that are to separate the respective states of the three Powers neighbouring Poland, following the total partition of the latter".³³¹ As with the other treaties, it was concluded "in the name of the Most Holy and Indivisible Trinity", which as one scholar noted, was an expression that was always used by the powers when they were on the point of committing a peculiarly immoral agreement.³³² The principal beneficiary of the third partition, in terms of territory gained, was Russia with over 46,330 square miles, with an additional 1,200,000 new subjects. This was almost half as much of the combined shares of territory that Austria and Prussia acquired. Austria obtained 18,147 square miles of territory, and Prussia 18,533 square miles. Austria secured 1,500,000 new subjects and Prussia acquired around a million new subjects.³³³

The international reaction to the second and third partitions

The partitions of Poland occurred in a tumultuous phase of European politics when it had become apparent to the great powers that the balance of power could no longer safeguard the security of Europe. This did not, however, mean that the balance of power was not invoked as a justification for the second and third partitions of Poland. It was, but it was contested. For instance, statesmen like Charles James Fox who supported the principles of the French Revolution opposed the partitions of Poland, whereas Burke who opposed that revolution supported the partition of Poland. When we bear in mind that those statesmen and scholars who critiqued "the rapine of Poland" tended to support the French Revolution, and those who supported the partitions of Poland tended to vigorously oppose it, we can deduce that the dispute

³³⁰ Lord, *The Second Partition of Poland*, supra n. 310, p. 484.

³³¹ See the preamble to the Treaty between Austria, Prussia and Russia for the Partition of Poland 1795, in Parry, supra n. 219.

³³² See James Brown Scott, "Poland", 11 *The American Journal of International Law* (1917), p. 140.

³³³ These statistics are all provided in Lukowski, *The Partitions of Poland*, supra n. 216, p. 177.

was essentially over the admissibility of the principle of popular sovereignty. The French and the Polish revolutionaries were asserting that sovereignty was vested continuously in the people whereas for the aristocrats this was a fiction and a threat.

Compared to the first partition of Poland, where the great powers were largely indifferent as to that nation's fate, the second and third partitions were viewed as being more problematic. As Burke had noted with his characteristic use of colourful language, the great powers had viewed the first partition of Poland in 1772, with "as total an indifference and unconcern, as we could read an account of the extermination of one horde of Tartars by another, in the days of Genghis Khan or Tamerlane".³³⁴ In contrast, the second and third partitions were viewed a little differently because they were tied up with events in revolutionary France in which the principle of popular sovereignty had been proclaimed challenging the legal, political, and social fabric of Europe. Burke's position on Poland and on the revolution in France had a great influence over Gentz, who shared his views and who translated many of his works from the English into the German.³³⁵ Gentz had, like Burke, expressed some very strong opinions on the state of Europe and the challenge posed to the balance of power by the partitions of Poland prior to taking up his appointment as official secretary to the Congress of Vienna in 1815.³³⁶ In his *Fragments Upon the Balance of Power in Europe* that was published in 1806, Gentz argued that the shock given to the European political system by the first partition of Poland in 1772 made it all too plain that the balance of power could be invoked for the annihilation of a weaker state that it was avowedly supposed to protect.³³⁷ In other words interventions justified by reference to the balance of power could both justify preserving the peace as well as the territorial aggrandizement by an unscrupulous power. Gentz observed that this "abuse of form" allowed revolutionary France to exploit the balance of power for its territorial ambitions conquering and annexing territories throughout the European continent and then having the gall to justify its crude exploits by referring to the

³³⁴ See "The Annual Register for the Year 1772: The History of Europe, Chap. I" in *The Annual Register, or a View of the History, Politics, and Literature, for the Year 1772* (London: Printed for J. Dodsley, in Pall-Mall, 1773), p. 2.

³³⁵ As noted in Osiander, *The States System of Europe*, supra n. 199, p. 174.

³³⁶ Frederick Gentz, *On the State of Europe before and after the French Revolution: Being an answer to L'Etat de la France à la Fin de l'An VIII*. Translated from the German by John Charles Herries (London: J. Hatchard, 1802), p. 83.

³³⁷ See The Chevalier Fred. Gentz, *Fragments Upon the Balance of Power in Europe*, translated from the German (London: Printed for M. Peltier, 18, Warwick-Street, Golden-Square, 1806).

partitions of Poland.³³⁸ Sir Robert Phillimore, writing several decades later, concurred with this view, recalling that: “The aggressions of Revolutionary France ... were repeatedly justified by reference to the rapine committed by Russia, Austria, and Prussia, upon Poland”.³³⁹ But what upset Gentz in particular was the French Revolution. He would probably not have raised such a fuss if the second and third partitions of Poland had not been linked to events in France where “a horde of jabbering sophists” were striving to undermine every existing constitution.³⁴⁰ It was for this reason that Gentz would justify the partitions of Poland as a lawful measure.³⁴¹

Nine years later Gentz would participate as one of the key players in the Congress of Vienna where Poland’s fate was sealed for 113 years. But even at Vienna there was support for the Polish cause amongst the French negotiators. As Talleyrand warned Metternich, France did not consider the dismemberment of Poland as being consistent with the “principles of political equilibrium”, which would lead to “tranquillity of all”.³⁴² He scolded Metternich, who was blinded by his obsession to preserve the Austro-Hungarian Empire at all costs, by arguing that in order to acknowledge the partition of Poland as legitimate, one would have to recognise:

that peoples have no rights distinct from those of their sovereigns, and can be likened to a small farmer’s cattle; that sovereignty is lost and acquired by the sole fact of conquest; that the nations of Europe are not united among themselves by moral ties other than those which unite them to the South Sea islanders, that they live among themselves subject only to the mere law of nature, and that what is called the public law of Europe does not exist....³⁴³

The American and French revolutions had changed the political dynamic. For the negotiators to fail to recognise this by dismembering Poland as if there had been no revolution verged on the absurd. Whilst it was legitimate to preserve the balance of power, one needed to take in to account the rise of a new national consciousness. In a

³³⁸ Gentz, *Fragments Upon the Balance of Power*, *ibid*, p. 75.

³³⁹ Robert Phillimore, *Commentaries upon International Law* (Philadelphia: T. & J. Johnson, 1854), p. 327.

³⁴⁰ Gentz, *Fragments Upon the Balance of Power*, *supra n.* 337, p. 77-78.

³⁴¹ Gentz, *Fragments*, *ibid*, pp. 80-81.

³⁴² See Charles Maurice de Talleyrand, letter to Metternich, in Moorhead Wright (ed.), *Theory and Practice of the Balance of Power 1486-1914* (London: Rowman and Littlefield, 1975), pp. 98-104, at p. 100.

³⁴³ *Ibid*, p. 102.

word, a man's cottage was his kingdom. And it was no longer appropriate to treat men like cattle. But this was anathema to the negotiators who instead felt compelled to reconstruct the European balance of power at the Congress of Vienna in 1815 in opposition to this new movement for national liberation. The despoilers of Poland reminded Castlereagh, the British Foreign Secretary, who at one point in the negotiations had come out in favour of recreating the Polish Kingdom, that he had supported the suppression of an anti-British rising and the annexation of Ireland in 1801, which had only been granted self-government in 1782. As Andres Osiander observed, the three east European great powers could consider themselves quite safe from any British complaints over their treatment of the Poles, as long as, in order to answer such complaints, it was enough to mention the word "Ireland".³⁴⁴

6. Conclusions

Throughout the nineteenth century the Poles were to follow the advice given to them by Rousseau in his *Considérations*: If you cannot be devoured, then you must make sure that you will not be digested. In 1794, 1806, 1830, 1846, and 1863 the Poles repeatedly rose up in insurrection forcing the great powers to confront the Polish question.³⁴⁵ In the process, the great powers were obliged to recognise the legitimacy of the Polish people's claims to national self-determination. Le Marquis de Noailles spoke for many, when in reaction to the 1863 Polish revolt, he asserted:

The Poles require not a revolution, but a restoration, having on their side justice, patriotism ...On the part of Russia, we see tyranny, violation of the right of nations, and violation of the laws of war. Russian soldiers murder the wounded after battle, pillage alike the cottage and the mansion, and massacre inoffensive persons, while the Government issues the most incendiary proclamations, persecutes the priests, and having thwarted the generous intentions of the nobles as to emancipation, tries to exasperate the peasants against the landowners by a promise of the land...³⁴⁶

³⁴⁴ See Osiander, *The States System of Europe*, supra n. 199, p. 180.

³⁴⁵ See Piotr S. Wandycz, "The Polish Question" in Manfred F. Boemeke, Gerald D. Feldman, and Elisabeth Glaser, (eds.) *The Treaty of Versailles: A Reassessment after 75 Years* (Cambridge: Cambridge University Press, 2006, first published 1998), p. 313.

³⁴⁶ Le Marquis de Noailles, *What is Poland? A Question of Geography, History, and Public Law, Abridged from 'La Pologne et Ses Frontières'* (London: Effingham Wilson, Royal Exchange, 1863, translated by Edward Johnstone), pp. 18-19.

To nineteenth century historians the partition of Poland became an “act of brigandage”, a notorious example of international immorality. Influenced by the liberalism associated with that age, those who supported the Polish cause pressed history to prove that Europe had to erase its “bad conscience” and bring Poland, a Christian and civilised nation, back into the European family.³⁴⁷ Thus, the struggle of the Poles with the Russian Empire became a platform, and a rallying cry, for “the forces of progress”, in opposition to “the Asiatic despotism” of the Russian Tsar:

To partition Poland was to mutilate Europe, as, beyond Germany, all is now subject to the Asiatic despotism of the Czar; and it must be repeated, that, for the interest of Europe, for the interest of the civilised world, in obedience to the call of Justice, and in conformity with the Law of Nations, our only course is to repudiate and to declare null and void the infamous partition, and to aid and support the Poles in restoring to perfect independence, and with her full rights, and to her former extent, the Ancient Kingdom of Poland.³⁴⁸

Many French aristocrats like the Marquis de Noailles could self-identify with Poland because it was a European Christian country that had its sovereignty violated by a “less civilised” and “barbarous” country on the periphery of Europe. And the Americans could self-identify with Poland for the same reason. Thus, in an exchange of letters with John Quincy Adams (1767-1848), Jefferson wrote: “A wound indeed was inflicted on the character of honor in the eighteenth century by the partition of Poland. But this was an atrocity of a barbarous government chiefly, in conjunction with a smaller one still scrambling to become great, while one only of those already great, and having character to lose, descended to the baseness of an accomplice in a crime”.³⁴⁹ This was a sentiment with which the former President did not disagree, writing that there is “no difference of opinion or feeling between us, concerning the partition of Poland”. Nonetheless, whilst the founding fathers of the American Constitution were horrified by what happened to Poland, they were still ideologically closer to Great Britain, and to France, in national sentiment, ideology, and outlook. This was because the American understanding of self-determination was also based on a social contract, which only encompassed a people who appeared alike, were God-

³⁴⁷ See the list of histories cited in Louis L. Gerson, *Woodrow Wilson and the Rebirth of Poland, 1914-1920: A Study in the Influence on American Policy of Minority Groups of Foreign Origin* (New Haven: Yale University Press, 1953), p. 4, note 15.

³⁴⁸ Le Marquis de Noailles, *What is Poland?*, supra n. 346, p. 80.

³⁴⁹ See Piotr S. Wandycz, “The American Revolution and the Partitions of Poland”, in Jaroslaw Pelenski (ed.) *The American and European Revolutions, 1776-1848: Sociopolitical and Ideological Aspects* (Iowa: The University of Iowa Press, 1980), pp. 95-110, at p. 97.

fearing, were wealthy, and who thought in a similar way. Inevitably, this only encompassed a small minority of people, since as explained in Part Two, most people in America in the eighteenth century were women, poor whites, natives, and slaves.

The Marxists, by contrast, looked at the partition of Poland in a different light, and came to radically different conclusions on what it meant, and how the nationality problem was to be resolved.³⁵⁰ “With all its shortcomings”, explained Karl Marx (1818-1883), this constitution [referring the 1791 Polish Constitution] appeared against the background of Russo-Prusso-Austrian barbarity as the only work of freedom which Central Europe has ever produced of its own accord. Moreover, it was created by a privileged class, the gentry. The history of the world knows no other example of such generosity by the gentry”.³⁵¹ For Marx and Engels, the Polish struggle against the Austrians, Prussians, and Russians, was a class struggle; the peasants, the gentry, and the privileged classes had all united in order to oppose the forces of conservatism and Monarchy. This is why Marx supported the secession of Poland from Russia.³⁵² Indeed, a recent study of Marx argued that along with Engels his support for the Polish cause “was one of the greatest political passions of his life”.³⁵³ Marx and Engels support for Poland, like their opposition to Russia, was for much of their generation, a litmus test demarcating the democratic and revolutionary character of the socialist cause from its conservative opponents. This might explain why Poland was the only country explicitly mentioned in *The Communist Manifesto* (1848) whose authors believed and hoped that its revolution would be of an agrarian character.³⁵⁴ Hence, the whole European Left, from nationalists like Mazzini and Michelet to English Chartists, were deeply stirred up by the Manifesto of the Polish Revolutionary Government of 22 February 1846.³⁵⁵ As Marx and Engels explained:

Poland ... is the only European people that has fought and is fighting as the cosmopolitan soldier of the revolution. Poland shed its blood during the American War of Independence; its legions fought under the banner of the first French Republic; by its revolution of 1830 it prevented the invasion of France

³⁵⁰ See G. Starushenko, *The Principle of National Self-Determination in Soviet Foreign Policy* (Moscow: Foreign Language Publishing House, 1962), p. 55.

³⁵¹ Quoted in Davies, *God's Playground*, supra n. 216, p. 403.

³⁵² See Starushenko, *The Principle of National Self-Determination*, supra n. 350, p. 55.

³⁵³ Kevin B. Anderson, *Marx at the Margins: On Nationalism, Ethnicity, and Non-Western Societies* (Chicago: The University of Chicago Press, 2010), p. 56.

³⁵⁴ As noted by E.H. Carr in *The Bolshevik Revolution 1917-1923, Volume One* (London: Macmillan & Co, 1960), p. 414.

³⁵⁵ Andrzej Walicki, *Philosophy and Romantic Nationalism: The Case of Poland* (Notre Dame, Indiana, University of Notre Dame Press, 1994, first published by Oxford University Press, 1982), p. 362.

that had been decided by the partitioners of Poland; in 1846 in Cracow it was the first in Europe to plant the banner of social revolution; in 1848 it played an outstanding part in the revolutionary struggle in Hungary, Germany, and Italy; finally, in 1871 it supplied the Paris Commune with its best generals and most heroic soldiers.³⁵⁶

As an expert on Polish history explained, for Marks and Engels Poland was an Eastern-European counterpart to France. They thought that Poland had to perform the same revolutionary task for the East as France had performed for the West, and therefore, that the revolutionary movements in the West had their natural ally in the Polish national movement. They saw Poland as the main bulwark of civilization among the Slavs and the main carrier of revolutionary ideas east of the Elbe; very often they spoke of Polish “sacrifices” to the cause of revolution in the West, especially of the services rendered by the Poles to different revolutions in France.³⁵⁷ In the aftermath of the First World War, when the balance of power was realigned, and when Lenin and the Bolsheviks seized power, one of their first acts was to grant Poland immediate independence. This suited the policy of Wilson, the US president who had been lobbied by Polish Americans to resurrect Poland, which explains why it is the only country mentioned in his famous fourteen point’s speech.³⁵⁸ Thus, Poland became an independent state in 1918, at the moment when the League of Nations established mandates over the former German and Ottoman colonies, and turned a blind eye to the continued colonisation of territories in Africa, Asia, and the Pacific, with the exception of Ethiopia, a Christian country, Liberia, which had been established as a free state as a refuge for liberated American slaves, and South Africa where the European, civilised, Christian minority, ruled over the majority. In order to understand how this could happen, we must next turn to the age of imperialism.

³⁵⁶ Quoted in Anderson, *Marx at the Margins*, supra n. 353, p. 76.

³⁵⁷ Walicki, *Philosophy and Romantic Nationalism*, supra n. 355, p. 383.

³⁵⁸ See, generally, Gerson, *Woodrow Wilson and the Rebirth of Poland*, supra n. 347.

Part Two

EUROPEAN PUBLIC LAW IN THE AGE OF IMPERIALISM

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States.

Dred Scott v. John F.A. Sandford in Reports of Cases Argued and Adjudged in the Supreme Court of the United States, December Term, 1856, ed. Benjamin C. Howard, Vol. XIX (Washington DC: William Morrison & Co. 1857), p. 393 at p. 408.

Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.

J.S. Mill, On Liberty (London: 1859) reprinted in John Gray (ed.) John Stuart Mill: On Liberty and Other Essays (Oxford: Oxford University Press, 1991), pp. 14-15.

Does the British Empire rest on universal and equal voting rights for all of its inhabitants? It could not survive for a week on this foundation; with their terrible majority, the coloureds would dominate the whites. In spite of that the British Empire is a democracy. The same applies to France and the other powers.

Carl Schmitt, Preface to the Second Edition (1926): On the Contradiction between Parliamentarism and Democracy, in Carl Schmitt, The Crisis of Parliamentary Democracy, translated by Ellen Kennedy (Cambridge: The MIT Press, 1986), p. 10.

Apartheid is not, at root, a colour policy; it is the policy of a total nationalism and the colour bar is far from being the most sinister of its manifestations ... The sting of the colour bar is nationalism, and the strength of nationalism is democracy.

Lord Percy of Newcastle, The Heresy of Democracy: A Study in the History of Government (London: Eyre & Spottiswoode, 1954), pp. 236-237.

In *The Origins of Totalitarianism*, Hannah Arendt described the period of Imperialism as spanning “[t]he three decades from 1884 to 1914” during the scramble for Africa when there was “stagnant quiet in Europe” before the outbreak of the First World War.¹ She was responding to an argument first advanced by Hobson and later refined by Lenin who noted that imperialism coincided with a specific historical period associated with economic development and high finance.² For Hobson, 1870 marked the year that indicated “the beginning of a conscious policy of imperialism”, although “the movement did not attain its full impetus until the middle of the eighties”.³ Similarly, Lenin, reflecting on Hobson’s thesis a decade later, thought that it was the 15-20 years after the Spanish-American War (1898), and the Anglo-Boer War (1899-1902) that the term “imperialism” began to be used in the political literature to define “the present era”.⁴ In contrast, Antony Anghie in his study of Imperialism focused on the years, which spanned from 1870 to 2003, although curiously his first chapter examined the writings of the fifteenth century Spanish jurist Francisco de Vitoria.⁵

In retrospect, the thirty years that Arendt, Hobson, and Lenin alluded to, would more accurately be described as “the high period of imperialism”. As Hobson observed these years could be distinguished from previous eras, by the fact that native lands were not colonised for the purpose of settling white men or their families; that the lands occupied were densely populated by the “lower races”; and that the occupation of these new territories was undertaken by, and in the presence of, *a small minority of white men*, including traders and industrial organisers, who exercised political and economic power over what they termed the “inferior” races.⁶ However, if one accepts that colonialism is inextricably linked to imperialism, and if one is of the view that colonialism is not solely about settling white peoples in distant lands, then one could plausibly argue as Anghie did in his study of Imperialism, and Vitoria,

¹ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich Publishers, 1979, first published in 1951), p. 123.

² J.A. Hobson, *Imperialism: A Study* (London: George Allen & Unwin, 1902). VI Lenin, *Imperialism: The Highest Stage of Capitalism* (London: Pluto Press, 1996, first published 1917).

³ Hobson, *Imperialism*, *ibid*, p. 19.

⁴ Lenin, *Imperialism: The Highest Stage of Capitalism*, *supra* n. 2, p. 9.

⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), pp. 13-31. I say curiously because there is a three hundred year gap between Anghie’s first chapter, which focuses exclusively on Vitoria, and his second chapter, which jumps to what international lawyers wrote about sovereignty in the nineteenth century.

⁶ Hobson, *Imperialism*, *supra* n. 2, p. 27 (emphasis added, for reasons that become clearer later).

that imperialism began with the conquest of the New World in the fifteenth century.⁷ As Edward Said noted, “colonialism is almost always a consequence of imperialism”.⁸ Ultimately the rules that the great powers invoked to preserve the balance of power during the colonisation of the New World were also invoked to colonise other places.

Indeed colonialism was an integral part of the policies adopted by Britain, France, and the other powers during the Age of Imperialism. This often involved the transfer of European populations into non-European territory, where the new arrivals lived as permanent settlers while maintaining political allegiance to their countries of origin.⁹ In contrast to the British method of indirect rule in which autonomy was granted to colonial legislatures, in France there was colonial representation in the metropolitan parliament.¹⁰ Thus no distinctions were made between French settlers and colonial subjects in terms of representation in the French parliament, which was not the case in the British colonies with the sole exception of Ireland where assimilation failed. And one reason why assimilation in Ireland failed was because after the Act of Union between Great Britain and Ireland in 1801, the Irish MPs returned to Parliament in Westminster remained Protestant until the restrictions on Catholic representation were repealed in 1829. Even so, most Irish MPs remained highly unrepresentative of Irish society as they were drawn overwhelmingly from the landed aristocracy.¹¹ This was also, of course, the case on the mainland where the patrician families dominated British politics.¹² In this connection one should not forget that prior to the 1911 reforms, the House of Lords was a more important and

⁷ Anghie, *Imperialism, Sovereignty and the Making of International Law*, supra n. 5, p. 9. Similarly, many of the historical events that Arendt went on to analyze in the subsequent pages related to issues such as the rise of the nation-state, the political emancipation of the bourgeoisie, race-thinking before racism, and race and bureaucracy, which related to ideas and practices that were in gestation long before 1870 or 1884. See Arendt, *The Origins of Totalitarianism*, supra n. 1, pp. 123-221.

⁸ Edward Said, *Culture and Imperialism* (London: Chatto & Windus, 1993), p. 8.

⁹ Hobson, *Imperialism*, supra n. 2, p. 6.

¹⁰ Contrast the way the British Overseas Territories are governed with their own legislatures to the overseas departments (“department d’outre mere”) in France. See Title XII on Territorial Communities in articles 72-3, 73, and 74 of the French constitution available at <<http://www.assemblee-nationale.fr/index.asp>>. For instance, Article 72-3 provides: “La République reconnaît, au sein du peuple français, les populations d’outre-mer, dans un idéal commun de liberté, d’égalité et de fraternité”.

¹¹ “Westminster, Irish representation at” in *The Oxford Companion to Irish History*, which can be accessed at <<<http://www.encyclopedia.com/doc/1O245-WestminsterIrishrprstnt.html>>>

¹² See David Cannadine, *The Decline and Fall of the British Aristocracy* (New York: Vintage, 1999), pp. 206-234 (examining how the ruling English families dominated the British cabinet in the imperial age). See also, Appendix B, “Patrician Members of British Cabinets, 1880-1980”, at pp. 711-712.

constitutionally powerful institution than the House of Commons.¹³ In other words, inequality was a principal feature of British imperialism both at home and abroad.

As Arendt observed, it was not by chance that there was “stagnant quiet in Europe” during the scramble for Africa, since there the balance of power was maintained, whilst Africa was effectively a free-for-all. This is because one of the original purposes behind the idea of maintaining the balance of power in Europe was to prevent conflict between the European powers during their discovery of the New World. Thus, after 1492, the Pope divided the earth into lines in which he drew a distinction between Christian and non-Christian territories. The former was considered “vacant land” or “terra nullius” and open to colonisation, whilst the latter was considered occupied and therefore unavailable for colonisation.¹⁴ In order to avoid conflict between the Catholic kingdoms of Portugal and Spain an agreement was reached and concluded two years later in the Treaty of Tordesillas (1494) whereby a line was drawn from the Arctic to the Antarctic poles separating Portugal’s possessions in the Cape Verde Islands and on the western coast of Africa from Spain’s possessions in the Indies.¹⁵ The aim of this treaty, as well as with subsequent treaties of this kind, was to avoid the outbreak of a general war in Europe. For instance, as late as 1559, France and Spain would reach an agreement at the Peace of Cateau-Cambrésis in France, whereby armed conflicts in the New World were allowed to continue on the understanding that they were not to disturb the peace of Europe.¹⁶

With the aim of preventing the emergence of a hegemonic power on the European continent, the balance of power was supposed to provide for the peace of Europe, whilst enabling a state of war to continue overseas.¹⁷ With the expansion of

¹³ After the 1911 reforms the Lords could only delay public Bills for two parliamentary sessions. After 1949 reforms the Lords could only delay reforms for one parliamentary session. See Ian Loveland, *Constitutional Law: A Critical Introduction* (London: Butterworths, 1996), pp. 196-197.

¹⁴ See *The Bull Inter Caetera* (Alexander VI.) May 3, 1493 in Frances Gardiner Davenport (ed.), *European Treaties bearing on the History of the United States and its Dependencies*, Vol. I (Washington DC: Carnegie Institute of Washington 1917), pp. 56-63.

¹⁵ See Treaty between Spain and Portugal concluded at Tordesillas, June 7, 1494 in Davenport (ed.), *European Treaties bearing on the History of the United States*, *ibid*, p. 84.

¹⁶ Hedley Bull, “The Revolt Against the West”, in Hedley Bull and Adam Watson (eds.) *The Expansion of International Society* (Oxford: Clarendon Press, 1984), p. 227.

¹⁷ Neither the papal arbitration nor the Treaty of Tordesillas was intended to be binding on the other great maritime powers, and both were in fact repudiated. Cabot’s voyage to North America in 1497 was England’s immediate reply to the partition. France, Holland, and Denmark rejected it as well. In 1580, the English government countered with the principle of effective occupation as a determinate of sovereignty. See Eric Williams, *Capitalism and Slavery* (Chapel Hill: The University of North Carolina Press, 1994, first published in 1944), pp. 3-4.

colonialism and great power contests overseas it would continue to apply but only in relations between great powers when it came to acquiring and colonising non-European territory.¹⁸ In other words, it was an all-white affair. The same rules that applied between European sovereigns did not equally apply between European sovereigns and non-European sovereigns. This was because non-European territory did not have the same quality as European territory because it was uncultivated. Accordingly, “vacant spaces” could be colonized by those who could use them productively. In the high period of imperialism, the balance of power was once again invoked to secure the peace of Europe to provide some semblance of order between the great European powers during their colonisation of Africa. In this respect, one can draw a parallel between the Treaty of Tordesillas, the Peace of Cateau-Cambrésis and the 1884-5 Berlin (West Africa) Conference during which the colonial powers sought to fix approximate borders in Africa in advance of occupying them in order to reduce the potential for conflict so as to secure a balance of power between them.¹⁹

It was often the case that the settlers who colonised the New World attempted to recreate the world they knew from home. Hence, Amsterdam became New Amsterdam; England became New England; York become New York, etc. In Bermuda, which is Britain’s oldest colony, and which remains an “overseas territory” today, the island was divided into parishes with very English names like Devonshire, Hamilton, Paget, and Southampton. It was as though the indigenous population in the US or the Africans brought across the Atlantic as slaves did not exist in the sense of forming political societies. This would explain why the natives in America, Canada, and Australia, and the descendents of slaves and “free men” in America, and Bermuda, were not granted political rights equal to that of whites, even after “emancipation”. Rather, segregation became a hallmark of policy in the US and Bermuda until the second half of the twentieth century.²⁰ It was assumed by most Europeans that only those societies which had collectively coalesced to form a nation in the European mould had the capacity to reason and to be bearers of sovereignty. Consequently,

¹⁸ See Schmitt’s examination of the Amity Lines, which separated the sphere where European Public Law applied, and the “New World” where it did not apply. See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003), pp. 92-99.

¹⁹ See Jörg Fisch, “Africa as *terra nullius*: The Berlin Conference and International Law”, in Stig Förster, Wolfgang J. Mommsen, and Ronald Robinson (eds.), *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (The German Historical Institute, London, published in Oxford: Oxford University Press, 1988), pp. 348-349 and pp. 353-354.

²⁰ Universal suffrage was not implemented in Bermuda until 1968.

only they had a right to have their political independence and territorial integrity respected. This is why the partitions of Poland provoked uproar in the eighteenth and nineteenth centuries whereas the partition of Africa hardly provoked a murmur of discontent within European society at the time of its conquest and colonisation.²¹

In the imperial age, as Martti Koskenniemi observed: “Europeans still acted from a position of superiority towards others: capitulation regimes, consular jurisdiction, and brutal colonial wars had become banal aspects of the international everyday”.²² Accordingly, one would be hard pressed to find an international lawyer writing in the high period of imperialism who recognised that native political society was entitled to equal civil and political rights on par with Europeans.²³ This is especially when we remember that such rights did not exist within the societies they belonged to. Thus, in the United Kingdom most Britons “generally conceived of themselves as belonging to an unequal society”. And it was in the light of this inequality that they “contemplated and tried to comprehend the distant realms and diverse society of their empire”.²⁴ In trying to comprehend these differences some British statesmen like A.J. Balfour (1848-1930) espoused eugenics.²⁵ Thus, Balfour, who knew Darwin from his days at Cambridge, and was familiar “with much of the contemporary intellectual agonizing over risen apes and fallen angels”, espoused all the peculiar racial theories that were common in his day.²⁶ He explicitly rejected the idea that “all men are created equal” as enshrined in the American Declaration of Independence (1776) as an eighteenth century anachronism as did many other men of his time. In his view, only Europeans were created equal. Even in France, which had avowedly abolished the privileges of the ancien régime, Victor Hugo would still lament that those who favoured the abolition of the death penalty, favoured abolishing it only for the upper classes and the deputies who might become ministers: *They had a*

²¹ This is not to suggest there was not opposition from the Africans at the time of colonization and partition or that opposition was vociferously expressed in later years.

²² See the second chapter (“Sovereignty: a gift of civilization: international lawyers and imperialism 1870-1914) in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), p. 98.

²³ See Anghie, *Imperialism, Sovereignty and the Making of International Law*, supra n. 5, pp. 52-65.

²⁴ See David Cannadine, *Ornamentalism: How the British Saw Their Empire* (London: Allen Lane, 2001), p. 4.

²⁵ Balfour was an honorary vice president of the British Eugenics Education Society.

²⁶ See Jason Tomes, *Balfour and Foreign Policy: The International Thought of a Conservative Statesman* (Cambridge: Cambridge University Press, 1997), p. 22.

right to life, but not “the deprived children of a cruel mother society whom the workhouse takes at twelve, the penal colony at eighteen, [and] the scaffold at forty”.²⁷

These inherent inequalities might explain why jurists like James Lorimer (1818-1890), the son of the factor of the earl of Kinnoull, that is, a Scottish aristocrat, was steadfastly opposed to granting equal civil and political rights to non-Europeans let alone to the “uneducated urchins” within Victorian Britain. Instead Lorimer favoured a weighted voting system that took into account a man’s social status.²⁸ Bearing in mind Lorimer’s opposition to extending universal manhood suffrage in his own country, it was not surprising that he opposed it in the colonies. In an article Lorimer wrote for *The North British Review* reviewing J.S. Mill’s *Considerations on Representative Government*²⁹ in 1861, the Scotsman had occasion to expand upon his opposition to universal suffrage.³⁰ At that time the case for extending the franchise in Britain was gaining currency, and in many parts of the country tenants were turning against their landlords.³¹ This provided Lorimer a cause for consternation.³² For Lorimer a numerical democracy spelt disaster especially if the vote was universal and equal because then government would be comprised of “the lowest class”.³³ Instead Lorimer thought that equality was relative, not absolute. In a word, “all men are not and never can be equal”.³⁴ This was why he favoured complex voting systems in which individuals would have votes linked to various qualifications. This might explain why after the franchise was widened at the domestic level in the United Kingdom, bills introducing compulsory education were passed by Parliament.³⁵ This was because, according to Mill, only the literate, those who could perform the

²⁷ See the preface Victor Hugo wrote to the 1832 edition of *The Last Day of a Condemned Man* (Richmond: Oneworld Classics, 2009, first published 1829, translated by Christopher Moncrieff), p. 9.

²⁸ See James Lorimer, *Political Progress Not Necessarily Democratic: Or Relative Equality the True Foundation of Liberty* (London: Williams and Norgate, 1857).

²⁹ This is reprinted in John Gray (ed.) John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1998), p. 203.

³⁰ See *The North British Review*, No. LXX, November 1861, pp. 534-563.

³¹ See Cannadine, *The Decline and Fall of the British Aristocracy*, supra n. 12, p. 36.

³² *The North British Review*, supra n. 30, pp. 538-539.

³³ *The North British Review*, ibid, p. 551.

³⁴ He added, “the doctrine of absolute equality is a French and American [doctrine], but it was never an English doctrine”. See *The North British Review*, ibid, pp. 562-563.

³⁵ It was not until the passage of The Elementary Education Acts of 1870 and 1880 that it became compulsory for children aged between 5 and 10 to attend school in England and Wales.

common operations of arithmetic, who had some knowledge of geography, politics, and history, and who paid their taxes, should be accorded the right to vote.³⁶

In the high period of imperialism international lawyers were virtually universal in viewing non-European societies as being backward. Accordingly, consent was not viewed as a necessary prerequisite to acquire legal title to the lands and resources of non-European societies because they were considered as being little better than “savages” or “brutes” who were in a perpetual state of “non-age”. These descriptive labels, which were employed almost exclusively by international lawyers to describe non-European societies in a “lower stage of civilisation”, were strikingly similar to the qualities—insanity, imbecility, non-age—that Lorimer claimed would rule out an entire class of people from the franchise in Britain. It was feared that if the franchise were extended to cover these categories of peoples it would have a detrimental impact on the safety and wellbeing of other members of society.³⁷ Effectively native society was being compared to those categories of peoples who were not accorded the right to vote in Britain. Accordingly, they had to be taught to acquire the attributes that those who ruled the British Empire believed were necessary to maintain their political independence. Absent European tutelage, most Europeans thought that the natives in their colonies could not claim to be bearers of sovereignty because it was assumed that if they attained independence prematurely they would become a threat to themselves and a source of insecurity to their neighbours. Thus Lorimer was drawing a parallel between the deeply divided society that he was familiar with at home, and the alien societies of the British Empire that he tried to comprehend from distant shores.³⁸

This might also explain why John Stuart Mill (1806-1873), who worked for many years at the East India Company, was also explicit in espousing the right of “a higher culture” to rule over “a lower one”. As Mill explained: “subjection to a foreign government...notwithstanding its inevitable evils, is often of the greatest advantage to a people, carrying them rapidly through several stages of progress, and clearing away obstacles to improvement which might have lasted indefinitely if the subject

³⁶ See “Considerations on Representative Government”, first published in 1851, in John Gray (ed.) John Stuart Mill, *On Liberty and Other Essays*, supra n. 29, p. 203 at pp. 330-331.

³⁷ See Lorimer in *The North British Review*, supra n. 30, p. 552.

³⁸ Lorimer never travelled to the Orient although as a young man he had intended to pursue a career in India. See John W. Cairns, “Lorimer, James (1818-1890)”, *Oxford Dictionary of National Biography*, Oxford University Press, 2004, online edition. << <http://www.oxforddnb.com/>>>

population had been left unassisted to its native tendencies and changes”.³⁹ This was a theory of economic, political, and social development that bore all the attributes of imperialism, and which would later be expressed and codified in the form of mandates and trusteeships. In a similar vein, Mill would also advocate support for minority rule in those British colonies comprised of plural societies if the minority was of a higher civilisation than the majority. This would be the case where, for instance, “a small but leading portion of the population, from difference of race, more civilized origin, are markedly superior in civilization and general character than the remainder”. In such a situation, “government by the representatives of the mass would stand a chance of depriving them of much of the benefit they might derive from the greater civilization of superior ranks”. Thus, Mill advocated installing sovereign authority “in the chief ruler of the dominant class”. It was assumed that “[h]e alone has by his position an interest in raising and improving the mass, of whom he is not jealous, as a counterpoise to his associates, of whom he is”.⁴⁰ It was in this theory of development and in according authority to a minority, which ensured that power remained in the hands of the few, rather than in the many, in which the seeds of partition were sown.

³⁹ See J.S. Mill, “Considerations on Representative Government” in Mill, *On Liberty and Other Essays*, supra n. 29, p. 264.

⁴⁰ See J.S. Mill, “Considerations on Representative Government” in Mill, *On Liberty and Other Essays*, ibid, p. 265.

III. Colonialism, Liberalism, Nationalism: Minority Rule and Self-Government

1. Introduction

At the end of the First World War, President Woodrow Wilson championed the principle of self-determination, which he articulated in opposition to the conflicts and territorial arrangements, which in days gone by had been justified as being necessary to preserve the balance of power. This was given immemorial expression in a speech to a joint session of Congress, when Wilson cautioned that, "...peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited of the balance of power".⁴¹ Instead, "every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned".⁴² Given that Wilson uttered these words in reply to the addresses he received from the governments of the Austro-Hungarian and German Empires, one can surmise that he was thinking of Europeans rather than Africans and Asians, whose territories had been partitioned and plundered. In Wilson's eyes and in the eyes of many of his contemporaries the inhabitants of these continents did not form separate nationalities entitled to national self-determination. Rather, they formed the "subject races" that were destined to be tutored by the victors of the First World War until they were deemed to have reached a stage of development when they could attain independence at an unspecified future date in the League of Nations mandate arrangements.⁴³

When Wilson gave this address to Congress he was speaking after he had articulated his Fourteen Points.⁴⁴ Poland was explicitly mentioned in those points: "An independent Polish state should be erected ... whose political and economic independence and territorial integrity should be guaranteed by international covenant".⁴⁵ The Poland that had been partitioned thrice in the eighteenth century and

⁴¹ See "Reply to the Addresses of the Imperial German Chancellor, and the Imperial and Royal Austro-Hungarian Minister for Foreign Affairs, Address Delivered at a Joint Session of the Two Houses of Congress, February 11, 1918", in James Brown Scott (ed.), *President Wilson's Foreign Policy: Messages, Addresses, Papers* (New York: Oxford University Press, 1918), pp. 364-373 at p. 371.

⁴² Scott (ed.), *President Wilson's Foreign Policy*, *ibid* (emphasis added), p. 372.

⁴³ This is why Wilson only spoke of nationalities when he reflected on the European situation. See Scott (ed.), *President Wilson's Foreign Policy*, *ibid* (emphasis added), p. 372.

⁴⁴ See "Address on the Condition of Peace Delivered at a Joint Session of the Two Houses of Congress, January 8, 1918", in Scott (ed.), *President Wilson's Foreign Policy*, *ibid*, pp. 354-363.

⁴⁵ Scott (ed.), *President Wilson's Foreign Policy*, *ibid*, p. 362.

that had revolted several times in the nineteenth century had been a Christian kingdom and thus its soil had a different “quality” to that of Africa and Asia. At the moment that Poland was “resurrected”, the former Ottoman provinces in the Middle East were parcelled out between the victors as though it amounted to a vast empty space in a similar manner to the way Africa had been partitioned in the late nineteenth century. This was because when Wilson thought of nations and national self-determination he thought of Europeans whose religion was Christian and whose skin tone was white—just like the Poles. He did not think that dark skinned people were entitled to the same civil and political rights as Europeans. This might explain why in *A History of the American People* (1902) Wilson made it clear he was steadfastly opposed to extending the franchise to “the negro” in the south and expressed alarming admiration for the Ku Klux Klan, whom he glowingly described as that “Invisible Empire of the South”.⁴⁶

Wilson’s racism might also explain why he recoiled in horror when the Japanese delegation to the Paris Peace Conference in 1919 proposed to enshrine the principle that “the equality of nations” is “a basic principle of the League of Nations”, in which “all alien nationals” should be ensured “equal and just treatment” and that “no distinction either in law or fact” could be made “on account of their race or nationality”.⁴⁷ Ignoring a majority vote at the session where the provision was approved, Wilson ensured that the draft never made it into the final text of the League Covenant, to the consternation of the French legal expert.⁴⁸ Lord Balfour, supporting the minority, concurred with Wilson’s opposition to the equality provision, and promptly informed Colonel House, Wilson’s chief foreign policy adviser, that “the proposition taken from the [American] Declaration of Independence, that all men are created equal ... was an eighteenth century proposition which he did not believe was true ... it was true in a certain sense that all men of a particular nation were created equal, but not that a man in Central Africa was created equal to a European”.⁴⁹ As argued in the following pages, the system devised by the League of Nations was

⁴⁶ Woodrow Wilson, *A History of the American People*, Vol. V, (New York: Harper & Brothers, 1903), pp. 58-64 at p. 60.

⁴⁷ The text is reproduced in *The Colonial Problem: A Report by a Study Group of Members of the Royal Institute of International Affairs* (London: Oxford University Press, 1937), p. 59.

⁴⁸ For the full story, see Paul Gordon Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Boulder: Westview Press, 1996), pp. 82-107 at pp. 99-100 (describing the vote). The vote was eleven out of 17 in favour of the proposal on racial equality. Those in favour were Japan (2), France (2), Italy (2), China, Brazil, Greece, Yugoslavia, and Czechoslovakia.

⁴⁹ Lauren, *Power and Prejudice*, *ibid*, p. 91.

constructed to deny equality to those territories populated by non-European peoples, unless that is, part of the territory was governed by a European minority, in which case the idea of partition would be promoted to preserve their way of life.⁵⁰

Wilson's support for self-determination was prompted in reaction to the Bolshevik Revolution in 1917 and V.I. Lenin's (1870-1924) forceful promotion of the idea in his speeches and writings. In contrast to Wilson, the Communists did not seek to restrict its application to the so-called "civilised" peoples of Poland nor even to those nations that sought to secede from the Russian Empire. This is not to suggest that Lenin and Stalin were unaffected by the racial assumptions of their day.⁵¹ They were, and they thought the Poles, as Europeans were more "civilised" than non-Europeans.⁵² The distinction was that they did not think that differences in economic, social, or political development should stand in the way of a nation's claim to independence.⁵³ Thus, in addition to being opposed to tutelage "from above", the Communists supported the right of secession, and regional autonomy for minorities.⁵⁴ In a word, Wilson's liberal understanding of self-determination was much more conservative than Lenin's. His liberal conception of democracy could not accommodate minorities in the polity, which is why African Americans were subjected to segregation. In Wilson's view, only a community, which had acquired the attributes to govern themselves independently, were entitled to have its demand for self-determination recognised. As explained in Part Three, it was the Communist /

⁵⁰ The starkest examples of these are highlighted in Part Three.

⁵¹ I am not suggesting that Marx, Lenin, or Stalin were racist. But the discourse that was used by Lenin and Stalin, and even Marx, in his writings prior to the 1857 Indian Mutiny, did make cultural assumptions about foreign peoples, such as the "Asiatics", which was the norm in their day. As Jani observed: "Marx's critique of British colonialism and the defense of Indian resistance in the post-Revolt articles is so powerful that some Marxists have mistakenly drawn a straight line from these articles to Lenin's "national self-determination" theses of the 1910s to the general Left support for decolonization after World War II". Jani later added, "Lenin and later Marxists thus provided a stronger theoretical footing to the economic and political conclusions on colonialism developed *unevenly* by Marx". See Pranav Jani, "Karl Marx, Eurocentrism, and the 1857 Revolt in British India", in Crystal Bartolovich and Neil Lazarus (eds.), *Marxism, Modernity, and Postcolonial Studies* (Cambridge: Cambridge University Press, 2002), pp. 81-97, at pp. 92-93 and at pp. 95-96.

⁵² See, for instance, the language used by Stalin towards the Tartars ("their schools controlled by omnipotent Mullahs, and their culture permeated by the religious spirit") in *Marxism and the National and Colonial Question* (University of the Press of the Pacific Honolulu, Hawaii, 2003, reprinted from the 1935 edition).

⁵³ This would explain why, in addition to his support for the Indian struggle against Britain, which he articulated after the 1857 mutiny, Marx was also an early supporter of the Irish and Polish movements for self-determination. See August Nimtz, "The Eurocentric Marx and Engels and other related myths", in Bartolovich and Lazarus (eds.), *Marxism, Modernity, and Postcolonial Studies*, *ibid*, pp. 65-80.

⁵⁴ I say more about this in Part Three. See Alfred Cobban, *The Nation State and National Self-Determination* (London: Collins, 1969), p. 194.

non-aligned understanding of self-determination that briefly won the day during decolonization. With the emergence of the “Third World” during the Cold War, equality became a principle of paramount importance, whereas in the eyes of the Western powers non-Europeans needed tutelage because they were “not yet able to stand by themselves under the strenuous conditions of the modern world”.⁵⁵

The ideology that underpinned the Western liberal understanding of self-determination was representative government. But this form of government, despite its name, was never truly representative. Rather, representative government grew out of the Protestant-Catholic divide and the Reformation in Europe first finding expression in Britain, whose parliament was almost universally lauded by the scholars of the Enlightenment, before finding expression elsewhere, most notably in the United States. Yet nineteenth century Britain was comprised of a society that was wrought with class conflict and divided by religion. The aristocracy, which had ruled Britain since the Norman Conquest, opposed any reform of the franchise since they were aware that paralleling these efforts was the emergence of socialism through which the working classes demanded a fair distribution of property and reform of Britain’s antiquated land laws.⁵⁶ Thus, the principle of self-determination appeared on the international stage at a moment of momentous upheaval with unrest between landlords and tenants sweeping throughout Europe, which climaxed in Russia with the 1917 Bolshevik Revolution, which wiped away the old aristocratic order there.⁵⁷ Although after the end of the First World War, Britain extended its franchise, the men who ruled the Empire were not keen on extending these rights to its colonial subjects. The British government only reluctantly conceded self-governing status to its colonies, declaring in 1917 that its aim in India was the gradual development of self-governing institutions under the aegis of the Crown. Even so, this did not prevent Britain from

⁵⁵ See Art. 22, League of Nations Covenant.

⁵⁶ According to an 1861 study on land ownership, approximately one-quarter of the land of England and Wales was owned by just 710 individuals, and nearly three-quarters of the entire British Isles was in the hands of less than five thousand people. See Cannadine, *The Decline and Fall of the British Aristocracy*, supra n. 12, p. 55. See also, the statistics that Cannadine provides for land held in estates of 1000+ acres in 1880 at p. 9. According to the figures provided by Cannadine, based on a contemporary study, approx. 93 per cent of the total land area in Scotland was held in the form of Estates of 1000+ acres. The figure for England was 56 per cent, for Wales 61 per cent, and for Ireland 78 per cent.

⁵⁷ As Balfour intimated when he was Foreign Secretary in 1918: “Russia is in a condition of septic dissolution”, Hungary, Austria, and even Germany were also suffering from the same Bolshevik infection, and there were some “who feared that we shall not wholly escape”. See Kenneth Young, *Arthur James Balfour: The happy life of the Politician, Prime Minister, Statesman and Philosopher-1848–1930* (London: G. Bell and Sons, 1963), p. 405.

replicating its class system in the Princely states in India and in the Gulf before adapting it to the international system in the form of A-, B-, and C-*class* mandates.⁵⁸

In this connection it was not by accident that many of the British statesmen who called for the creation of a League of Nations, who formulated imperial policy, and who administered the various colonies, tended to hail from the upper classes. Most of them were already nobles, earls, peers, dukes, and lords before they entered government or were appointed to govern distant colonies.⁵⁹ Many were related to royalty, like the Cecils, who produced several Prime Ministers, including Lord Balfour, who features prominently in the following pages, and whose uncle Lord Salisbury, was thrice Prime Minister. Salisbury's cabinets remained so full of his relatives that Lord Rosebery felt compelled to congratulate him on being the "head of a family with the most remarkable genius for administration that has ever been known".⁶⁰ British imperial families like the Cecils and Salisburys who made their money from land and from India had vested interests in opposing socialism and preserving empire. Whilst they were powerless to prevent these changes emerging at home after the 1911 reforms, they were still able to thwart them overseas where the aristocracy still dominated the Foreign Service until after the Second World War.⁶¹ Thus they opposed granting India independence and succeeded in thwarting several attempts to concede Home Rule to Ireland. Undoubtedly their Victorian education and austere religious upbringing inculcated in them a particular imperial outlook that affected the formulation of imperial policy. As explained in Part Three, this imperial outlook would contribute to the partitions of Ireland, Palestine, and India. Hence it is necessary to revisit their approach to nationalism and self-government for the so-called "subject races" as it proved to be pivotal to later instances of partition.

In the remainder of this chapter, the manner in which colonialism, liberalism, and nationalism came together at the height of British imperialism and contributed to

⁵⁸ See Cannadine, *Ornamentalism*, supra n. 24, pp. 41-57 (on India) pp. 71-82 (on the mandates). I think it is striking the word "class" is actually used to describe peoples in the "lower" human chain of evolution—something that I don't think many international lawyers have picked up on.

⁵⁹ See Appendix C, in Cannadine, *The Decline and Fall of the British Aristocracy*, supra n. 12, p. 712.

⁶⁰ Cannadine, *The Decline and Fall of the British Aristocracy*, ibid, p. 206.

⁶¹ Before the First World War recruitment to the Foreign Office was restricted to the highest social classes. No one could sit the exam for the diplomatic service without a certificate from the Secretary of State saying that the candidate was known to him personally, or had been recommended by someone whose judgement he trusted. Entry to the diplomatic service was also restricted to those with an income (independent of that earned whilst working for the Foreign Service) to the tune of at least £400 a year. See Cannadine, *The Decline and Fall of the British Aristocracy*, ibid, p. 281.

the partitions of Ireland, India, Palestine, and the attempts to partition Southern Africa, is explored. Colonialism was the method that encouraged the planting of settlements in overseas territories for “low class undesirables” to populate in order to alleviate overcrowding in the metropolis. Liberalism, although it was associated with individual rights, freedom of opinion, religion, and trade, as well as opposition to monarchical power, was at the same time intolerant of cultures, which lacked these traditions. So cultures that championed group identity over individual identity, that were paternalistic, that were superstitious, which did not believe in monotheism, that were poor and illiterate, and that proved to be resistant to political invasion, missionary evangelism, and economic penetration, were viewed as backward and illiberal by British standards—especially if they were not capable of providing security for persons and property, in terms identical to what Westerners could expect in their own countries.⁶² Accordingly, such communities were not entitled to the range of benefits accorded to those cultures and peoples who were more disposed to liberal values. Nationalism whilst often touted as a cohesive and collective force was also a force for division and exclusion. The British experience of nationalism and the struggle between Catholics and Protestants greatly affected its approach to the question of nationality, which in turn was also influenced by class prejudice. This explains why in the colonies British statesmen deemed the lower classes incapable of self-government, even if they formed a numerical majority of the population, in favour of vesting political power in the higher classes, even if they were in a minority.

2. Creating the colony: excluding the “uncivilised”

Writing in his *Essays* sometime in the sixteenth century, Sir Francis Bacon (1561-1626) lamented that the peoples sent to populate the colonies, or “the plantations” as he liked to call them, tended to emanate from the lower classes. He thought this most unfortunate since they would cause all sorts of mischief to the colony:

It is a shameful and unblest thing to take the scum of the people, and wicked condemned men, to be the people with whom you plant; and not only so, but it spoileth the plantation; for they will ever live like rogues, and not fall to work,

⁶² Accordingly, they could expect to be incorporated into the territory of a Western state. See Anthony Carty, *Philosophy of International Law* (Edinburgh: Edinburgh University Press, 2007), p. 85.

but be lazy, and do mischief, and spend victuals, and be quickly weary, and then certify over to their country to the discredit of the plantation.⁶³

Rather than convicts and criminals, Bacon thought that instead “the people wherewith you plant ought to be gardeners, ploughmen, labourers, smiths, carpenters, joiners, fishermen, fowlers, with some few apothecaries, surgeons, cooks, and bakers”.⁶⁴ Alas, Bacon’s advice was not heeded, and the editor of *Bacon’s Essays* that was assembled and published two-and-a-half centuries after Bacon’s death, likewise lamented that the English government, by establishing penal colonies in various part of the world, such as in Australia, had in so doing, “begun an impudent nation”.⁶⁵ As the editor observed, whilst the land was certainly planted, it was “planted with the worst of weeds”.⁶⁶

One of the great ironies of history is that it was “the worst of weeds” that during the height of British imperialism in the late nineteenth century would be accorded the right of self-government in the colonies to lord over the natives who were cast out of civil society.⁶⁷ Thus in the emerging nations within the colonies, Africans, Jews, Indians, Irish, “Orientals”, and anyone who basically did not acquire the cultural attributes associated with the Anglo-Saxon Protestant settler communities that established themselves in the colonies were excluded or driven out of political society.⁶⁸ In other words, they were not considered to form a part of the nation, which being based on a social contract meant that it was restricted to the upper classes, in

⁶³ See Francis Bacon, “Essay XXXIII. Of Plantations” in Richard Whately (ed.), *Bacon’s Essays* (London: John W. Parker and Son, West Strand, 1860), p. 374.

⁶⁴ Francis Bacon, “Essay XXXIII Of Plantations”, *ibid*, p. 374.

⁶⁵ Quoting the language of Shakespeare, see “Annotations”, in Whately (ed.), *Bacon’s Essays*, *ibid*, p. 378.

⁶⁶ The British practice of “transporting” people to distant colonies began during Elizabethan times, and was given fresh impetus during the Civil Wars when Oliver Cromwell ordered his defeated enemies to be shipped to North America. James II sent the survivors of Monmouth’s Rebellion of 1685 to Virginia, where they worked alongside the existing black slave population. A law of 1718 permitted convicted thieves and vagabonds to be transported to North America. It was not until the 1783 Treaty of Paris, which brought the American War of Independence to an end, that transportation would no longer be permitted in North America. Instead, Britain sent undesirables to Australia, Penang in Malaya, Singapore, and the Seychelles. In 1787, 400 impoverished “free” blacks from London and sixty white prostitutes were sent on the British warship, the HMS *Nautilus* to Sierre Leone. See Richard Gott, *Britain’s Empire: Resistance, Repression, and Revolt* (London: Verso, 2011), pp. 81-94.

⁶⁷ For a Marxist perspective, see V.G. Kiernan, *The Lords of Human Kind: Black Man, Yellow Man, and White Man in an Age of Empire* (New York: Columbia University Press, 1981).

⁶⁸ Jack P. Greene, “Empire and Liberty” in Jack P. Greene (ed.) *Exclusionary Empire: English Liberty Overseas* (Cambridge: Cambridge University Press, 2010), pp. 1-24, at p. 22.

other words, to white men of property.⁶⁹ This development is crucial to understanding the ideology and imperial outlook that would influence those statesmen who were responsible for proposing partition during decolonization, explored in Part Three. It also explains why non-Europeans could never be accorded equality in Wilson's eyes and were therefore not entitled to self-determination in the way Europeans were.

The native in English colonial society

British society in the colonies mirrored British society in metropolitan Britain, where the lower classes were excluded from participating in the social contract.⁷⁰ Accordingly, when it came to recreating British society in the colonies, the lower classes they encountered there were also excluded from the body politic, and from participating in the social contract.⁷¹ This is why the colonial legislatures in the Thirteen American Colonies reproduced the very undemocratic (by modern standards) British House of Commons in which "the colonists who were privileged sought to exclude those who were not". Accordingly, "there were exclusions on grounds of race, religion and property as well as of sex and colour".⁷² In other words, the natives and the lower classes were not treated as equals, for it was assumed that non-European cultures could not exercise rational choice, and so were not to be granted self-government until they had acquired the attributes of civilisation.⁷³ In the British context the term "civilised" was used almost exclusively to describe upper class English speaking settlers who were accorded full participation in the political affairs of the colony in contrast to the "uncivilised" i.e. the natives and slaves, as well as Jews, the Irish, and Orientals, who although treated better than natives and slaves,

⁶⁹ "The settlers extended to the colonies the same rights to security of property and civic participation that appertained to the empowered, high-status, and independent property holders in England". See Greene, "Empire and Liberty", *ibid*, pp. 5-7.

⁷⁰ See Greene, "Empire and Liberty" in *Exclusionary Empire*, *ibid*, p. 5. See also, Frederick Madden and David Fieldhouse (eds.), *The Classical Period of the First British Empire, 1689-1783: The Foundations of A Colonial System of Government* (London: Greenwood Press, 1985).

⁷¹ In those colonies that were not earmarked for large-scale European settlement, the system of government that was devised was autocratic Crown Colony Government where power lay with the Governor and his council and not with a legislature. See Frederick Madden and David Fieldhouse (eds.), *Imperial Reconstruction, 1763-1840: The Evolution of Alternative Forms of Government* (London: Greenwood, 1987), p. 507, and p. 670.

⁷² See Madden and Fieldhouse, *The Classical Period of the First British Empire*, *supra* n. 70, p. 343.

⁷³ In this regard, the French with their *mission civilisatrice* were not that different to the British. In fact, the French went further than the British in trying to mould "little Frenchmen" out of the natives. See Martin Deming Lewis, "One Hundred Million Frenchmen: The 'Assimilation' Theory in French Colonial Policy", *4 Comparative Studies in Society and History* (1962), pp. 129-153.

were not accorded these rights immediately, and would have to struggle to attain them. These inequalities went to the heart of British imperial policy in its colonies. Anyone who did not conform to the dominant class, creed, and colour associated with English high society, would be distinguished and ostracised from the rest of society. Thus, Sir Ivor Jennings (1903-1965), reflecting on the history of British colonial policy in Ceylon, admitted that “a person in a colony who speaks the language of the English, but who has been treated by them as an inferior because of the colour of his skin or the immaturity of his social and political background, probably will not like the British”.⁷⁴

The Spaniards were the first to make these differentiations, distinctions, and exclusions when they encountered the native societies, which they had difficulty accepting were “fully human”, at the first point of contact, in their discovery of the “New World”.⁷⁵ Essentially, the Spaniards viewed the Indians as “barbarians” and “savages”, terms that were used to describe individuals or societies that “stand outside of the borders of the societies or states that refer to them by these terms”.⁷⁶ For the Spaniards, the status of peoples as human beings was linked to Christianity.⁷⁷ Essentially, savages were believed to share with barbarians an inability to understand the benevolence and humanity inculcated by the Christian religion.⁷⁸ But the Spaniards were not the only people to view natives in this way. In fact, as explained in Part One, with the noticeable and sole exception of Edmund Burke, later jurists and scholars like Alberico Gentili, Thomas Hobbes, John Locke, William Blackstone, Emmerich de Vattel, and John Westlake also expressed similar opinions, even more forcefully.⁷⁹ Thus, Gentili quoted the Book of Genesis to reach the categorical conclusion that God did not create the world to be empty, and “therefore the seizure of vacant places is regarded as a law of nature”.⁸⁰ Similarly, in his description of “the natural conditions of mankind” in *Leviathan* (1651), Hobbes drew a sharp distinction between those places in the world that had government from those that had “no

⁷⁴ Sir Ivor Jennings, *The Approach to Self-Government* (Cambridge: At the University Press, 1956), pp. 12-13.

⁷⁵ See Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003), pp. 56-74. On Vitoria, see also Anghie, *Imperialism, Sovereignty, and the Making of International Law*, supra n. 5, pp. 13-31.

⁷⁶ Keal, *European Conquest and the Rights of Indigenous Peoples*, ibid, p. 67.

⁷⁷ Keal, *European Conquest and the Rights of Indigenous Peoples*, ibid, p. 69.

⁷⁸ Keal, *European Conquest and the Rights of Indigenous Peoples*, ibid, p. 72.

⁷⁹ Keal provides an excellent summation of these scholar’s various views in *European Conquest and the Rights of Indigenous Peoples*, ibid, particularly chapters two and three from pp. 74-112.

⁸⁰ See Alberico Gentili, *De Iure Belli Libri Tres*, translated by John C. Rolfe (Oxford: At the Clarendon Press, 1933, translation of the edition of 1612), Book I, p. 80.

government at all”. And it is significant that in making this distinction Hobbes mentioned “the savage people in many places of America” as being devoid of government where the social contract was inapplicable in contrast to “the government of small families” where it was applicable.⁸¹ For Hobbes only the European pilgrims and settlers who had arduously voyaged to America from Europe were in a position to establish a government of small families, which by implication excluded “the savage people of America”. Of course, Hobbes made no anthropological study of Native American forms of government. He simply made an assumption based on incomplete evidence. But the point is that he made this distinction. And he was not the first, nor the last to do so. It was implicit in the historical development of liberal imperialism.

Hobbes’s assumption that Native Americans were incapable of self-government was a view of native society that Locke was in complete concord with. In fact, Locke went further than Hobbes in divesting the natives from ownership over their ancestral lands and in excluding them from ever being in a position to form a part of the body politic of the government of small families in the Americas. And Locke had vested interests in making these assumptions and arguments. He helped to draw up the *Fundamental Constitutions of Carolina* in 1670, which provided the foundation for a government of slave-owners run by wealthy land barons; he was an investor in the Royal Africa Company, and in the Bahamas islands, and a landgrave of Carolina.⁸² Locke was active in supporting the Atlantic slave trade.⁸³ He was secretary to the English Council for Trade and Foreign Plantations (1673-4); and towards the end of his life he was also the secretary to its successor the Board of Trade (1696-1700).⁸⁴ Berriedale Keith explained that when Locke was Secretary to the Council for Trade and Foreign Plantations, its work was conscientiously done, meetings were frequent, complaints and memorials from the colonies were sedulously examined, instructions given to Governors were carefully prepared, and colonial legislation scrutinized.⁸⁵ As Barbara Arneil noted, Locke was “involved in the most minute details of colonial life”

⁸¹ Thomas Hobbes, *Leviathan*, edited and with an introduction by J.C.A. Gaskin, (Oxford World’s Classics, Oxford: Oxford University Press 2008, first published 1651), p. 85 (in this edition), Chapter 13, p. 63 (in original numbering), para. 11.

⁸² Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), p. 167.

⁸³ See James Farr, “Locke, Natural Law, and New World Slavery”, 36 *Political Theory* (2008), p. 495.

⁸⁴ David Armitage, “John Locke, Carolina, and the “Two Treatises of Government”, 32 *Political Theory* (2004), p. 603.

⁸⁵ See A. Berriedale Keith, *Constitutional History of the First British Empire* (Oxford: At the Clarendon Press, 1930), p. 60.

in the Carolinas. She added, “[t]he amount of paperwork involved in administering Carolina, and therefore which passed through Locke’s hands, was staggering”.⁸⁶ By all indications Locke was a very wealthy man for his time, with investments in the silk trade in addition to the slave trade. He invested heavily in the first issue of stock of the Bank of England, just a few years after he wrote his *Second Treatise*.⁸⁷

As mentioned in Part One, Locke had argued against the theory that conquest could be a source of legal title to territory because it lacked consent from the nation that had been conquered. A conqueror only obtained sovereignty over those persons who concurred or consented to the conquest. Whilst the conqueror had an absolute right over the lives of those persons who fought against him in a just war, this did not extend to their possessions.⁸⁸ Now of course in the Americas, Locke, like Hobbes, did not recognise native political society (those “savage people of America”) as having political authority in the manner Europeans did. In Locke’s eyes only the European settlers had the requisite characteristics that enabled them to fully participate in colonial society.⁸⁹ This is because consent required the person that was giving their consent to reason.⁹⁰ Those who did not have the capacity to reason were deemed not have the necessary prerequisites for expressing consent.⁹¹ Accordingly, they could be excluded from the political constituency or be governed without their consent.⁹² Due to what Locke had argued on the matter of conquest and consent, he could hardly have invoked the doctrine of conquest to dispossess the natives of their lands in the Americas, as he had already disavowed of this possibility in his *Second Treatise* when challenging imperial rule in Europe. Accordingly, in order to remain ideologically consistent and to continue his support for European colonisation (as opposed to conquest) in the Americas, Locke amended his theory on property rights in the *Second*

⁸⁶ Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996), p. 118. This is why the phrase attributed to Seeley that Britain acquired its Empire “in a fit of absence of mind” is arrant nonsense—for Englishmen like Locke carefully constructed it.

⁸⁷ See Howard Zinn, *A People’s History of the United States 1492–Present* (London: Pearson Education, 2003), p. 73.

⁸⁸ C.B. Macpherson (ed.) John Locke, *Second Treatise of Government* (Cambridge: Hackett Publishing, 1980, originally published 1690), pp. 91-93 at §175 through §179.

⁸⁹ These characteristics were outlined most clearly in Locke’s *Thoughts Concerning Education* (1693).

⁹⁰ Macpherson (ed.) John Locke, *Second Treatise*, supra n. 88, pp. 32-33, at §57-59.

⁹¹ Accordingly, “somebody else must guide him, who is presumed to know how far the law allows a liberty”. See Macpherson (ed.) John Locke, *Second Treatise*, *ibid*, p. 33, at §59.

⁹² See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: The University of Chicago Press, 1999), p. 59.

Treatise to divest the natives with rights of ownership over their ancestral lands.⁹³ Locke accomplished this by arguing that the English Crown was not acquiring sovereignty over the Americas by virtue of conquest but was instead extending its authority and legal jurisdiction over certain territories, which were being acquired from the natives who were not entitled to their lands, because they did not cultivate them.⁹⁴ Thus Locke was not arguing for extending sovereignty over natives with all the problems that this entailed, such as having to consider whether to grant them civil and political rights. Instead he argued that government only followed the ownership of land, that is, private ownership of property in the Western tradition.⁹⁵ In Locke's view territory with no distinguishing markers, with nothing to set it apart, and with nothing enclosed, was effectively ownerless. Picking apples and acorns, hunting deer, and fishing were not actions sufficient in his mind to form a political society that would afford such territory protection from those who could put it to better use.⁹⁶ This meant that land could be appropriated if the settlers brought it into cultivation and put to some positive use. Accordingly the writ of the English Crown extended to those areas cultivated by English settlers over which it had jurisdiction.⁹⁷ It followed that the chiefs and tribes in America could not claim jurisdiction over land that was barren, went uncultivated, and/or was unproductive, even if it had a special spiritual significance. Until the native applied his industry and reason to the land, the English settlers believed that they had the right to appropriate it because each colonist had a natural right through his labour to such land.⁹⁸ In theory, those Native Americans who cultivated their lands, were also entitled to them, although this was the seldom-observed in actual practice. As Arneil admitted: "It is beyond scholarly doubt that John Locke's *Two Treatises* were used in the early years of the history of the United States to justify Americans taking over land claimed by the aboriginal peoples".⁹⁹

Locke's *Two Treatises* provides a clear example of a theory that affected state practice and evolution of international law. Thus, in his influential *Commentaries*, Blackstone accepted that those peoples at a "lower" stage of civilisation, like the

⁹³ Armitage, "John Locke, Carolina, and the "Two Treatises of Government", supra n. 84, pp. 618-9.

⁹⁴ Arneil, *John Locke and America*, supra n 86, p. 166.

⁹⁵ See Keal, *European Conquest and the Rights of Indigenous Peoples*, supra n. 75, p. 75-80.

⁹⁶ Mehta, *Liberalism and Empire*, supra n. 92, p. 126.

⁹⁷ Tuck, *The Rights of War and Peace*, supra n. 82, p. 176.

⁹⁸ Arneil, *John Locke and America*, supra n. 86, p. 166.

⁹⁹ Arneil, *John Locke and America*, *ibid*, p. 169.

Native Americans, were to be subjected to the property laws of the “higher” stage, which had implications in all British colonies.¹⁰⁰ Similarly, Vattel, taking his cue from Bacon, Gentili, Hobbes, and Locke, agreed that in order to alleviate overcrowding in Europe, uncultivated land could be expropriated from the natives in the colonies:

...when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them. We have already said that the earth belongs to all mankind as a means of sustaining life. But if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it. Hence we are not departing from the intentions of nature when we restrict the savages within narrower bounds. However, we cannot but admire the moderation of the English Puritans who were the first to settle in New England.¹⁰¹

To give a sense of perspective to Vattel’s views on the acquisition of Native American land and the effect it had on their communities in New England, we need look no further than Marx, who reminds us: “In 1703 those sober exponents of Protestantism, the Puritans of New England, by decrees of their assembly set a premium of £40 on every Indian scalp and every captured redskin; in 1720, a premium of £100 was set on every scalp; in 1744, after Massachusetts Bay had proclaimed a certain tribe as rebels, the following prices were laid down: for a male scalp of 12 years and upwards, £100 in new currency, for a male prisoner £105, for women and children prisoners £50, for the scalps of women and children £50”.¹⁰² Like Locke, Vattel justified the taking of land “belonging to no one” on the basis that it went uncultivated. Accordingly, the settler that “took possession of a territory which belongs to no one” was “considered as acquiring sovereignty over it as well as ownership”. Thus, it followed that if “a number of free families, scattered over an independent country, come together to form a Nation or State, they acquire as a body sovereignty over the entire territory they inhabit”.¹⁰³ Of all the international jurists, it was Vattel who was “instrumental in

¹⁰⁰ See Keal, *European Conquest and the Rights of Indigenous Peoples*, supra n. 75, p. 75-76 quoting from Blackstone, *Commentaries on the Laws of England*, vol. II.

¹⁰¹ E. de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Volume 3, Translation of the Edition of 1758 by Charles G. Fenwick (Washington: Carnegie Institution, 1916), pp. 85-86.

¹⁰² Karl Marx, *Capital: A Critique of Political Economy*, Volume One (London: Penguin Books in association with New Left Review, 1976, first published 1867), pp. 917-918.

¹⁰³ Vattel, *The Law of Nations*, supra n. 101, p. 84.

crafting a doctrine that differentiated between effective occupation on the one hand and indigenous nomads' claims on the other, pushing territories inhabited by 'roaming' peoples rather than farming settlers into the realm of *res nullius*".¹⁰⁴

When John Westlake (1828-1913) expressed a similar view to Vattel over a century later, the language he employed differed slightly from Vattel's but the distinction he was making between European and non-Europeans was the same. In those parts of the world that lacked any government "the first necessity" of civilisation was "to establish government".¹⁰⁵ Writing in an age associated with empire and social Darwinism, skin colour and race were emphasised instead of the Christian religion and the government of small families: "The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilised".¹⁰⁶

Peoples deemed intrinsically "uncivilised"

As Antony Anghie aptly observed, the distinction between communities that were considered civilized and uncivilized, was not concerned with sovereignty, but with society. At the height of European imperialism the constellation of ideas associated with society enabled the jurist to link a legal status to a cultural distinction.¹⁰⁷ Accordingly, when it came to the matter of contemplating whether or not to grant self-government to a colonial community there were certain immutable characteristics, which meant that their unsuitability for government was always inherent.¹⁰⁸ These societies therefore needed tutelage from the colonial power before they were deemed ready to assume the burden of self-government. These categories all related in one

¹⁰⁴ Lauren Benton and Benjamin Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice", *28 Law and History Review* (2010), p. 1 at p. 26.

¹⁰⁵ Westlake made a distinction between the Asiatic empires where there was government from those places that lacked government. In the former "the law of our own international society has to take account of it". See John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), p. 142.

¹⁰⁶ Westlake, *Chapters on the Principles of International Law*, *ibid*, pp. 142-143.

¹⁰⁷ Anghie, *Imperialism, Sovereignty, and the Making of International Law*, *supra* n. 5, p. 59.

¹⁰⁸ As Carty observed, the discourse of civilization is one of *modernization*. Accordingly, societies that opposed modernization were coerced i.e. taught to be modern. See Carty, *Philosophy*, *supra* n. 62, p. 85.

way or another to a community's class, colour, and creed, which were connected to the questions of loyalty and trust, the capacity of that community in question to enter into reciprocal relations with Britain, as well as to assist the British Empire with its safety and security, its civilising mission, and its imperial project. It was assumed that a community who differed substantially from the characteristics associated with English high society, i.e. upper class, white, Protestant, could be a potential threat—especially if they were criminals or from the lower classes; and so it was considered safer to cast them out of the body politic.¹⁰⁹ If a certain category of people was deemed incapable of self-government in the metropole, then it usually followed that they were also deemed incapable of self-government in the colony. This is why Britain encouraged the emigration of Irish, Jews, paupers, and Africans to the colonies.¹¹⁰ This was also a policy, which would be replicated by the United States of America, Britain's most important colonial possession after independence in 1776.¹¹¹

In short, those peoples pushed to the peripheries within English society, would also be pushed to the peripheries of those English societies in the colonies. Thus, in the US Supreme Court's infamous decision in *Dred Scott* (1856), in which it was held that an African American could never become a citizen of the US, the colonial policies of "the English Government and the English people" were favourably cited.¹¹² In the words of the US Supreme Court: "The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a Negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the

¹⁰⁹ Offences for which the punishment was deportation or transportation to the colonies included the stealing of cloth, burning stacks of corn, killing cattle, corrupt legal practices, and in later years trade union activity. Proposals made in England in 1664 would have banished to the colonies all vagrants, rogues, idlers, petty thieves, gipsies, and loose persons frequenting unlicensed brothels. Poaching rabbits on a gentlemen's estate, picking a pocket for more than a shilling, or stealing horse or sheep were punishable by death. See Williams, *Capitalism and Slavery*, supra n. 17, pp. 11-12.

¹¹⁰ See Williams, *Capitalism and Slavery*, ibid, pp. 11-16.

¹¹¹ Paradoxically, this British policy was actually a cause of grievance. Benjamin Franklin opposed this "dumping upon the New World of the outcasts of the Old" as the most cruel insult offered by one nation to another, and asked, if England was justified in sending her convicts to America, whether America was justified in sending to England its rattlesnakes. See Williams, *Capitalism and Slavery*, ibid, p. 12. And yet, America would deport thousands of Africans to Liberia in the nineteenth century.

¹¹² *Dred Scott v. John F.A. Sandford* in *Reports of Cases Argued and Adjudged in the Supreme Court of the United States, December Term, 1856*, ed. Benjamin C. Howard, Vol. XIX (Washington DC: William Morrison & Co. 1857), p. 393 at pp. 407-408.

Constitution of the United States".¹¹³ Thus at first the position in the US was that Africans were not a part of the body politic. Moreover, after the Civil War when they were begrudgingly accepted as citizens, they were still treated far less than equals. Instead, African Americans were encouraged to immigrate to Haiti and Liberia.

In addition to those peoples hailing from Africa who were stigmatised on grounds of their skin colour, and their dehumanization during the trans-Atlantic slave trade, other peoples who were deemed intrinsically "uncivilised" in the age of British imperialism included almost anyone who was not accepted as a gentleman in English high society. Thus, the Irish, who although European, and Christian, and in some cases hailing from the upper classes, were generally considered suspect and a potential threat if they were Catholic, as the vast majority of Irishmen were, which became especially evident at the time of Cromwell's Protectorate.¹¹⁴ Similarly, most Jews, although mainly European, were not Christian, and their fortunes would ebb and flow depending upon who wielded political power. Thus, Cromwell's puritanical supporters tended to favour the Jews as "the chosen people", which might explain why he permitted Jews to return to England in 1656, whereas high Anglicans and Catholics tended to malign the Jews for not accepting Christ as the true messiah.¹¹⁵ Since the Crusades, Muslims and Turks have been depicted as a danger to the security of Europe with the Balkans proving a battle zone to protect the Gates of Vienna.¹¹⁶

The point of mentioning these prejudices is not to denigrate European culture, history, or society, nor to shock the uninitiated. Rather the point is to explain how these prejudices informed the gradations and categorisations of different peoples in the Age of Imperialism, which influenced the racial classifications found in Cuvier's *Le Règne animal* (1817), Gobineau's *Essai sur l'inégalité des races humaines* (1853), and Robert Knox's *The Races of Man* (1850). To these ideas were added theories of

¹¹³ *Dred Scott v. Sandford*, *ibid*, p. 408.

¹¹⁴ Many of Cromwell's Irish prisoners were sent to the West Indies. According to Williams so many Irish were deported to Montserrat that it effectively became an Irish colony. He added: "The Irish ... were poor servants. They hated the English, were always ready to aid England's enemies, and in a revolt in the Leeward Islands in 1689 we can already see the burning indignation which...gave Washington some of his best soldiers. See Williams, *Capitalism and Slavery*, *supra* n. 17, p. 13.

¹¹⁵ On Puritan support for returning the Jews to Palestine see the chapter entitled "On the Edge of Prophecy: Puritan England and the Hope of Israel", in Barbara W. Tuchman, *Bible and Sword: How the British Came to Palestine* (London: Macmillan 1982, first published 1956), pp. 121-146.

¹¹⁶ The hatred displayed towards Turks and Muslims can be detected most clearly in the writings of Gentili and was related to his fear and mistrust of the Ottoman Empire, which at the time he was writing was at war with the Hapsburgs. See Noel Malcolm, "Alberico Gentili and the Ottomans", in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010), pp. 127-145.

evolution, which seemed to accentuate the “scientific” validity of the division of races into advanced and backward, or European-Aryan, and Oriental-African, which also had an impact on the racialised scientific lexicon of positive international law.¹¹⁷ As Anghie acknowledged, “anthropology, science, economics and philology, while purporting in various ways to expand impartial knowledge, participated crucially in the colonial project”.¹¹⁸ Indeed these so-called “scientific” ideas and warped social Darwinian theories had a major impact on the policies employed by imperial statesmen to govern the distant and diverse societies of their Empire. In doing so they imprinted upon the rest of the world the prejudices that existed within their own societies. This also affected their approach to the question of self-government. Rather than treating all their colonial subjects equally, when it came to self-government, some peoples were evidently treated more equally than others.

The Semite in the European imagination

Today the term “Semite” is often used exclusively to describe Jews as in the expression “anti-Semitism”. However, this was not always so, and in nineteenth century Europe, Muslims and Jews were pilloried together as Semites. Thus, James Lorimer, the Scottish jurist, lumped Jews and Muslims together as Semites in his *Institutes* and complained that according to their understanding of religion: “Man becomes a mere listener to external commands which all must obey”, which implied that unlike the Protestants, Jews and Muslims were not capable of acting rationally or engaging in reciprocity, and therefore no consent was needed from them to take their lands and properties.¹¹⁹ Another of the consequences of this line of reasoning was that the Semites were not capable of fully participating in European society because they lacked a nationalised authority that was necessary in any civilised society governed by the rule of law. Thus Lorimer thought that the Turks as “a race” were totally incapable of the political development or of enacting constitutional government.¹²⁰

In Lorimer’s eyes the Jews in England were not real Englishmen on account of their “alien character”. On the same page where he referred to the “modern Jew” as

¹¹⁷ Anghie, *Imperialism, Sovereignty and the Making of International Law*, supra n. 5, p. 66.

¹¹⁸ Anghie, *Imperialism, Sovereignty and the Making of International Law*, ibid, p. 66.

¹¹⁹ James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh and London: William Blackwood and Sons, 1883), p. 118.

¹²⁰ Lorimer, *The Institutes of the Law of Nations*, ibid, p. 123.

being of an “alien character” in his *Institutes*, he invoked the name of “Mr. Darwin” and then concluded that “the un-speculative character of the Semitic race ... is traceable in their forms of speech [which] warns us that ethical development from the human side, in their case, can come but very slowly”.¹²¹ Sounding eerily like the anti-Semites in Germany, he added: “The sympathies of modern Jews do not extend beyond the nationality to which they have become attached by birth or residence; and their loyalty even to it is subordinate to the wider allegiance of race”. Lorimer continued by attacking “the imperialistic foreign policy” of Lord Beaconsfield (that is, Benjamin Disraeli) claiming it to be “directly at variance with the idea of reciprocity”. He could not help but exclaim that it was “a curious indication of this Semitic peculiarity, too, that Lord Beaconsfield and his disciples always spoke of rhetoric, in circumstances in which Europeans are accustomed to speak of logic”.¹²²

Essentially Lorimer was questioning the identity and loyalty of the Semitic race. Jews and Muslims have often been described as an alien presence in Europe, “a nation within a nation” because of their refusal to assimilate, preferring to maintain their traditions.¹²³ As Martti Koskenniemi explained in his comprehensive history of international law, Lorimer’s views on Aryans and Semites would not have been considered out of place amongst many members of the *Institut de droit international*, who shared them.¹²⁴ Jews were far more numerous than Muslims in eighteenth-century Europe, which is why the Jews were a target of acute prejudice in the nineteenth century, with the vast majority inhabiting an area in Eastern Europe known as the Pale of Settlement, which was established by the Russian tsars in Poland and Eastern Europe.¹²⁵ The presence of Jews proved to be a major source of discomfort to

¹²¹ Lorimer, *The Institutes of the Law of Nations*, *ibid*, pp. 120-121.

¹²² Lorimer, *The Institutes of the Law of Nations*, *ibid*, pp. 121-122.

¹²³ Thus anti-Semitism arose as a popular movement in the twentieth century because its instigators sought to make everyone the same. See Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford: Stanford University Press, 2002), p. 139.

¹²⁴ Koskenniemi, *The Gentle Civilizer of Nations*, *supra* n. 22, p. 104. And these views remained prevalent amongst some international lawyers well into the twentieth century. See Raphael Gross, *Carl Schmitt and the Jews: The “Jewish Question”, the Holocaust, and German Legal Theory* (Madison: The University of Wisconsin Press, 2007).

¹²⁵ It was in the Pale where the vast majority of Jews, the so-called Ostjuden, lived. According to Vital, in 1880 world Jewry numbered between 7.5 and 8 millions; of these the overwhelming majority (88.4 per cent) were in Europe, with the vast majority (75 per cent) inhabiting Eastern Europe. And within Eastern Europe, 4 million Jews (that is 70 per cent) lived in Russian occupied Poland. And within the Russian Empire, the vast majority of Jews lives in the Pale. For instance, in 1897, 4.9 million Jews lived in the Pale, out of a total of 5.1 million Jews who lived in the Russian Empire. Although Jews were not the only inhabitants of the Pale, they formed very high proportion of the total population. See David Vital, *The Origins of Zionism* (Oxford: Clarendon Press, 1975), pp. 30-31.

the Christian majority during the formation of the nation-state with many scholars expressing differing opinions on whether to grant them civil and political rights.¹²⁶ They were uncomfortable with granting these rights to a society whose cultural traditions differed from those of the Christian majority, whether this was manifested in terms of custom, dress, language, religious holidays, outlook on life, etc. In short, they wanted the Jews to integrate, to effectively become “good Christians”.

Ultimately, the opinions that Lorimer, and many others like him expressed were about identity, trying to fit in, belong to, and be accepted by, a nation, which was defined by religion. And as indicated by the Inquisition, Judaism and Islam were perceived to pose a problem in a time when national identity tended to be expressed in the form of religion. Accordingly, in order to “tolerate” the Jews, John Locke and Hugo Grotius favoured converting English and Dutch Jews to Christianity. Thus, in 1622 Grotius composed a treatise that was entitled *The Truth of Christian Religion* in which he made the case for converting those Jews (and Muslims) who lived in Europe to Christianity.¹²⁷ If, however, they refused to become Christians, then Locke and Grotius favoured “restoring” the Jews to the Holy Land, i.e. Palestine. Both Locke and Grotius were by today’s standards religious men. Stories from the Bible littered Grotius’s writings on the law of nations and informed Locke’s philosophy. Their conception of nationhood was in many ways informed by their own knowledge of history and in their reading and understanding of the ancient Israelites in the Bible.

Similarly, religious prejudice also informed Voltaire’s writings even if he is considered a doyen of rationalism and the Enlightenment. Whilst Voltaire is often considered a champion of “free speech”, it has been suggested that he was not in fact such an advocate¹²⁸, and he often mocked the status of women and wrote of “the

¹²⁶ See e.g. Bruno Bauer, “The Jewish Problem (1843),” in Paul Mendes-Flohr and Jehuda Reinharz (eds.), *The Jew in the Modern World: A Documentary History* (Oxford: Oxford University Press, 1995), pp. 321-324. See also, Marx’s reaction to Bruno Bauer “On the Jewish Question” in Karl Marx, *Early Writings* (London: Penguin (1992), pp. 211-241.

¹²⁷ See Nabil I. Matar, “John Locke and the Jews” 44 *The Journal of Ecclesiastical History* (1993), p. 45 at p. 50 citing the 1680 English translation by Simon Patrick.

¹²⁸ At least not in the way people commonly think, see Brian Klug *Offence: The Jewish Case* (New York: Seagull Books, 2009), pp. 34-39 (explaining the misattribution of the famous saying “I disapprove of what you say, but I will defend to the death your right to say it”, which is commonly attributed to Voltaire, but which he never actually uttered.) See also, Elizabeth Knowles, *What They Didn’t Say: A Book of Misquotations* (Oxford: Oxford University Press, 2006), p. 55.

Mohamedans” and the Jews in a highly discriminatory manner.¹²⁹ Take Voltaire’s entry for “tolerance” in his *Philosophical Dictionary* (1764) in which he writes of the Jews in this manner: “It is with regret that I discuss the Jews: this nation is, in many respects, the most detestable to have ever sullied the earth”.¹³⁰ Note how Voltaire spoke of the Jews as a “nation” which is important since this would be taken up by the Zionist movement to establish a Jewish nation outside Europe in the twentieth century contributing to the partition of Palestine. What Voltaire wrote about the Jews was not so different to what the nineteenth century anti-Semites would write a century later.¹³¹

Even Voltaire’s archrival Rousseau depicted the Jews of the Old Testament as intolerant to the point of justifying the destruction of their neighbours and confiscation of their territory, and he saw in their “fanaticism” the seeds of subsequent wars of religion.¹³² In his *Considérations sur le gouvernement de la Pologne*, Rousseau wrote of the Jews in Poland as a “nation” of “wretched fugitives, without arts, arms, talents, virtues or courage, who were wandering as a horde of strangers over the face of the earth without a single inch of ground to call their own”.¹³³ “Moses”, he continued, “had the audacity to create a body politic, a free people”, from what he described as a “wandering and servile horde”. He then added, ominously: “To prevent his people from melting away among foreign peoples, [Moses] gave them customs and usages incompatible with those of other nations; he overburdened them with peculiar rites and ceremonies; he inconvenienced them in a thousand ways in order to keep them constantly on the alert and to make them forever strangers among other men”.¹³⁴

Intriguingly, Immanuel Kant (1724-1804) authored anti-Jewish writings as well.¹³⁵ Paradoxically in light of recent history, Kant referred to the Jews of the

¹²⁹ One can sense this from reading Voltaire’s most famous work *Candide* as well as in his other writings. For further reading on Voltaire’s anti-Semitism, see Arthur Hertzberg, *The French Enlightenment and the Jews* (New York: Columbia University Press, 1968).

¹³⁰ Quoted in Klug *Offence: The Jewish Case*, supra n. 128, p. 50. For the original see Voltaire, *Dictionnaire Philosophique* (1764) M. XX. pp. 517-18.

¹³¹ To Voltaire, Judaism signified “primitivism, legalism, and blind reverence for tradition”. See Adam Sutcliffe, *Judaism and The Enlightenment* (Cambridge: Cambridge University Press, 2003), p. 232.

¹³² Ronald Schechter, *Obstinate Hebrews: Representations of Jews in France, 1715-1815* (Berkeley: University of California Press, 2003), p. 54.

¹³³ Jean-Jacques Rousseau, “Considerations on the Government of Poland and on its Proposed Reformation” (Completed but not published April 1772), translated and edited by Frederick Watkins in *Rousseau: Political Writings* (New York: Nelson, 1953), p. 163.

¹³⁴ Rousseau, “Considerations on the Government of Poland”, *ibid*, pp. 163-164.

¹³⁵ Léon Poliakov, “Racism from the Enlightenment to the Age of Imperialism”, in Robert Ross (ed.), *Racism and Colonialism* (The Hague: Martinus Nijhoff Publishers for the Leiden University Press, 1982), p. 55 at pp. 58-59.

eighteenth century as “Palestinians”. In one of his works he wrote: “The Palestinians living amongst us are, since their exile, because of their usurious spirit not unjustifiably renowned for their deceitfulness, so far as the great majority is concerned”.¹³⁶ Notwithstanding the emancipation of the Jews in the nineteenth century, the coupling of the Jews as a “nation” comprised of “Palestinians” by Kant is an outstanding example of an anti-Semitic idea that would be picked up by later generations of scholars and statesmen from Disraeli to Balfour to encourage Jewish emigration from Christian Europe to their “true” homeland, namely, Palestine.¹³⁷ This is important to bear in mind because as non-Christians neither Jews nor Muslims were considered by Enlightenment scholars or the literati to be fully European in the sense that they were entitled to equal civil and political rights on par with the Christian majority, which is why a homeland was often sought for them outside Europe.¹³⁸

In addition to anti-Semitism, the way in which the Europeans viewed Jews in the centuries preceding Zionism also contributed to the manner in which those who ruled Britain warmed to Zionism in the late nineteenth century. This coincided with a massive influx of Jewish immigrants into Britain fleeing Russian and Romanian persecution.¹³⁹ As explained in Part Three, the British Government favoured establishing a national home for European Jews in its Balfour Declaration, which was read out in Parliament in November 1917, and which necessitated a population transfer i.e. deportation. The idea of encouraging Jewish emigration to Palestine was accepted and encouraged by other European states in the inter-war years even though the vast majority of the population in Palestine was of Arab descent and opposed to Zionism. In time this policy would also lead to various proposals to partition Palestine to establish a national home for the Jews and a national home for the Arabs.

Catholicism and the question of allegiance

¹³⁶ Poliakov, “Racism from the Enlightenment”, *ibid*, p. 58 citing CF. *Vermischte Schriften*, ed. F. Cross (Leipzig, 1921), pp. 389-90 (emphasis in original).

¹³⁷ Although the Jews were, at the last hour, granted legal equality by the revolutionary government of the French Republic, Schechter suspects that it amounted to little more than a publicity stunt “since it resulted in the enfranchisement of a negligible portion of the population”. See Schechter, *Obstinate Hebrews*, *supra* n. 132, pp. 156-157.

¹³⁸ For the impact of social Darwinism on debates on Jewish nationhood and the link to Theodor Herzl and Zionism see Shlomo Sands, *The Invention of the Jewish People* (London: Verso, 2009), pp. 77-83.

¹³⁹ See Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (London: Pluto Books, 2009), pp. 8-37.

Although the Irish were not ever considered alien in the way Jews and Muslims were, those Irish of Catholic origin would nonetheless be excluded from British society after the Reformation when Britain established its own Church. After England had severed its ties to Rome, anyone who continued to maintain that link was considered a traitor and a threat. Thus, in one of his earliest works, Gentili, who was a passionate Protestant, set out to prove in great detail that the Pope was the Antichrist predicted in the Book of Revelation.¹⁴⁰ Because of their allegiance to the Papacy, the Irish were effectively seen as the “enemy within” never to be trusted in positions of power. Thus in 1689, the Protestant Parliament in Ireland enacted the Penal Laws restricting the activities of the Catholic Church, depriving Catholics of property, and political rights, and excluding Catholics from the Irish Parliament. Although the religious aspects of the Penal Laws were apparently lightly enforced, the authorities in Ireland rigidly imposed their political and property clauses that coerced most of the Catholic aristocracy and gentry to either leave the country or convert to Anglicanism (such as Edmund Burke) in order to protect their property and retain their social status.¹⁴¹

To understand the hatred and contempt that the English felt towards the Irish in the centuries that have passed since the conquest of Ireland, consider the following extract from the English historian Christopher Hill’s biography of Oliver Cromwell:

The hatred and contempt which propertied Englishmen felt for the Irish is something which we may deplore but should not conceal. Even the poet Spencer, who knew Ireland well, the philosopher Bacon and the poet Milton, who believed passionately in liberty and human dignity, all shared the view that the Irish were culturally so inferior that their subordination was natural and necessary. Religious hostility reinforced cultural contempt ... A great number of civilized Englishmen of the propertied class in the seventeenth century spoke of Irishmen in tones not far removed from those which Nazis used about Slavs, or white South Africans use about the original inhabitants of their country. In each case the contempt rationalized a desire to exploit.¹⁴²

As with popular prejudices against the Jewish minority, prejudices against the Irish also filtered into legal and political circles. Thus Thomas Macaulay (1800-1859) in his *History of England* popularized an interpretation of Irish history based upon the

¹⁴⁰ See Malcolm, “Alberico Gentili and the Ottomans”, in Kingsbury and Straumann, *Alberico Gentili and the Justice of Empire*, supra n. 116, pp. 140-141.

¹⁴¹ Lawrence J. McCaffrey, *The Irish Question: Two Centuries of Conflict* (Lexington: The University of Kentucky Press, 1995), pp. 13-14.

¹⁴² Christopher Hill, *God’s Englishman: Oliver Cromwell and the English Revolution* (London: Penguin 1990), p. 109.

Celtic love of violence and anarchy. His book was so popular that its second and third volumes sold 26,500 copies in the first ten weeks.¹⁴³ Macaulay, a historian and reformer, was one of the first scholars to propose the idea of having two parliaments in Ireland as a solution to the Irish Question, which would presumably have necessitated or precipitated a partition.¹⁴⁴ When Benjamin Disraeli (1804-1881) sought to attract the attention of the Irish Tories, he articulated their sentiment towards Ireland in a series of articles published in *The Times* in 1836. Disraeli charged that the Irish “hate our free and fertile isle. They hate our order, our civilisation, our enterprising industry, our sustained courage, our decorous liberty, our pure religion. This wild, reckless, indolent, uncertain, and superstitious race has no sympathy with the English character”. He went on to describe Irish history as “an unbroken circle of bigotry and blood” before asking parenthetically, “shall the delegates of these tribes, under the direction of the Roman priesthood, ride roughshod over our country...?”.¹⁴⁵

This view of the Irish as being deceitful and treacherous was also one shared by Lorimer who explained that “one of the strongest of the many insuperable objections to granting a separate international position to Ireland is, that her ecclesiastical ties to Rome would render it unsafe for England to recognise her as a reciprocating political community”. He added: “The nationalisation of Churches was the most precious fruit of the Reformation when seen from an ethical or political point of view, but it was a fruit which unhappy Ireland failed to reap”.¹⁴⁶ Lorimer assumed that the Irishman’s allegiance was to Rome, not Westminster, and that, moreover, they had repudiated the very “Reformation”, which was seen as an important milestone in English national history, but which was a tragedy for the Catholics. Similarly during the Home Rule debates Prime Minister Salisbury believed that Home Rule meant Rome Rule and that “the superstitious priest” would dominate a self-governing Ireland. The Ulster Protestants would not tolerate “the subjection of their prosperity, their religion, their industry, their lives to the absolute mastery of their ancient and unchanging enemies”. He feared that a Home Rule Ireland would be a permanent

¹⁴³ On the book sales, see William Speck, “Thomas Babington Macaulay”, in John Cannon (ed.) *The Historian at Work* (London: George Allen & Unwin, 1980), p. 56.

¹⁴⁴ See Frank Gallagher, *The Indivisible Island: The History of the Partition of Ireland* (London: Victor Gollancz, 1957), p. 57.

¹⁴⁵ See Richard Ned Lebow, *White Britain and Black Ireland: The Influence of Stereotypes on Colonial Policy* (Philadelphia: Institute for the Study of Human Issues, 1976), pp. 61-62 citing *The Times*, April 18, 1836 (Letter XVI of the Runnymede Letters); Robert Blake, *Disraeli* (London, 1966), 132.

¹⁴⁶ Lorimer, *The Institutes of the Law of Nations*, supra n. 119, p. 115.

threat to national security. Sounding like Locke from the seventeenth century, he feared that Ireland would become “a haven for the enemies of the Empire as in the days of the Wars of the Roses, the Reformation and the Jacobite threat”.¹⁴⁷

Salisbury likened the Irish question to “an evil dream”, and thought Ireland was inhabited “by men of different races and antagonistic traditions”. He explained that: “Representative government answers admirably as long as those who are represented desire much the same thing, and have interests tolerably analogous, but it is put under intolerable strain when it rests upon a community divided into two sections, one of which is bitterly hostile to the other and desirous of opposing it on all occasions”.¹⁴⁸ During the Home Rule debates one of Salisbury’s critics noted:

When Lord Salisbury talked of the minority in Ireland as being that portion of the country which contained all that was progressive and enlightened, he meant that that was Ulster...According to Lord Salisbury Ulster contains all the light, all that is progressive, all that is not priest-ridden in Ireland...He divides Ireland into two parts, and the division is not geographical; it is religious. They are divisions into Catholic Ireland and Protestant Ireland, and to the first of these divisions he attributes want of enlightenment, and the absence of all the elements of progress and civilisation; to the second he attributes all the civic virtues. The first of these divisions he denounces as the traditional enemies of England; for the second he claims the exclusive possession of that much desired and much misunderstood quality of loyalty.¹⁴⁹

On Ireland, the views of Lord Salisbury influenced his nephew and political protégé Lord Balfour, and for that matter most of the Cecils. To Conservatives like Salisbury and Balfour, who belonged to one of Britain’s oldest, wealthiest, and politically influential aristocratic families (“Hotel Cecil”) with large landed estates, the nationalist rhetoric of the Irish expressed deep-rooted antagonisms that existed between landlord and tenant. To confront the Irish land problem Salisbury appointed his nephew Balfour to be Chief Secretary to Ireland. A few days after his appointment, Balfour provocatively announced that he would be “as relentless as Cromwell in enforcing obedience to the law”.¹⁵⁰ He appointed Edward Carson (1854-1935) to become a part of his legal staff before calling in the army to aid the police in enforcing evictions and battering down the barricaded cottages in an effort to end the uprising.

¹⁴⁷ Robert Taylor, *Lord Salisbury* (London: Allen Lane, 1975), p. 119.

¹⁴⁸ Taylor, *Lord Salisbury*, *ibid*, pp. 117-118.

¹⁴⁹ HC Deb 09 February 1892 vol 1 cc43-116, at col. 90 (Sir Charles Russell).

¹⁵⁰ Sydney Zebel, *Balfour: A Political Biography* (Cambridge: At the University Press, 1973), p. 63.

Thus it was in Ireland where Balfour acquired the nickname “bloody Balfour”. And one of his solutions to resolve the land dispute was state-assisted emigration.¹⁵¹

Excluding Catholics from the British body politic, and maintaining these restrictions in Ireland where the overwhelming majority of the population was Catholic had major repercussions for the way in which nationalism developed there, which contributed to the partition in the twentieth century, as explained in Part Three. After the Reformation religion was bound up with politics and the question of loyalty and from this time the division of the two future political communities on religious grounds in the island of Ireland would contribute to the policy of partition. In addition to the religious antagonism there was also the question of class. Because the Catholic population had been disadvantaged in the era of the Penal Laws, they were poorer than the landed aristocracy, and the gentry, that is, the capitalist class who favoured maintaining the Union, and who were mostly the descendants of Protestant settlers. During the Home Rule debates, Balfour repeatedly sided with his fellow aristocrats in opposing Home Rule because it would “put the more prosperous and less backward part of the population under the control of the less prosperous and more backward part of the population ... the result would be ... that the prosperous, advancing, and progressive minority might have their interests seriously imperilled by the action of those who, as a matter of fact, are less prosperous and more backward”.¹⁵²

The inferiority of Oriental culture and society

Such racial prejudices and stereotypes that afflicted European attitudes towards Jews and the Irish also had an impact on European attitudes towards “the Orient”, which invariably included the peoples of North Africa and the Middle East, but also, South Asia, China, and Japan. But it was above all the Turk and his religion that proved to be a particular target of European prejudice because of his proximity to Europe and because of the historical enmity that existed between Christians and “Mohammedans”, which began with the Crusades, and was followed with the fall of Constantinople.¹⁵³ Hence Gentili, thinking of the Turks, argued that alliances with infidels were always wrong because they were infidels. And in making this argument he cited various

¹⁵¹ Zebel notes that this remedy was opposed by many Irish, who regarded it as akin to deportation. See Zebel, *Balfour*, *ibid*, p. 71.

¹⁵² See HC Deb 09 February 1892 vol 1 cc43-116, at col. 78 (Mr Balfour).

¹⁵³ See Božidar Jezernik, “Imagining the ‘Turk’” in Božidar Jezernik (ed.) *Imagining the “Turk”* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2010), p. 1 at p. 4.

Biblical passages, including the statements in the Pentateuch about driving out the nations of unbelievers from Canaan.¹⁵⁴ But of course, not everyone agreed with Gentili. Christian nations such as Poland did forge alliances with Turkey, and the latter proved to be pivotal to the European balance of power during its wars against the Hapsburgs, which provided a distraction that allowed for the spread of Protestantism in northern Europe.¹⁵⁵ When the Ottoman Empire was a great power, it was admired and feared, which is why many scholars, including Grotius, called for the creation of a general league of Christian states and a crusade against “the Turk”.¹⁵⁶

It was only when the Ottoman Empire began to crumble that its image in the eyes of Europeans sharply deteriorated. Whilst Turkey was welcomed and invited to take part in various European congresses (e.g. Carlowitz 1699, Paris 1856, the Hague 1899), it was always perceived to be a cultural threat.¹⁵⁷ This perceived threat became particularly strained in an age associated with nationalism and European imperialism. Although jurists less frequently quoted biblical passages in the nineteenth century, one can nonetheless detect that the old religious animosity had not completely waned. Rather than invoking biblical verses and their language of eternal damnation, the civilising nature of Christianity was instead cited with the discourse of “science and progress”. Thus, Fyodor Fyodorovich Martens (1845-1909), who made his career serving the Russian Empire, thought that Islam represented “the epitome of backwardness and fanaticism, of hostility to scientific progress, and intercourse between states”.¹⁵⁸ Like his contemporary Westlake, Martens made distinctions between “civilized peoples” like the Persians, Chinese, and Japanese, and those “non-

¹⁵⁴ See Malcolm, “Alberico Gentili and the Ottomans”, in Kingsbury and Straumann, *Alberico Gentili and the Justice of Empire*, supra n. 116, p. 144.

¹⁵⁵ The Poles, for instance, formed many alliances with the Turks in their contests with Prussia and Russia. See the secret treaty of alliance between Poland and the Ottoman Empire referenced in Part One. On the Ottoman Empire, the balance of power, and the spread of Protestantism see Jezernik, “Imagining the ‘Turk’” in Jezernik (ed.) *Imagining the “Turk”*, supra n. 153, p. 5.

¹⁵⁶ See Iver B. Neumann, *Uses of the Other: ‘The East’ in European Identity Formation* (Minneapolis: University of Minnesota Press, 1999), pp. 50-51. In September 1782, Catherine the Great, Empress of Russia, devised a plan for reconstructing the map of the Balkan Peninsula. She desired to expel the Ottoman Turks from Europe, after which its possessions would be partitioned. See J.A.R. Marriot, *The Eastern Question: An Historical Study in European Diplomacy* (Oxford: At the Clarendon Press, 1940), pp. 155-156. Even the Abbé de Saint-Pierre’s *Projet pour rendre la paix perpétuelle en Europe* amounted to a European coalition against the Ottoman Empire. See the author’s introduction to Immanuel Kant, *Perpetual Peace: A Philosophical Essay, 1795*, translated with an introduction and notes by M. Campbell Smith (London: George, Allen & Unwin, 1903), p. 36.

¹⁵⁷ Jezernik, “Imagining the ‘Turk’” in Jezernik (ed.) *Imagining the “Turk”*, supra n. 153, p. 7.

¹⁵⁸ I have used the Russian spelling for his name. For the quote, see Andreas Müller, “Friedrich F. Martens on ‘The Office of Consul and Consular Jurisdiction in the East’”, paper presented at the 4th ESIL Research Forum, Tallinn, Estonia, 28 May, 2011, p. 7.

civilized or semi-barbarous peoples” in Eastern Turkestan and Afghanistan that were “nomadic, semi-savage peoples living on theft and pillage”. In his opinion, international law could not extend to such peoples since they could not be held responsible for their behaviour as they were unable to understand simple juridical ideas which formed the basis for international relations between European peoples.¹⁵⁹

Instead of being designated infidels in the imperial age, non-Europeans from the East were referred to as “Oriental”, which as Edward Said observed, involved an evaluative judgment.¹⁶⁰ In the case of the peoples inhabiting the Ottoman Empire, it signified an implicit program of action: “Since the Oriental was a member of a subject race, he had to be subjected”.¹⁶¹ European ideas about the biological bases of racial inequality ineluctably led them to conclude that the peoples of the Orient were naturally backward and degenerate. In addition to theories of Social Darwinism, the Evangelicalism and Utilitarianism of influential figures like Charles Grant (1746-1823) and James Mill (1773-1836) affected their perceptions of the peoples of the Orient, particularly in their cases, of British India. Grant was the author of an enormously influential policy paper that made the case for an aggressively Anglicizing and Christianizing stance toward India and its culture, in opposition to the prevailing policy of respect for Indian laws, religion, and custom that had been set in motion by Warren Hastings.¹⁶² In *On Liberty and Representative Government* J.S. Mill wrote that his views could not be applied to British India because the Indians were civilizationally, if not, racially, inferior.¹⁶³ Grant in his *Reflections* described the “Hindoos” as “a people void of public spirit, honour, attachment; and in society, base, dishonest, and faithless”.¹⁶⁴ Moreover, because of the fundamental cultural and religious differences within Indian society, and the lack of homogeneity, it was argued by some that representative government was not suitable in India: “The religious distinctions of India are very different to those with which we are familiar in this

¹⁵⁹ See Rein Müllerson, “F.F. Martens – a man of the Enlightenment: Any lessons or parallels for today’s world?” paper presented at the 4th ESIL Research Forum, Tallinn, Estonia, 28 May, 2011, p. 4 quoting F.F. Martens, *Russia and England in Central Asia*, St. Petersburg, 1880, p. 19.

¹⁶⁰ Edward Said, *Orientalism* (London: Penguin, 2003), p. 207.

¹⁶¹ Said, *Orientalism*, *ibid*, p. 207.

¹⁶² Thomas R. Trautman, *Aryans and British India* (Berkeley: University of California Press, 1997), p. 101.

¹⁶³ As noted by Said in *Orientalism*, *supra* n. 160, p. 14.

¹⁶⁴ Trautman, *Aryans and British India*, *supra* n. 162, p. 104.

country. There they cut far deeper than here into the social fabric, and divide far more fundamentally man from man, family from family, and even village from village”.¹⁶⁵

When Macaulay expressed his opinion on Indian education policy in his *Minute on Indian Education* (1835), he could not help but exclaim in a stridently Oriental manner that “a single shelf of a good European library was worth the whole native literature of India and Arabia”.¹⁶⁶ Macaulay’s view that Oriental culture whether expressed in the form of art, literature, or even music, was by its nature inferior to whatever was produced and originated within Europe, was something that would be expressed by those persons tasked with writing up the Royal Commission Report on the Partition of Palestine in 1937, chaired by Lord Peel, as explained in Part Three. Instead Macaulay implored the natives to study Milton, Locke, and Newton, before calling on the British government to form an elite class: “Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect”.¹⁶⁷ As India marched towards independence, this British policy had, over time, the effect of creating an elite class of British Indians in the manner Macaulay had prescribed in which a national conflict would emerge between upper caste Hindus and Muslims, whilst the interests and opinions of the masses were ignored.¹⁶⁸ As Nehru recollected:

...the British treated India as a kind of enormous country-house. They were the gentry owning the house and occupying the desirable parts of it, while the Indians were consigned to the servants’ hall and pantry and kitchen. As in every proper country-house there was a fixed hierarchy in those lower regions—butler, housekeeper, cook, valet, maid, footman, etc.—and strict precedence was observed among them. But between the upper and lower regions of the house there was, socially and politically, an impassable barrier ...We developed the mentality of a good country-house servant.¹⁶⁹

As Bhikhu Parekh explains, the British in India, following the logic of the language of civilization, justified their rule in educational terms and used pedagogical and tutorial metaphors with great regularity. The Indians were effectively treated as though they were their pupils, and as if India was a big public school—like Eton writ large. Britain introduced a new language and taught its pupils how to speak to each other

¹⁶⁵ Indian Councils Bill [Lords.], HC Deb 01 April 1909 vol 3 cc496-601 at col. 551 (Mr. Balfour).

¹⁶⁶ See “Thomas Babington Macaulay on Education for India” in Philip D. Curtin (ed.), *Imperialism* (London: MacMillan 1972), p.182.

¹⁶⁷ “Macaulay on Education” in Curtin, *Imperialism*, *ibid*, p. 190.

¹⁶⁸ See Bruce Tiebout McCully, *English Education and the Origins of Indian Nationalism* (Gloucester: Peter Smith, 1966), p. 388.

¹⁶⁹ Jawarharlal Nehru, *An Autobiography* (London: John Lane, 1936, reprint, 2001), p. 417.

and their rulers in a “civilized” tongue. They introduced Indians to the writings of Hume, Locke, Berkeley, Bentham, J.S. Mill and Spencer—exactly as Macaulay had prescribed in his *Minute on Education*. And Britain set up schools, colleges, and universities in India, to train Indians to “think” and develop “good character”.¹⁷⁰

Slavery and the origins of apartheid

Like Jews, the Irish, Indians, and Orientals, the so-called “men of colour” were also the target of widespread prejudices. These prejudices had their origins in the sixteenth century, and earlier, when Europeans first encountered the African in Africa, which created long-standing prejudices concerning the African’s physical, mental, and moral nature.¹⁷¹ In 1685, Louis XIV issued a decree known as “*Le Code Noir*” that created a strict separation between whites and non-whites in France’s colonies.¹⁷² Nearly all aspects of daily life were affected by the Code: prescriptions against assembly, alcohol use, flight, and interracial sexual relations. They also stipulated that slaves had to be baptized in the Roman Catholic Church and forbade Jews from residing in the colonies and sought their eviction.¹⁷³ For centuries, Africans were mythologised by Europeans as brutish, evil, satanic, and concupiscent.¹⁷⁴ And it was with this pervading view of the African, and because the white man considered him physically “suited” for slavery,¹⁷⁵ that he was sold into bondage, especially in the US where 69 per cent of the signers of the American Declaration of Independence had held colonial office under English rule, many of whom also happened to be slave owners.¹⁷⁶

¹⁷⁰ See Bhikhu Parekh, *Gandhi’s Political Philosophy: A Critical Examination* (London: MacMillan, 1989), p. 13.

¹⁷¹ Nancy Stepan, *The Idea of Race in Science: Great Britain 1800-1960* (London: The MacMillan Press, 1982, in association with St Antony’s College, Oxford), p. 8.

¹⁷² See Laurent Dubois and John D. Garrigus, *Slave Revolution in the Caribbean, 1798-1804: A Brief History with Documents* (Boston: Bedford Series in History and Culture, 2006), pp. 49-54 (providing an English translation of The Black Code).

¹⁷³ See Arts. I and II of the Black Code, *ibid*, p. 50.

¹⁷⁴ Stepan, *The Idea of Race*, *supra* n. 171, p. 8. See also, Emmanuel Chukwudi Eze, *Race and the Enlightenment: A Reader* (Oxford: Blackwell Publishers, 1997), pp. 93-4.

¹⁷⁵ Eric Williams makes the point that “unfree labour in the New World was brown, white, black, and yellow; Catholic, Protestant, and pagan”. He explains that the first people to be enslaved in the New World were the Indian (that is, the native Indians of the Americas and the Caribbean). However, the native Indian was soon regarded as too weak and unprofitable to the colonial powers. The cultivation of sugar, cotton, and other commodities required strength the Indians lacked. It was said that, “one Negro was worth four Indians”. See Eric Williams, *Capitalism and Slavery*, *supra* n. 17, pp. 7-9.

¹⁷⁶ Zinn, *A People’s History of the United States*, *supra* n. 87, p. 74.

This included Thomas Jefferson (1743-1826), the man who wrote most of that Declaration. In his writings he repeatedly insisted that black slaves were a threat to the character of the US, and that after emancipation they should be “colonized to such place as the circumstances of the time should render most proper, sending them out with arms, implements of household, and of the handicraft arts, feeds, pairs of useful domestic animals”.¹⁷⁷ Jefferson owned some 175 slaves, and he took few steps to liberate any of them at any time in his comparatively long life.¹⁷⁸ And in not freeing his slaves, Jefferson was breaking a promise to his Polish compatriot Tadeusz Kosciuszko to free them.¹⁷⁹ For Jefferson’s conception of American nationhood excluded the African.¹⁸⁰ Thus in *Dred Scott* the Supreme Court interpreted the words that Jefferson had penned to the Declaration of Independence to the effect that “all men are created equal”, to deny that he had ever intended to include enslaved Africans. “[I]t is all too clear for dispute”, the Court categorically confirmed, “that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration”.¹⁸¹ This was because for more than a century, the African “had been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect”.¹⁸² As the Supreme Court explained, this view was one shared by the Founding Fathers:

...the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of

¹⁷⁷ Peter S. Onuf, *The Mind of Thomas Jefferson* (Charlottesville: University of Virginia Press, 2007), p. 208.

¹⁷⁸ With the exception of Sally Hemings and the children he fathered with her. See R.B. Bernstein, “Wrestling with Jefferson: The Struggles of a Biographer”, *New York Law School Journal of International and Comparative Law* (2003), p. 399. See also, Winthrop D. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* (New York: W.W. Norton & Company, 1977), pp. 465-466. For the slave figures see Paul Finkelman, “The Centrality of the Peculiar Institution in American Legal Development”, 68 *Chicago-Kent Law Review* (1992-1993), p. 1009 at p. 1018.

¹⁷⁹ See Alex Storozynski, *The Peasant Prince: Thaddeus Kosciuszko and the Age of Revolution* (New York: Thomas Dunne, 2009), pp. 275-284.

¹⁸⁰ See Jordan, *White over Black*, supra n. 178, p. 547 citing his letter to Governor Monroe, Nov. 24, 1801.

¹⁸¹ *Dred Scott v. Sanford*, in *Reports of Cases*, supra n. 112, p. 410.

¹⁸² *Dred Scott v. Sanford*, in *Reports of Cases*, ibid, p. 407.

nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by the indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.¹⁸³

It ought to be remembered that although Abraham Lincoln (1809-1865) authored the Emancipation Proclamation (1863), and was genuinely committed to granting Africans their natural rights to life, liberty, and happiness, he opposed the rights of blacks to vote, become citizens, serve on juries, hold office, or marry whites.¹⁸⁴ Lincoln did not believe that Africans were political or social equals to whites. As he admitted: “I am in favour of the race to which I belong having the superior position”.¹⁸⁵ Lincoln only opposed slavery because it was inconsistent with the principles of the war fought against Britain in 1776, and the theory of government by consent.¹⁸⁶ But the theory of consent had nothing to do with equality. Although disagreeing with the opinion expressed by the Supreme Court in *Dred Scott*, Lincoln nonetheless told an 1857 Republican rally: “I think the authors of [the Declaration of Independence] intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all we equal in color, size, intellect, moral development, or social capacity”.¹⁸⁷ It was only after the Union’s victory in the Civil War that a new approach to American self-determination was established in which the new social compact was premised on there being equal citizenship. This history may partly explain why America refused to support the maintenance of the British Empire and its old fashioned form of imperialism after World War II.¹⁸⁸

Lincoln, like Jefferson, was, prior to the Civil War, a proponent of various colonization schemes to send free black men and slaves to Liberia, Haiti, and

¹⁸³ *Dred Scott v. Sanford*, in *Reports of Cases*, *ibid*, p. 410.

¹⁸⁴ Robert J. Reinstein, “Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment”, 66 *Temple Law Review* (1993), p. 361 at p. 381.

¹⁸⁵ Reinstein, “Completing the Constitution”, *ibid*, p. 381 quoting *The Writings of Abraham Lincoln*.

¹⁸⁶ Reinstein, “Completing the Constitution”, *ibid*, pp. 381-382.

¹⁸⁷ Reinstein, “Completing the Constitution”, *ibid*, p. 397 (emphasis in original).

¹⁸⁸ See the section on decolonization in Part Three where the Kennedy administration said it was determined to do what it could “to show that they still stand by the beliefs of the Founding Fathers in the rights of nations to freedom and independence”. See “US Attitude on Colonialism”, Telegram from Washington to Foreign Office, 1 February, 1961, FO 371/160902.

Panama.¹⁸⁹ Indeed some slaves, after their owners were compensated, were sent to Liberia and Haiti.¹⁹⁰ Although Lincoln thought that the white population in America would grow faster than the black, others supported colonisation because they feared that emancipation would result in the black population outgrowing the white. Indeed this is what happened in some of the Southern states whose white population dwindled prior to the Civil War.¹⁹¹ This might explain why only a month before issuing the Emancipation Proclamation, Lincoln had asked for a constitutional amendment authorising Congress to appropriate funds for colonization, along with funds to compensate owners of slaves who gained their freedom as a result of the war.¹⁹² By sending the “uncivilised” and the “undesirables” to the colonies, these US statesmen were mimicking British colonial policy, in which its undesirables were sent to the Americas and Australasia. The policy had come full circle. Between its founding in 1816 and 1860, the American Society for Colonizing Free People of Color in the United States had transported some 11,000 persons to Africa, the majority slaves manumitted by their owners for the express purpose of removal to Liberia.¹⁹³

Inequality based on race was at the heart of colonial policy throughout the nineteenth and twentieth centuries. In places of white settlement racism against blacks was particularly acute. These old prejudices provided the context for the extraordinary ease with which Europeans came to accept the enslavement of African negroes as a “natural” function of their black skin.¹⁹⁴ And these views were prevalent in the twentieth century. Thus Frantz Fanon (1925-1961), writing during the Algerian struggle for independence, summed up a view that was still common then in the West: “Black Africa is looked on as a region that is inert, brutal, uncivilised—in a word, savage”.¹⁹⁵ He complained of “the drivelling paternalism with regard to blacks” which was a “loathsome idea derived from Western culture that the black man is impervious to logic”.¹⁹⁶ It was therefore no coincidence that when the white man came into contact with non-Europeans of a different skin colour in large numbers in

¹⁸⁹ See John Milton Cooper Jr and Thomas J. Knock (ed.), *Jefferson, Lincoln and Wilson: The American Dilemma of Race and Democracy* (Charlottesville: University of Virginia Press, 2010), pp. 107-123.

¹⁹⁰ Cooper and Knock, *The American Dilemma of Race and Democracy*, *ibid*, pp. 112-119.

¹⁹¹ Cooper and Knock, *The American Dilemma of Race and Democracy*, *ibid*, pp. 118-119.

¹⁹² Cooper and Knock, *The American Dilemma of Race and Democracy*, *ibid*, p. 118.

¹⁹³ Cooper and Knock, *The American Dilemma of Race and Democracy*, *ibid*, p. 112.

¹⁹⁴ Stepan, *The Idea of Race in Science*, *supra* n. 171, p. 8.

¹⁹⁵ Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001), p. 130.

¹⁹⁶ Fanon, *The Wretched of the Earth*, *ibid*, p. 130.

southern Africa, a legal system was created that would entrench his legal and political position. Outright racism against Africans had a long history in Western academia, which fuelled the ideology of those who established apartheid that would mutilate southern Africa, contributing to its attempted partition in the twentieth century.

These sweeping generalisations had a major impact on the attitudes of those who were vested with responsibility for colonial policy at the height of British imperialism, which affected the differentiations they made between their colonial subjects, and the manner in which certain colonies would be divided during decolonization as explained in Part Three. The prejudices that the English speaking settlers developed in categorising peoples in terms of their alleged innate differences on the grounds of class, colour, and creed, was a reflection of the way in which English nationalism had developed within the British Isles. This in turn had an impact on nationality legislation and the development of nationhood overseas. In order to appreciate how these differences came into being and how they affected later instances of partition the genesis of nationality in the Empire ought to first be considered. This is best appreciated by contrasting the development of nationhood and nationality in Britain and France, the chief colonial rivals, in the imperial age.

3. The evolution of nationhood: British and French approaches

The way in which the notion of nationhood developed in the United Kingdom after it was formally established in the Act of Union in 1707, differed somewhat from the French concept of nationhood. The significance of these differences as regards colonial policy becomes clearer when one takes a closer look at how the nation was forged in England and France. This is because how these nations defined their body politics influenced the way in which they defined the body politics in their colonies. In order to appreciate how the concept of the nation was understood differently in England and in France during their respective periods of revolutionary turmoil, it is necessary to revisit, albeit briefly, the laws passed that prescribed their respective political bases, whether in the form of citizenship, nationality, or immigration laws. The reason for revisiting these laws is because the way in which the English and French determined and defined their nationals provides a reference point for

comparison, since it is only by understanding these differences, that we can appreciate why partition was a phenomenon common to British, but not to French, colonies.

A brief comparison with France is also useful because of its geographical and political proximity to England, its close historical association, and because the greatest empires in colonial history were English and French. In Britain, the revolution ultimately failed and the old order was restored during the Restoration in 1660.¹⁹⁷ Whilst the 1688 revolution made the King's exercise of power subject to the consent of Parliament this did not greatly affect the social structure of British society. In contrast in France, the revolution, despite several setbacks, ultimately succeeded. It was during the French Revolution that the concept of nationality, as a distinct idea, was codified in legislation, which provided a model for other nations to follow.¹⁹⁸ This was not the case in the United Kingdom where nationality laws developed very differently. The reason for this is that unlike in France, Britain had, and still has, no written constitution clarifying the rights and duties of its citizens. In Britain the idea of nationality developed haphazardly, and was closely connected to immigration law.¹⁹⁹ The French Revolution was partly to blame for this state of affairs, since it was in reaction to the revolutionary wars, that hierarchy, privilege, and patriotism, in the form of the British class system, and Anglicanism, became further entrenched.²⁰⁰

It has to be remembered that one of the major differences between the British and French experiences of revolution was that the constitutional settlement negotiated during the Interregnum deliberately kept the class system intact. This was not the case in France, where the aristocracy fled *en masse* to Austria and Germany, after their manors, castles, and abbeys, had been burned to the ground during the peasant uprising. To appease the peasants, the revolutionaries abolished the privileges of the

¹⁹⁷ See Brian Manning, *Aristocrats, Plebeians, and Revolution in England 1640-1660* (London: Pluto, 1996), p. 139 ("The fundamental fact is that the aristocracy was not expropriated by the revolution: it retained its estates and its status, though deprived temporarily of its political power. In essence the Restoration was the re-establishment of the aristocracy in political power, but under new terms of relationship to a state evolving into a great naval, commercial, colonial, and industrial power, and to increasing interdependence with the 'middle sort of people'").

¹⁹⁸ There were huge debates in France on nationality. See David A. Bell, *The Cult of the Nation in France* (Cambridge: Harvard University Press, 2001); Peter Sahlins, *Unnaturally French: Foreign Citizens in the Old Regime and After* (Ithaca: Cornell University Press, 2004); and Patrick Weil, *How to be French: Nationality in the Making since 1789* (Durham: Duke University Press, 2008).

¹⁹⁹ Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld and Nicolson, 1990), p. 2.

²⁰⁰ David Cesarani, "The Changing Character of Citizenship and Nationality in Britain" in David Cesarani and Mary Fulbrook (eds.) *Citizenship, Nationality, and Migration in Europe* (London: Routledge, 1996), p. 57, at p. 59.

aristocracy.²⁰¹ In Britain, in contrast, Cromwell, whilst he abolished feudalism, and the House of Lords, did not interfere with the social structure of British society. The Parliamentarians who briefly took control of the state during the Interregnum were not concerned with rights for the masses of the people. Instead, sovereign power in the state shifted to the House of Commons. After the Restoration when Charles II was invited back to Parliament, he and the monarchs who succeeded him were called “our sovereign lord”. The sovereign king-in-Parliament would become an oligarchy, and within the small group of aristocratic families who dominated the Lords (now re-established) and the Commons, the king was leader of one faction among many.²⁰²

Another major difference between the English and French experiences of revolution was the way in which they dealt with the problem of religion. In England, religion was the major issue during the Interregnum as the Puritan revolutionaries sought to make England a more religiously tolerant and equal society, but the Monarchy, and the forces of conservatism they were up against, succeeded in thwarting their reforms during the Restoration in 1660. Charles II and his supporters ensured that the aristocratic Anglican system was reinstated once they regained power, which included reinstating the upper chamber, with its Lords and Bishops, although the Bishops were never again to assume their former position when they controlled Parliament.²⁰³ In France, in contrast, the revolutionaries were mostly atheists, and hailed from the bourgeoisie. A surprisingly large number of them were lawyers fed up with the abuses and corruption of the Monarchy, the aristocracy, and the clergy.²⁰⁴ The French revolutionaries sought to create a more equal society, with no role for Monarchy and a lesser role for religion. The French revolutionaries therefore had to create an entirely new nation, with laws defining the rights and duties of the citizen.

Prior to the Civil War and the Restoration in Britain, naturalisation was the primary legal technique employed to distinguish foreigners from those who were born

²⁰¹ See “The August Decrees”, in John Hardman (ed.), *The French Revolution Sourcebook* (London: Arnold Publishers 1999), p. 111. See further, Gunther E. Rothenberg, “The Origins, Causes, and Extension of the Wars of the French Revolution and Napoleon”, in *18 Journal of Interdisciplinary History* (1988), pp. 779-781; the Declaration of war on Austria, 20 April 1791, in John Hardman (ed.), *The French Revolution Sourcebook* (London: Arnold Publishers 1999), p. 141 and Bailey Stone, *Reinterpreting the French Revolution: A Global-Historical Perspective* (Cambridge: Cambridge University Press 2002), p. 169.

²⁰² Dummett and Nicol, *Subjects, Citizens, Aliens and Others*, supra n. 199, p. 68.

²⁰³ Christopher Hill, *The Century of Revolution 1603-1714* (London: Thomas Nelson, 1961), p. 187.

²⁰⁴ When the deputies of the Third Estate convened in Versailles in May 1789, with its revolutionary agenda, 46 per cent of them were members of the French bar. See David A. Bell, *Lawyers and Citizens: The Making of a Political Elite in Old Regime France* (Oxford: Oxford University Press, 1994), p. 6.

and bred in Britain.²⁰⁵ The assumption underlying the concept of naturalisation was that a subject was more likely to be loyal to his king if he was born and bred within the kingdom. The law would accord that person the greatest protection. If, however, an alien born in territory belonging to the king's enemy entered Great Britain by chance that person could be slain as the law gave him no protection. Thus becoming a subject of the English king was defined in relationship to his enemies. In other words, it all came down to loyalty. The king needed to be assured of his kingdom's security and self-preservation.²⁰⁶ In the colonies naturalisation laws would be used to distinguish European settlers from others, as well as through efforts to restrict the franchise so only those who were considered loyal to the Empire could exercise it. It was only after the Act of Union in 1707 that one could first speak of a distinctive British concept of nationality.²⁰⁷ This developed through immigration policy, which aimed at encouraging the settlement of people in Britain to benefit the economy.

In contrast to post-revolutionary France, religion and class played a crucial component in the concept of British nationhood as reflected in its nationality and immigration laws. Accordingly, Britain encouraged the emigration of paupers and convicts (the "lower classes") to the colonies, whilst encouraging wealthy Protestant artisans, including Huguenot refugees from France, and during Cromwell's days the immigration of Dutch Jewish merchants, to settle in England and Ireland. Those who were sent by Britain to the colonies included thousands of poor Irish men, women, and children, whom Cromwell sent to plantations in the West Indies and in Virginia, where they were exposed naked in the cattle market to be selected and purchased by the agents of planters as though tantamount to slaves.²⁰⁸ Within Britain and Ireland, religious tests were imposed on aliens seeking naturalisation. The Old Catholic aristocracy in Ireland was deliberately replaced by a new class, which wanted more

²⁰⁵ Sir Francis Bacon's speech to Parliament "concerning the article of general naturalisation of the Scottish nation" (read in Feb. 1606-7), which greatly influenced Lord Coke's opinion in *Calvin's Case* (1608), the leading case on citizenship in the seventeenth century. See *Resuscitatio Or, bringing into Publick Light Several Pieces of the Works, Civil, Historical, Philosophical, and Theological Hitherto Sleeping of the Right Honourable Francis Bacon, Baron of Verulam, Viscount Saint Alban, in Two Parts, The Third Edition, According to the best corrected Copies, Together with his Lordship's Life*, By William Rawley (London: Printed by S.G. and B.G. for William Lee, 1671), pp. 8-19.

²⁰⁶ "The Law giveth him no protection, neither for Body, Lands, nor Goods: So as if he be slain, there is no Remedy, by any appeal", *ibid*, pp. 14-15. There was, however, a presumption that a person "born under the faith", was not an enemy. Correspondingly, one can deduce that a person that was not born under the faith was *prima facie* considered a suspect, if not an enemy.

²⁰⁷ Dummett and Nicol, *Subjects, Citizens, Aliens and Others*, *supra* n. 199, pp. 71-72.

²⁰⁸ Dummett and Nicol, *Subjects, Citizens, Aliens and Others*, *ibid*, p. 72, footnote. See also, the description in Zinn, *A People's History of the United States*, *supra* n. 87, pp. 42-44.

autonomy. The result was that Irish nationalism in the eighteenth century became Protestant and upper class, although this was reversed in the following century.

The legislation, which naturalised foreign-born Protestants who had settled in England and Ireland, was appropriately entitled the Foreign Protestants Naturalisation Act (1708). This Act allowed any alien to become naturalised on taking the oaths and communion and declaring, before a court, support for the Protestant succession.²⁰⁹ Thus the enjoyment of full political rights rested on conformity to Anglicanism. This would explain why there was public outcry when the government considered an Act enabling the naturalization of foreign-born Jews.²¹⁰ The English, the Welsh, and the Scots common investment in Protestantism allowed them to be fused together, despite their cultural and linguistic differences. It was also Protestantism that helped to make Britain's wars against France significant in the process of state formation. The image of a persistently powerful and threatening French Empire "became the haunting embodiment of that Catholic Other which Britons had been taught to fear since the Reformation in the sixteenth century".²¹¹ Prior to the Union, the nationality laws of England applied to the colonies, which did not have their own separate nationality.²¹² The result was that the same class and religious distinctions applied there, with the exception of the American colonies, where differences in Christian worship were tolerated, and where instead difference was expressed in the form of racial appearance.

In the United Kingdom it was only after the union with Ireland that the exclusion of Catholics became untenable, which led to the Catholic Relief Act in 1829. This step dislocated the identification of the Anglican Church with the British nation, but ended up reinforcing the popular perception that the United Kingdom was a Christian country.²¹³ In any event, the passage of the Catholic Emancipation Act had little impact on the prevailing Protestant worldview in which many Britons viewed themselves as a distinct and chosen people, a view that they continued to hold well into the twentieth century.²¹⁴ Indeed this Protestant worldview had direct impact on the attempt to create an imperial citizenship to encompass the English-speaking

²⁰⁹ 7 Anne, c. 5, cited in Dummett and Nicol, *Subjects, Citizens, Aliens and Others*, *ibid*, p. 284.

²¹⁰ Cesarani, "The Changing Character of Citizenship and Nationality in Britain", *supra* n. 200, p. 60.

²¹¹ Linda Colley, *Britons: Forging the Nation 1707-1837* (London: Pimlico, 2003, first published by Yale University Press, 1992), pp. 367-368.

²¹² See Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of The Republic of Ireland* (London: Stevens & Sons, 1957), p. 56.

²¹³ Cesarani, "The Changing Character of Citizenship and Nationality in Britain", *supra* n. 200, p. 60.

²¹⁴ Colley, *Britons: Forging the Nation 1707-1837*, *supra* n. 211, p. 368.

peoples in the Dominions of white settlement.²¹⁵ This Protestant worldview would also have a direct impact on the decision to partition Ireland between nationalists and unionists (in reality, between Protestants and Catholics) and also explains British support for Zionism in Palestine, which contributed to various schemes to partition it.

In contrast to the manner in which religion influenced nationality and citizenship legislation in Britain, in France, Emmanuel Joseph Sieyès (1748-1836), described as “the theoretical architect of the French Revolution of 1789”,²¹⁶ deliberately avoided race and religion. Instead, Sieyès sought to create a secularized concept of citizenship that only discriminated on grounds of class, in that it made a distinction between “active” and “passive” citizens, which would find expression in the first French revolutionary Constitution.²¹⁷ To be an active citizen, an individual had to have been born in France or to have French parents, be at least 25 years old, domiciled in France, not be in a condition of servitude, and to pay the property taxes. Women, whilst not explicitly excluded from citizenship in the language of the law noted Peter Sahlins, were nonetheless in fact treated “like children, the very poor, and others in a position of dependence, only capable of enjoying the quality of being French (*qualité de français*)”.²¹⁸ This concept of citizenship was thus similar to the Anglo-American citizen, but only to the extent that there was a property qualification.

In France, the Declaration of the Rights of Man and of the Citizen (1789) proclaimed the principle “men are born free and remain equal in rights”. Unlike in the Thirteen American Colonies, and in other British colonial territories, the French revolutionaries sought to apply their principle of equality equally through assimilation, which was introduced in France and in its colonies. In France, equality meant that everyone should be treated by legislation as if they were identical. This meant, for instance, that only the French language could be used to the exclusion of all others.²¹⁹ The eradication of local *patois* not only affected revolutionary France, however.

²¹⁵ For the different schools of thought on imperial citizenship between those who developed a gradually inclusive view of Empire and those who held to a more exclusive Anglo-centric understanding, see Daniel Gorman, *Imperial Citizenship: Empire and the Question of Belonging* (Manchester: Manchester University Press, 2006).

²¹⁶ See Michael Sonenscher’s introduction to Sieyès, *Political Writings: Including the Debate between Sieyès and Tom Paine in 1791* (Indianapolis: Hackett Publishing 2003), p. viii.

²¹⁷ Sahlins, *Unnaturally French*, supra n. 198, pp. 271-272.

²¹⁸ Sahlins, *Unnaturally French*, ibid, p. 272.

²¹⁹ See Fernand de Varennes, *Language, Minorities and Human Rights* (The Hague: Martinus Nijhoff, 1996), p. 14. Out of a population of 28 million, the abbé estimated that only 3 million actually spoke French properly. See Bell, *The Cult of the Nation*, supra n. 198, pp. 175-178.

Local dialects in the colonies were also targeted. There, in the words of the principal textbook that was written to explain the law of colonisation to law students in France, assimilation aimed to inculcate the native “with our ideas and customs”, in the hope of making “them into Frenchmen”. This meant that the native was “educated”, “granted the right of suffrage”, as well as “dressed in the European mode”, and that French law was “substituted for their customs”. However if the natives refused to assimilate to the French way of life, then they were to be “exterminated or pushed back”.²²⁰

This French understanding of nationhood sought to encompass all those individuals who found themselves under French sovereignty. So long as they assimilated to the French way of life, they were to be treated equally, at least on paper. One of the consequences of this approach to nationhood was that the notion of belonging to the French nation was all encompassing. It was not predicated on establishing internal divisions, as the British colonial model was, whether these distinctions were based on an individual’s class, colour, or creed. This might explain why France did not partition its colonies during decolonisation, in contrast to Britain, which did, because in the British colonies these distinctions tended to extenuate difference. And these differences in turn affected the evolution of nationhood.

4. The colonial franchise: to avoid a numerous democracy

Another way in which the state could define its national community, in addition to defining it through the instruments of immigration and nationality legislation, was by restricting membership in political society. This was done through limiting who could exercise the vote by manipulating the franchise qualifications.²²¹ There were many ways in which this could be accomplished: it could either be blatantly discriminatory i.e. so as to directly preclude non-Europeans on the basis of their class, creed, or colour; or, as proved to be more common, by imposing a high property qualification. Locke resorted to both qualifications when he helped draft *The Fundamental*

²²⁰ See Lewis, “One Hundred Million Frenchmen”, supra n. 73, pp. 132-133 summarizing pp. 54-75 of the first edition from Arthur Girault, *Principes de Colonisation et de Législation Coloniale* (Paris, 1st ed., 1895). This book was revised several times and went through six editions until 1943.

²²¹ As Madden and Fieldhouse note, in the period of the First British Empire, “less than one in ten had the vote in Pennsylvania or in Virginia. In Massachusetts, even under the more liberal charter of 1691, it was perhaps as low as one in fifty. The imperial government accepted these limitations and divergences, making no attempt after 1691 to insist on a more uniform or democratic representation. See Madden and Fieldhouse, *The Classical Period of the First British Empire*, supra n. 70, pp. 343-344.

Constitutions of Carolina in 1669.²²² To Locke, the notion of equality only applied to Lords Proprietors, and their heirs and successors, it applied to no one else. This might explain why the preamble to the *Fundamental Constitutions*, which Locke is believed to have written, ensured that “the government of this province may be made most agreeable to the monarchy under which we live and of which this province is a part; and that we may avoid erecting a numerous democracy”.²²³ Why did one of the founding fathers of liberalism desire to avoid erecting a numerous democracy?

In order to answer this important question, it is necessary to contextualise the *Constitutions*, and briefly consider the demographic, political, and social situation in the Carolinas when Locke helped draft it. In his extensive and scrupulously documented study on the *Negroes in Colonial South Carolina*, Peter Wood explained that “black slaves were present in South Carolina colony from the year of its founding, and by the second generation they constituted a majority of the population”.²²⁴ The reason for this was that well over 40 per cent of the slaves reaching the British mainland colonies between 1700 and 1775 arrived in South Carolina. The first Africans came to the Carolinas in 1526 as members of a sizeable Spanish expedition from the West Indies.²²⁵ Those who settled in the Carolinas from Barbados and Bermuda also brought slaves with them.²²⁶ In addition, the settlers came into contact with the nineteen Native American tribes indigenous to the southern Carolinas. Around the area of the Carolinas some 60,000 Creek, Cherokee, Choctaw, and Chickasaw Indians roamed—who frequently clashed with the settlers. In other words, the land was not as empty as Locke wished it to be. There were at least as many, if not more, natives and slaves, than whites, in the Carolinas when he helped write the *Constitutions*.²²⁷ Thus, in 1737, Samuel Dyssli, a Swiss newcomer, commented that “Carolina looks more like a negro country than a country settled by white people”.²²⁸

²²² See Francis Newton Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America*, compiled and edited under Act of Congress of June 30, 1906, Vol. V (Washington: Government Printing Office, 1909), pp. 2772-2786.

²²³ *The Federal and State Constitutions*, *ibid.*, p. 2772.

²²⁴ Peter H. Wood, *Black Majority: Negroes in Colonial South Carolina from 1670 through the Stono Rebellion* (New York: W.W. Norton Company, 1974), p. xiv.

²²⁵ Wood, *Black Majority*, *ibid.*, p. 3.

²²⁶ Locke noted that “the Barbadians endeavor to rule all”. See Wood, *Black Majority*, *ibid.*, p. 24.

²²⁷ According to the statistics provided by the Governor for South Carolina in 1708, as reproduced in Wood, *Black Majority*, *ibid.*, p. 144, Table 1, 350 Indians were slaves, including women and children. A further 3000 slaves were African. The white population in 1708 stood at 3,800, of whom 200 were in a condition of servitude. However, this figure included women and children. If the figure for free

In order to offset this population imbalance, Locke and his fellow proprietors sought to encourage settlers to colonise the Carolinas from New England, New Jersey, New York, and Virginia,²²⁹ as well as French Huguenots and Scottish dissenters from Europe.²³⁰ The colonists in the Carolinas sought to divide the slaves and natives so they would not be able to combine numbers to overthrow the minority ruling aristocracy. One of the proprietors admitted that their policy was “to make Indians & negroes a cheque upon each other lest by their Vastly Superior Numbers we should be crushed...”²³¹ The *Constitutions* provided that the hereditary nobility, as well as being members of parliament, were to rule over the colony, which was divided by counties, as the land was apportioned in England.²³² And naturally, this English aristocracy were also the biggest landowners. Just to be a register in a colony, the *Constitutions* specified that one had to own a minimum of 50 acres of freehold in the colony.²³³ The natives and slaves were to be encouraged to become good Christians,²³⁴ although the *Constitutions* affirmed the absolute powers of life and death of the slaveholders over their slaves.²³⁵ The conditions in Locke’s Carolinas prompted one scholar to describe it as having yielded “the most rigorous deprivation of freedom to exist in institutionalized form anywhere in the English continental colonies”.²³⁶

The concept of majoritarianism

The decision to avoid erecting a numerous democracy in the *Constitutions of the Carolinas* was deliberate. Locke did not want political authority to be vested in slaves, natives, and the lower classes. This was because in any democratic system, Locke

white men (1, 460) is compared to the figure for negro men slaves (1,500), then the slaves actually outnumbered the free white men in 1703. They would continue to outnumber the white settlers for many years, even after independence in 1776.

²²⁸ Wood, *Black Majority*, *ibid*, p. 132.

²²⁹ Wood, *Black Majority*, *ibid*, p. 24.

²³⁰ Armitage, “John Locke, Carolina, and the “Two Treatises of Government”, *supra* n. 84, p. 612.

²³¹ See Zinn, *A People’s History of the United States*, *supra* n. 87, p. 54. This policy of divide and rule was an accusation that would be levelled against the British authorities when they imposed direct rule over India after the 1857 mutiny.

²³² See clauses one to four, “The Fundamental Constitutions of Carolina”, in Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States*, *supra* n. 222, p. 2772.

²³³ Clause eighty-five, *The Fundamental Constitutions*, *ibid*, p. 2782.

²³⁴ Clause ninety-seven, *The Fundamental Constitutions*, *ibid*, p. 2783.

²³⁵ Clause one hundred and ten, *The Fundamental Constitutions*, *ibid*, p. 2783. (“Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever”).

²³⁶ Jordan, *White over Black*, *supra* n. 178, p. 85 (also mentioning the 1690 Slave Code).

understood that political power was nominally vested in the majority of those persons who formed the political assembly, and were elected by a majority vote. As Locke admitted in his chapter on the beginning of political societies in the *Second Treatise*: “when any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein *the majority* have a right to act and conclude the rest”. Thus Locke’s understanding of the nature of government in a civil society was based on the principle that the opinion of the majority had to prevail. The founding father of liberalism clearly associated the source of political and legislative authority as being vested in the fact that the minority had to submit to the opinion of the majority: “...every man, by consenting with others to make one body politic under one government, put himself under an obligation, to every one of that society, to submit to the determination of the *majority*”.²³⁷

Locke wrote at length on “majoritarianism” in the *Second Treatise* because it is central to the source of legislative authority in Western political society.²³⁸ When Locke was pontificating upon the state of nature it was evident that he was thinking primarily of the Americas, hence he referenced Mexico, Peru, and Florida.²³⁹ And in his conception of society, Locke was only thinking of *freemen*. This did not mean that legislative power emanated from a majority of the community in which every individual was given an equal vote. This was only the case in what Locke called “a perfect democracy”.²⁴⁰ Such a democracy in Aristotle’s view was based on “numerical equality, not equality based on merit”. One of the results of this was that “in democracies the poor have more sovereign power than the rich; for they are more numerous, and the decisions of the majority are sovereign”.²⁴¹ Political authority thus hinged on the notion that authority in such a society was vested in the majority, albeit the manner in which this majority was determined could be rather restrictive if it was based on factors other than population statistics, such as loyalty, merit, or wealth. The problem was that any system, which vested power exclusively in the majority, was likely to lead to a tyranny of the minority, which is why Locke wanted to avoid establishing a democracy in the Carolinas until the settlers became the majority.

²³⁷ Macpherson (ed.) John Locke, *Second Treatise*, supra n. 88, Chap. VIII, § 95-97, p. 52 (emphasis in original).

²³⁸ Macpherson (ed.) John Locke, *Second Treatise*, ibid, Chap. VIII, § 99, p. 53 (emphasis in original).

²³⁹ Macpherson (ed.) John Locke, *Second Treatise*, ibid, Chap. VIII, § 102, p. 54 and § 102, pp. 55-56.

²⁴⁰ Macpherson (ed.) John Locke, *Second Treatise*, ibid, Chap. X, § 132, p. 68.

²⁴¹ Aristotle, *The Politics*, (London: Penguin, 1992), Book VI, Chapter ii, p. 362.

This understanding that democracy implied majority rule was not restricted to Aristotle or Locke. Many natural lawyers writing before and after Locke (and since) have understood that political authority in a democracy is vested in the majority, although the natural lawyers did not mean a universal majority. Thus, Gentili wrote: “...as the rule of a state and the making of its laws are in the hands of a majority of its citizens, just so is the rule of the world in the hands of the aggregation of the greater part of the world”.²⁴² In the words of Grotius: “...it is manifestly unfair that the majority should be ruled by the minority. Therefore, naturally, the majority has the same right as the entire body...Thucydides says: ‘Whatever the majority votes has full power’”.²⁴³ Puffendorf approved: “...each citizen in agreeing to a democratic form of government is understood to have subordinated his will to the will of the majority...”²⁴⁴ He added: “in popular assemblies, the will of the majority prevails. For it is a moral affection of all large bodies that the consent of the larger part of those who gather in the council should be taken as the will of all...”²⁴⁵ Also in accord with this view was Wolff, who wrote: “...in a democracy or a popular state treaties can be made only by the people, but since in this form of state that is to be considered the will of the whole people which shall have seemed good to the majority...”²⁴⁶

The problem was that any form of government that purported to represent the “majority”, hinged upon the community in question “agreeing to unite into one political society”.²⁴⁷ But what if such a society was lacking? Or what if the community in question refused to unite into “one political society”? Who would make the decisions? Who was to abide by the decisions? What if there was a competition to attain the rights accorded the majority, when nationalism or class divided societies? To this, the natural law jurists provided no answers, as they were writing in an age before such conflicts had a major impact on international relations. Thus, the only answer Vattel could provide when he asked himself what was to be

²⁴² Alberico Gentili, *De Iure Belli Libri Tres*, translated by John C. Rolfe (Oxford: At the Clarendon Press, 1933, translation of the edition of 1612), p. 9.

²⁴³ Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, (Oxford: At the Clarendon Press, 1925, first published 1646, translated by Francis W. Kelsey), pp. 249-250.

²⁴⁴ Samuel Puffendorf, *De Jure Naturae et Gentium Libri Octo*, (trans. and ed. by C.H. Oldfather and W.A. Oldfather, Oxford: Clarendon Press, 1934, first published by Andream ab Hoogenhuysen in 1688), p. 975.

²⁴⁵ Puffendorf, *De Jure Naturae et Gentium Libri Octo*, *ibid*, p. 1028.

²⁴⁶ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, Volume 2, (Oxford: at the Clarendon Press, 1934, Joseph H. Drake translation of the 1764 original), p. 192.

²⁴⁷ Macpherson (ed.) John Locke, *Second Treatise*, *supra* n. 88, Chap. VIII, § 99, p. 53.

done when the nation was divided, was to say: “In the ordinary affairs of the State the opinion of the majority must pass unquestioned as that of the whole people; otherwise it would be impossible for the society to pass any measures at all”.²⁴⁸ As monarchy was the predominant form of government in the eighteenth century, perhaps many jurists did not concern themselves with trying to answer what must have seemed a rather abstract question. This would only change when Europeans had to confront the class and religious divisions within their own societies in times of revolution, and when they came to confront the major cultural, economic, linguistic, political, and social differences with the alien communities they encountered overseas.

The state of the franchise in Locke’s day

When Locke was drafting his *Constitutions* he was attempting to reproduce a political system in the Carolinas that he was familiar with from England. It was not by chance that the colony was named the Carolinas, in memory of King Charles I. In Locke’s day, the concept of a “political community” was restricted in England to “40 shilling freeholders” i.e. those persons who owned land to the value of at least 40 shillings.²⁴⁹ The purpose of restricting the franchise to this limit, according to the 1430 statute, was to keep out “as outrageous and numerous people of small substance who pretend a voice as to such election with the most worthy knights and esquires”.²⁵⁰ A 1445 decree further stipulated that those who aspired to hold political office were limited to “notable knights, esquires, or gentlemen able to be knights and not of the degree of yeomen or under”,²⁵¹ In other words, the franchise was restricted to the nobility and the gentry. The franchise remained restricted to this minority for 400 years from 1429 until 1832 when it was modified by the Representation of the People Act.

This extremely restrictive conception of representation might explain why five years before Hobbes published *Leviathan*, the Levellers and their “agitator” friends in Cromwell’s New Model Army drafted *An agreement of the people*, which they

²⁴⁸ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, Translation of the edition of 1758 by Charles G. Fenwick, (Washington: Carnegie Institution of Washington, 1915), pp. 18-19.

²⁴⁹ Hugh P. Williamson, “Evolution of the Franchise in England and the United States”, 6 *American Journal of Economics and Sociology* (1947), p. 403 at p. 405.

²⁵⁰ See John Hostettler and Brian Block, *Voting in Britain: A History of the Parliamentary Franchise* (Chichester: Barry Rose, 2001), pp. 13-14 (highlighting the acts main provisions).

²⁵¹ Hostettler and Block, *A History of the Parliamentary Franchise*, *ibid*, p. 14.

presented to the army's General Council in Putney Church on 28 October 1647.²⁵² This agreement, among other things, called for electoral redistribution of parliamentary seats "according to the number of inhabitants", which when appreciated in historical context is striking, because it made no distinctions between the different socio-economic classes within seventeenth-century Britain.²⁵³ Thus, it was considered a very radical document and was attacked as a call for "universal manhood suffrage".²⁵⁴ As explained in Part One, Cromwell was opposed to vesting power in the lower classes (although not promoting them in the army) as he thought they would instinctively vote to reinstate the King. In his first speech to Parliament, Cromwell had equated poor men with bad men, and said that if a commonwealth must suffer, it was better that it should suffer from the rich than from the poor.²⁵⁵ Cromwell was not the only politician to be genuinely opposed to "majority rule". For "the tyranny of the majority", has haunted international politics ever since the word democracy was invented. In Cromwell's case he was right to fear that extending the franchise might lead to monarchy, since most of the gentry were instinctive monarchists, and indeed after his death, the monarchy was reinstated through a "democratic" process.²⁵⁶

Instead the Lord Protector and his Parliament restricted the franchise, and those who could hold office, to those persons who were considered loyal to the Commonwealth. Accordingly, anyone who had consorted in the war against Parliament on the side of Charles I during the civil wars, was excluded.²⁵⁷ Additionally, all those who had "advised, assisted, or abetted the rebellion in Ireland" were excluded, as naturally, were "all such who do or shall profess the Roman Catholic religion".²⁵⁸ Catholics had been a suspect community in England ever since the reign of Elizabeth I, but it was the discovery of the Gunpowder Plot on 5 November 1605 by Lord Robert Cecil* (1563-1612), which "provided the English

²⁵² See Ian Gentles, "The *Agreements of the people* and their political contexts, 1647-1649", in Michael Mendle (ed.), *The Putney Debates of 1647: The Army, the Levellers, and the English State* (Cambridge: Cambridge University Press, 2001), p. 148, at pp. 150-151.

²⁵³ Gentles, "The *Agreements of the people* and their political contexts", *ibid.*, p. 151.

²⁵⁴ Gentles, "The *Agreements of the people* and their political contexts", *ibid.*, p. 152.

²⁵⁵ Hill, *God's Englishman*, *supra* n. 142, p. 197.

²⁵⁶ See Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (London: Vintage, 2005), p. 270.

²⁵⁷ See Articles XIV, "The Instrument of Government" in Samuel Rawson Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford: At the Clarendon Press, 1906), p. 410.

²⁵⁸ Article XV, "The Instrument of Government", *ibid.*, p. 410.

* Lord Robert Cecil, 1st Earl of Salisbury, is not to be confused with his ancestor of the same name.

monarchy with an excuse to roll back advances made in institutionalising electoral representation in parliament”.²⁵⁹ Also excluded from the franchise were “immoral and irreligious persons, profaners of Lord’s Day, profane swearers and cursers, drunkards, and common haunters of taverns and ale-houses”.²⁶⁰ This meant that voters were confined to English and Scottish settlers and most of the MPs elected to Cromwell’s Parliament were army officers.²⁶¹ It must be remembered that Locke was profoundly anti-Catholic. He feared that had James II returned to England, the English nation would have been divided and that Englishmen would face the “ruin of [their] estate and family, the impoverishment of their children, the rape of their wives, and the prospect of becoming a popish convert and a miserable French peasant”.²⁶²

This was the political context and the state of the franchise that Locke was familiar with when he sought to avoid erecting a numerous democracy in the Carolinas and when he was theorising on the function and nature of government in his *Second Treatise*. Thus, it would be safe to assume, that when Locke wrote of the will of the majority, he was not referring to a numerical or a universal majority, in which the franchise was open to all communities, whatever their class, colour, or creed. Thus even though blacks were a majority in the Carolinas, soon after Locke had drafted his *Constitutions*, they were denied the franchise because they were not free men. Similarly, Native Americans were denied the franchise although they were free because they were not European. But what would happen after emancipation?

The franchise in America and the Jim Crow laws

In “the Land of the Free”, to where many Christians had fled in order to escape religious persecution in Europe, the laws made racial rather than religious distinctions when limiting the franchise in which a man’s social status was also taken into account through a property qualification. Thus a few years before the American colonies attempted to assert their independence from Britain, a suffrage law was passed in Georgia in 1761, which empowered “every free white man and no other” who was

²⁵⁹ Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Anglo-American Law* (Oxford: Hart, 2010), p. 59.

²⁶⁰ Hostettler and Block, *A History of the Parliamentary Franchise*, supra n. 250, p. 29.

²⁶¹ Hostettler and Block, *A History of the Parliamentary Franchise*, ibid, p. 30.

²⁶² Lois G. Schworer, “Locke, Lockean ideas, and the Glorious Revolution”, 51 *Journal of the History of Ideas* (1990), p. 545, and p. 547.

over 24 years of age, who owned 50 acres of land, and who had been resident in the province for six months, to vote in local elections. Whilst this provision made no mention of religion, its effect was to preclude free black men, slaves, and resident Indians, *as well as poor white people*, from the franchise.²⁶³ This was because whilst the Fathers of the American Constitution believed in representative and republican government, they feared the populace as they feared original sin. One of their fundamental purposes in shaping the form of the federal government was to break the force of majority rule at its source in elections and in the operation of government.²⁶⁴

After the US Civil War, the Supreme Court's decision in *Dred Scott* was voided through the adoption of the thirteenth, fourteenth, and fifteenth amendments, which provided for the abolition of slavery, citizens rights, and voting rights, respectively. However, these changes made little difference in practice.²⁶⁵ Take the case of South Carolina*, where Locke had sought to avoid erecting a numerous democracy.²⁶⁶ It was not for a further 197 years, until after a devastating Civil War, that Congress enacted the Civil Rights Act of 1866, and the Reconstruction Acts of 1867 and 1868, which widened the franchise to give voting rights to all resident males twenty-one years of age or older.²⁶⁷ In South Carolina as throughout much of the Southern States there was resistance to this new policy. Accordingly, a South Carolina Law passed in 1865 defined "persons of colour", as anyone having less than seven-eighths of Caucasian blood, and who were emphatically "not entitled to social or political equality with white persons".²⁶⁸ Throughout the period of Reconstruction (1865-1877), white South Carolinians, and many other Southerners, would resort to all kinds of chicanery, including intimidation, threats, and acts of violence, which often took the form of lynching, in order to deter and restrict blacks from participating in

²⁶³ Dummett and Nicol, *Subjects, Citizens, Aliens and Others*, supra n. 199, p. 79. Dummett and Nicol overlook the fact that the property qualification in the Georgia franchise precluded poor Europeans.

²⁶⁴ Charles A Beard and John D. Lewis, "Representative Government in Evolution", 26 *The American Political Science Review* (1932), p. 223 at p. 228.

²⁶⁵ Derrick A. Bell, Jr., "Black Faith in a Racist Land: A Summary Review of Racism in American Law", 17 *Howard Law Journal* (1971-1973), p. 300, p. 306.

* In Locke's day the Carolinas encompassed North and South Carolina as well as parts of Georgia. However, Charleston (originally "Charles Town" named after King Charles) was the centre of colonial activity in Locke's day, and it is located in South Carolina, which became the principal seat of colonial government in the early days of the colony. Unlike North Carolina, South Carolina maintained an aristocratic slave owning society until well into the nineteenth century, just as Locke envisaged.

²⁶⁶ See Laughlin McDonald, "An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina", 37 *South Carolina Law Review* (1985-1986), p. 557.

²⁶⁷ McDonald, "An Aristocracy of Voters", *ibid*, p. 559.

²⁶⁸ McDonald, "An Aristocracy of Voters", *ibid*, p. 558.

political society, and in the political process.²⁶⁹ It was not by chance that the Ku Klux Klan was founded in 1865 during Reconstruction in order to regain white power.

As a result of the Civil War amendments and the Civil Rights Acts, the number of blacks registered eligible to vote in South Carolina dramatically increased so that they outnumbered white voters by 116,969 to 86,900.²⁷⁰ Predictably, this mass enfranchisement caused consternation amongst the whites, many of whom had previously owned slaves, and still had blacks as servants. They were not enamoured to being ruled by their former slaves, even if they formed a majority of the electorate. Thus they devised various schemes to abrogate the fifteenth amendment, schemes which would last some seventy-five years. These schemes included literacy tests and requesting documents showing proof of land ownership; a poll tax, and criminalising non payment of the tax; restricting the right to vote to a single precinct so as to disenfranchise black farm labourers, who often moved with the crops and seasons; redrawing precinct boundary lines so that some blacks had to travel all day to vote; and enacting what became known as the “Eight Box Law”. This law required voters to deposit the ballot for each office in separate ballot boxes, and if a voter put his ballot in the wrong box, his vote did not count. The US Attorney General for South Carolina estimated that this law eliminated 83 per cent of black ballots.²⁷¹ The result of all these obstacles was that by 1896, only 5,500 blacks were registered voters.²⁷²

Similar legislation followed throughout the South to prevent blacks from voting, and from fully participating in political society. These laws collectively became known as “the Jim Crow laws”, which enshrined the principle of racial segregation. And this segregation was upheld by various decisions of the US Supreme Court, the most famous of which included *Plessy v Ferguson* (1896), which upheld segregated carriages on the railway, and the case of *Berea College* (1906), which upheld segregated education.²⁷³ As legal historians have observed these laws and Supreme Court decisions did not emerge out of a vacuum but reflected prevailing white opinion in the early twentieth century. “As Republicans and Progressives

²⁶⁹ See W. Lewis Burke, “Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina after the Civil War”, *57 South Carolina Law Review* (2005-2006), p. 859.

²⁷⁰ See Burke, “Killing, Cheating, Legislating, and Lying”, *ibid*, p. 865. McDonald, “An Aristocracy of Voters”, *supra* n. 224, p. 568.

²⁷¹ McDonald, “An Aristocracy of Voters”, *supra* n. 266, pp. 570-571; and Burke, “Killing, Cheating, Legislating, and Lying”, *ibid*, p. 868.

²⁷² McDonald, “An Aristocracy of Voters”, *ibid*, p. 571.

²⁷³ See Michael J. Klarman, “The Plessy Era”, *The Supreme Court Review* (1998), p. 303.

rallied behind imperialist adventures abroad that brought eight million non-whites under force of American arms”, explained Benno Schmidt, “they took up characteristic Southern attitudes towards black people”.²⁷⁴ Similarly, Michael Klarman noted that proponents of acquiring Hawaii, Puerto Rico, and the Philippines, after the Spanish-American War of 1898, “rejected the notion of extending full citizenship rights to persons thus incorporated into the United States—a position that the Supreme Court conveniently accommodated in the early twentieth century”.²⁷⁵

5. The Anglo-American Approach to Self-Determination

The Anglo-American approach to self-determination developed during the height of imperialism, and posited that the entity claiming self-determination had to have acquired the attributes of a nation as a prerequisite. As explained in Part Three, this approach to self-determination was not that different to the Marxist approach in that both approaches were concerned with identifying the people who could exercise this right. The difference was that the conception of the nation in Marxist theory encompassed all economic, political, and social classes, to include even those peoples who were viewed as economically, politically, and socially “backward”, whereas the Anglo-American approach tended to restrict its conception of the nation to those who it viewed as having acquired the necessary attributes to maintain that independence, without threatening the balance of power. The Marxist approach in contrast required revolution and immediate independence for all oppressed nationalities regardless of what impact this may have on the balance of power, whereas the Anglo-American approach was based on a hierarchy, which bore a striking resemblance to the evolutionist theories of social Darwinism. The Anglo-American approach to self-determination was an elite movement, in contrast to the Marxian mass movement.

The “Anglo” in the *Anglo-American* approach to self-determination was preoccupied with class, and tended to vest political power in minority community if the minority was better able to govern than the majority in line with J.S. Mill’s theories on representative government. This envisaged a civilized, cohesive community, committed to the Protestant work ethic and well versed in both the

²⁷⁴ Benno C. Schmidt, “Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow”, 82 *Columbia Law Review* (1982), p. 444 at pp. 452-453.

²⁷⁵ Klarman, “The Plessy Era”, supra n. 273, p. 313.

machinery and theory of government. This approach put the Anglo-Americans at diametrical loggerheads with the Marxist approach to self-determination that was avowedly based on creating a classless society. The “American” in the Anglo-American approach to self-determination tended not to emphasize class as much as economic development which it tended to assume was a quality associated with the white race, and in particular with the Protestant religion. The Anglo-American approach to self-determination was ultimately influenced by the historical development of representative government in England and in the Thirteen Colonies, and later in the Thirteen United States, and was connected to the notion of self-government, which they then projected onto the non-European world in the high period of imperialism regardless for whether those communities desired this.

I have chosen to focus on the personalities and politics of Woodrow Wilson and A. J. Balfour because they were the two main actors representing the US and Britain respectively during the negotiations at the Paris Peace Conference in 1919 to create the League of Nations. It was there that the principle of self-determination was modified and reformulated so that it could apply to those communities in “a lower stage of civilisation” in the form of A-, B-, and C-class mandates. The USSR did not participate in the drafting of the League Covenant due to the October Revolution, and it did not become a member of the League until 1934. Its approach to the question of self-determination would not have an impact on international law and relations until after 1945. In order to delve deeper into the Anglo-American notion of self-determination it is necessary to have regard to the way in which Wilson and Balfour understood the historical development of nationhood within their own societies.

Woodrow Wilson and “the self” in self-determination

Woodrow Wilson (1856-1924), a white Southerner who was born on the eve of the Civil War, raised during that war, and during Reconstruction, was an early exponent of American imperialism. The son of a Presbyterian minister, Wilson grew up surrounded by blacks, although his family were not allowed to own slaves because of religious custom. Instead they had servants. Much of Wilson’s youth was spent in

August, Georgia, and in Columbia, South Carolina.²⁷⁶ His childhood experiences in the latter state are important because prior to the Jim Crow laws, and the legislative chicanery employed to disenfranchise blacks, South Carolina had the largest number of black officeholders elected following the Constitutional amendments enforced after the Civil War. Since political power in South Carolina had shifted to the black majority, many whites, some of whom Wilson and his family may have been on friendly terms with, would have lost their former political positions in the state. In *A History of the American People* (1903), which Wilson published when he was President of Princeton University (1902-1910), prior to running for the Presidency for the Democratic Party, he explained that in reaction to Reconstruction:

The white men of the South were aroused by the mere instinct of self-preservation to rid themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant negroes...There was no place of open action or of constitutional agitation, under the terms of reconstruction, for the men who were the real leaders of the southern communities. Its restrictions shut white men of the old order out from the suffrage even. They could act only by private combination, by private means, as a force outside the government ... They took the law into their own hands, and began to attempt by intimidation what they were not allowed to attempt by the ballot box or by any ordered course of public action.²⁷⁷

Evidently, “the real leaders of the southern communities” were the whites who had been disenfranchised during Reconstruction as a result of the amendments to the Constitution. The blacks being “ignorant” in Wilson’s eyes were an intolerable burden on the government and therefore by implication they should not have been given the franchise. In Wilson’s opinion the whites had no other means of recourse except to take the law into their own hands and to act as vigilantes in order to safeguard their interests and position in society; in short, to maintain white power.

²⁷⁶ Much of my information on Wilson is taken from the three articles on Wilson, which appear in the collection edited by Cooper and Knock, *Race and Democracy*, supra n. 189, pp. 145-208. In reading these articles I sensed that some of the authors hesitated to describe Wilson as a “racist”. Astonishingly, not one of the scholars cited in this collection mentioned Wilson’s views on race in *A History of the American People*, which I shall quote here. This is a major oversight. He expressed views, which I have no doubt were they expressed today would be deemed racist, and would probably have also been considered offensive to African Americans at the turn of the twentieth century.

²⁷⁷ Wilson, *A History of the American People*, Vol. V, supra n. 46, pp. 58-59

In the light of Wilson's views on the Ku Klux Klan²⁷⁸ and his critique of enfranchising blacks it is not surprising that he was very critical of Reconstruction, describing it as "nothing more than a host of husky children untimely put out of school".²⁷⁹ Wilson criticised the naivety of those Northerners who had travelled southwards to assist, educate, and improve the position and status of the blacks in the South so they could govern. He singled out the teachers and chastised them for working with "the negroes", which in his opinion was "a cause of mischief". He accused the lessons these teachers taught "to be lessons of self-assertion against whites: they seemed too often to train their pupils to be aggressive Republican politicians and mischief-makers between races".²⁸⁰ Wilson was opposed to black tutelage. The blacks were supposed to be passive: till the fields, work in the factories, and serve the white man, but do no more. Thus, when Wilson was President of Princeton University, all blacks who applied to the college were coerced into withdrawing from consideration. By 1900, seven of the eight Ivy League schools had admitted African Americans as students; the sole exception was Princeton.²⁸¹

It was no accident that Wilson was a Democrat. Half of his cabinet hailed from the South.²⁸² During Wilson's tenure as President (1913-1921) segregation became entrenched in government departments, including in lavatories, waiting rooms, and restaurants. Collectors of internal revenue and postmasters were allowed to fire black employees outright, or otherwise reduce their ranks and salaries.²⁸³ Moreover, as Manning Marable noted: "Between 1909 and 1915 an average of seventy African Americans were lynched across the South each year; Wilson's response was cold silence".²⁸⁴ It is often overlooked by international lawyers who champion Wilson as being the great father of self-determination and anti-colonialism that it was during Wilson's tenure as President that some of the worst race riots in American history took place in the cities of Chicago and Washington DC in the same year as he

²⁷⁸ Wilson expressed admiration for the Ku Klux Klan, which as he tells us, was named after the *Kuklos*, the "Circle". He then wrote a passage, accompanied by a picture of two Klansmen sheeted like ghosts with white conical hats, that reads as though Wilson was himself a Klansman. One of the Klansmen in the picture is armed with a pistol, and the other is armed with a shotgun. See Wilson, *A History of the American People*, Vol. V, *ibid*, pp. 59-60, the picture appears at p. 61.

²⁷⁹ Quoted in the contribution by Manning Marable, in Cooper and Knock, *Race and Democracy*, *supra* n. 189, p. 163.

²⁸⁰ Wilson, *A History of the American People*, Vol. V, *supra* n. 46, p. 63.

²⁸¹ See Marable, in Cooper and Knock, *Race and Democracy*, *supra* n. 189, p. 169.

²⁸² Cooper, in Cooper and Knock, *Race and Democracy*, *ibid*, p. 151.

²⁸³ Marable, in Cooper and Knock, *Race and Democracy*, *ibid*, p. 171.

²⁸⁴ Marable, in Cooper and Knock, *Race and Democracy*, *ibid*, p. 177.

attended the Paris Peace Conference (1919). These riots took the form of “white mob aggression against newly arrived blacks”.²⁸⁵ And one of the reasons why Wilson prevaricated about entering the war was because he feared the possible consequences of a depletion of white manpower in the struggle with “the yellow races”.²⁸⁶

As explained in the Introduction, when Wilson spoke of self-determination he was thinking of Europeans rather than Africans and Asians who in his eyes did not form separate nationalities entitled to self-determination. For Wilson’s understanding of self-determination was informed by his understanding of American history. Since Wilson was opposed to granting blacks the suffrage in the US, he could hardly be expected to extend the franchise to Africa and other “backward” parts of the world. So when Wilson spoke of the balance of power, the right of people to choose the sovereignty under which they live, or when he pontificated on the equality of rights, the affections or convictions of mankind, and when he wrote his *History of the American People* he was thinking primarily of the rights of Caucasian, Christian men. Thus whenever he spoke of nations and communities these nouns were qualified by the adjectives “modern” and “enlightened”, as in “modern nations” and “enlightened communities”, which were expressly chosen to qualify what he was preaching.²⁸⁷ And Wilson’s understanding of American history informed him that it was the social contract and consent, not social equality that formed the bedrock of civilised society.

Thus, “the self” in Wilson’s conception of “self-determination” only applied to those advanced communities, which in Wilson’s day, were predominantly Caucasian and Christian, and which had already or were in the process of forming a cohesive, collective, and organised community, united in aptitude, political belief, and ideological outlook. This meant that the community had to be comprised of a highly cultured and educated elite, which had some prior experience of self-government. In the age of imperialism, the qualities that men like Wilson looked to before they would even contemplate conferring the right to self-government upon a non-European people included the qualities they themselves valued highly. The qualities men like Wilson valued were often inculcated in childhood, in the Church, in Sunday school, or in public school, and later refined at Oxbridge or at an Ivy League institution. These

²⁸⁵ Cooper, in Cooper and Knock, *Race and Democracy*, *ibid*, pp. 157-158.

²⁸⁶ Cooper, in Cooper and Knock, *Race and Democracy*, *ibid*, pp. 156-157.

²⁸⁷ See the contribution by Erez Manela in Cooper and Knock, *Race and Democracy*, *ibid*, pp.184-208, at p. 190.

qualities included the ability to maintain a certain degree of camaraderie with one's colleagues ("to be one of the lads"), being "a good sport", and being good *at* sport, particularly *manly outdoor sport*, as well as being honest, obedient, and loyal *within the community* were highly valued, whilst all the while trying to maintaining one's integrity, individuality, and industry.²⁸⁸ And it was thought that some communities due to their inherent and inbred attributes could never acquire these qualities, which is why they had to be segregated to prevent the corruption of the "white races".

Erez Manela tells us that when Wilson gave speeches, he often like to remind his audiences that the Anglo-American form of government emerged out of a historically contingent and specific set of political circumstances. Accordingly, it was not a system that suited everybody. This is why, he thought, the US should instruct "less civilised" peoples "in order and self-control in the midst of change" and in the "habit of law and obedience". The ultimate goal was to lift the colonized to the level of the colonizer so they could become "equal members of the family of nations", although he was of the opinion that this process could take as many as three or four generations, and necessitated conceptual flexibility and sensitivity to cultural difference.²⁸⁹ In many respects, Wilson's view of development and self-determination did not tolerate cultural or racial difference. Instead he sought to recreate non-European societies as a mirror image and replica of Western societies. The "backward races" had to acquire certain qualities before democracy could work. They had to be made fit for democracy otherwise chaos would ensue. This is why tutelage was deemed paramount. Liberty could not coexist in a society without order. Thus, it was probably not by chance that in the light of Wilson's personal prejudices and predilections his favourite political philosopher was none other than Edmund Burke.²⁹⁰

A question of class: The British approach to self-determination

²⁸⁸ Some of these qualities were proscribed by Cecil Rhodes in his will regarding the provision of scholarships at Oxbridge for American students and for those from the Dominions of White settlement. ("literary and scholastic attainments ... fondness of and success in manly outdoor sports such as cricket, football, and the like ... qualities of manhood, truth, courage, devotion to duty, sympathy for the protection of the weak, kindness, unselfishness, and fellowship etc."). See "The Last Will and Testament of Cecil John Rhodes" in Barbara Harlow and Mia Carter (eds.), *Archives of Empire. Volume II: The Scramble for Africa* (Durham: Duke University Press, 2003), p. 538 at p. 554.

²⁸⁹ Manela in Cooper and Knock, *The American Dilemma of Race and Democracy*, supra n. 189, p. 197.

²⁹⁰ Manela in Cooper and Knock, *The American Dilemma of Race and Democracy*, ibid, p. 196.

Since the US approach to self-government grew out of its historical relationship with the British Empire, one might assume that their approach to self-determination was the same. Whilst there were similarities, there was a major difference, which can be summed up in one word: class. In contrast to race, which was the principal distinguishing criterion employed by Americans in American society, in Britain, the approach to self-government was all about preserving aristocracy.²⁹¹ At the turn of the twentieth century, the aristocratic way of life in Britain was waning.²⁹² Radicals like Joseph Chamberlain (1836-1914) and David Lloyd George (1863-1945) were attacking the stark inequalities within British society regarding the distribution of wealth, and demanded major reforms in the spheres of voting rights, labour rights, the provision of state education, fairer wages, and a better system of taxation, which would target the rich, and their landed estates. The radicals despised the patrician families, like the Hotel Cecil (see p. 152) who had ruled Britain since Elizabethan times and other aristocrats who had traced their heritage back to the Norman Conquest.

One of the members of Hotel Cecil who was determined to protect the financial and material interests of his class and ensure that the radicals did not get their way entirely was Arthur Balfour (1848-1930).²⁹³ As Chief Secretary for Ireland (1887-1891), Prime Minister (1902-1905), First Lord of the Admiralty (1915-16), Foreign Secretary (1916-1919), and Lord President of the Council of the League of Nations (1919-1921), as well as holding a score of other prominent positions in government, Balfour dominated parliamentary politics for a quarter of a century. Balfour had a profound influence on the course of events in South Africa as a result of his role as leader of the opposition (1906-1911) during the debates on South Africa in 1909-10, which coincided with his attempt to thwart Lloyd George's legislative proposals passed by the House of Commons, which led to a constitutional crisis between 1909-1911 over the powers of the House of Lords.²⁹⁴ Balfour was also instrumental in encouraging Jewish colonisation to Palestine after 1917, which

²⁹¹ This is not to suggest that race was not a factor in British imperialism. It was. But Britain never had a domestic "race problem" because there were so few ethnic minorities in the country at the turn of the twentieth century. Instead Britain tended to classify and distinguish its subjects by their class.

²⁹² Cannadine provides the best account in *The Decline and Fall of the British Aristocracy*, supra n. 12.

²⁹³ For biographical information I am relying primarily on the two books published on his life by Cambridge University Press. Zebel's *Balfour: a Political Biography* (1973), supra n. 150, and Tomes, *Balfour and Foreign Policy* (1997), supra n. 26, which have both been cited earlier in this text.

²⁹⁴ On the constitutional crisis see Roy Jenkins, *Mr Balfour's Poodle: an account of the struggle between the House of Lords and the government of Mr. Asquith* (London: Collins, 1968).

eventually led to various partition proposals, and was the key player in the 1919-1921 negotiations that led to the Government of Ireland Act, which partitioned Ireland.²⁹⁵

By fortune of birth Balfour belonged to the Cecils, a large landowning oligarchy who had virtually monopolized power in Britain until the Reform Act of 1832, and who continued to enjoy, with the *nouveau riche*, and the bourgeoisie, political, economic, and social pre-eminence until the First World War.²⁹⁶ As David Cannadine has explained until 1905, every British cabinet, whether Conservative or Liberal, was dominated by the traditional territorial classes, with brief exceptions of the Liberal ministries of 1892-5.²⁹⁷ When most businessmen were busy making their fortunes, those with patrician roots were gaining valuable experience through a family connection in the service of a senior political figure. As scholars have pointed out Balfour's uncle was Robert Gascoyne-Cecil, the Third Marquess of Salisbury, who was thrice Prime Minister (June 1885 - January 1886; 1886-1892; and 1895-1902), four times Foreign Secretary, (1878-1880; 1885-1886; 1887-1892; and 1895-1900), twice Secretary of State for India (1866-1867 and 1874-1878), and three times leader of the opposition (1881-1885; January 1886-July 1886; and 1892-1895). After the premature death of Balfour's father, Lord Salisbury, his maternal uncle, assumed a greater role in his life and assured his nephew's rapid ascendancy into parliamentary politics by making Balfour his Parliamentary Private Secretary in 1878, where he participated in the Congress of Berlin, and by later appointing him to be the Chief Secretary to Ireland.²⁹⁸ Salisbury, who ruled Britain at the height of imperialism, was an incorrigible opponent of democracy, and was adamantly opposed to "any bestowal on any class of a voting power disproportionate to their stake in the country".²⁹⁹

²⁹⁵ See Catherine Shannon, *Arthur J. Balfour and Ireland 1874-1922* (Washington, D.C.: The Catholic University of America Press, 1988). See also, T.J. Fraser, *Partition in Ireland, India and Palestine: Theory and Practice* (London: MacMillan, 1984), who makes the connection between Balfour and partition on the passage of the Government of Ireland Bill at p. 27, p. 29, pp. 32-33, and p. 42 although he does trace Balfour's steadfast advocacy for partition before the 1919-1921 debates as Shannon does.

²⁹⁶ Zebel, *Balfour: a Political Biography*, supra n. 150, p. 1.

²⁹⁷ Cannadine, *The Decline and Fall of the British Aristocracy*, supra n. 12, p. 207.

²⁹⁸ Taylor, *Lord Salisbury*, supra n. 147, p. 115; Zebel, *Balfour: a Political Biography*, supra n. 150, pp. 45-59; Tomes, *Balfour and Foreign Policy*, supra n. 24, p. 11. The sheer scale of nepotism in British parliamentary life in the era of the Cecils should not be underestimated. It was so dire that it even prompted some disgruntled Tory back-benchers to snipe that "all honours, emoluments and places are reserved for the friends and relatives of the favourite few". See Cannadine, *The Decline and Fall of the British Aristocracy*, supra n. 12, p. 211 (on Balfour), p. 213 (on Tory sniping). In Salisbury's 1885 cabinet 14 out of 15 ministers had patrician roots (Appendix B, p. 711.)

²⁹⁹ Cannadine, *The Decline and Fall of the British Aristocracy*, *ibid*, p. 223.

In order to appreciate Balfour's outlook on life, it is important to note that he was a deeply religious man, and had been raised a strict Evangelical by his mother who brought up her children in both the Anglican Church of England and the Presbyterian Church of Scotland.³⁰⁰ Like most aristocrats, the Balfours went to Oxbridge. In 1869, Balfour matriculated from Cambridge University where he knew Charles Darwin (1809-1882),³⁰¹ and when he came of legal age he acquired control of a £4,000,000 fortune, invested in landed property and other equity.³⁰² Most of this money had been made by his father in India.³⁰³ One of Balfour's brothers became an authority on genetics and was appointed to the newly created chair of Animal Morphology at Cambridge University.³⁰⁴ Like his brother, Balfour maintained an interest in science, particularly eugenics, and religion. The bulk of his non-political publications concerned the conflict between science and religion in which he sought to prove that advancement of science could be compatible with deep religious belief. In his view ethics, aesthetics, and science, were more intelligible when framed in a theological setting, and criticised those scholars who relied on science alone.³⁰⁵

Although Balfour did not find pure social Darwinism attractive he did espouse its theories when it came to the "lower races".³⁰⁶ He held particularly strong views on race, and opposed miscegenation. In 1913, the same year in which he advanced his two-nation theory for Ireland, he became honorary vice president of the British Eugenics Education Society.³⁰⁷ In his Henry Sidgwick Memorial Lecture which he had delivered at Newnham, an all-girls college at Cambridge University five years earlier, Balfour had explained that "any attempt to provide widely differing races with an identical environment, political, religious, what you will, can never make them alike. They have been different and unequal since history began; different and unequal they are destined to remain through future periods of comparable duration".³⁰⁸

³⁰⁰ Zebel, *Balfour: a Political Biography*, supra n. 150, p. 3.

³⁰¹ Tomes, *Balfour and Foreign Policy*, supra n. 26, p. 22.

³⁰² Zebel, *Balfour: a Political Biography*, supra n. 150, p. 10.

³⁰³ Zebel, *Balfour: a Political Biography*, ibid, p. 1.

³⁰⁴ Zebel, *Balfour: a Political Biography*, ibid, pp. 3-4.

³⁰⁵ For a detailed analysis of his views see L.S. Jacyna, "Science and Social Order in the Thought of A.J. Balfour", 71 *Isis* (1980), pp. 11-34. See also, Tomes, *Balfour and Foreign Policy*, supra n. 26, pp. 22-23; and Zebel, *Balfour: a Political Biography*, supra n. 150, p. 22.

³⁰⁶ See Tomes, *Balfour and Foreign Policy*, ibid, pp. 27-34.

³⁰⁷ Jacyna, "Science and Social Order in the Thought of A.J. Balfour", supra n. 305, p. 31.

³⁰⁸ See Tomes, *Balfour and Foreign Policy*, supra n. 26, p. 29, quoting Balfour lecture which was entitled "Decadence", pp. 46-7. *The New York Times* reported the lecture, noting that Balfour's essay "is clearly not optimistic". See "Mr. A. J. Balfour on Decadence: Discusses Tragedy of the

Balfour sought to create an Anglo-Saxon commonwealth of white nations. He proclaimed “that our pride in the race to which we belong is a pride which includes every English-speaking community in the world”, such as Britain, the US, Canada, Australia, and New Zealand, which were united in an “Anglo-Saxon patriotism”.³⁰⁹ For Balfour racial and cultural differences gave rise to different social and political systems, which had to be kept separate and intact. This was even the case where the white Anglo-Saxon community was numerically a minority in a particular territory.

In Balfour’s mind a multicultural and multiracial society was completely inconceivable—it was an anathema. Equality could only exist between equals. Non-whites, even if they formed a majority in a particular geography, were simply not equal. The races had to be kept strictly apart. The “whole point of eugenics” Balfour emphasised in a speech he gave to the First Eugenics Congress in 1913, was that “we reject the standard of mere numbers. We do not say survival is everything; we deliberately say that the feeble-minded man, even if he survives, is not so good as the professional man”.³¹⁰ And of course the same reasoning based on the science of Eugenics and social Darwinism provided a convenient cover to support the social inequality that Balfour’s Conservatism was trying to defend in opposition to the socialism advanced by his adversaries like Chamberlain and Lloyd George. It followed that the greatest social value attached to those of highest social rank and the least to those of the lowest. Government policy therefore had to be orientated accordingly, rather than trying to sustain the latter group by despoiling the former.³¹¹ Eugenics provided a convenient argument to denounce socialism and revolution.

As leader of the opposition in 1907-8, Balfour used the upper chamber where there were 479 Unionists compared to only 88 Liberals to thwart the government’s legislative proposals. As Sydney Zebel explained, Balfour thought it both practicable and justifiable to employ the House of Lords to weaken or set aside the Cabinet’s “dangerous” legislative proposals until the revolutionary tide inspired by the 1905 October Revolution in Russia had subsided.³¹² Balfour likened socialism to a

Degeneration of Civilizations, and Asks Whether Modern Nations Will Escape”, *The New York Times*, 9 May, 1908.

³⁰⁹ Tomes, *Balfour and Foreign Policy*, *ibid*, p. 36.

³¹⁰ Jacyna, “Science and Social Order in the Thought of A.J. Balfour”, *supra* n. 305, pp. 31-32 quoting *Reports of the Proceedings of the First Eugenics Congress* (London: Eugenics Education Society, 1913), Vol. II, pp. 7-11 at p. 9.

³¹¹ Jacyna, “Science and Social Order in the Thought of A.J. Balfour”, *ibid*, p. 32.

³¹² Zebel, *Balfour: a Political Biography*, *supra* n. 150, p. 151.

“continental disease”, and saw nothing wrong when the Lords struck down a Plural Voting Bill, which aimed to eliminate multiple votes for owners of property in different constituencies. The government reacted by denouncing the anti-democratic posture adopted by Balfour and the House of Lords, which was encapsulated by the famous phrase attributed to Lloyd George: “The House of Lords has long ceased to be the watchdog of the Constitution. It has become Mr. Balfour’s poodle. It barks for him. It fetches and carries for him. It bites anybody that he sets it on to”.³¹³ Balfour’s political philosophy, as David Nicholls observed, resulted from his belief that aristocracy provided the dynamic element in society; whilst democracy was essentially regulative. The many could never produce new ideas and they did not have the ability to run the country. This could only be accomplished by the few.³¹⁴

Balfour’s views on race, religion, and class, were informed by his own life, his experience of British parliamentary democracy, and by his views of Britain’s role in world affairs. Accordingly, he carried these views with him as leader of the opposition and later as Foreign Secretary. Balfour was firmly of the view that representative government was only suited for European peoples who had common traditions, a common outlook on life, and who coalesced in a community. Accordingly, Balfour attacked the Morley-Minto Bill on India in 1909, which sought to incrementally increase the involvement of Indians in the governance of India. Balfour repeated his view that representative government was only suitable “where you are dealing with a population in the main homogeneous, in the main equal in every substantial and essential sense, in a community where the minority is prepared to accept the decisions of the majority, where they are all alike in the traditions in which they are brought up, in their general outlook upon the world, and in the broad view of national aspirations”.³¹⁵ He later expressed his opinion that this was found wanting in India. He told the Lords: “you cannot regard India as a homogeneous community, that you cannot simply count heads, and that you cannot regard them as a community in any sense, however remote, comparable to, say, the inhabitants of these

³¹³ Zebel, *Balfour: a Political Biography*, *ibid*, p. 152.

³¹⁴ See David Nicholls, “Few Are Chosen: Some Reflections on the Politics of A.J. Balfour”, 30 *The Review of Politics* (1968), pp. 33-42 at p. 34.

³¹⁵ Indian Councils Bill [Lords.], HC Deb 01 April 1909 vol 3 cc496-601, col. 553 (Mr Balfour).

islands, or the United States of America, or our self-governing Colonies, or those countries on the Continent which have adopted representative institutions”.³¹⁶

In the light of his views on representative government it was hardly surprising that during the debates on the Government of South Africa Bill in 1909, Balfour strongly argued against enfranchising the coloured population* of South Africa even though they formed the vast majority of the inhabitants.³¹⁷ The Act created the Union of South Africa from the British Colonies of the Cape of Good Hope, Natal, Orange River Colony, and the Transvaal Colony.³¹⁸ This entailed uniting the Dutch and English speaking provinces together under one Parliament. As an “unquestioning believer in white supremacy”, Balfour supported amalgamating the English and Dutch races in South Africa (this is what British imperialists meant by “the unification” of South Africa), but he was convinced that that any extension of the suffrage to the coloured races and the Africans would be disastrous not only because they formed the overwhelming majority of the population of South Africa but because of their “alleged innate intellectual and moral inferiority”.³¹⁹ Balfour told the Lords that the Maoris in New Zealand were numerically insignificant; Native Americans were gradually dying out; and the Australian Aborigines were “clearly predestined to early extinction”. In the Dominions of White Settlement, the race problem was no longer acute. However, this was not the case with the “black races” in America and the former slaves transported there. Coming from a tradition of thought he shared with Jefferson, Lincoln, and Wilson, Balfour observed that after the Americans abolished slavery “they were face to face with the immutable principles of their Constitution, which laid down, in true eighteenth-century language, that all men were equal”. But Balfour told Parliament that he manifestly did not believe that all men were created equal:

³¹⁶ Indian Councils Bill [Lords]. HC Deb 26 April 1909 vol 4 cc32-107, at col. 54.

* The expression “coloured” referred both to the African and Asian population in Southern Africa.

³¹⁷ For a good summary of the debates in both Houses of Parliament and the Colonial Secretary’s Conference see L.M. Thompson, *The Unification of South Africa 1902-1910* (Oxford: At the Clarendon Press, 1960), pp. 398-432.

³¹⁸ The Act also made provisions for admitting Rhodesia as a fifth province of the Union, but Rhodesians rejected this option in a referendum held in 1922, in which only Europeans were allowed to participate. There were 34,000 Europeans in Rhodesia in 1922, and they voted 8,774 to 5,989 to remain separate. See Ralph Zacklin, *The United Nations and Rhodesia: A Study in International Law* (New York: Praeger, 1974), p. 12. Zacklin does not give figures for the population of the black African majority who were not given the right to vote to determine the destiny of their territory, but presumably it was much higher than the white population. See Jericho Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (Oxford: Clarendon Press, 1985), p. 3.

³¹⁹ Zebel, *Balfour: a Political Biography*, supra n. 150, p. 154.

...to suppose that the races of Africa are in any sense the equals of men of European descent, so far as government, as society, as the higher interests of civilisation are concerned, is really, I think, an absurdity which every man who seriously looks at this most difficult problem must put out of his mind if he is to solve the problem at all. If the races were equal the matter would be simple. Give them all the same rights, put them on precise political equality, but if you think, as I am forced to think, that this is an inequality, not necessarily affecting every individual, but really affecting the two races, I will not say for historic reasons—they go far back beyond the dawn of history, into the very arcana of nature, in which these different races were gradually differentiated—if anyone believes that difference is fundamental, you cannot give them equal rights without threatening the whole fabric of your civilisation.³²⁰

Accordingly, the coloured races in South Africa could not be accorded political equality with the white population because by doing this the whole fabric of the white man's civilisation there would be threatened. As explained in Part Three, this was precisely the same argument employed in 1948 by the National Government to deny political representation to blacks, and to keep the races strictly separated. In other words the architects of apartheid in South Africa was arguably the British Government, and not the Government of South Africa, because it was the British Government that first enacted legislation to disenfranchise the voting rights of the vast majority of the people of South Africa.³²¹ Whether the South African Government would have done so in any event, is more than likely, but the British role should not be overlooked or simply dismissed.³²² Nor is it adequate or historically accurate to blame the Boers for

³²⁰ South Africa Bill [Lords]. HC Deb 16 August 1909 vol 9 cc951-1058 at cols. 1000-1002.

³²¹ One of Britain's first legal initiatives was to introduce a law in the Cape in 1809 requiring native blacks to carry passes if they wished to enter "white" areas of the colony. In addition, the Cape's 1853 constitutional arrangements enacted when Britain was still the colonial power only granted the franchise to adult male British subjects who either earned an income of at least £50 per year or who occupied property with an annual rental value of £25 or more. Although the law said nothing of colour, these restrictions would have effectively precluded most non-White, non-British men from the vote. When the law was amended in 1887 when Cecil Rhodes was Governor of the Cape the property qualification was increased to £75 per year and a literacy test was added. These reforms would have removed the right to vote from some poor whites and coloureds. In addition, communal property was excluded from consideration that would have only affected the African community. The 1894 Glen Grey Act introduced native reserves and those who lived in them were specifically denied the right to vote. In 1903, when Milner was Governor of the Transval and the Orange River Colony, the Municipalities Election Ordinance was passed which extended the right to vote to all white adult British subjects in the Transvaal. All non-whites were excluded. Although the Cape had a nominally "colour blind" franchise immediately prior to the Union, in practice whites, Indians, coloureds, and natives enjoyed different access to the franchise since the whites occupied a disproportionately large percentage of the Cape's land and filled a disproportionately large percentage of the Cape's better paid jobs. See Ian Loveland, *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* (Oxford: Hart, 1999), p. 9, pp. 19-20, pp. 36-37, pp. 70-71, and p. 115.

³²² According to Keegan, in the 1870s Britain was toying with the idea of creating a larger white confederation under imperial auspices, combing all the white-ruled states of the subcontinent, including the Boer republics. See Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order*

South African racism.³²³ Even Professor Thompson, the Anglophile Professor of the University of Cape Town, admitted that Britain was not bound by Treaty of Vereeniging (which ended the second Anglo-Boer War) to exclude Coloured and Indian men from the franchise in the Transvaal and Orange River Colony.³²⁴ Rather, it *chose* to do this. Accordingly, the old colonial voting laws in Natal, which excluded Africans, Coloureds, and Indians, and those which loaded the vote with income and property qualifications were agreed to by the British Parliament, which knew what the consequences would be.³²⁵ Furthermore, it was during the years that Britain ruled supreme in South Africa after the conquest of the Transvaal and the Orange Free State in 1902, and *before* it progressively devolved power to South Africa, first informally to Jan Smuts, and formally during the creation of the Union in 1910, that the seeds of segregation between Africans and Europeans in separate territorial spaces were sown.³²⁶ This began through the creation of the South Africa Native Affairs Commission (SANAC) of 1903-5 headed by the Sir Geoffrey Langden, who one scholar described as a “reactionary High Tory, who had served as Resident Commissioner in Basutoland before his appointment by Milner to run Native Affairs in the Transvaal where his chief task was to secure labour for the mines”.³²⁷ As Ian Loveland explained, the SANAC explicitly approved the principle of territorial segregation along racial lines. Specific areas of the country were set aside for the exclusive occupation of the native black population. Blacks would not, however, be able to own this land. Instead it was held in trust on their behalf by the colonial government where the natives would be assisted in developing their own forms of government to manage their internal affairs within their respective territories.³²⁸ The

(London: Leicester University Press, 1996), p. 293. This is intriguing because, as described in Part Three, Britain attempted to establish a confederation of minority white settler regimes throughout Southern and central Africa in the 1960s, although it was thwarted by the USSR and non-aligned states.

³²³ In 1901 some 7000 native blacks were uprooted from their Cape Town homes and forcibly relocated in a camp built on the site of an old sewerage works at Uitvlugt. See Loveland, *By Due Process of Law?* supra n. 321, p. 67. This does not appear to be all that different to the apartheid government’s decision to forcefully relocate 60,000 Africans over a number of years from Cape Town’s District Six in the 1970s in order to relocate them to the Cape Flats Township complex 25 kilometres away.

³²⁴ See Thompson, *The Unification of South Africa*, supra n. 317, p. 401, note 10.

³²⁵ Bernard Makhosezwe Magubane, *The Making of a Racist State: British Imperialism and the Union of South Africa 1875-1910* (Trenton: Africa World Press, 1996), p. 281.

³²⁶ See Martin Legassick, “British Hegemony and the Origins of Segregation in South Africa, 1901-12” in William Beinart and Saul Dubow (eds.), *Segregation and Apartheid in Twentieth-Century South Africa* (London: Routledge 1995), p. 43.

³²⁷ Legassick, “British Hegemony and the Origins of Segregation in South Africa”, *ibid.*, p. 48.

³²⁸ Loveland, *By Due Process of Law?*, supra n. 321, p. 66.

idea underpinning the formation and function of the SANAC was strikingly similar to the South African government's decision in 1954 to create Bantu Homelands, when the Tomlinson Commission recommended such a policy (as described in Part Three).

The British approach to self-determination was similar to the American approach in the sense that they corresponded in the belief that non-Europeans were inherently not suited to representative government. This was because, as one Anglophile member of the Transvaal Parliament explained, "the negro races occupy the lowest position in the evolutionary chain".³²⁹ Many Southerners in the US would have shared this view of African-Americans. Nor did the Anglo-Americans think that representative government could evolve amongst non-Europeans absent guidance. In transferring power to South Africa, Britain preferred to divest the coloured races from the body politic, so that they could evolve in their own way without the whites interfering in their lives. Because of the sheer imbalance in numbers this was the only way to preserve the European way of life. Where the British approach to self-determination differed from the American approach was in the principle of aristocracy. Men like Balfour, Lorimer, and Salisbury believed it was better for the masses to be guided by an oligarchy who by their enlightenment, experience, and their superior knowledge, were best placed to rule. The result was that Britain preferred to establish minority governments in the colonies where the native populations outnumbered the Europeans. For an elite had ruled Britain for almost a thousand years even though they amounted in overall terms to a minority. As explained in Part Three, the clamour for majority rule never came from Britain or from America. It came from the call to liberate the toiling masses as encapsulated in the Soviet revolutionary approach to national self-determination after it had become fused during decolonization with the anti-colonial approach, which was encapsulated by the non-aligned movement.

6. Conclusions

Whilst it is a cliché to repeat that civilisation was the key term used to distinguish certain types of political societies from others it is important to realise that what underlay the term civilisation was a set of assumptions about how those political societies belonging to the Western liberal tradition saw themselves in the world. This

³²⁹ See George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African History* (Oxford: Oxford University Press, 1981), p. 196.

is important because it affected the way they viewed the development of political society in the colonies placed under their control. One of the consequences of this worldview was that only societies with a similar economic, cultural, and political system i.e. a mirror image to themselves, could possibly be deemed civilised. Self-identification between the colonizer and the colonial subject played a major role in the development of self-determination especially in British colonies, whether this self-identification was manifested in terms of class, colour, or creed. This would explain why, for instance, Burke and Gentz could identify with the Americans during their War of Independence in 1776, as explained in Part One, when they succeeded in breaking their chains to Britain, but recoiled when it was attempted elsewhere.

Accordingly, it was virtually impossible for any society to be classified as civilised and deemed “fit for independence”, which was not Christian; which was not of a similar class to the British aristocracy i.e. well-bred, well-spoken, and wealthy; and that was racially different to Europeans i.e. not Caucasian. In this connection it is important to stress that being considered civilised did not mean that one was considered an equal, a negation which applied to individuals, groups, and nations. Thus, the Ottoman Empire was left in the periphery of European politics even though it was admitted into the Concert of Europe in the nineteenth century.³³⁰ And Japan although it was considered a great power after it defeated Russia in 1904-5 was never really considered an equal which is why Wilson strenuously opposed its espousal of equality.³³¹ Nor was Siam (Thailand), Arabia, the Hejaz, China, or Ethiopia considered equals even though they had all been recognised as states or admitted into the League of Nations.³³² Ultimately, equality would have to be fought for by the gun and the ballot box which is why the rest of the world would have to wait until

³³⁰ Turkey, still waiting to become a member of the EU, was only admitted to the European Concert when it was the Ottoman Empire at the Congress of Paris in 1856—but it was an unequal relationship. In 1878, Turkey would find its European possessions being partitioned by the great powers at the Congress of Berlin. See Art. VII of the Treaty of the Congress of Paris, 30 March 1856, in M. Edouard Gourdon, *Histoire du Congrès de Paris* (Paris: Librairie Nouvelle, 1857), p. 10 (“...déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens”). For the English translation, see Edward Hertslet, *The Map of Europe by Treaty*, Vol. II (London: Butterworths, 1875), p. 1250. For the history of Turkey’s attempt to enter the European Concert, see Fikret Adanir, “Turkey’s entry into the Concert of Europe”, 13 *European Review* (2005), p. 395.

³³¹ Gong argues that Japan had already attained a recognised “civilised” status by the European states in the decade prior to that conflict. See Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society* (Oxford: Clarendon Press, 1984), pp. 195-200.

³³² This might explain why the nominal independence of the Hejaz was so short lived and why no one came to Ethiopia’s rescue when Mussolini annexed it in the Second Italo-Ethiopian War (1935-6).

decolonization when they were “granted” independence from their colonial masters or when they liberated themselves in wars of national liberation by resort to armed force.

Of course, these European prejudices did not remain static or stuck in the nineteenth century. They remained in the ascendancy until well into the twentieth century and had a major impact on the development of international law, which in turn had a major impact on the development of self-determination. In the colonial context a community claiming self-determination had to be viewed as having the qualities of nationhood before its claim would be recognised. In other words, they had to have the capacity for good government in the form of an organised collectivity that was united in aptitude, political belief, and ideological outlook. This necessitated a pre-existing community that was comprised of a highly literate, culturally assimilated, and racially homogenous society that was aligned to the Western tradition. This tradition assumed that there was a separation between the church and the state, which meant a form of rationalised Christianity of the post-reformation Protestant variety. The problem of course was that outside the dominions of white settlement, few such societies could ever exist that could achieve these lofty self-serving goals. This conception of the nation caused particular problems in those fault lines where the white settler came across the native particularly where the former was not strong enough to exert itself by exterminating or cleansing the land of the natives i.e. as in Australia, Canada, and the US.³³³ The problem became particularly acute in Ireland, British India, Palestine, and in Southern Africa because of the sheer size of the native communities, which disturbed the natural evolution of self-government, which being based on the Westminster model, necessitated a form of government in which the majority ruled.

For in a plural society which majority was to rule and over which territorial unit? Was it the native or the settler? Was it the Catholic or the Protestant, the Muslim or Hindu, the Jew or Arab? And what was a nation anyway? The difficulties in answering these questions is that they could not be resolved—absent partition—if

³³³ This would explain why the statistics for the indigenous populations of Australia (1 per cent), Canada (1.5 per cent), New Zealand (9 per cent), and the US (0.5 per cent) are so low compared to Ireland (which prior to the partition in 1921 had a population that was over 85 per cent Catholic), South Africa (over 80 per cent during apartheid), India (over 99 per cent), and Palestine (20 per cent in Israel proper today, 45-50 per cent if the West Bank and the Gaza Strip are included, although it was over 93 per cent Arab in 1917 when the Balfour Declaration was issued and over 67 per cent Arab when the UN recommended partitioning Palestine in 1947). See Andrew Kenny, “Right of Passage”, *The Spectator*, 30 September 1989, pp. 9-11 at pp. 9-10. I would like to thank Professor Robert Wintemute at King’s College for drawing my attention to this article where the indigenous statistics for Australia, Canada, New Zealand, the US, and South Africa appear, and for sending me a PDF copy by email.

the prevailing system of government was to be representative or democratic. This is why nationality conflicts did not present much of a problem to the dictator, the prince, or the tribe, which did not need to legitimise their systems of government by having regular recourse to the plebiscite. However, if the system of government was to be democratic then absent the defining characteristics of representative government, it was practically impossible to establish a state, which would remain in state of peace, since there would be a constant struggle for political power. It was partly for this reason that the colonial power always favoured the rights and interests of the European races in those colonies settled by Europeans. For it was assumed that the Europeans in the dominions of white settlement were a highly literate, culturally assimilated, and racially homogenous community. And of course in the colonial context it was the colonial power that defined the national community and differentiated it according to assumed “national characteristics”. In the British colonial context, these differences tended to be defined according to religious differences, since this is how Britain differentiated its own subjects. Thus the colonial census often categorised peoples according to religion i.e. Christian, Muslim, Jew, Hindu or in colonial India by their “scheduled caste”. Then there was “the Other”.³³⁴

³³⁴ This nominally referred to communities that did not fit into the other categories.

Part Three

INTERNATIONAL LAW IN THE AGE OF DECOLONIZATION

In capitalist society, we have a democracy that is curtailed, wretched, false: a democracy only for the rich, for the minority. The dictatorship of the proletariat, the period of transition to Communism, will, for the first time, produce a democracy for the people, for the majority, side by side with the necessary suppression of the minority constituted by the exploiters. Communism alone is capable of giving a really complete democracy, and the fuller it is the more quickly will it become unnecessary.

V.I. Lenin, The State and Revolution (New York: Vanguard Press, 1926), p. 194.

It had come to be accepted that the pigs, who were manifestly cleverer than the other animals, should decide all questions of farm policy, though their decisions had to be ratified by a majority vote. This arrangement would have worked well enough if it had not been for the disputes between Snowball and Napoleon.

George Orwell, Animal Farm: A Fairytale (1945) Penguin Classics, 1989, p. 31.

THE PRIME MINISTER said that he would face difficult elections in the near future in England since he did not know what the Left would do....

THE PRESIDENT said that in 1940 there had been eighteen political parties in France and that within one week he had had to deal with three different prime ministers in France. He said that when he had seen de Gaulle last summer he had asked him how this had happened in French political life, and de Gaulle replied that it was based on a series of combinations and compromises, but he intended to change all that.

THE PRIME MINISTER remarked that Marshal Stalin had a much easier political task since he only had one party to deal with.

MARSHAL STALIN replied that experience had shown one party was of great convenience to a leader of a state.

Churchill, Roosevelt, and Stalin in conversation at the tripartite dinner meeting, 10 February, 1945, Vorontsov Villa, The Conference at Yalta, Foreign Relations of the United States, (Washington: Government Printing Office, 1955) p. 923.

Although it took some time for the Marxists to come to grips with the question, they can no doubt lay claim to being on the whole the oldest established and most consistent of opponents of colonialism and advocates of national self-determination.

Rupert Emerson, Self-Determination Revisited in the Era of Decolonization (1964), Published by the Centre for International Affairs, Harvard University, p. 7.

The defining characteristic of international relations in the twentieth century was the triumph of national self-determination, although it would lose its “national label” as time progressed. What initially began as an idea, emanating from the revolutions of the eighteenth century, was proclaimed a principle at the end of the First World War, before it acquired its status as a customary rule of international law, during decolonization, and was finally proclaimed a peremptory norm.¹ This story of progress, however, is insufficient, for it masks the violent ideological struggles that took place during decolonization between two competing visions of what self-determination entailed: The Anglo-American versus the Soviet / Non-Aligned approach. The first approach was associated with a liberal conception of nationhood which required a colonial people to develop the necessary characteristics before they would be granted the right to establish representative government in a manner that would not threaten international peace and security. The second approach, in contrast, was ambivalent regarding the question of representative government, although it was universal in application, and was to be granted to all peoples colonised by Europeans immediately, and unconditionally, by all necessary means, including armed struggle.

If we want to understand how partition became associated with the age of decolonization, then in addition to the Cold War rivalry, and the divergent views that were expressed on self-determination, the manner it was applied to certain peoples and territories ought to be considered. This is because the way in which nationalism developed in territory placed under colonial control played a major factor when the colonial power came to relinquishing control over the territory. Nor is it a coincidence that most territories partitioned during decolonization were British colonies. As noted in Part Two, those who ruled the British Empire had a distinctive approach to the nationality question in its colonies and the application of self-determination that was formed on the basis of a superior hierarchical structure informed by the Anglo-Saxon class system and the Westminster model of government. Imperial government in Britain was very much character driven by men from aristocratic families who belonged to the ruling minority elite.² Thus, they were

¹ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 26 January 1971, ICJ Reports (1971), p. 31, para. 53; East Timor (Portugal v. Australia), judgment, ICJ Reports 1995, p. 90 at p. 102, para. 29; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136 at p. 199, at paras. 155-156.

² See Carroll Quigley, *The Anglo-American Establishment: From Rhodes to Cliveden* (New York: Books in Focus, 1981, first written 1949) especially Chapter 2, ‘The Cecil Bloc’, pp. 15-32.

not averse to entrenching minority rule elsewhere where they thought it necessary to preserve British economic interests and the integrity of the Empire. This is especially if the minority in the territory in question were either European or were foreign but of a class that was “English in taste, in opinions, in morals, and in intellect”.³

As noted in Part One, this contrasted starkly with the Marxist-Leninist approach to self-determination, which was inspired by the resistance of the Poles to the partitions of Poland. This resistance had given inspiration to Marx and Engels contributing to the language of self-determination.⁴ As Joseph Stalin (1878-1953) recalled, in the language reminiscent of his day, “... Marx was in favour of the separation of Russian Poland; and he was right, for it was then a question of emancipating a higher culture from a lower culture that was destroying it”.⁵ Poland also contributed to the international policy of the Bolshevik party when it seized power. As Stalin explained, the Kerensky government that attained power in the February Revolution of 1917 wanted to continue the war “in order to subjugate new lands, new colonies, and new nationalities”.⁶ In contrast, the Bolsheviks who seized power in the October Revolution of the same year, proclaimed “self-determination for the toiling masses of the oppressed nations” such as Finland.⁷ The Bolsheviks wanted self-determination to apply to all colonies irrespective of their location which initially included its own colonies in Europe such as Finland, Latvia, Estonia, and Poland, as well as the Western colonies of Egypt, India, and Ireland, whereas for Wilson and the imperialists their mind was focused almost exclusively on the nationalities of Europe.⁸ Class, argued Vladimir Ilyich Lenin (1870-1924), would become the politically dominant social identity only when national identity was given proper respect.⁹ This meant that nations should have the right not only of autonomy, but also of secession.¹⁰

The principle of popular sovereignty and government by consent, originated in Western political philosophy, as an outcome of the formation of the nation-state

³ To coin a phrase from Macaulay, see “Thomas Babington Macaulay on Education for India” in Philip D. Curtin (ed.), *Imperialism* (London: MacMillan 1972), p. 178 at p.190.

⁴ See Kevin B. Anderson, *Marx at the Margins: On Nationalism, Ethnicity, and Non-Western Societies* (Chicago: The University of Chicago Press, 2010).

⁵ Joseph Stalin, *Marxism and the National and Colonial Question* (University of the Press of the Pacific Honolulu, Hawaii, 2003, reprinted from the 1935 edition), p. 21.

⁶ Stalin, *Marxism and the National and Colonial Question*, *ibid*, p. 69.

⁷ Stalin, *Marxism and the National and Colonial Question*, *ibid*, p. 71.

⁸ See Derek Heater, *National Self-Determination: Woodrow Wilson and His Legacy* (London: MacMillan, 1994), pp. 36-37.

⁹ See Ronald Grigor Suny and Terry Martin (eds.), *A State of Nations: Empire and Nation-Making in the Age of Lenin and Stalin* (Oxford: Oxford University Press, 2001), p. 68.

¹⁰ Stalin, *Marxism and the National and Colonial Question*, *supra* n. 5, p. 51.

during the revolutions in England, America, France, and Poland as explained in Part One. However, the concept of the nation in Western political thought was not a universal community, and was initially restricted to Europeans, to those who professed the Christian faith, and to the upper classes.¹¹ As explained in Part Two, those peoples who did not fit into European society in the colonies were shunned, placed in a position of subordination, or deported to the colonies. In sharp contrast the Marxist-Leninist approach to the concept of the nation sought to abolish all distinctions and forms of privilege. In the words of the All-Russian Congress of Soviets: “...where capitalist democracy prevails and where the state rests on private property, the very basis of the state fosters national enmity, conflicts, and struggle”. In contrast, in the realm of the Soviets, power was built not on capital, but on labour, not on private property, but on collective property, not on the exploitation of man by man, but on hostility to such exploitation. According, there was “a natural striving on the part of the toiling masses towards unity in a single socialist family”.¹² In Marxist-Leninist theory, national self-determination was promoted as a *mass* movement.

In 1941, the US and Great Britain announced in the Atlantic Charter—the precursor to the UN Charter, which was adopted in 1945, and which established the post World War II international security framework—that they desired to see no territorial changes that did not accord with the freely expressed wishes of the peoples concerned.¹³ However, in the British House of Commons, Prime Minister Winston Churchill clarified that this was not meant apply to colonial peoples, (i.e. the “darker races” who he perceived as “economically backward”), only to those states and nations in German-occupied Europe (i.e. “the lighter-skinned races” who he perceived as “economically productive”).¹⁴ The US Government was not, however, in complete accord with this view, and so in 1943, in furtherance of the policy enunciated in the Atlantic Charter of 1941, it drafted a Colonial Declaration of its own.¹⁵ This Declaration provided that: “It is the duty and the purpose of those of the United

¹¹ Hence Karl Marx and Friedrich Engels referred to the French revolution as “bourgeois”. See *The Communist Manifesto* (Oxford: Oxford University Press, 1998, first published 1848), p. 18.

¹² Report Delivered at the Tenth All-Russian Congress of Soviets, 26 December 1922 in Stalin, *Marxism and the National and Colonial Question*, supra n. 5, pp. 120-128 at pp. 123-124.

¹³ The Atlantic Charter of 14 August 1941 is reproduced in 35, *Supplement to the American Journal of International Law: Official Documents* (1941), pp. 191-192.

¹⁴ See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), p. 37.

¹⁵ See Colonial Declaration: Meeting of the Ministerial Committee, 28 March 1944, FO 371/ 40749. The Colonial Declaration reproduced in the file is dated 9 March 1943.

Nations which have, owing to past events, become charged with responsibilities for the future of colonial areas to co-operate fully with the peoples of such areas toward their becoming qualified for independent national status”. It added that: “While some colonial peoples are far advanced along this road, the development and resources of others are not yet such as to enable them to assume and discharge the responsibilities of government without danger to themselves and to others”. Accordingly, it was the duty and the purpose of each nation having political ties with colonial peoples:

- a. To give its colonial peoples protection, encouragement, moral support and material aid and to make continuous efforts toward their political, economic, social and educational advancement;
- b. To make available to qualified persons among the colonial peoples to the fullest possible extent positions in the various branches of the local governmental organisation;
- c. To grant progressively to the colonial peoples such measures of self-government as they are capable of maintaining in the light of the various stages of their development towards independence;
- d. To fix, at the earliest practicable moments, dates upon which the colonial peoples shall be accorded the status of full independence within a system of general security; and
- e. To pursue policies under which the natural resources of colonial territories shall be developed, organised and marketed in the interests of the peoples concerned and of the world as a whole.¹⁶

This document displayed many of the features of what would follow in the form of the UN Trusteeship System. Yet the suggestion that colonial peoples needed special assistance to assume and discharge the responsibilities of government because they would be “a danger to themselves and to others” was, as explained in Part Two, typical of imperial mentality. Thus Britain opposed the suggestions outlined in subsections c. and d. that mentioned independence and which sought to set target dates to achieve that end. Accordingly, it was hardly surprising that Britain resolutely opposed both any extension of the principles enunciated in the Atlantic Charter to its colonial dependencies and the American initiative to the issuance of a Colonial Declaration. In 1944 the British cabinet would only agree to “the establishment, as part of the general world organisation, of machinery which would help to promote good colonial administration and the material well-being of dependent peoples”.¹⁷

In other words, the British approach went to the heart of the quality of government. It was not concerned with independence or majority rule but rather it

¹⁶ See Colonial Declaration, *ibid*, March 1944.

¹⁷ See War Cabinet: Proposed Colonial Declaration, 13 April 1944, CAB 78/20.

gave preference to a community that was in its eyes better equipped with the tools for self-government.¹⁸ As Sir Ivor Jennings explained, the real problem in colonial countries was not simply drafting a constitution or making laws, but finding the men and women who would be capable of running the machinery of government after independence.¹⁹ This was the approach that would find expression in the UN Trusteeship system characterised by a rather condescending Anglo-American attitude that subject peoples needed to be nurtured in their “progressive development towards self-government or independence”.²⁰ This was an idea first encapsulated in Article 22 of the League of Nations Covenant where in line with the evolutionary ideas associated with social Darwinism the former colonies of the Axis powers were classified into A-, B-, or C- mandates according to their “stages of development”. In stark contrast stood the Soviet and Non-Aligned approaches to self-determination in which no fetters were to be placed on a people’s exercise of that right which was to be granted immediately and unconditionally.²¹ These divergent approaches to self-determination are best understood by comparing and contrasting the American 1943 draft of a Colonial Declaration quoted above to the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the UN in 1960.

The latter Declaration was inspired by a fusion of Marxist-Leninist philosophy with the anti-colonialism inspired by those nations, which formed the non-aligned movement. Thus it opened by proclaiming that: “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation”. It added: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. In this connection: “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence”. Moreover, immediate steps were to be taken in those territories which had not yet attained independence, “to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any

¹⁸ For a critique of this view, see the chapter entitled, “Freedom First”, in Kwame Nkrumah, *Africa Must Unite* (London: Panaf books, 2006, first published 1963), pp. 50-56.

¹⁹ Ivor Jennings, *The Approach to Self-Government* (Cambridge: At the University Press, 1956), p. 24.

²⁰ See Art. 76 b. UN Charter.

²¹ Rosalyn Higgins, *Conflict of Interests: International Law in a Divided World* (London: The Bodley Head, 1965), p. 153.

distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom". It clarified that in the transfer of power, "any attempt aimed at partial or total disruption of the national unity and the territorial integrity of a country" would be incompatible with the purposes and principles of the Charter.²²

Accordingly, no longer was colonialism described as benevolent and peaceful, but as a project that constituted "a denial of fundamental human rights" associated with "alien subjugation, domination, and exploitation". Self-determination was thus firmly established in the lexicon of rights rather than as an abstract principle, and the irreverent Anglo-American attitude that only the colonial power could decide when a subject people's moral well-being and preparedness for self-government had been met, was expressly negated and deemed irrelevant. Moreover, for the first time in the history of international relations, self-determination was proclaimed as a right of *all* peoples and not just *some* peoples. Although the word "nation" was dropped in favour of "peoples", conceptually this was meaningless since what was really meant was that all peoples colonised by Europeans *who were able to form themselves into nations* had the right to self-determination. The Colonial Declaration did not intend to suggest that the peoples of Brooklyn, Soweto, or Stoke-on-Trent, or any other city, township, village, or refugee camp, had a right to self-determination. As Rupert Emerson observed, the Declaration meant that "all overseas colonial peoples have a right to be liberated from the over-lordship of their alien white masters".²³ And in the transfer of power to the colony, no distinctions were to be made in terms of "race, creed or colour", although discrimination based on class was not mentioned at all.

The colonial powers naturally abstained from voting in favour of the Colonial Declaration, which was nonetheless swiftly followed up by a further resolution demanding that there was "an international obligation" on the colonial powers to transmit information on their non-self-governing territories under Article 73 UN Charter to the UN Secretary-General.²⁴ In a last minute attempt to forestall the adoption of this resolution, the British Foreign Office desperately and in haste drafted an alternative resolution on "Nation-Building".²⁵ One of the operative parts of this draft resolution prescribed that "independence to be real requires conditions of

²² GA Res. 1514, 14 December 1960.

²³ Rupert Emerson, *Self-Determination Revisited in the Era of Decolonization*, Occasional Papers in International Affairs, Number 9, December 1964, published by Harvard University, p. 63.

²⁴ GA Res. 1541, 15 December 1960.

²⁵ See Draft Resolution on Nation-Building in Colonialism and Target Dates: Revised Draft Resolution, 31 May 1961, FO 371/160905.

political, economic and social stability and must draw its strength from adequate resources in all these fields”.²⁶ It added: “an essential aspect of this problem is the adequate training of the inhabitants of the territory to meet the requirements of a modern state for skilled manpower of all kinds”.²⁷ Clearly, Britain still had a fundamental dilemma with giving up control over its colonies until it thought the people there were ready for self-government, let alone independence. It was as a direct result of the Cold War contest that human rights would be forced on to the international agenda. As Bill Bowring reminds us, it was primarily due to Marxist ideology, and lobbying by the USSR that self-determination is even mentioned in the 1945 UN Charter, the 1960 Colonial Declaration, and in the 1966 human rights covenants.²⁸ This is underscored by the fact that the original language employed in Article 1 (2) UN Charter, omitted mentioning self-determination altogether.²⁹

In 1948, the Soviet Union also attempted to address self-determination and the colonialism in the Universal Declaration of Human Rights but it was thwarted by the colonial powers.³⁰ During the drafting of the Universal Declaration the Soviet delegate in the drafting committee criticised “the absurd theory current among colonial powers that there were superior races and inferior races”.³¹ Indeed, it was largely due to the insistence by the USSR on the principle of the equality of races whatever their stage of economic development that a schism emerged between the Anglo-American and the Soviet / Non-Aligned approaches to self-determination. This in turn had an impact in those territories where a nationality conflict emerged between Europeans and non-Europeans, such as in Palestine, and Southern Africa. In these cases the national community which formed the majority of the population would insist upon its right of self-determination without regard for whether it satisfied the social, economic, or cultural indices of development which the colonial power insisted were relevant criterions upon which to assess whether a particular nation was ready for independence, which accorded to the Soviet / Non-Aligned view. In contrast the

²⁶ Draft Resolution on Nation-Building, *ibid*, para. 2

²⁷ Draft Resolution on Nation-Building, *ibid*, para. 3.

²⁸ See Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Abingdon: Routledge-Cavendish, 2008), pp. 9-38, at pp. 30-33.

²⁹ During the conversations at Dumbarton Oaks, Article 1 (2) originally stated that one of the purposes of the Organization was “to develop friendly relations among nations and to take other appropriate measures to strengthen universal peace”. See volume 1 of *The United Nations Year Book* (1946), p. 4.

³⁰ See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 96-101.

³¹ Morsink, *The Universal Declaration of Human Rights*, *ibid*, p. 101 (quoting Dimitri Z. Manuilsky).

nationality that formed the “superior race”, to borrow Soviet language, would insist upon its right of self-determination irrespective of its minority status, according to Anglo-American view, because it deemed itself better prepared for independence.

During the debates on the UN Partition Plan for Palestine with Economic Union in November 1947 a schism occurred between the colonial powers and its former colonies when opposition was expressed to that Plan. The newly independent states argued that it would be contrary to self-determination to divide Palestine in the face of opposition from the majority of its inhabitants whereas most of the states that had formerly been members of the League of Nations looked to the identity of the communities claiming self-determination, which they considered to be of paramount importance. India and Pakistan led the opposition to the Partition Plan for Palestine by pointing out that the partition of the Indian subcontinent had been accomplished on the principle of majoritarianism, i.e. by distinguishing rights to territorial sovereignty on the basis of whether a specific population formed the majority in an allotted territory, whereas Palestine was being divided to favour a minority community, mostly comprised of European immigrants, many of whom had not yet immigrated to Palestine, and most of whom had no prior connection to the territory. The newly independent countries viewed Zionism as an agent of imperialism because it was a form of nationhood that did not develop organically within Palestine, but was instead nurtured by a colonial power, that had spent three decades administering the territory, and in the process, it had encouraged the colonisation of Palestine by European Jews.

With the burgeoning of successful Soviet sponsored national liberation struggles, which reached their peak in the 1960s, the decade most associated with decolonization, “the right to self-determination” would be repeatedly invoked by colonised peoples as an explicative in heated debates in the UN, proclaiming the necessity of bringing colonialism “to a speedy end”, to borrow language from the Declaration on the Granting of Independence to Colonial Countries and Peoples. Two centuries after the revolutions that convulsed Europe and the Americas in the eighteenth and nineteenth centuries, a similar phenomenon would occur in the colonies of the same powers where those revolts had originated. The difference was that this time the peoples that revolted were mostly not of European origin. In other words the nationalism that spread through the colonial system was being invoked against the colonial power in the name of self-determination. Since the USSR did not fully participate in the European colonial project in the eighteenth and the nineteenth

centuries preferring to incorporate colonies closer to home, it had little to lose by promoting worldwide revolution in its contest with the European colonial powers and against the US that was aligned with those powers. Moreover, support for national liberation was consistent with Marxist-Leninist philosophy, which sought to eradicate all the distinctions that divided mankind. Thus, it was not a coincidence that by 1969, only one per cent of humanity remained living in Western created colonies.³²

³² See Bowring, *The Degradation of the International Legal Order?* supra n. 28, p. 33 citing Tunkin.

IV. Minority, Nation, People: Self-Determination and Partition in Plural Societies

1. Introduction

Throughout the course of the twentieth century international lawyers expressed differing opinions on what they understood by the term “self-determination” and who was entitled to invoke it. In late twentieth century discourse this was expressed in terms of the rights of peoples rather than nations, although the difference was somewhat academic, because regardless of what term was used what really was in dispute were the qualities associated with nationhood. These qualities did not simply disappear because of a change of terminology. Thus international lawyers invoke the term “people” today in conjunction with self-determination when their predecessors would have spoken of the nation.³³ If we accept that at the turn of the twentieth century self-determination was equated with the right of a nation to seek independence it would seem absurd to suggest that any people could have invoked it when they may have comprised the population of a state, several states, as could a minority, or several minorities. Thus the phraseology employed in Article 1 (2) UN Charter, which calls for “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”, would seem to suggest that not all peoples have evolved into nations.³⁴ Whilst nations are undoubtedly comprised of peoples, it would appear that something more is needed for the people in question to form a nation.

The word minority does not appear in the UN Charter.³⁵ This omission is curious since a nation, whilst undoubtedly being comprised of a people, could also be comprised of a minority, if the minority views itself as a nation or is viewed as a nation by others. Whether a people amount to a minority or a nation all comes down to how the population of a specific territory is described. In a word, the connecting

³³ See e.g. Joseph S. Roucek, “The Problem of Minorities and the League of Nations” 15 *Journal of Comparative Legislation and International Law* (1933), p. 67, at p. 69. (“From the democratic idea of liberty of the individual it is only a step to the demand for the liberty of a nation—the principle of self-determination, to form an independent state”.)

³⁴ A memorandum prepared by the UN Secretariat during the San Francisco conference noted that the term “‘nation’ is used in the sense of all political entities, states and non states, whereas ‘peoples’ refers to groups of human beings who may, or may not, comprise states or nations”. See XXVIII *United Nations Conference on International Organization* (1945), p. 142.

³⁵ One possible explanation for the failure to mention minorities in the Charter, in addition to the failure of the League of Nations minority regime in Eastern Europe, was the fear in the US that African American civil rights leaders might use minority rights machinery at the new UN to embarrass the US Government. See Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (New Jersey: Princeton University Press, 2009), p. 147.

factor between a minority, a nation, and a people, is territory. Whether or not a people are a minority in a state, which is in the process of formation, comes down to how the boundary or the boundaries have been demarcated and delineated. Accordingly, the people who numerically form the smallest unit in the newly created state, will by mathematical logic be described as a minority, and those peoples who are numerically numerous, will be described as the majority. Since in a liberal democracy, political power is generally vested in the numerically preponderant population (minority rights notwithstanding) where the boundary is drawn takes on added significance. It is perhaps for this reason, that the word “partition” has acquired a pejorative connotation in those territories where there was a dispute as to which particular people amounted to “a nation” entitled to “external self-determination”, which in the colonial era meant the right to establish a state, as opposed to the minority, which was not so entitled.³⁶

In this regard we can learn a lot about the history of minorities, nations, and peoples in international law by examining how they were understood in specific partition proposals in differing historical epochs. As an example, consider the manner in which international lawyers expressed differing opinions on the lawfulness of the 1947 UN Partition Plan for Palestine. For instance, writing in 1968, Elihu Lauterpacht could confidently express the opinion that the Partition Plan was “a direct application of the principle [of self-determination]. The Jews were not to determine the future of the Arabs, nor were the Arabs to determine the future of the Jews. Each group was to determine its own future”.³⁷ And yet in a lecture delivered at the University of Auckland only four years later, Michael Akehurst said that he found Lauterpacht’s argument regarding the 1947 Partition Plan “very odd”. Referring to the unequal and one-sided territorial and demographic aspects of the UN proposal, Akehurst said he thought “the partition plan represented such a clear sacrifice of the interests of the majority [i.e. the Arabs] for the benefit of the minority [i.e. the Jews] that it cannot be regarded as compatible with the rights the [League of Nations] Covenant had conferred on the population of Palestine as a whole”.³⁸ Bearing in mind that both

³⁶ See Report of the Commission of Rapporteurs presented to the League of Nations Council, League of Nations on the Aaland islands Doc. B.7.21/68/106 (1921), p. 28 quoted in Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 1990) p. 30. (“To concede to minorities...the right of withdrawing from the community to which they belong...would be to destroy order and stability ... and to inaugurate anarchy in international life”).

³⁷ Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israel Association, 1968), p. 18.

³⁸ Michael Akehurst, “The Arab-Israeli Conflict and International Law”, *5 New Zealand Universities Law Review* (1973), p. 236.

Lauterpacht and Akehurst were reputable British international lawyers who had both studied at Cambridge, who inspired a generation of lawyers, students, as well as Professors, some of whom teach at Oxbridge, it is striking that they reached such conflicting conclusions regarding their understanding of self-determination in the context of the UN Partition Plan for Palestine. For Lauterpacht the issue at hand seemed to be the irreconcilable national identity of the two communities in Palestine and the necessity to satisfy the national aspirations of both communities, without regard for population statistics, nationality laws, and the like, whereas for Akehurst it was his association of self-determination with decolonization, democracy, and majority rule, which informed his understanding of the UN Partition Plan for Palestine, and which led him to criticise it. What led these two prominent international lawyers writing in the same era, to so boldly assert such opposed views?

In order to answer this question and to provide points of reference for context and comparison, it is necessary to examine other partitions that occurred in British colonial territories in the twentieth century; namely the partition of Ireland in 1920 and of India in 1947, as well as the proposals to partition Palestine, and vast tracts of territories in Southern Africa. Indeed one feature that these partitions all have in common is that they were justified by the language of self-determination. The other common feature is that there was a “minority problem” in each of these areas of conflict: the Unionists were a minority in Ireland; the Muslims a minority in India; and the Jews a minority in Palestine, comprised mostly of immigrants. Only in South Africa was the minority problem inverted. There, the minority ruled. In all these cases the political leadership who claimed to represent the minorities were not satisfied with their status as a minority. They did not want to be “second class” citizens. They all claimed that they were nations, not minorities, and therefore entitled to self-determination, which they understood to imply a right to independence over a specific territorial unit. Thus they called on the colonial power to partition the territory to safeguard their interests without pointing out that partition was also likely to create a new minority problem. If the colonial power felt that the minorities claims had merit, either because it self-identified with these communities or considered the minorities to have the right to self-determination, the greater chance that partition would occur.

One of the major differences between the partitions of Ireland, Palestine, India, and Southern Africa was that Ireland and Palestine were places of white settlement as were the numerous territories in Southern Africa, whereas India was not. Another

difference was that Palestine, as a League of Nations mandate, was administered by Britain under a “sacred trust”. When Britain sought to relinquish that trust, it asked the members of the international community as it was then composed to suggest a solution, which they did in the form of partition. Thus they were able to articulate their views on the UN proposal to partition Palestine in an international forum comprised of sovereign member states. In contrast, Ireland and India were British colonies and they were partitioned by British Acts of Parliament in which the debates on those partitions were restricted to that Parliament. This point is important because it was in the debates on Palestine in the UN General Assembly in 1947 that a new understanding of self-determination was articulated by those states which had recently achieved independence and that would later establish the non-aligned movement. The principal states behind this new movement were from the Indian subcontinent, which had been partitioned by Britain in August 1947, three months before the UN General Assembly would recommend such a solution to resolve the conflict in Palestine.

Before examining each of these cases of partition with regards to their international legal implications and the development of self-determination in international law and relations, brief reference ought to be made to the Marxist-Leninist approach to self-determination. This is because that approach to self-determination challenged the Anglo-American approach in that it encapsulated a distinctive approach to addressing the claims of minorities, which it sought to resolve through the formation of autonomous socialist republics. When the Marxist-Leninist approach to self-determination became fused with the Non-Aligned approach during decolonization it culminated in an attempt by the UN General Assembly to prohibit partition during the transfer of power from the colonial power to the colony. In this connection it is important to remember that the manner in which international lawyers approach the question of self-determination and minority rights today differs significantly from the way it was understood and applied in the first half of the twentieth century. In the first half of the twentieth century, it was the colonial power that determined who would be the beneficiaries of self-determination in its colonies. Accordingly it alone determined how this would be geographically expressed. This was not challenged until decolonisation reached its apotheosis in the 1960s.

2. The Marxist-Leninist approach to self-determination

During the First World War, the multi-national Austro-Hungarian, Ottoman, and Russian Empires collapsed. The Austro-Hungarian Empire was dissolved at the Paris Peace Conference in 1919.³⁹ The Ottoman Empire was obliged to cede sovereignty over its former provinces in the Middle East that were placed under colonial administration in the form of mandates, which included the area that would come to be called Palestine.⁴⁰ The Russian Empire collapsed due to two revolutions, in February, and in October 1917. As a result of the second revolution, when the Bolsheviks seized power, Russia concluded a peace treaty with Germany, and withdrew from the war.⁴¹ V.I. Lenin, the leader of the Bolshevik Party, established the world's first multi-national socialist state based upon Marxist-Leninist theory. Karl Marx (1818-1883) had not imagined that the socialist revolution would happen in an Empire like Russia, which is why Lenin had to interpret, elaborate, and apply his theories to the practical realities of Russian society, when he assumed power in 1917. The focus on Lenin, rather than Marx, is crucial, because it was Lenin who determined the course of Russian history, the course of Communism, and the course of twentieth century international relations. Of course, without Marx, there would be no Leninism. But for the purposes of international law and relations, Lenin is the key figure, as he was the first international statesman to put Marx's theories into practice.

It ought to be remembered that the Russia Lenin knew was a notoriously unequal society. The tsar Peter the Great had reinforced feudalism in the eighteenth century, which tied the peasants to the landowners. This included establishing the Pale of Settlement where Jews were crowded into towns where they had no adequate basis for livelihood and had to rely on primitive handicraftsmanship and petty trade to survive. A Jew in Russia could only alter his status by converting to Christianity.⁴² Thus, Lenin's grandfather on his mother's side converted to eliminate the many social and economic obstacles that Jews faced in nineteenth century Russia.⁴³ In the late nineteenth century, the situation of the Jews deteriorated, and pogroms became

³⁹ See David Hunter Miller, *The Drafting of the Covenant, Vol. I*, (New York: G.P. Putnam's Sons, 1928), p. 102.

⁴⁰ See The Treaty of Peace with Turkey signed at Lausanne, 24 July, 1923 in *Treaties of Peace 1919 - 1923, Vol. II*, (New York: Carnegie Endowment for International Peace, 1924), pp. 959 – 1022.

⁴¹ See the text of the Brest-Litovsk Treaty in Jane Degras (ed.), *Soviet Documents on Foreign Policy, Vol. 1, 1917-1924* (London: Oxford University Press, 1951), pp. 50-55.

⁴² See Richard Pipes, *The Formation of the Soviet Union: Communism and Nationalism 1917-1923* (Cambridge: Harvard University Press, 1997), p. 6.

⁴³ Robert Service, *Lenin: A Biography* (London: MacMillan, 2000), p. 17.

commonplace. This led many Jews to emigrate to safer climes in Western Europe, and the US. It was during this period that various solutions to the Jewish Question were debated.⁴⁴ Some Jews sought assimilation, whereas others found refuge in Zionism. The Zionists were inspired by the European scramble for Africa, and sought to establish a colonizing corporation to facilitate Jewish settlement in Palestine.⁴⁵ Within Russia, the Romanov police state banned political parties, trade unions, and all forms of public protest. Although Emperor Alexander II had tried to encourage reform, by freeing peasants from personal bondage to the nobility, there remained a huge gap between the rich and the poor. The Yusupov family, for instance, owned vast estates throughout the country, and ordered their meals to be shipped by train from Germany.⁴⁶ Resentment against the establishment in Russia was acute.

As one of Lenin's biographers has explained, this inequality gave Lenin the impetus to replace old Russia with a European socialist order that would liquidate all exclusions, privileges, and hierarchies.⁴⁷ When Lenin was a young boy his favourite book was Harriet Beecher Stowe's *Uncle Tom's Cabin* (1852). This tale of a slave's attempt to flee the cotton plantations in the American South was given pride of place in his bedroom.⁴⁸ Lenin's parents were a liberal couple by nineteenth century standards and sought fair treatment for those subjects of the Russian Empire who were not Russian. This sensitivity towards other national and ethnic groups was something that exercised Lenin's mind to the end of his life.⁴⁹ This might also explain why Lenin opposed Zionism, viewing it as reactionary, since Zionism was opposed to assimilation, and as imperialist, because Zionism necessitated forging an alliance with the capitalists and their various colonial projects. Later Lenin was also influenced by the Russian anarchist Mikhail Bakunin (1814-1976) who argued that everything should be attacked and challenged and if it survived then according to Darwin's theories, it was meant to do so.⁵⁰ The execution of Lenin's brother undoubtedly

⁴⁴ See Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (London: Pluto Press, 2009), pp. 8-37.

⁴⁵ Mark Levene, "Herzl, the scramble, and a meeting that never happened: revisiting the notion of an African Zion", in Eitan Bar-Yosef and Nadia Valman (eds.) *The Jew in Late-Victorian and Edwardian Culture* (Basingstoke: Palgrave Macmillan, 2009), pp. 202-220. See also, Kattan, *From Coexistence to Conquest*, *ibid*, pp. 21-26, pp. 30-35, and pp. 60-61.

⁴⁶ Robert Service, *Lenin: A Biography*, *supra* n. 43, p. 2.

⁴⁷ Robert Service, *Lenin: A Biography*, *ibid*, pp. 2-4.

⁴⁸ Robert Service, *Lenin: A Biography*, *ibid*, p. 43.

⁴⁹ Robert Service, *Lenin: A Biography*, *ibid*, p. 29.

⁵⁰ Christopher Read, *Lenin: A Revolutionary Life* (London: Routledge, 2005), p. 13. Service, *Lenin: A Biography*, *ibid*, p. 8.

contributed to his hatred of tsarism and old Russia. As the brother of a convicted terrorist, Lenin, who was an exceptionally bright student,⁵¹ was prevented from attending the best universities in Russia, despite being well qualified to do so. It has been suggested that this exclusion from Russian society meant that a regular career was closed to him pushing him further into radical and revolutionary activities.⁵²

One of the first major challenges that Lenin had to confront during and after the Civil War (1917-1923) was to preserve the territorial integrity of the vast Russian Empire, to stem the tide of rising nationalism, and to prevent the Empire from disintegrating. This meant that Lenin had to rapidly come up with a solution to the nationality question. Whilst orthodox Marxists have long abhorred nationalism, arguing that it was a distraction from creating a true socialist society, Lenin thought otherwise. In his opinion only when national tensions were resolved through the establishment of a socialist nation-state, would the working classes set aside their differences, and coalesce in establishing an international socialist society. Lenin also wanted to tackle Great Russian chauvinism in which Russia had been seen under the previous tsarist regime as an oppressor nation by its minorities. Only the right of self-determination could overcome that distrust.⁵³ Alluding to Marx's theory of history, Lenin further argued that Marxists were obligated to analyse all social questions with regard to "the concrete historical moment" in which they existed. When considering the nationality question, Marxists therefore had to make a distinction between the period of developing capitalism and the period of developed capitalism. Lenin explained that in the period of developing capitalism, when the bourgeoisie and the workers joined together to overthrow an absolutist regime, national movements became mass movements and drew all classes into politics. This was not the case in the period of developed capitalism, when nations had already crystallised into states, and when nationalism created divisions between the bourgeoisie and the workers. Accordingly, national self-determination was only relevant in the context of developing capitalism, and the formation of the nation state, and it was because Russia

⁵¹ Service, *Lenin: A Biography*, *ibid*, p. 39.

⁵² Read, *Lenin: A Revolutionary Life*, *supra* . 50, pp. 14-15.

⁵³ See Suny and Martin, *A State of Nations*, *supra* n. 9, p. 68.

was passing through the phase of developing capitalism that the Bolsheviks required an item in their program on the right of nations to national self-determination.⁵⁴

In 1912, when Lenin took up residence in Krakow, in Poland, he had occasion to elaborate upon his approach to nationalism when he became involved in a series of intellectual disputes with the Polish socialist Rosa Luxemburg (1871-1919), and the Austro-Marxists Karl Renner (1870-1950) and Otto Bauer (1881-1938). Luxemburg had argued that Marx's approval of Polish independence movements, whilst they were valid for the middle of the nineteenth century, were no longer valid in the twentieth century because Poland had ceased to be the bulwark of European absolutism and had advanced culturally, economically, and socially. She therefore favoured an autonomous Poland within a larger Russian federation, and explicitly came out against Polish independence.⁵⁵ Renner and Bauer's theory of national-cultural autonomy, in contrast, was developed with a view to resolving the minority problem within the Austro-Hungarian Empire. They sought to break the link between territory and nationalism by giving extraterritorial rights to dispersed national minorities to govern their own cultural affairs.⁵⁶ Each nation was treated not as a territorial corporation, but as a union of individuals. This was to result in the creation of a national register for each community who would be given the right to administer their cultural affairs autonomously as one body, regardless of where they happened to reside.⁵⁷

Luxemburg's thesis was an affront to Lenin, and it prompted him to write a polemic entitled *The Right of Nations to Self-Determination*, which he published in 1914.⁵⁸ He argued that: "...if we want to grasp the meaning of self-determination of nations, not by juggling with legal definitions, or 'inventing' abstract definitions, but by examining the historic-economic conditions of the national movements, we must inevitably reach the conclusion that the self-determination of nations means the political separation of these nations from alien national bodies, and the formation of

⁵⁴ For an excellent summary of Lenin's views on the national question summarised with reference to his original writings in Russian see Francine Hirsch, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union* (Ithaca: Cornell University Press, 2005), pp. 28-29.

⁵⁵ See for a brief summary see Pipes, *The Formation of the Soviet Union*, supra n. 42, pp. 22-23.

⁵⁶ On national-cultural autonomy, see Bill Bowring, "Austro-Marxism's Last Laugh? The Struggle for the Recognition of National-Cultural Autonomy for Russians and Russians", 54 *Europe-Asia Studies* (2002), pp. 229-250; Bill Bowring, "Burial and resurrection: Karl Renner's controversial influence on the 'national question' in Russia", in Ephraim Nimni (ed.), *National-Cultural Autonomy and its Contemporary Critics*, (London: Routledge 2005), pp. 162 – 176.

⁵⁷ Pipes, *The Formation of the Soviet Union*, supra n. 42, p. 26 (quoting Bauer).

⁵⁸ See volume 20, *Lenin's Collected Works* (Moscow: Progress Publishers, 1972), pp. 393-454.

an independent national state”.⁵⁹ He justified his argument with reference to Norway’s secession from Sweden in 1905, which he described as “practicable” and a form of secession that was assumed “under conditions of political freedom and democracy”. Lenin supported the secession of Norway because the forces against secession were comprised of his bitter enemies, the Swedish landed proprietors and the clergy. Moreover, the secession resulted in a “close alliance between the Norwegian and Swedish workers”, and “their complete fraternal class solidarity”. In other words the secession of Norway from Sweden improved the relationship between the Swedish and Norwegian working classes, and resulted in amity and friendship.

Lenin then referred to the resolution of the London International Socialist Congress in 1896, which had affirmed “the full rights of the self-determination of all nations...” Indeed the word “self-determination”, which is derived from the German word *Selbstbestimmungsrecht*, was first explicitly expressed in that Congress.⁶⁰ And the nation the International had in mind when they were debating that resolution was Poland. The Polish nationalists had wanted the text of the resolution to explicitly support Polish independence, and they cited Marx, who had indeed approved of this. However, the Polish Socialist Party defeated the motion by arguing that Marx had been writing in a different historical epoch, that the national question was of secondary importance, the priority was to create a purely proletarian party in Poland, and to proclaim the principle that the Polish and Russian workers had to maintain the closest alliance in their class struggle. In the light of this debate, Luxemburg had argued that the International inferred that self-determination did not give rise to a right of secession. Lenin disagreed arguing that there was no contradiction between class struggle and the rights of oppressed nations to freedom and independence. This is because Lenin recognized that there was a democratic content in the nationalism of oppressed nations, which should be supported, in spite of its bourgeois character. He saw in the victory of the Serbs and Bulgars in the Balkan wars the destruction of Balkan feudalism and the creation of a free class of peasant landowners, which was a step forward. It was on these grounds Lenin reminded his supporters that Marx had supported the Irish nationalist movement towards the end of his life.⁶¹ This history is important to note because the right to secession was incorporated into the

⁵⁹ Lenin, *The Right of Nations to Self-Determination*, *ibid*, p. 394.

⁶⁰ See Umozurike Oji Umozurike, *Self-Determination in International Law* (London: Archon Books, 1972), p. 3.

⁶¹ Alfred Cobban, *The Nation State and National Self-Determination* (London: Collins, 1969), p. 190.

constitutional framework of the USSR for each of the autonomous socialist republics, and explains its later support for wars of national liberation as well as secession.⁶²

In response to the thesis on national-cultural autonomy advanced by the Austro-Marxists, Lenin asked Stalin, the Georgian Bolshevik expert on nationalities, to write an essay critiquing the idea of extraterritorial autonomy. This was later published as *Marxism and the National and Colonial Question* by Stalin in 1935, although it was first written in 1913, under the guidance of Lenin.⁶³ Lenin's views on what constitutes a nation entitled to self-determination were social democratic orthodoxy derived directly from Kautsky—who would later clash with the Bolsheviks.⁶⁴ Before Lenin asked Stalin to write the essay, he had expressed strong opinions against extraterritorial autonomy, when he attacked the Bund (the Communist Jewish political party in Russia), which favoured it.⁶⁵ In his opinion the Jews could not be a nation because they lacked a common language and territory. Instead he favoured Jewish assimilation.⁶⁶ Stalin agreed although he also opposed extraterritorial autonomy because he thought it would lead to nationalism, which would distract the working classes from establishing a true socialist order. The Bund, as Stalin explained, wanted to adapt “socialism to nationalism”⁶⁷ instead of the other way around. As a result, the Bund was heading for separatism, not in the sense of secession, because the Jews “do not constitute a majority in a single gubernia”,⁶⁸ but by separating the working classes through seeking national existence in isolation.⁶⁹ Stalin thought that the abolition of the Pale by the Communists would hasten the

⁶² On the constitutional structure of the USSR see Harold J. Berman and John B. Quigley, Jr. (trans. and eds.), *Basic Laws on the Structure of the Soviet State* (Cambridge: Harvard University Press, 1969).

⁶³ Towards the end of Lenin's life, he became involved in a bitter dispute with Stalin over a number of issues, including the national question, and especially the decision whether to amalgamate Georgia, Armenia and Azerbaijan into Transcaucasian SFSR, a move that was staunchly opposed by the Georgian leaders who urged for their republic a full-member status within the Soviet Union. Stalin was in favour of centralization, which was something that Lenin was opposed to. Lenin thought that it was necessary to combat the strong tradition of oppression that had characterized the Tsarist state. This is why Lenin favoured a union in which due consideration would be given to the federal character of the Union, the rights of the Republics, and the preservation of their independence. See Moshe Lewin, *Lenin's Last Struggle* (London: Pluto Press, 1975), pp. 43-63 and pp. 91-103.

⁶⁴ I am grateful to Professor Bill Bowring for pointing this out to me. After the October Revolution in 1917, Kautsky sharply criticized the Bolsheviks, and was referred to by Lenin as a “renegade”. This prompted Trotsky to write *Terrorism and Communism: A Reply to Karl Kautsky* (London: Verso 2007, which was first published in English in 1920 by the Workers Party of America).

⁶⁵ See Bill Bowring, “Positivism versus self-determination: the contradictions of Soviet international law” in Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), pp. 133-168 at p. 139.

⁶⁶ Stalin, *Marxism and the National and Colonial Question*, supra n. 5, pp. 10-13.

⁶⁷ Stalin, *Marxism and the National and Colonial Question*, ibid, p. 42.

⁶⁸ Stalin, *Marxism and the National and Colonial Question*, ibid, p. 36.

⁶⁹ Stalin, *Marxism and the National and Colonial Question*, ibid, p. 43.

process of Jewish assimilation as they integrated into Russian society, which might also explain why in addition to Lenin, Stalin, as well as Trotsky, all opposed Zionism.⁷⁰ The USSR's recognition of Israel in 1948 can only be understood in the light of the failure of Soviet nationality policy towards the Jews, and the fact that Stalin thought the Jewish state would join the socialist camp.⁷¹ Stalin seems to have been influenced by the failure to establish a Jewish homeland in the USSR in Birobidzhan. Of the 19,635 Jews who arrived in Birobidzhan between 1928 and 1933, 11,450 departed. This meant that in those years less than 10 per cent of the population of Birobidzhan was Jewish.⁷² As Stalin recalled at the Yalta Conference the Jews "had only stayed there two or three years and then scattered to the cities".⁷³

The idea behind the USSR's nationality policy in the early years of its formation was to provide an outlet for nationalism through the creation of state-controlled homelands, which connected nationalities to specific territories, often arbitrarily mapped, linking the political and cultural-linguistic positions of the nationalities with a degree of autonomy, through a hierarchy of union republics, autonomous republics, autonomous regions, and autonomous districts.⁷⁴ Soviet policy systematically promoted the distinctive national identity and national self-consciousness of its non-Russian populations. Each homeland was encouraged to use its own national language, and to mark its national identity through national folklore, museums, dress, food, costumes, opera, poets, classical historical works etc. The long-term goal was to establish national identities that would coexist in a framework of amity and peace within an emerging all-union socialist culture, which was supposed to supersede any pre-existing national tensions.⁷⁵ The advantages of this system explained Stalin, was that "it does not deal with a fiction deprived of territory, but with a definite population inhabiting a definite territory". Moreover, it did not

⁷⁰ See Walid Sharif, "Soviet Marxism and Zionism", 6 *Journal of Palestine Studies* (1977), pp. 77-97, p. 84. Lenin castigated Zionism as "manifestly reactionary" because it encouraged a "ghetto mood".

⁷¹ See Arnold Krammer, "Soviet Motives in the Partition of Palestine, 1947-8", 2 *Journal of Palestine Studies* (1973), pp. 102-119. This article does not consider support for Zionism in the light of later Soviet nationality policy, which was the official line of argument adopted by the USSR at the UN General Assembly in November 1947 (see below). However, it does contain useful information on the strong links between the communist parties operating in the British mandate of Palestine and the USSR.

⁷² Sharif, "Soviet Marxism and Zionism", supra n. 70, p. 94.

⁷³ Stalin in conversation with Roosevelt at the tripartite dinner meeting, 10 February, 1945, Vorontsov Villa, The Conference at Yalta, *Foreign Relations of the United States*, (Washington: Government Printing Office, 1955), p. 924 (explaining the failure of Birobidzhan.)

⁷⁴ See Bowring, "Austro-Marxism's Last Laugh?", supra n. 56, p. 239; and Bowring, "Burial and resurrection", supra n. 56, p. 198.

⁷⁵ See Suny and Martin, *A State of Nations*, supra n. 9, pp. 74-75.

divide people according to nationality, nor did it “strengthen national partitions”. Instead, it broke down “these partitions” and united the population in such a manner that a division emerged of a different kind; a division which was based on class.⁷⁶

Lenin and Stalin sought to break the conflict between minorities and majorities, by doing away with the system of representative government altogether. In this connection it is crucial to understand that the Marxian concept of democracy, which inspired Lenin, was one in which the proletariat became the ruling class.⁷⁷ It was not a multiparty system based on regular elections in which certain individuals might be given the vote depending on their status in society. When Marx and Engels composed *The Communist Manifesto* (1848), England was a thoroughly unequal society: In 1848, over 90 per cent of the British population could not be elected to Parliament or vote, children were wage labourers, most of the land was in private ownership, education was a privilege, and there were no trade unions etc. This explains why Marx and Engels often fulminated against the minority ruling aristocracy and the bourgeoisie, which had concentrated property into a few hands.⁷⁸ As they noted, “previous historical movements were movements of minorities or in the interest of minorities”. In contrast “the proletarian movement is the independent movement of the immense majority, in the interest of the immense majority”.⁷⁹ Communism as Marx understood it was a mass movement aimed at breaking down barriers, removing divisions between the working classes everywhere.⁸⁰ This is why the struggle of the working class against the bourgeoisie represented the interests of the entire proletariat and the movement as a whole. As Stalin explained, this is why the policy of Marxism-Leninism towards the nationality problem aimed “to unite the workers of all nationalities in Russia into *united* and *integral* collective bodies in the various localities and to unite these collective bodies into a *single* party”.⁸¹

The Marxist approach to democracy as developed by Marx and Lenin is crucial to understanding how self-determination as it developed during the course of the twentieth century became a mass movement. Lenin, like Marx, and Rousseau before him, had articulated a vision of society in which the majority, meaning the whole people, ruled. This envisaged the nation as an integral, complete whole, with

⁷⁶ Stalin, *Marxism and the National and Colonial Question*, supra n. 5, pp. 57-58.

⁷⁷ See Marx and Engels, *The Communist Manifesto*, supra n. 11, p. 25.

⁷⁸ Marx and Engels, *The Communist Manifesto*, ibid, pp. 5-7.

⁷⁹ Marx and Engels, *The Communist Manifesto*, ibid, p. 14.

⁸⁰ Hence the repeated references to “the majority” in *The Communist Manifesto*, e.g. at pp. 14, 20, 21.

⁸¹ Stalin, *Marxism and the National and Colonial Question*, supra n. 5, p.59 (emphasis in original).

no distinctions, differentiations, or divisions. As explained in Part One, Rousseau's general will was both inalienable and indivisible, which meant that it could never be alienated or divided. This meant that the executive had to represent the whole people, and not just a part of it, in formulating policy. How one could actually accomplish an identity between the law and the people's will through a representative assembly or an executive, became highly controversial. The conundrum is in fact insolvable and circular. This was understood by contemporary observers of the USSR as diverse as Karl Kautsky, Carl Schmitt, and even George Orwell, who noted that the Marxist approach to democracy merely established a new aristocracy in Russia in the form of a dictatorship of the workingmen's council.⁸² And indeed Lenin justified a "temporary" dictatorship as the means necessary to establish his true ideal of a communist society:

The dictatorship of the proletariat, the period of transition to Communism, will, for the first time, produce a democracy for the people, for the majority, side by side with the necessary suppression of the minority constituted by the exploiters. Communism alone is capable of giving a really complete democracy, and the fuller it is the more quickly will it become unnecessary and wither away of itself. In other words, under capitalism we have a state in the proper sense of the word: that is, a special instrument for the suppression of one class by another, and of the majority by the minority at that. Naturally, for the successful discharge of such a task as the systematic suppression by the minority of exploiters of the majority of exploited, the greatest ferocity and savagery of suppression is required, and seas of blood are needed, through which humanity has to direct its path, in a condition of slavery, serfdom and wage labour.⁸³

For Marxist-Leninists the elimination of the capitalist system and the establishment of the socialist system were to be attended by the abolition of the bourgeois nations and the establishment of new, socialist nations. The economic basis on which these nations were formed was the socialist system of economy and socialist ownership of the implements of production. The overthrow of bourgeois power and the establishment of the dictatorship of the proletariat were to be the decisive political prerequisite and basis for the foundation of the socialist state.⁸⁴ It was Lenin, Stalin,

⁸² Carl Schmitt, *Preface to the Second Edition, The Crisis of Parliamentary Democracy*, (1926): *On the Contradiction between Parliamentarism and Democracy*, in Carl Schmitt, *The Crisis of Parliamentary Democracy*, translated by Ellen Kennedy (Cambridge: The MIT Press, 1986), pp. 51-64. See also George Orwell, *Animal Farm: A Fairytale* (1945) Penguin Classics, 1989, p. 31.

⁸³ V.I. Lenin, *The State and Revolution* (New York: Vanguard Press, 1926), p. 194.

⁸⁴ See G. Starushenko, *The Principle of National Self-Determination in Soviet Foreign Policy* (Moscow: Foreign Language Publishing House, 1962), pp. 24-25.

and Trotsky's support for the dictatorship of the proletariat, which they put into effect during the revolution in October 1917 that prompted the break with Kautsky.⁸⁵ This is why Trotsky accused Kautsky of having "a fetishism" for parliamentary democracy:

This fetishism of the parliamentary majority represents a brutal repudiation, not only of the dictatorship of the proletariat, but of Marxism and of the revolution altogether. If, in principle, we are to subordinate socialist policy to the parliamentary mystery of majority and minority, it follows that, in countries where formal democracy prevails, there is not place at all for the revolutionary struggle. If the majority elected on the basis of universal suffrage in Switzerland pass draconian legislation against strikers, or if the executive elected by the will of a formal majority in North America shoots workers, have the Swiss and American workers the 'right' of protest in organizing a general strike? Obviously, no. The political strike is a form of extra-parliamentary pressure on the 'national will', as it has expressed itself through universal suffrage.⁸⁶

Whilst today human rights law has softened the impact of majority rule in democratic countries, in the 1920s when Trotsky was writing, this was not the case. As explained later, it was not until the civil rights struggle during the height of the Cold War competition during decolonization that a universal system of human rights legislation was articulated in the form of the 1966 Covenants that would later find expression in individual states through the adoption of these treaties in domestic legislation.⁸⁷

One of the major consequences of the Marxist-Leninist approach to national self-determination is that when it was superimposed onto the international plane

⁸⁵ See Karl Kautsky, *Terrorism and Communism: A Contribution to the Natural History of Revolution* (London: George Allen & Unwin Ltd, 1920), p. 175 (arguing in favour of a democracy where each party addresses itself to the whole social community, and criticizing the Bolsheviks for favouring an autocracy of the working-man's council, which deprives the bourgeois of his rights, and abolished the freedom of the press. This act argued Kautsky denied the workingman of a means to independently examine the arguments that arise in the struggle of the various classes and parties).

⁸⁶ Trotsky, *Terrorism and Communism*, supra n. 64, p. 24.

⁸⁷ Even today, the safeguards against majority rule in some democracies like the United Kingdom are still inadequate. As the late Judge Bingham observed: "We live in a society dedicated to the rule of law; in which Parliament has power, subject to limited, self-imposed restraints, to legislate as it wishes; in which Parliament may therefore legislate in a way which infringes the rule of law; and in which judges, consistently with their constitutional duty to administer justice according to the laws and usages of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed". There are of course huge political differences between Lord Bingham, a British Law Lord writing at the turn of the twenty-first century, and Leon Trotsky, a Marxist revolutionary, justifying the purges and civil wars of 1917-1920. Yet, I think it is striking that, despite their differences, they both expressed concerns with the tyranny of the majority, and the lack of safeguards in a Parliament or a National Assembly, when a majority of the legislators have approved a law in clear and unambiguous terms that could have detrimental consequences for the welfare of the nation as a whole. Indeed resolving majority tyranny in a democratic system remains a riddle. For if the will of Parliament is supreme then laws and constitutions can be altered even if, in so doing, they infringe the rule of law, as Judge Bingham aptly observed. See Tom Bingham, *The Rule of Law* (London: Penguin, 2011), pp. 168-170.

during decolonization, it was adapted to promote majority rule, which was to be achieved by all necessary means, including armed struggle.⁸⁸ This meant that during the transition of political power from the colonial power to the colony, political power was to be vested in “the toiling masses”, the “whole people”, rather than in the minority ruling elite, which was the model preferred by the liberal democracies. Moreover, the Marxist-Leninist approach to self-determination extended:

to all nations without exception, as well as to the national groups which have not yet developed into nations. Economic and cultural backwardness cannot be used as a pretext to deny a people the right to establish an independent state...The Marxist presentation of the question, tested by life itself, smashes to smithereens the colonialist fable that the underdeveloped peoples are incapable of running a state. The Soviet experience in national development shows that in socialist conditions the former backward peoples, which have set up their own national states, have rapidly succeeded in eliminating their economic and cultural backwardness with the help of other friendly peoples.⁸⁹

As explained later, during the height of decolonisation the Marxist-Leninist approach to self-determination became fused with the Non-Aligned approach to self-determination and was successfully employed in combination to thwart the emergence of the minority-ruling regime of Ian Smith that was established in Rhodesia in 1965, and the continuation of minority rule in South Africa. It also affected the discourse employed by Irish, Indian, Greek-Cypriot, and Palestinian nationalists who articulated an understanding of self-determination based on majority rule. Furthermore, the Marxist-Leninist approach to self-determination bore an uncanny resemblance to the manner in which it would be expressed in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.⁹⁰ That Declaration accepted that all nations are sovereign and equal and that they have a right to autonomy or to enter

⁸⁸ This was of course opposed by the liberal democracies. But words to this effect or words, which could be interpreted to this effect, were included in the UN’s 1974 Definition of Aggression annexed to GA Res. 3341 (XXIX), 14 Dec. 1974, Article. 7. See also, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Amongst States of 1970, which also contains a provision on self-determination, in which peoples deprived of that right, are entitled to resist their occupiers in pursuit of the exercise of their right to self-determination, and are entitled to seek and to receive support in accordance with the purposes and principles of the Charter. See further, Article 1, paragraph 4, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁸⁹ Starushenko, *The Principle of National Self-Determination*, supra n. 84, p. 51.

⁹⁰ See “the principle of equal rights and self-determination of peoples” annexed to GA Res. 2625, 24 Oct. 1970.

into a federation—exactly as Lenin had explicitly prescribed some fifty years previously.⁹¹ Although the Declaration on Friendly Relations was silent on the question of secession, which had been forcefully promoted by the Marxist-Leninists, the Declaration left the door open by agreeing that another mode of exercising self-determination in addition to establishing a state, a free association, or integration would be one that would lead to “the emergence into any other political status freely determined by a people” which could be read as an implicit acknowledgement of the possibility of secession. The Declaration also recognized the right of peoples struggling for self-determination to receive support from other states in their acts of resistance, which was another idea inspired by Lenin and Stalin. And finally, it was made clear that self-determination, however it was construed, did not authorise or encourage “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government *representing the whole people* belonging to the territory without distinction as to race, creed or colour”.⁹² This provision would seem to amount to a reaffirmation of majority rule since the phrase, being possessed of a government *representing the whole people* belonging to the territory without distinction as to race, creed or colour could not be read to apply to minorities. Thus, for the first time in history, representative government was redefined as being truly representative on the international diplomatic and legal level in the sense that all classes, castes, creeds, and communities formed a part of the people.

3. The Partitions of Ireland, India, and Palestine

The Bolsheviks seizure of power in 1917 caused alarm and consternation amongst the Western liberal democracies, which responded by sending armies to assist the White Russians in restoring the old order. This effort ultimately failed, and the USSR was founded in 1922, although it did not join the League of Nations until 1934. Thus, the League of Nations was largely a Christian club mostly comprised of Western liberal democracies, dictatorships, and monarchies. Of its original members, only Haiti,

⁹¹ Compare the Declaration on Principles *ibid* to what Stalin (under Lenin’s guidance) wrote in *Marxism and the National and Colonial Question*, *supra* n. 5, at pp. 18-19.

⁹² Emphasis added.

Liberia, Japan, and Siam, could be described as having cultural traditions that differed significantly to the states of Europe and the Americas. Although Abyssinia became a member in 1923, the League turned a blind eye when it was invaded by Italy. After the USSR's invasion of Finland, when the Council of the League of Nations resolved that through this act, "the USSR has placed itself outside the League of Nations",⁹³ Moscow complained that the League "did not find it necessary to expel Poland for seizing Vilna or Italy for invading Ethiopia, but voted for expulsion of the Soviet Union when it deprived Germany of a springboard prepared for invasion".⁹⁴

Those who drafted the Covenant of the League of Nations were uncomfortable with according membership to states with vastly different ideological systems. Thus, one of the British war aims during the First World War was to secure the expulsion from Europe of the Ottoman Empire "which had proved itself so radically alien to Western civilisation".⁹⁵ Accordingly, it was hardly surprising that the USSR was only a member of the League for five years, and that Marxism-Leninism had no discernable impact on the policies or practices of the League of Nations in the inter-war years. The USSR was never an original member and so it did not participate in drafting the Covenant, which was mainly confined to Anglo-Americans who ensured that their approach to self-determination remained in the ascendancy.⁹⁶ It was not until the UN was established in 1945 that self-determination would be explicitly mentioned in an international instrument, instead of being selectively applied in Europe, or by way of exception to the A-class mandates that were established in the Middle East.⁹⁷

Accordingly, the Anglo-American approach to self-determination was the predominant model in the inter-war years, and it was this model that contributed to the partitions of Ireland in 1920, India in 1947, as well as several British proposals to

⁹³ 4178, Appeal by the Finnish Government. 20 *League of Nations Official Journal*, 1939, p. 506.

⁹⁴ See the Soviet publication "War and the Working Class" in Leo Gross, "Was the Soviet Union Expelled from the League of Nations?" 39 *The American Journal of International Law* (1945), p. 35, note. 1

⁹⁵ Umozurike, *Self-Determination in International Law*, supra n. 60, p. 17. Turkey did not become a member of the League of Nations until 1932.

⁹⁶ See F.P. Walters, *A History of the League of Nations: Volume 1* (Oxford: Oxford University Press, 1952), pp. 15-24. The British League of Nations society was founded in 1915. One of its most prominent members was A.J. Balfour's cousin, Lord Robert Cecil. Jan Smuts was also a leading player and he saw himself and his country as belonging to the Anglo-Saxon race, which included the membership in the Anglo-American club. On Smut's role in formulating the ideas that led to the League of Nations and the mandate system see Mazower, *No Enchanted Palace*, supra n. 35, pp. 39-46.

⁹⁷ It had been hoped to exclude Germany's Pacific and African colonies from the mandate system on the grounds that they were "inhabited by barbarians who not only cannot govern themselves but to whom it would be impracticable to apply any idea of self-determination in the European sense". See Mazower, *No Enchanted Palace*, *ibid*, pp. 82-83 (quoting Jan Smuts).

partition Palestine, which culminated with the UN proposal to Partition Palestine in 1947. Britain would also propose partition to resolve the conflict in Cyprus when it proposed to transfer power to the island in 1960. However, by that time, the British liberal understanding of self-determination faced considerable challenge from the Soviet / Non-Aligned movement, and so the plan to partition Cyprus was withdrawn.⁹⁸ Instead, it is collecting dust in the archives.⁹⁹ Similarly, the architects of separate development throughout Southern Africa took inspiration from British partition policy which they sought to emulate. However, by the time they sought to establish Black Homelands in South and South West Africa in the 1960s and 1970s, state practice had changed and efforts to preserve minority rule were looked at with particular disdain.

Whilst most studies of the partition begin with Ireland and the Government of Ireland Act of 1920, the underlying rationale for that Act had in fact been decided during the negotiations that led to its adoption. This is also the case with India and Palestine. In India the justification for partition is not mentioned in the 1947 Government of India Act. Rather the justification for the partition of the Indian subcontinent is contained in the speeches that Mohammed Ali Jinnah gave before the All-India Muslim League. Similarly, the underlying rationale for the partition of Palestine was not really contained in the UN Partition Plan for Palestine of 1947 or for that matter in the 1937 Peel Partition Plan although both documents adumbrated how partition was to be affected. It was the attempt to establish representative government in Palestine, whilst maintaining the policy enunciated in the Balfour Declaration, which ultimately led to the proposals to partition Palestine between Arabs and Jews.

*The partition of Ireland*¹⁰⁰

⁹⁸ Question of Cyprus, First Committee, Thirteenth Session, 996th meeting, 25 November 1958, in UN General Assembly, Official Records, vol. 13, 1958, 1-3 Committees, p. 247.

⁹⁹ See *Cyprus: Report on Methods, Costs, and Consequences of Partition* in The Future of Cyprus. Proposed Partition 1957. CO 926/710. This document was only declassified in 2009.

¹⁰⁰ In reviewing the partition of Ireland I have relied on the following: Joseph M. Curran, *The Birth of the Irish Free State 1921-1923* (Alabama: The University of Alabama Press, 1980); Michael Laffan, *The Partition of Ireland 1911-1925* (Dundalk: Historical Association of Ireland, 1983); T.J. Fraser, *Partition in Ireland, India and Palestine: Theory and Practice* (London: MacMillan, 1984); Catherine B. Shannon, *Arthur J. Balfour and Ireland 1874-1922* (Washington, D.C.: The Catholic University of America Press, 1988); Anthony Carty, *Was Ireland Conquered? International Law and the Irish Question* (London: Pluto, 1996); and Bill Kissane, *The Politics of the Irish Civil War* (Oxford: Oxford University Press, 2005).

Partition was first suggested in the decolonization context to resolve the conflict that had arisen between the United Kingdom and Ireland, Britain's oldest colonial possession, in the debates over Home Rule.¹⁰¹ As a result of the Acts of Union of 1801 Irishmen were represented in the British Parliament. However, there was a division between those Irishmen such as Daniel O'Connell (1775-1847) who sought to repeal the Union and advance the cause of Catholic emancipation, and those who sought to maintain the restrictions on Catholics and maintain the Union. Those Irishmen in favour of the Union were largely Protestants, members of the Church of Ireland, Presbyterians, and Anglicans. Those Irishmen who sought to repeal the Union were largely Catholic, although there were exceptional men like Wolf Tone (1763-1798) and Charles Stewart Parnell (1846-1891) who were not. The words "Catholic" and "Protestant" were thus not always synonymous with Nationalist and Unionist. Nonetheless, since the partition of Ireland was undertaken on the basis of an assumed identity that was formed and distinguished by the colonial power, which implemented the partition, on *religious* lines, in its eyes, Catholics and Protestants were to all intents and purposes used as synonyms with Nationalists and Unionists.

The legislation that led to the partition were the Government of Ireland Act 1920¹⁰² (hereafter "GOI Act"), and the Anglo-Irish Treaty of 1921¹⁰³ (hereafter "Anglo-Irish Treaty"). The former led to the establishment of Northern Ireland that remained in union with the United Kingdom whereas the latter led to the establishment of the Irish Free State that was to have "the same constitutional status in the Community of Nations known as the British Empire".¹⁰⁴ Article 1 (1) of the GOI Act provided for the establishment of a Parliament, Senate and House of Commons in Southern Ireland and a Parliament of Northern Ireland "consisting of His Majesty, the Senate of Northern Ireland, and the House of Commons of Northern Ireland". The key provision of this act, which established the partition, explained that: "For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs".

¹⁰¹ See Curran, *The Birth of the Irish Free State*, *ibid*, p. 1.

¹⁰² See Government of Ireland, 1920. 10 & 11 George 5 Ch. 67. An Act to provide for the better Government of Ireland. Enacted the 23rd December 1920.

¹⁰³ See the Treaty between Great Britain and Ireland, signed at London, 6 December, 1921, 26 *League of Nations Treaty Series*, (1924), pp. 9-18.

¹⁰⁴ Art 1. Treaty between Great Britain and Ireland, *ibid*.

Article 12 of the Anglo-Irish Treaty provided for the opting out of the new Irish state of the six counties mentioned in Article 1 (2) of the GOI Act. A three-man Boundary Commission was established pursuant to this provision and it was tasked to “determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission”. The Boundary Commission took it for granted that most, i.e. not all, nationalists in Ireland were Roman Catholic and most Unionists, i.e. not all, were Protestant, of some sort of denomination.¹⁰⁵

The nationalists thought that almost half of Northern Ireland would be transferred to the Irish Free State on the basis that the nationalists in those counties with a majority Catholic population would desire this, whilst the Unionists said they would “never abandon places such as Derry City and Enniskillen” due to their historical and sentimental importance to Protestants, a view that ignored their Catholic majorities.¹⁰⁶ Due to controversy the report of the Boundary Commission was not published until 1968 and its findings were never implemented.¹⁰⁷ Rather, the status quo created by the GOI Act was preserved in the sense that the boundary it established presently remains the boundary, which still separates Northern Ireland from the remainder of the Republic. In any event, the Boundary Commission was of the opinion that the partition of 1920 was legitimate and that there was already an existing boundary separating the six counties from the rest of Ireland as provided by the GOI Act. As Anthony Carty explained, the Commission interpreted its terms of reference narrowly. “It started with the principle of the legitimacy of the Northern Irish entity and decided that no changes in the boundary should affect the integrity of this entity”.¹⁰⁸ As a result the Commission merely recommended minor border adjustments giving priority to economic and geographical conditions over the wishes of the inhabitants affected by the division. In other words, it avoided addressing the

¹⁰⁵ See Geoffrey J. Hand, *Report of the Irish Boundary Commission 1925* (Shannon: Irish University Press, 1969), pp. 30-31.

¹⁰⁶ Laffan, *The Partition of Ireland*, supra n. 100, p. 93.

¹⁰⁷ See the introduction in Hand, *Report of the Irish Boundary Commission*, supra n. 105, pp. vii-xxii. For archival documentation see Vol. II, *Documents on Irish Foreign Policy, 1923-1926* (Dublin: Royal Irish Academy, 2000). For a penetrating critique of the Commission’s terms of reference see Anthony Carty, *Was Ireland Conquered?* supra n. 100, particularly chapter 7, pp. 135-166.

¹⁰⁸ Carty, *Was Ireland Conquered?* ibid, p. 141.

underlying rationale for partition. It is precisely this underlying rationale that ought to be examined, as it was this rationale that ultimately resulted in the partition of Ireland.

It is submitted that the partition of Ireland gave expression to the identity of the minority Unionist community whose claim to self-determination was favoured over the claims advanced by the majority nationalists. Thus, Lord Balfour, who was the chief architect of the decision to divide Ireland in 1920¹⁰⁹ told a gathering in Nottingham that Ireland never had an organic political past as a single great community, and he claimed that when an Irishman asked Britain to restore to Ireland Irish institutions he was in fact asking them to restore what were English institutions:

It is not the fault of the Irish; it implies no inferiority on their part. It does imply that the contact between England and Ireland took place at a time when the civilisation of England, the political organization of England, was far more advanced than the tribal system that prevailed in Ireland. But it is a fact that there are no Irish institutions, there are no Irish laws, there is nothing in existence at this moment that could possibly be restored to Ireland which is of itself of pure national Irish origin.¹¹⁰

T.J. Fraser explained that during the negotiations, Balfour who was then President of the League, delivered “a devastating riposte” to the idea of a nine-county Ulster that would have contained an even larger Catholic minority, which was initially being considered by the Cabinet, to be retained within the Kingdom, as opposed to a six-county Ulster. Balfour told the Cabinet: “There can be no doubt...that if the Peace Conference had been delimiting the new frontier [of what would become Northern Ireland], in accordance with the general procedure adopted at Paris [which was based on the principle of self-determination], we should *not* have included in the Protestant area so large and homogenous a Roman Catholic district as (say) that of the greatest part of Donegal”.¹¹¹ Balfour feared that if the largely Catholic counties in historic Ulster (i.e. all nine counties) were included then it would create a “*Hibernia irrendenta*” (i.e. a movement to reunite the whole of historical Ireland in all thirty-two counties) that would scupper the partitionist project. This was because the Protestant majority in the nine counties was too tenuous. In order to ensure the success of partition the minority had to have a *secure majority* in the territory allotted it. This could only be accomplished by restricting Northern Ireland to six counties.

¹⁰⁹ Shannon, *Arthur J. Balfour and Ireland*, supra n. 100, p. 256.

¹¹⁰ See Shannon, *Arthur J. Balfour and Ireland*, ibid, pp. 167-168 quoting *The Times*, 1 Feb. 1913.

¹¹¹ See Fraser, *Partition in Ireland, India and Palestine*, supra n. 100, p. 32 (emphasis in original).

In advocating a partition based on a six-country division, Fraser has argued that Balfour failed “to consider the wishes and possible reactions of the nationalists of the six counties. Balfour and others spoke of the six Ulster countries as if they were homogeneously Unionist, which, of course, was far from being the case”.¹¹² This is because two of the counties—Tyrone and Fermanagh—had nationalist majorities and Catholics were dispersed throughout the remaining counties. Alternatively, it could be argued that Balfour was aware of the nationalist presence but that he *deliberately* intended to thwart their political aspirations because in his mind the aspirations of the unionists were deemed of more import. This is certainly consistent with Balfour’s personal prejudices and those of his extended family, who expressed considerable anti-Catholic sentiments. It was also consistent with Balfour’s attitude towards other colonial hotspots. In other words self-determination as Balfour understood it, and as it was allegedly being applied by the League of Nations, was inherently *discriminatory*. It only applied to those who were *deemed* by the colonial power to be entitled to it. The fact that most Irishmen wanted to secede from Britain was beside the point.

Accordingly, Ireland was ultimately partitioned to safeguard the interests of the minority unionist community in those parts of Ulster where they formed, for the most part, the majority of the population. But this principle was not applied to the whole of Ireland as a single geographical unit otherwise it would have resulted in all 32 counties seceding from Britain. Balfour argued that no one could think that Ulster should be “divorced” from Britain, because in his opinion this was manifestly *not* an act of self-determination. As Balfour explained, “The only people who will grumble [about the partition] are those who imagine that this scheme deprives Ireland of a unity to which she had a historic claim. But these people ignore the fact that such unity as Ireland possesses is mainly the work of England, and that she has never in all the centuries, been a single, organized, independent state and that if she were not surrounded by water, no human being would ever think of forcing the loyal and Protestant North into the same political mould as the disloyal and Roman Catholic south”.¹¹³ In Balfour’s eyes the nationalists did *not* form a nation in Ulster and therefore could *not* claim self-determination. Balfour’s views are important because he was ultimately responsible for the partition. As Catherine Shannon observed, the

¹¹² Fraser, *Partition in Ireland, India and Palestine*, *ibid*, p. 33.

¹¹³ See Shannon, *Arthur J. Balfour*, *supra* n. 100 p. 250 quoting from Balfour’s memorandum on Ireland, 25 Nov. 1919, Cabinet Records, CP 193, CAB 24/93. Also, quoted in Fraser, *Partition in Ireland, India and Palestine*, *ibid*, p. 27.

memorandum drafted by Balfour considerably influenced the final shape of the Government of Ireland Bill of 1920, which provided for the six-county division.¹¹⁴

In essence, the Unionist claim to self-determination was based on an identity that was manifested in contradistinction to the claim to self-determination advanced by the nationalists whose claim to self-determination was expressed in *opposition* to British rule.¹¹⁵ To use contemporary legal parlance, the Unionist claim to remain an integral part of the United Kingdom was an act of *internal* self-determination. In contrast, the nationalist claim to secede from the Kingdom could be described as an example of *external* self-determination. The partition of Ireland was a decision made and executed by the colonial power, without the wishes of the majority of the inhabitants of the island of Ireland being consulted. Due to Sinn Fein's victory in the 1918 elections and their call for independence, it is highly unlikely that a majority of Irishmen would have voted in favour of partition had there been a referendum. It is for this reason that republicans have always maintained that Ireland had been denied the right to self-determination since the 1918 general election.¹¹⁶ The partition of Ireland thus favoured the interests of the colonial power that had a stronger and closer relationship with the unionists and which was in a position to disregard the wishes of the majority of Irishmen. In essence, the colonial power viewed the Protestants in Ireland as an integral part of the United Kingdom. They were viewed by the imperial centre as being one and the same, thus, there could be no division because it would amount to carving up a self-determination unit, in the majority of Englishmen's eyes.

*The Peel partition plan for Palestine*¹¹⁷

As in Ireland, in Palestine, Balfour denied that the Palestinian Arabs were a nation. Accordingly, it was only right that they should make way for the immigration of

¹¹⁴ Shannon, *Arthur J. Balfour and Ireland*, *ibid*, p. 250, and p. 255.

¹¹⁵ On the use of self-determination by De Valera and *Sinn Fein* from 1917-1921 see Kissane, *The Politics of the Irish Civil War*, *supra* n. 100, especially chapter two, pp. 39-63.

¹¹⁶ Kissane, *The Politics of the Irish Civil War*, *ibid*, p. 39.

¹¹⁷ In reviewing the partition of Palestine prior to the 1947 UN Partition Plan I have primarily relied on Palestine Royal Commission Report Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty, July, 1937, Cmd. 5479. I have also considered T.J. Fraser, *Partition in Ireland, India and Palestine: Theory and Practice* (London: MacMillan, 1984), pp. 130-150; T.G. Fraser, "A Crisis of Leadership: Weizmann and the Zionist Reactions to the Peel Commission's Proposals, 1937-8", 23 *Journal of Contemporary History* (1988), pp. 657-680; Penny Sinanoglou, "British Plans for the Partition of Palestine, 1929-1938", 52 *The Historical Journal* (2009), pp. 131-152; and the general knowledge I have acquired from my own research and writings.

European Jews. This explains the policy enunciated in the 1917 declaration named after him, which called for establishing a Jewish national home in Palestine despite the fact that the population of Palestine was then 93 per cent Arab and 7 per cent Jewish.¹¹⁸ As Balfour explained to his colleague Lord Curzon: “Zionism, be it right or wrong, good or bad, is rooted in age-long tradition, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land”.¹¹⁹ In 1923, Lord Balfour, reflecting on his “great experiment” in Palestine, told a meeting of the English Zionist Federation that if the principle of self-determination was applied logically and honestly in Palestine, then the majority of the existing population should have decided Palestine’s future destiny. He, added, however, that “looking back upon the history of the world...the case of Jewry in all countries is absolutely exceptional, falls outside all the ordinary rules and maxims”, and that “the principle of self-determination really points to a Zionist policy, however little in its strict technical interpretation it may seem to favour it”.¹²⁰

The sheer size of Palestine’s Arab majority prevented the British Government from establishing self-governing institutions as required under the mandate since it was feared that a representative legislative assembly that would reflect the interests of the native majority would block the Zionist project.¹²¹ And it was the failure to establish representative government that played a primary role in the development of the proposals to partition Palestine.¹²² In 1936, Sir Arthur Wauchope, the British High Commissioner of Palestine, submitted proposals for establishing self-governing institutions in Palestine. Wauchope’s proposals attracted vehement opposition in the British Parliament. As William Ormsby-Gore (1885-1964), the Colonial Secretary, observed, the entire House, bar the member of the Communist Party, was opposed to the High Commissioners’ plan to establishing self-governing institutions in Palestine,

¹¹⁸ When Palestine was carved out of the Ottoman Empire, it had in 1918 a population of 688,957 Arabs (including Christians, Muslims and other minorities) and 58,728 Jews. See Justin McCarthy, *The Population of Palestine: Population History and Statistics of the Late Ottoman Period and the Mandate* (New York: Columbia University Press, 1990), Table 2.2., p. 26.

¹¹⁹ See Balfour’s memorandum to the British Foreign Secretary, Curzon, 11 August 1919, Foreign Office No. 371/4183 (1919). This is reproduced in E.L. Woodward and Rohan Butler (eds.), *Documents on British Foreign Policy 1919-1939* (London: HMSO, 1952), p. 345.

¹²⁰ See Israel Cohen (ed.) *Speeches on Zionism by the Right Hon. The Earl of Balfour* (London: Arrowsmith, 1928), pp. 25-26.

¹²¹ See Art. 2 of the Mandate in addition to the provisions regarding the National Home also provided for self-governing institutions and for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

¹²² See Sinanoglou, “British Plans for the Partition of Palestine, 1929-1938”, supra n. 117, p. 131 who reaches the same opinion, although without elaborating.

which would vest power in the Arab majority.¹²³ As Winston Churchill recognised: “If you have an Arab majority...you will have continued friction between the principle of the Balfour Declaration and ... the wishes of the Arab majority. I should have thought it would be a very great obstruction to the development of Jewish immigration into Palestine and to the development of the national home of the Jews there”.¹²⁴

Parliament opposed the Commissioner’s proposals to establish a representative assembly in Palestine. Lord Melchett told the Lords: “You cannot settle the matter merely by setting up a Legislative Council and enfranchising an enormous electorate who have never used a vote in their lives and have not the remotest idea of how to use it ... in reality the Government are going to impose upon the population of Palestine a franchise which is totally unsuited to the people and in which they have never been instructed”.¹²⁵ In the Commons, Captain Cazalet concurred: “As I understand it, we are going to enfranchise some 250,000 or more people, the large majority of whom are completely illiterate. They have had practically no experience whatever in representative Government or in the manner in which they should exercise the vote and, however you like to interpret the numbers of the proposed legislative council, as a matter of fact it will develop into an Arab majority.”¹²⁶ Moreover, as Colonel Wedgewood observed it was unfair to side with the Arabs and to envisage the prospect of the Jews living under Arab rule when the Jews, especially those from Germany, were a people, “coming very near to ourselves in culture and civilisation”.¹²⁷ The fear that the Commissioner’s proposals would leave the Jews in a minority position was also a particular cause for concern. “For two thousand years [the Jews] have been homeless, a minority in every country”, exclaimed Sir A. Sinclair, which was why he was adamantly opposed to granting the Arabs political equality with the Jews, since they demanded “the repeal of the mandate”.¹²⁸ Were the proposals implemented thought Lord Snell, the Jews would not be able to immigrate to Palestine “as of right but only on the sufferance of a hostile majority”.¹²⁹ The

¹²³ HC Deb 21 July 1937 vol. 326, col. 2241.

¹²⁴ HC Deb 24 March 1936 vol. 310, col. 1114.

¹²⁵ HL Deb 26 February 1936 vol. 99, col. 777.

¹²⁶ HC Deb 24 March 1936 vol. 310, col. 1119.

¹²⁷ HC Deb 24 March 1936 vol. 310, col. 1080.

¹²⁸ HC Deb 24 March 1936 vol. 310, col. 1102.

¹²⁹ HL Deb 26 February 1936 vol. 99, col. 755.

Marquess of Lothian concurred: “I feel that civilisation does owe some redress to a people which for nearly two thousand years has been without a home”.¹³⁰

It was directly due to the opposition expressed in Parliament to the prospect of Arab majority rule that the leaders of the Arab national movement went on strike in 1936. This led to violence and an armed rebellion (the 1936-9 Arab revolt) that triggered a proposal to send a Royal Commission of Inquiry to Palestine (the “Peel Commission” named after its Chairman) to examine the causes of the disturbances. According to the terms of reference provided to the Commission, they were not to question the underlying policy of the Balfour Declaration, which led the Commission to conclude that the only solution to the conflict was partition. “About 1,000,000 Arabs are in strife, open or latent, with some 400,000 Jews. There is no common ground between them. The Arab community is predominantly Asiatic in character, the Jewish community predominantly European. They differ in religion and language. Their cultural and social life, their ways of thought and conduct are as incompatible as their national aspirations. These last are the greatest bar to peace”.¹³¹ In reaching this conclusion, the Commission argued that Palestinian citizenship was a “mischievous pretence” since neither Arab nor Jews had any sense of service to a single state.¹³²

The Commission’s report was replete with references to “the Asiatic character” and the “old-fashioned Arab world”, in which Arab nationalism, along with Irish and Indian nationalism, was looked at with particular disdain. Consider the following extract: “The ugliest element in the picture remains to be noted. Arab nationalism in Palestine has not escaped infection with the foul disease, which has so often defiled the cause of nationalism in other lands. Acts of ‘terrorism’ in various parts of the country have long been only too familiar reading in the newspapers. As in Ireland in the worst days after the War or in Bengal, intimidation at the point of a revolver has become a not infrequent feature of Arab politics”.¹³³ If we contrast this statement with the manner in which the Jewish national home is described by the Commission as “a highly educated, highly democratic, very politically-minded, and unusually young community” it becomes self-evident which community they self-

¹³⁰ HL Deb 26 February 1936 vol. 99, col. 762.

¹³¹ See Chapter XX, “The Force of Circumstances”, in Palestine Royal Commission Report Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty, July, 1937, Cmd. 5479, p. 370, para. 5.

¹³² Palestine Royal Commission Report, *ibid.*, p. 371, para. 5.

¹³³ See Chapter V, Palestine Royal Commission Report, *ibid.*, p. 135, para. 45.

identified with.¹³⁴ Indeed the Commission's report reads like it should be the subject of a serious case study in Orientalism: "With every year that passes, the contrast between this intensely democratic and highly organized modern community and the old-fashioned Arab world around it grows sharper". The Commission then added: "The literary output of the National Home is out of all proportion to its size. Hebrew translations have been published of the works of Aristotle, Descartes, Leibnitz, Fichte, Kant, Bergson, Einstein and other philosophers, and of Shakespeare, Goethe, Heine, Byron, Dickens, the great Russian novelists, and many modern writers ... But perhaps the most striking aspect of the culture of the National Home is its love of music. It was while we were in Palestine, as it happened, that Signor Toscanini conducted the Palestine Symphony Orchestra, composed of some 70 Palestinian Jews..."¹³⁵

As an aside, the Commission added, "there is Arab literature, of course, and Arab music, but the culture of Arab Palestine is the monopoly of the *intelligenza*; and, born as it is of Asia, it has little kinship with that of the National Home, which, though it is linked with ancient Jewish tradition, is predominately a culture of the West".¹³⁶ No wonder then that the Commission expressed its opinion that democracy could not flourish in such a society because Palestine lacked a homogenous population that was essential for representative government to work: "...the successful working of representative government requires that the population concerned should be sufficiently homogenous. Unless there is common ground enough between its different groups or classes to enable the minority to acquiesce in the rule of the majority and to make it possible for the balance of power to readjust itself from time to time, the working basis of parliamentary government or democracy as we understand it is not there". The Commission referred to the "most patent example of this in present-day politics", which was "the impossibility of uniting all Ireland under a single parliament; and that the gulf between Arabs and Jews in Palestine is wider than that which separates Northern Ireland from the Irish Free State".¹³⁷

*British India*¹³⁸

¹³⁴ See Chapter V, Palestine Royal Commission Report, *ibid*, p. 121, para. 17.

¹³⁵ See Chapter V, Palestine Royal Commission Report, *ibid*, pp. 116-117, para. 7.

¹³⁶ See Chapter V, Palestine Royal Commission Report, *ibid*, p. 117, para. 8.

¹³⁷ See Chapter XVIII, Palestine Royal Commission Report, *ibid*, p. 361, para. 11.

¹³⁸ In addition to primary literature, I have in reviewing the partition of India primarily relied on the following: T.J. Fraser, *Partition in Ireland, India and Palestine: Theory and Practice* (London: MacMillan, 1984), pp. 68-129; Farzana Shaikh, "Muslims and Political Representation in Colonial

The major difference between Ireland, Palestine, and British India was that the latter was never a location of mass European settlement. Instead British India consisted of an amalgamation of administrative units, crown agencies, and princely states, through which Britain exercised direct and indirect authority over the subcontinent. Whilst some of these units would coalesce after independence, others would break away to form separate states: India and Pakistan were established as a result of the partition announced by Admiral Mountbatten (1900-1979), last Viceroy of the British Indian Empire, on 3 June, and executed on 15 August 1947.¹³⁹ Burma, which had formerly been part of British India, attained independence in the following year, and East Pakistan in 1971 after it seceded from West Pakistan to form the state of Bangladesh.

When one speaks of the partition of India it ought to be remembered that one is principally speaking of the partition of the Punjab and Bengal.¹⁴⁰ Jammu and Kashmir was not divided in 1947, and the line of control that divides Pakistan and Indian controlled Kashmir is the result of armed conflict, which erupted after partition.¹⁴¹ Similarly, the Rann of Kutch was not partitioned in 1947. In 1968, it was delimited in arbitration after another Indo-Pakistan war failed to conclusively resolve its status.¹⁴² The Princely states were given the “choice” to accede either to India or to Pakistan.¹⁴³ Despite this “choice”, some of the Princely states such as Hyderabad and Junagadh were forcefully incorporated into the Union of India after Prime Minister Nehru ordered his troops to take over.¹⁴⁴ The June 3 Partition Plan instructed that the demarcation of the Punjab and Bengal would be undertaken “on the

India: The Making of Pakistan”, 20 *Modern Asian Studies* (1986), p. 539; Anita Inder Singh, *The Origins of the Partition of India* (Oxford: Oxford University Press, 1987); Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League, and the Demand for Pakistan* (Cambridge: Cambridge University Press, 2004); David Page, *Prelude to Partition: The Indian Muslims and the Imperial System of Control 1920-1932* (Delhi: Oxford University Press, 1999); and Ian Talbot and Gurharpal Singh, *The Partition of India* (Cambridge: Cambridge University Press, 2009).

¹³⁹ Statement by His Majesty’s Government, IOR R/3/1/156, in Mian Muhammad Sadullah *et al.*, (eds.) *The Partition of the Punjab, 1947: A Compilation of Official Documents*, Vol. I, (Lahore: National Documentation Centre, 1983), pp. 4-10.

¹⁴⁰ See Arts. 1 and 2 of the Indian Independence Act, 1947. 10 & 11 GEO. 6. CH. 30.

¹⁴¹ See Brian Farrell, “The role of international law in the Kashmir conflict”, 21 *Penn State International Law Review* (2003), pp. 293-318.

¹⁴² See Rann of Kutch Arbitration (India and Pakistan), The Indo-Pakistan Western Boundary Case, constituted pursuant to the Agreement of 30 June, 1965, Award, 19 February 1968, 7 *International Legal Materials* (1968), pp. 633 – 705.

¹⁴³ Talbot and Singh, *The Partition of India*, supra n. 138, pp. 54-55.

¹⁴⁴ See Taraknath Das, “The Status of Hyderabad During and After British Rule in India”, 43 *American Journal of International Law* (1949), pp. 57-72 and Clyde Eagleton, “The Case of Hyderabad Before the Security Council”, 44 *American Journal of International Law* (1950), pp. 277-302.

basis of ascertaining the contiguous majority areas of Muslims and non-Muslims”, although it also instructed the Commission to take “other factors” into account.¹⁴⁵

What is striking about the 3 June Plan for the partition of British India is that for the first time in the history of British imperial policy, the notion of majoritarianism i.e. distinguishing rights to territorial sovereignty on the basis of whether a specific population formed the majority in an allotted territory, was *explicitly* spelt out in an instrument of government policy. This was not so in Ireland where the colonial power did not recognise the right of the majority of Irishmen to independence and drew the boundary separating Northern Ireland from the rest of Ireland even though two of the counties in the six-county division allotted to Northern Ireland—Tyrone and Fermanagh—had nationalist majorities. Nor was it the case in Palestine where partition was above all an attempt to secure a national home for those European Jewish immigrants who had settled in Palestine and those who might desire to do so in the future in an area delineated by the colonial power in disregard of Arab interests.

Britain began its rule of the Indian subcontinent in the eighteenth century at a time when the notion of Indian nationalism was still in its embryonic stage. Initially, British rule in India had been administered through the British East India Company, but this changed after the mutiny of 1857, when Britain formally ended company rule and established rule of the Crown over the Indian Dominions of the Company. From the late nineteenth century on, Britain began to steadily devolve power into Indian hands, in which new classes, castes, communities, and interests, were drawn into a competition for political power.¹⁴⁶ As explained in Part Two, Britain had a tendency to view India in terms of monolithic caste and religious identities, which “in part arose from the interaction between British sources of knowledge of native society and perceptions of the significance of religious identity arising from the place of Christianity and the Catholic-Protestant divide in contemporary European ideas”.¹⁴⁷

The Indian National Congress claimed to represent all Indians, irrespective of caste or religion, and it initially sought to amalgamate all the Princely states as well as those parts of British India with majority Muslim populations into a single territorial unit that would be ruled from the centre. “Though predominantly Hindu in membership”, explained Jawaharlal Nehru (1889-1964), “the Congress had large

¹⁴⁵ Statement by His Majesty’s Government, *supra* n. 139, p. 6.

¹⁴⁶ See Page, *Prelude to Partition*, *supra* n. 138, p. 3.

¹⁴⁷ Talbot and Singh, *The Partition of India*, *supra* n. 138, p. 28.

numbers of Muslims on its rolls, as well as all other religious groups like Sikhs, Christians, etc. It was thus forced to think in national terms. For it the dominating issue was national freedom and the establishment of an independent democratic state”.¹⁴⁸ Muhammad Ali Jinnah (1876-1948), and the Muslim League, in contrast, claimed to represent Indian Muslims who it viewed as a separate political community. Established in 1906, one of their central demands was for Muslims to be treated as a separate political unit by the colonial power. Sir Syed Ahmed Khan, one of the Muslim community’s earliest and ablest advocates, argued on the basis of a close reading of J.S. Mill’s views in support of representative government that the liberal theory presupposed an ethnically and religiously homogenous society in which there was a basic harmony of interests.¹⁴⁹ In 1906, the Aga Khan voiced his concern with Lord Minto, and asked him to establish safeguards for the Muslim minority by awarding the Muslims representation “beyond its numerical strength” in order to protect it from being a wholly ineffective minority and to give recognition to its political importance and its contribution to imperial defence.¹⁵⁰ It has been argued that one of the reasons for creating the League was to foster a sense of loyalty to the British government among the Muslims of India. In the first decade of its existence the League amounted to an alliance of Muslim landlords and British civil servants, who sought to collectively combat the increasing economic power of the Hindus.¹⁵¹

In this regard the origins of partition in India have been traced to the evolution of self-government there, and the demand for separate electorates for Muslims at the provincial level, which provided the foundations for Muslim separatism that emerged in the form of Pakistan.¹⁵² Some scholars have argued that the perceived need for separate Muslim electorates arose as a protective measures due to “the Muslim’s relative educational backwardness” when compared to high caste Hindus and Sikhs

¹⁴⁸ Jawaharlal Nehru, *The Discovery of India* (London: Penguin, 2004, first published 1946), pp. 422-423.

¹⁴⁹ *The Pioneer*, 5 October 1893. See Syed Sharifuddin Pirzada (ed.), *Foundations of Pakistan: All-India Muslim League Documents: 1906-1947, Volume I* (Karachi: National Publishing House, 1970), p. xxxvii.

¹⁵⁰ Rupert Emerson, *From Empire to Nation: The Rise to Self-Assertion of Asian and African Peoples* (Cambridge: Harvard University Press, 1960), p. 344.

¹⁵¹ Tariq Ali, *Pakistan: Military Rule or People’s Power?* (London: Jonathan Cape, 1970), pp. 26-27. The alliance with the Muslims, as Lord Olivier, the Secretary of State for India in the first MacDonald Government admitted in a letter to *The Times* was simple: “No-one with a close acquaintance with Indian affairs will be prepared to deny that on the whole there is a predominant bias in British officialdom in favour of the Muslim community party on the ground of closer sympathy but more largely as a make-weight against Hindu nationalism”. See T. Walter Wallbank, *The Partition of India: Causes and Responsibilities* (New York: D.C. Heath and Company, 1966), p. 40.

¹⁵² See Page, *Prelude to Partition*, supra n. 138, p. 259.

who were wealthier and had better access to western education (at least until the late nineteenth century).¹⁵³ One of the principal aims of creating separate electorates was to increase the Muslim representation in the system of elective local government. One of the consequences of this was that it “strengthened the belief that people following a particular religion naturally shared common interests from which others were excluded”.¹⁵⁴ Nehru understood the Muslim demand for separate electorates although like most members of Congress he was suspicious of them, and was firmly of the opinion that the genuine emergence of nationalism did “not come to a nation or a community from mere numbers, or special seats in legislatures, or protection given by outsiders”. Rather, in his opinion, “it [came] from within and from the cooperation and goodwill of comrades in a common cause. The minorities in India will not flourish by being spoon-fed from above but by their own merits and strength”.¹⁵⁵

However, the League did not want to end up in a situation where non-Muslims would rule Muslims. This was because “within the context of Islamic political values, it is more important to Muslims to be represented by Muslims than by elected, politically accountable, non-Muslims”.¹⁵⁶ As Sir Muhammad Iqbal (1877-1938), the Muslim poet, philosopher, and the ideological father of Pakistan, explained: “The units of Indian society are not territorial as in European countries. India is a continent of human groups belonging to different races, speaking different languages, and professing different religions. Their behaviour is not at all determined by a common race-consciousness. Even the Hindus do not form a homogenous group. The principle of European democracy cannot be applied to India without recognizing the fact of communal groups”.¹⁵⁷ Iqbal added that Islam could not be compared to the nationalist movements that arose in Europe. “Islam is not a church” he told the Muslim League, before explaining that Islam was “a contractual organism long, long before Rousseau ever thought of such a thing”. It is “animated by an ethical ideal which regards man not as an earth-rooted creature, defined by this or that portion of the earth, but as a spiritual being understood in terms of a social mechanism, and

¹⁵³ See Talbot and Singh, *The Partition of India*, supra n. 138, p. 28.

¹⁵⁴ Talbot and Singh, *The Partition of India*, ibid, p. 29.

¹⁵⁵ Jawaharlal Nehru, *Selected Works of Jawaharlal Nehru, Volume Eight* (New Delhi: Orient Longman, 1976), p. 127.

¹⁵⁶ Shaikh, “The Making of Pakistan”, supra n. 138, p. 542.

¹⁵⁷ See Presidential Address by Dr Muhammad Iqbal at 21st session of the All-India Muslim League at Allahabad, 29-30 December 1930 in Pirzada (ed.), *Foundations of Pakistan, Vol. II*, supra n. 149, pp. 158-159.

possessing rights and duties as a living factor in that mechanism”.¹⁵⁸ Accordingly, he demanded “the formation of a consolidated Muslim State in the best interests of India and Islam. For India, it means security and peace resulting from an internal balance of power; for Islam, an opportunity to rid itself of the stamp that Arabian Imperialism was forced to give it, to mobilize its laws, its education, its culture, and to bring them into closer contact with its own original spirit and with the spirit of modern times”.¹⁵⁹ In contrast to the Islamic political ideology of the League, Nehru explained that the Congress party had been influenced “by the ideas of the French and American revolutions, as also by the constitutional history of the British Parliament”, in addition to “the influence of the Soviet revolution”.¹⁶⁰ After the League parted ways with Congress, it sought to create a homeland for the Muslims in the Muslim majority provinces in the Punjab, Afghan Province (North-West Frontier Province), Kashmir, Sind and Baluchistan that would collectively come to be called “Pakistan”.¹⁶¹

The foundations for the Congress-League split ultimately lay in the passing of the Government of India Act of 1935 (the “GOI Act”), which widened the franchise from 7 to 35 million people.¹⁶² The League was strenuously opposed to this as they feared that absent specific protection for the minority Muslim community, a widening of the franchise would lead to the formation of a “Hindu Raj” with political power being vested in the Hindu majority. Instead Jinnah urged that the Muslims of North-West India and Bengal should be considered as nations entitled to national self-determination in an arrangement that would safeguard their interests.¹⁶³ One year after the outbreak of the Second World War, Jinnah spoke before an estimated crowd of 100,000 in a Presidential Address to the 27th session of the League enunciating his claim for a Muslim homeland.¹⁶⁴ Rejecting the notion that the Muslims were just a minority, as opposed to a nation, Jinnah asserted: “The Musulmans are a nation by any definition”. He pointed out that, “...even according to the British map of India, we [the Muslim League] occupy large parts of this country where the Musulmans are in a

¹⁵⁸ See Iqbal’s address to the All-India Muslim League in Allahabad in 1930, in Pirzada (ed.), *Foundations of Pakistan*, ibid, p. 160.

¹⁵⁹ Iqbal’s address in Pirzada (ed.), *Foundations of Pakistan*, ibid, p. 160.

¹⁶⁰ Nehru, *The Discovery of India*, supra n. 148, pp. 420-421.

¹⁶¹ Fraser, *Partition in Ireland, India, and Palestine*, supra n. 138, p. 77.

¹⁶² Singh, *The Origins of the Partition*, supra n. 138, pp. 1-44.

¹⁶³ Fraser, *Partition in Ireland, India, and Palestine*, supra n. 138, p. 76.

¹⁶⁴ Presidential Address of Mr. M.A. Jinnah, All-India Muslim League, Twenty-Seventh Session, Lahore, March 22-24, 1940 in Pirzada (ed.), *Foundations of Pakistan*, supra n. 149, pp. 325-349

majority—such as Bengal, Punjab, N.W.F.P., Sind and Baluchistan”.¹⁶⁵ In other words, in those areas where Muslims were populous they were not a minority, but a majority, with a long established cultural and social history, in the form of a nation.

With his knowledge of the British parliamentary system, gained from his days at Lincoln’s Inn and nurtured in England where he practiced as a barrister, Jinnah explained his opposition to the GOI Act: “The British Government and Parliament, and more so the British nation, have been, for many decades past, brought up and nurtured with settled notions about India’s future, based on developments in their own country which have built up the British constitution, functioning now through the Houses of Parliament and the Cabinet system. Their conception of party-government, functioning on political planes, has become ideal with them as the best form of government for every country; and the one-sided and powerful propaganda which naturally appeals to the British has led them into a serious blunder, in producing a constitution envisaged in the Government of India Act of 1935”.¹⁶⁶ Jinnah warned that: “Notwithstanding a thousand years of close contact, nationalities which are as divergent today as ever cannot at any time be expected to transform themselves into a one nation merely by means of subjecting them to a democratic constitution and holding them forcibly together by unnatural and artificial methods of British Parliamentary Statutes”. He added that: “What the unitary Government of India for 150 years had failed to achieve cannot be realized by the imposition of central federal government”. In Jinnah’s opinion: “The present artificial unity of India dates back only to the British conquest and is maintained by the British bayonet”.¹⁶⁷ According to him, the Muslims had merely been amalgamated with the Hindus for British administrative convenience, but they were always a people apart:

The problem in India is not of an inter-communal but manifestly of an international character, and it must be treated as such. So long as this basic and fundamental truth is not realized, any constitution that may be built will result in disaster and will prove disaster and harmful not only to the Muslims, but also to the British and Hindus. If the British Government are really in earnest and sincere to secure the peace and happiness of the people of this Subcontinent, the only course open to us all is to allow the major national separate homelands, by dividing India into “autonomous national states”.¹⁶⁸

¹⁶⁵ Jinnah, Address to Muslim League, in Pirzada (ed.), *Foundations of Pakistan*, ibid, p. 335.

¹⁶⁶ Jinnah, Address to Muslim League, in Pirzada (ed.), *Foundations of Pakistan*, ibid, p. 336.

¹⁶⁷ Jinnah, Address to Muslim League, in Pirzada (ed.), *Foundations of Pakistan*, ibid, pp. 337-8.

¹⁶⁸ Jinnah, Address to Muslim League, in Pirzada (ed.), *Foundations of Pakistan*, ibid, p. 337.

Whilst some have argued that the term “autonomous national states” was an ambiguous phrase and did not mean the formation of an independent state, this cannot be ruled out especially when one considers Iqbal’s 1930 address to the League that specifically called for the establishment of “a consolidated Muslim State” and Jinnah’s references to self-determination and international law. Moreover, Jinnah always stressed that the Muslim-Hindu problem in India was an international problem and not merely a domestic matter. Throughout the 1940s he consistently made reference to two nations.¹⁶⁹ As Jinnah explained to Ghandi, in their inconclusive three-week conversation in 1944, “[we] maintain that Moslems and Hindus are two major nations by any definition or test of a nation. We are a nation of a hundred million, and what is more we are a nation with our own distinctive culture and civilization, language and literature, art and architecture, names and nomenclature, sense of value and proportion, legal laws and moral codes, customs and calendar, history and traditions, aptitudes and ambitions. In short, we have our own distinctive outlook on life and of life. By all canons of international law, we are a nation”.¹⁷⁰

At the heart of the ideological divide that emerged between Congress and the League in the 1930s and 1940s were their different philosophical approaches to nationhood and the question of representation. The Congress hierarchy had been influenced by the revolutionary experiences in the US and Europe in the eighteenth century and by the revolution in Russia in 1917, and it sought to establish a centralised nation-state ruled from Delhi as a strong parliamentary democracy based on the principle of majority rule.¹⁷¹ This idea was alien to the League which did not look to the US or Europe or Russia for inspiration. For the Muslim League majority rule and the West’s history of nationalism was extraneous. In terms of looking at the Indian subcontinent as a single political unit, Jinnah “repeatedly and categorically dismissed the suitability of applying the principles of arithmetic to the problem of representation”.¹⁷² If, however, it was recognised that the Indian Muslims were a nation entitled to self-determination, then he was prepared to accept that on the basis of arithmetic, Muslims were entitled to majority rule in those areas where they formed the majority. Indeed, this was to be the principle argument for partition.

¹⁶⁹ Singh, *The Origins of the Partition*, supra n. 138, p. 239.

¹⁷⁰ Jinnah in conversation with Ghandi quoted in Sir Frederick Puckle, “The Gandhi-Jinnah Conversations”, 23 *Foreign Affairs* (1945), p. 318, at p. 320.

¹⁷¹ See Jalal, *The Sole Spokesman*, supra n. 138, p. 273 quoting Patel demanding majority rule.

¹⁷² See Shaikh, “The Making of Pakistan”, supra n. 138, p. 548.

In this regard, Iqbal's and Jinnah's approach to self-determination was surprisingly similar to Anglo-American approach associated with the theories of J.S. Mill explored in the introduction to Part Two, which in turn had influenced British imperialists from Milner to Balfour, and which tended to favour minorities. Indeed it would seem that they were merely parroting the "contractarian" view of self-determination, which focused, on identity, rather than on numbers. Perhaps it was no coincidence that they had both been bestowed Knights of the British Empire. In a word, it all came down to differing conceptions of the *nation*. For Congress, the nation amounted to all Indians of whatever class, caste, and creed, whereas for the League, the Muslims were a distinctive political community; a nation within a nation. It was Jinnah's persistent demand for Pakistan, for a British role in the transfer of power, and for maintaining post-independence military ties with the British Empire, which was an anathema to Congress, that led to partition.¹⁷³ But in the end, Congress also came out in favour of partition because it wanted to create a strong centralised government in India, and parity with the League would have prevented that.¹⁷⁴

The UN Partition Plan for Palestine

In April 1947, Britain decided to turn the Palestine Question over to the United Nations where its future destiny was to be determined by the international community as it was then composed.¹⁷⁵ Britain realised that the Jewish minority was not prepared to live under Arab sovereignty in an Arab state, where they would remain a minority, and the Arab majority were not prepared to live under a Jewish minority in a Jewish state, when they would remain the majority. Due to the fact that some of the states participating in this debate had recently achieved independence a schism occurred between the colonial powers and its former colonies when opposition was expressed in the debate at the UN General Assembly on the UN Plan to Partition Palestine in November 1947. The newly independent states argued that it would be contrary to self-determination to divide Palestine in the face of opposition from the majority of its inhabitants whereas the colonial powers looked to the identity of the communities claiming self-determination, which they considered to be of paramount importance. It was due to the schism that emerged during the debates on partition, which reflected

¹⁷³ Singh, *The Origins of the Partition*, supra n. 138, pp. 249-252.

¹⁷⁴ Jalal, *The Sole Spokesman*, supra n. 138, pp. 241-293.

¹⁷⁵ Question of Palestine, UN doc. A/286, 3 April 1947.

these two differing approaches, that Egypt and Syria sought to persuade the Assembly to seek an opinion from the International Court of Justice on the following question:

Whether the United Nations, or any of its Member States, is competent to enforce or recommend the enforcement of any proposal concerning the constitution and future Government of Palestine, in particular, any plan of partition which is contrary to the wishes, or adopted without the consent of, the inhabitants of Palestine.¹⁷⁶

Although this resolution failed to secure enough votes in the General Assembly to be rendered before the International Court of Justice in the form of an advisory opinion India and Pakistan voted in favour of this question, as did France. No records exist providing explanations for the vote but one might assume that India and Pakistan voted against it in light of their own partition and France because of its revolutionary history where the rights of man were first proclaimed. Belgium, Czechoslovakia, Luxembourg, the Netherlands, and the United Kingdom decided to abstain rather than vote against it.¹⁷⁷ Essentially, Palestine was trapped in the middle of two competing ideas of self-determination: the liberal view which was associated with Western political philosophy that looked to the identity of the community and whether that community had acquired the attributes of a nation in the sense of having a cohesive, collective, and organised community, united in aptitude, political belief, and ideological outlook. This meant that the community had to be comprised of a highly cultured and educated elite, which had substantial experience of self-government, and the emerging nations, which looked to population statistics and equal rights, and who were less concerned with whether the community in question had acquired Western cultural attributes or had a history of establishing western legal and political systems.

On 26 November 1947, the world community, as it was then composed, met in New York to debate the merits of the UN partition plan for Palestine.¹⁷⁸ Arguing in

¹⁷⁶ See *Yearbook of the United Nations* (1947-48), p. 241.

¹⁷⁷ The vote was as follows: *In favour*: Afghanistan, Argentina, Brazil, Colombia, Cuba, Egypt, El Salvador, France, Greece, Haiti, India, Iran, Iraq, Lebanon, Liberia, Pakistan, Saudi Arabia, Syria, Turkey, Yemen. *Against*: Australia, Byelorussia, Soviet Socialist Republic, Canada, Chile, Costa Rica, Denmark, Dominican Republic, Guatemala, Iceland, New Zealand, Norway, Panama, Peru, Poland, Sweden, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United States of America, Uruguay, Venezuela. *Abstentions*: Belgium, Bolivia, China, Czechoslovakia, Ecuador, Ethiopia, Honduras, Luxembourg, Mexico, Netherlands, Nicaragua, United Kingdom, Yugoslavia.

¹⁷⁸ For the first of the debates see UN General Assembly, Official Records, 2, 1947, Plenary Meetings, II, -- Hundred and Twenty-Fifth Plenary Meeting, Held in the General Assembly Hall at Flushing Meadow, New York, on Wednesday, 26 November 1947, at 3pm.

favour of partition, the Netherlands referred to its failed union with Belgium. The Dutch delegate explained that although Belgium and the Netherlands “had very close ties, relations and interests of a cultural, historical, ethnological and economic nature, this unitary state soon ended in failure”. He added that the “differences between Arabs and Jews now are much greater and of an odder character than those between Belgium and the Netherlands in 1830”. In the opinion of the Netherlands “in all parts of the world where there was to be found a difference due to historical causes between peoples—peoples whom destiny brought together—no solution in the direction of a unitary state has proved to be workable”.¹⁷⁹ The USSR also supported partition and referred to its nationalities policy in its associated republics as an application of self-determination. As explained earlier, the Soviet vote may have also been affected by overtures from Jewish emissaries claiming that Israel would join the Communist camp.¹⁸⁰ Alternatively, it has been suggested that the USSR’s support for partition was to sow discord in the hope that it would contribute to a quick British exit (which happened).¹⁸¹ The USSR said that it was sympathetic to the national aspirations of the nations of the Arab East and that its attitude towards the efforts of these peoples to rid themselves of the last fetters of colonial dependence was one of understanding and sympathy.¹⁸² However, in its opinion the decision to partition Palestine was “in keeping with the principle of the national self-determination of peoples”, which was consistent with the policy of the USSR in the sphere of nationality problems, which was “a policy of friendship and self-determination”.¹⁸³ In other words the USSR saw both the Jewish community in Palestine and the Arab community in Palestine as separate national communities entitled to self-determination in separate states.¹⁸⁴

Mr Chamoun of the Lebanon was particularly irked by the USSR’s support for partition. He pointed out that partition was being proposed contrary to the wishes of the majority of the inhabitants of Palestine. In Lebanon’s opinion this was contrary to

¹⁷⁹ Mr. Sassen (Netherlands), *ibid.*, pp. 1354-1356 at p. 1356.

¹⁸⁰ See Krammer, “Soviet Motives in the Partition of Palestine, 1947-8”, *supra* n. 71, pp. 104-8.

¹⁸¹ See Musa Budeiri, *The Palestine Communist Party 1919-1948: Arab and Jew in the Struggle for Internationalism* (Chicago: Haymarket Books, 2010), p. 158.

¹⁸² Mr. Gromyko (USSR), *supra* n. 178, pp. 1358-1364 at p. 1360.

¹⁸³ Mr. Gromyko (USSR), *ibid.*, pp. 1360-1361.

¹⁸⁴ One should also bear in mind Russian policy in the concentration camps in its zone of occupation. See Oles M. Smolansky, “The Soviet Role in the Emergence of Israel” in Wm. Roger Louis and Robert N. Stookey (eds.), *The End of the Palestine Mandate* (London: I.B. Tauris, 1986), pp. 61-78. The USSR’s decision confused the various Communist affiliated parties in Palestine who tried to assert their independence from Moscow by arguing for a single unitary state with equal rights for Arabs and Jews. The National Liberation League rejected partition as “aiming at ensuring the interests of Anglo-American imperialism”. See Budeiri, *The Palestine Communist Party*, *supra* n. 181, p. 155.

self-determination. Moreover, the USSR's understanding of self-determination was illogical: "The USSR representative's argument, if it were pushed to its logical conclusion, would lead to the following sequences of events: self-determination for the Jewish people, therefore a separate Jewish State. Now there is an Arab minority almost equal to the majority in this separate Jewish State, as you have envisaged it. Will the principle of self-determination, as the USSR representative understands it, apply to this Arab minority? If it applies to the Arab minority, there will be a fresh sub-division in the Jewish State for the sake of the Arab part and the Jewish population".¹⁸⁵

When Canada challenged Mr Chamoun's argument that self-determination meant majority rule, the Lebanese representative replied by referring to Canadian history and the problem of Quebec. "We know Canadian history", Chamoun replied. "We know about the struggle of the French-Canadian population with the population of English origin. We know that, during and after this struggle, Canada remained a united state because the wishes of the minority have never succeeded in partitioning Canada and in interfering with the majority's wishes".¹⁸⁶

Poland acknowledged that whilst it had struggled to regain its freedom for more than a century, the Polish Jewish survivors of the Holocaust needed a place to go to, which in its view could only be to Palestine.¹⁸⁷ Poland recognised that the Palestine Arabs, as well as Palestine's Jews both wanted national independence over the same territory. This is why Poland had initially hoped that these national aspirations might find their expression in one Palestinian state in which both Arabs and Jews would be equal partners, free to develop their national life. However, this had proved impossible and so the only solution was to establish an Arab state and a Jewish state, to provide for the national aspirations of the two communities that live in Palestine.¹⁸⁸ Poland's explanation for its vote did not satisfy the delegate from Syria, however, who impolitely reminded the Polish delegate that whilst he was usually so punctilious when it came to interpreting the terms of the UN Charter, Poland suddenly fell silent when it was a question of violating the Charter to create a Jewish state in Palestine "which would allow Poland to get rid of its own Jews". The Syrian delegate then reminded the Polish representative that, "when his country was partitioned

¹⁸⁵ Mr Chamoun (Lebanon), Un General Assembly, Official Records, 26 Nov. supra n. 178, pp. 1341-1345 at p. 1342.

¹⁸⁶ Mr Chamoun (Lebanon), *ibid*, pp. 1342-1343.

¹⁸⁷ Mr. Lange (Poland), pp. 1331-1337 at pp. 1331-1332.

¹⁸⁸ Mr. Lange (Poland), *ibid*, p. 1334.

between its neighbours, Russia, Prussia and Austria, the only country that refused to recognize that partition was the Ottoman Empire, of which Palestine was part”.¹⁸⁹

In the debate, Sir Mohammed Zafrullah Khan, the Foreign Minister of Pakistan, waded into the fray by tearing the partition plan to shreds. After making short shrift of the argument that Palestine was a solution to the Jewish Question by highlighting the hypocrisy of Western immigration policy before and during the war,¹⁹⁰ Khan concentrated on the details of the plan. Having become adept at reading maps and population statistics, Khan, who only three months previously had been given a week’s notice to make the case for partition before the Punjab Boundary Commission, pointed out that there were 1,300,000 Arabs in Palestine and 650,000 Jews—with room wanted for more—and that the problem had become insoluble. Since it was being argued that it was not right for the Jews to form a minority in a single state, it was being suggested that the only fair solution was partition and the establishment of two states, an Arab state and a Jewish state. The boundaries were accordingly drawn and the UN Committee that produced the Partition Plan envisaged establishing an Arab state with only 10,000 Jews and almost 1,000,000 Arabs in it. However, in the Jewish state the Committee envisaged a state where there would be 498,000 Jews and 435,000 Arabs. This prompted Khan to question whether the minority problem had really been solved: “Jews are not to live as a minority under the Arabs, but the Arabs are to live as a minority under the Jews. If one of these is not fair then neither is the other; and if one is not a solution, the other is not”.¹⁹¹

In critiquing the UN Partition Plan, Khan had deftly highlighted the dilemma of proposing a territorial solution for a minority problem. For as soon as one community formed the majority of the population in a particular geographic sphere, the other community inhabiting that same territory would by mathematical logic become a minority. The argument that Khan highlighted has had a recurring theme in critiques of partition plans which was also raised in the report produced by subcommittee 2 which also advanced a comprehensive challenge to partition.¹⁹² After having exposed the demographic fallacy inherent in the partition plan, Khan turned his

¹⁸⁹ Amir Arslan (Syria), *ibid*, pp. 1338-1341 at p. 1339.

¹⁹⁰ Hundred and Twenty-Sixth Plenary Meeting, Held in the General Assembly Hall at Flushing Meadow, New York, on Friday, 28 November 1947, at 11am in UN General Assembly, *Official Records*, 2, 1947, Plenary Meetings, II, p. 1369.

¹⁹¹ Sir Mohammed (Pakistan), *ibid*, p. 1374.

¹⁹² See Ad Hoc Committee on the Palestinian question, Report of Sub-Committee 2, UN doc. A/AC.14/32, 11 November 1947.

attention to boundaries, pointing out that Jews only constituted 33 per cent of the population of Palestine and Arabs 67 per cent, and yet 60 per cent of the area of Palestine was to go to the Jewish state—which he thought was hardly fair or equitable. He then mentioned a document which had been circulated to members of the Committees by the United Kingdom representative prior to the debate showing that, of the irrigated, cultivable areas, 84 per cent would be in the Jewish state and 16 per cent in the Arab state”.¹⁹³ In the Negev, the inequity was even starker where Arabs owned 14 per cent of the land and the Jews owned only one per cent, and yet the whole of the Negev was to be awarded to the Jewish state. Moreover, there was an Arab population of over one hundred thousand inhabiting the Negev, and a Jewish population of only two thousand, and yet the Jewish state was to be awarded the lot.¹⁹⁴

The emerging consensus amongst newly independent states was that they associated self-determination as not only being the right of the majority of the population to determine its political destiny, but also to have a right to control its natural resources and territory. They also made distinction as to the quality of the resources and territory for the future productivity of the state. In this connection there was a particular point of agreement amongst the delegates opposing partition, that in ignoring the wishes of the majority of the population, which could be ascertained in a plebiscite, the plan was contrary to self-determination. Khan criticised the UN for ignoring the wishes of the majority of the inhabitants of Palestine in proposing to implement the partition plan against their will.¹⁹⁵ Cuba, Iraq, and Iran concurred.¹⁹⁶ In making these arguments these states associated the majority as being akin to the *native* majority i.e. those who inhabited the territory at the time of its colonisation. As Palestinian scholars have argued, in Palestine not only were the Jews a minority, but most of them had not even acquired citizenship.¹⁹⁷ Moreover, unlike in Ireland and India, the Jews who settled in Palestine never owned the majority of the land until after Israel was created in 1948.¹⁹⁸ In other words, the Palestinians had good grounds

¹⁹³ Sir Mohammed (Pakistan), UN General Assembly, Official Records, 28 Nov., supra n. 190, p. 1374.

¹⁹⁴ Sir Mohammed (Pakistan), *ibid.*, p. 1375.

¹⁹⁵ Sir Mohammed (Pakistan), *ibid.*, pp. 1376-1377.

¹⁹⁶ Mr. Adl (Iran), supra n. 178, Hundred and Twenty-Fifth Plenary Meeting, Held in the General Assembly Hall at Flushing Meadow, New York, on Wednesday, 26 November 1947, pp. 1328-1329. Mr. Dihigo (Cuba), *ibid.*, pp. 1382-1385 at pp. 1381-1383. Mr. Jamali (Iraq), *ibid.*, pp. 1385-1395 at p. 1390.

¹⁹⁷ Henry Cattán, “Recollections on the United Nations Resolution to Partition Palestine”, 4 *Palestine Yearbook of International Law* (1987-1988), pp. 260-264 at p. 263.

¹⁹⁸ See Official Records of the Second Session of the General Assembly, Ad Hoc Committee on the Palestinian Question, Summary Record of the Thirty-Second Meeting, Lake Success, New York,

to argue that their country was being partitioned for the benefit of a minority community mostly comprised of immigrants who were being given the right to territorial sovereignty in which they would have more rights than the native majority.

The schism during the UN vote

Until the second half of the twentieth century, the Anglo-American approach to self-determination remained predominant and partition was viewed as a policy the colonial power could employ to safeguard the interests of the minority at the expense of the native majority on the basis that the minority was also a nation. However, in the eyes of the majority community, who never recognised the claims of the minority to a separate nationality, partition would acquire a pejorative connotation because it became associated in its eyes with the division of a nation. After 1945, when the UN was created, the newly independent states were able, for the first time in their history, to assert themselves on the international plane. They did this in many ways, but one of the most important, and overlooked methods they employed to this end was to challenge the view that self-determination could apply to favour the right of a minority community to self-determination and independence because the imperial power considered the minority to have reached a stage of cultural, economic, and political development, which the majority had yet to reach, when the majority claimed sovereignty over the whole of the territory, which they inhabited with the minority.

In the process of criticising the UN Partition Plan for Palestine those states that had recently achieved independence articulated an understanding of self-determination that was associated with majority rule, an assessment which in turn was affected by demographic and territorial factors rather than on the quality of government, ideology, economic development, education, religion, or the pigmentation of a particular community that had a close affinity with the colonial power. A closer look at the UN partition vote reveals that those states which voted in favour of partition were either European, Christian, settler-states, or former League members whose conception of nationhood was influenced by the Anglo-American approach to self-determination:

In Favour: Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Costa Rica, Czechoslovakia, Denmark, Dominican

Monday, 24 November 1947, at 830pm. UN doc. A/AC.14/SR.32, 25 November 1947 at paras. 67 and 68.

Republic, Ecuador, France, Guatemala, Haiti, Iceland, Liberia, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Sweden, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United States of America, Uruguay, Venezuela. *Against*: Afghanistan, Cuba, Egypt, Greece, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey, Yemen. *Abstentions*: Argentina, Chile, China, Colombia, El Salvador, Ethiopia, Honduras, Mexico, United Kingdom, Yugoslavia.¹⁹⁹

What might surprise some is that India voted with Pakistan against the UN General Assembly resolution to partition Palestine in 1947, as did every single Arab country.²⁰⁰ India also voted with Pakistan against Israel's application for membership in the UN in 1949.²⁰¹ Vijayalakshmi Pandit, Nehru's sister, who in 1947, was India's Ambassador to the UN, explained in a cable to her brother, that the Arab demand for national independence in Palestine was the same as Congress's claim to represent India. This was why India, in her opinion, had to support the Arab claim to Palestine: "The Arab demand is based on the same principle of right of self-determination and freedom, which Congress in India has always fought for. India's support of the Arab demand will also therefore be ideologically consistent ..."²⁰² As P.R. Kumaraswamy has explained, "Jewish-Israeli exclusivism in Palestine ran counter to Nehru's vision of a partitioned but genuinely multiracial, multireligious, and multicultural India".²⁰³ In Nehru's view, the Jews "preferred to take sides with the foreign ruling power, and have thus helped it to keep back freedom from the majority of the people".²⁰⁴

Afghanistan, Burma, Egypt, Ethiopia, Iran, Iraq, Lebanon, Saudi Arabia, Syria, and Yemen also voted with India and Pakistan against Israel's UN membership.²⁰⁵ Ireland in all likelihood would also have voted against the UN Partition Plan had it been a UN member in 1947. In 1937, Eamon de Valera, then President of the Executive Council of Ireland, gave a stirring speech at the sixth committee of the League of Nations Assembly in Geneva in which he castigated Britain and argued that

¹⁹⁹ See UN Doc. A/PV.128.

²⁰⁰ UN General Assembly 181, (II), 29 November 1947.

²⁰¹ On India foreign affairs with Israel, the Palestinians, and the Arab world see Najma Heptulla, *Indo-West Asian Relations: The Nehru Era* (Bombay: Allied Publishers, 1991), pp. 140-168; and P. R. Kumaraswamy, *India's Israel Policy* (New York: Columbia University Press, 2010).

²⁰² Quoted in Rami Ginat, "India and the Palestine Question: The Emergence of the Asia-Arab Bloc and India's Quest for Hegemony in the Post-Colonial Third World", 40 *Middle Eastern Studies* (2004), p. 189 at p. 208.

²⁰³ Kumaraswamy, *India's Israel Policy*, supra n. 201, p. 187.

²⁰⁴ Jawaharlal Nehru, *Glimpses of World History*, (New Delhi: Penguin, 2004), pp. 764-765.

²⁰⁵ See UN doc. A/RES/273(III), A/PV.207, 11 May 1949.

partition was the cruellest wrong that could be done to any people.²⁰⁶ Ireland's hostility to partition was no less fierce in the wake of the UN vote on partition in 1947²⁰⁷ and the Irish press were virtually unanimous in their condemnation of the partition plan for Palestine when it was first proposed in 1937 as well as when it was proposed in 1947, which they compared to their own partition in 1920.²⁰⁸ However, Ireland was unable to participate in the debate in 1947 as it had been denied entry to the UN by a Soviet veto when it first attempted to join the organisation in 1946.²⁰⁹

The newly independent states clearly associated ascertaining the will of the people with the will of the *native* majority, an assessment that depended on ascertaining the population of the whole people, in which it was necessary to examine population statistics, the location of the population, and the nationality of those who claimed to belong to the state. In assessing a territorial division between two competing peoples these countries also paid close attention to land ownership, habitation, quality of land for cultivation, and the extent of minerals and resources located in the territory for industry. However, in 1947, the notion that it was for the native majority to decide the fate of a political community was not generally accepted by the international community, as it was then composed, predominantly of colonial powers and those from the "lighter skinned" countries. In the early years of the UN its composition was still dominated by the former members of the League of Nations fixated with the old ways of thinking. Then many members of the Council and the Assembly still thought of resolving nationality conflicts in terms of techniques that had been applied to Europe by the League of Nations including internationalization, treaties safeguarding minority rights, transfers of population, and partition.²¹⁰

This explains why there was an ideological split during the debates on the 1947 UN Partition Plan as it straddled the early phase of decolonization associated with the League era and its "high phase" in the 1960s when many of the inter-war techniques for resolving minority conflicts would be challenged. This change would only progressively take place as more states won their independence and joined the international community avowedly "as sovereign and equal members" in which they

²⁰⁶ Rory Miller, *Ireland and the Palestine Question* (Dublin: Irish Academic Press, 2005), p. 7.

²⁰⁷ Miller, *Ireland and the Palestine Question*, *ibid*, p. 8.

²⁰⁸ See Shulamit Eliash, *The Harp and the Shield of David: Ireland, Zionism and the State of Israel* (New York: Routledge 2007), pp. 13-48.

²⁰⁹ Miller, *Ireland and the Palestine Question*, *supra* n. 206, p. 4. Ireland only became a member of the UN in December 1955.

²¹⁰ See Nathaniel Berman, "But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law", 106 *Harvard Law Review* (1993), p. 1792.

could express their opinions in the UN and contribute to the development of a new kind of international law. This occurred when the Marxist-Leninist approach to self-determination found an ally in the non-aligned movement and became fused with their approach to self-determination. This change culminated in the 1960s in opposition to minority rule and the policy of separate development (apartheid) in Southern Africa. In order to understand how these approaches became fused it is necessary to take a closer look at the politics behind the 1960 Colonial Declaration which would attempt to prohibit future attempts to partition colonial territories undergoing decolonization.

4. The non-aligned approach to self-determination

In the decades following the discussions at the UN General Assembly on the UN Partition Plan for Palestine, the international community underwent a fundamental transformation from that which had hitherto existed. For between 1945, when the UN Charter was adopted, and 1960, when the UN's Colonial Declaration was passed by the General Assembly, no less than forty states with a population of 800 millions – more than a quarter of the world's inhabitants – revolted against colonialism and won their independence.²¹¹ These fifteen years formed the high period of decolonization when attempts were made to partition two of Britain's colonies—Palestine and Cyprus—although they were thwarted on both occasions by political developments and armed insurrection. As more states were admitted to the UN, the balance of power in the Assembly gradually tilted in favour of the non-aligned states whose view on self-determination became predominant. It was during and after these fifteen years that self-determination became associated with “majority rule”, the language of a new discourse specifically employed by those who opposed partition, on the basis that it was undemocratic to subject the majority to the whims of the minority even if that minority had reached a level of economic, cultural, and political development that the majority had yet to reach. This is why those states (mostly from the Third World) that advocated a majoritarian notion of self-determination came up with the simple and effective slogan of “one man, one vote”, in which self-determination was to be determined by a head count. This discourse was most clearly expressed by the

²¹¹ Geoffrey Barraclough, “The Revolt Against the West”, in Prasenjit Duara (ed.), *Decolonization: Perspectives from Now and Then* (London: Routledge, 2004), p. 118.

international community's negative response to Rhodesia's unilateral declaration of independence in 1965 and to South Africa's policy of "separate development".

This opposition to partition had principally arisen due to the non-aligned movement's steadfast opposition to partition and minority rule, which was most graphically expressed in Southern Africa. At the helm of this new movement was Nehru, who tried to stay clear from siding with any one side in the Cold-War rivalry along with Nasser of Egypt, Nkrumah of Ghana, Sukarno of Indonesia, and Tito of Yugoslavia. Non-alignment was summed up nicely by Nehru, who in a speech he gave in 1943, explained that a future independent India would stand up "for certain ideals in regard to the oppressed nations", rather than "trying to align ourselves with this great power or that and becoming its camp follower in the hope that some crumbs might fall from their table".²¹² In the 1950s, the USSR recognised the importance of this new movement and made strenuous attempts to influence it in the hope that "the military position in the Third World would eventually improve in the wake of revolutionary structural socio-economic changes which, they believed, would orient the policies of the majority of the developing countries firmly against the West".²¹³ Soviet officials believed that these states shared important common attributes and accepted similar restraints on their foreign policies, in the form of neutralisation.²¹⁴ Indeed many of the states that would later become associated with the non-aligned movement "felt that both Communist China and the Soviet Union were closer to them in outlook than the Western countries who still controlled many African lands".²¹⁵

As early as 1928, Nehru advocated a collation of progressives, open to the USSR and its "new civilization", as an obstacle to imperialism, which he hoped would extricate Indians from their "curious mentality of subservience to England".²¹⁶ The year before, Nehru had explained to the International Congress against Colonial Oppression and Imperialism at Brussels, that judging by developments in Latin America, American imperialism would become the major threat to the world. Nehru surmised that American imperialism would either replace British imperialism or lead

²¹² Quoted in Alok Datta, *Indian Non-Alignment and National Interest: From Jawaharlal Nehru to Indira Gandhi* (Kolkata: Sujana Publications, 2005), p. 10.

²¹³ Roy Allison, *The Soviet Union and the strategy of non-alignment in the Third World* (Cambridge: Cambridge University Press, 1988), p. 2.

²¹⁴ Allison, *The Soviet Union and the strategy of non-alignment*, *ibid*, p. 21.

²¹⁵ Gwyneth Williams, *Third-World Political Organizations* (London: MacMillan 1981), p. 49.

²¹⁶ Mazower, *No Enchanted Palace*, *supra* n. 35, p. 167.

to the formation of “a powerful Anglo-Saxon bloc to dominate the world”.²¹⁷ After India’s independence, Nehru continued to distrust the Americans because of its support for Western powers that still had colonies. Secretary of State Dean Acheson said that Nehru was one of the most difficult people with whom he had ever had to negotiate. The author of a top-secret US report suggested that Nehru’s hostility towards America was due to multiple factors, including his socialism, America’s perceived imperialism, and the fact that Nehru was “a frustrated revolutionary who was still at core an aristocrat despite his professions of commitment to democracy”.²¹⁸

Nehru’s politically combative temperament and his vision of a unified India were instilled in him from childhood in British India where he had been born to a wealthy and politically sophisticated Kashmiri Brahmin family, whose father Motilal was a Congress party stalwart.²¹⁹ The family had left Kashmir in the early eighteenth century to take up service in Delhi under the Mughal Emperor.²²⁰ Educated at Harrow School, one of Britain’s leading public schools for boys, where the rich send their children, and Cambridge University, Nehru was part of the educated elite of British Indians, which included M.K. Gandhi who studied at University College London and Zafrullah Khan who studied at King’s College, London.²²¹ In the 1920s, the young Nehru came under the influence of Gandhi’s politics, whose *satyagraha* (campaign of non-violent resistance against British rule) he had fully supported, and for which he had spent considerable time in gaol.²²² After the death of Motilal in 1931, Nehru became even closer to Gandhi, despite their disagreements over the merits of socialism, western culture, and materialism in the struggle against Britain.²²³ During his travels in Europe, where he hoped his wife would recover from her tuberculosis, Nehru came into contact with Marxist thinkers, and became convinced that Russia, a primarily agricultural country with a large illiterate population, had a great deal to teach India. This made him sympathetic to Communism, an ideology that Gandhi opposed.²²⁴ Despite their differences, Nehru recognised that Gandhi had the ability to

²¹⁷ Benjamin Zachariah, *Nehru* (London: Routledge, 2004), p. 59.

²¹⁸ Judith M. Brown, *Nehru: A Political Life* (New Haven: Yale University Press, 2003), pp. 257-258 (mentioning the comment by Dean Acheson and referencing the top-secret report).

²¹⁹ Denis Judd, *Jawaharlal Nehru* (Cardiff: JPC Books, 1993), p. 1; Zachariah, *Nehru*, *ibid*, p. 11.

²²⁰ Brown, *Nehru: A Political Life*, *supra* n. 218, p. 30. See also, Zachariah, *Nehru*, *ibid*, p. 11 (noting that the family lost its fortune after the 1857 Mutiny).

²²¹ Zachariah, *Nehru*, *ibid*, pp. 17-19, (briefly describing Nehru’s life at Harrow and Cambridge).

²²² Sometimes with his father. See Brown, *Nehru: A Political Life*, *supra* n. 218, p. 65. Judd, *Jawaharlal Nehru*, *supra* n. 219, pp. 12-14; Zachariah, *Nehru*, *ibid*, pp. 48-52.

²²³ Judd, *Jawaharlal Nehru*, *ibid*, p. 1.

²²⁴ Judd, *Jawaharlal Nehru*, *ibid*, pp. 16-17. Zachariah, *Nehru*, *ibid*, pp. 58-61.

touch a wider swathe of the population than any other Indian politician, and that independence would only come through the Congress in alliance with Gandhi.²²⁵

Although Gandhi was opposed to Communism, and particularly to that aspect of Marxist-Leninist thought that advocated armed struggle, in actual fact his basic political philosophy, was not that far removed from that aspect of Marxism that viewed social inequality as a product of the Western capitalist society and its racist modes of thinking. For Gandhi, one of the problems with Communism was that it was still based on Western modes of thinking in that it espoused economic forms of development in which peoples would inevitably be exploited. The only difference was that the economic development it espoused was undertaken through public rather than through private institutions. But for Gandhi modern civilization—whether capitalist or communist—was problematic because they always led to exploitation: For Gandhi true civilisation placed the interest of humankind at the centre and measured its greatness in terms of its ability to produce men and women possessing such distinctive human power as self-determination, autonomy, self-knowledge, self-discipline, and social co-operation. In his opinion, modern civilization did the opposite. By encouraging men and women to alienate their powers to large organizations run by experts, it rendered them passive, helpless, and heteronomous.²²⁶

For Gandhi, capitalism was highly problematic because consumers were manipulated into desiring things they did not need and which were not in their long-term interests. Workers were made to work at subsistence wages under inhuman conditions and given little opportunity to develop their intellectual potential. The weaker races were treated as if they were animals, and the weaker nations were conquered and used as dumping grounds for surplus goods.²²⁷ For Gandhi, communism was also problematic because like capitalism it was based on the materialist view of man and did not represent a new or higher civilization. Rather, it was capitalism's twin and only claimed to offer more of the same. It represented a statist approach to social problems, deified the state, impoverished the individual, and dried up local sources of initiative and energy. By combining both economic and political power in the state, it posed a grave danger to human self-respect and dignity.

²²⁵ Brown, *Nehru: A Political Life*, supra n 218, p. 87.

²²⁶ I am greatly indebted to Bhikhu Parekh for his fascinating study on Gandhi's thought. See Bhikhu Parekh, *Gandhi's Political Philosophy: A Critical Examination* (London: MacMillan, 1989), p. 26

²²⁷ Parekh, *Gandhi's Political Philosophy*, *ibid*, p. 33.

Moreover, it needed a violent revolution to establish it, and such revolutions inevitably led to greater evils than those Communism was designed to eradicate.²²⁸

Whilst Nehru disagreed with many of Gandhi's views, especially his views on development and modern technology, among other things, he was in agreement with his view that modern India needed to develop a path of its own and steer clear from taking sides in the Cold War struggle. Accordingly, Nehru tried to steer India in a direction, which was neither Communist nor capitalist, and this was reflected in his policy of non-alignment. This led to a differentiated approach to international relations that combined the merits of the liberal democratic approach to self-determination (free press, regular elections, rule of law, etc.) with the Marxist-Leninist approach (state control of natural resources, industrialization, free education). Nehru thought that the India he had inherited from Britain was "an odd mixture of medievalism, appalling poverty and misery and a somewhat superficial modernism of the middle classes".²²⁹ Accordingly, Nehru argued that it was necessary to bring modernisation to the masses, by the middle classes understanding and promoting the needs of the masses—very similar to the approach adopted by the USSR and China.²³⁰ But what made Nehru's approach a little difference was his support for those states that tried to maintain their independence from the Anglo-American camp as well as from the Communist camp, even though he was closer to the latter ideologically.

In 1947 and 1949, Nehru inaugurated the process that would eventually lead to the establishment of a non-aligned movement by convening Asian Relations Conferences in New Delhi, which, among other things, supported national liberation movements, condemned racism, and sought the elimination of colonialism.²³¹ Gandhi, Nehru, and Zafrullah Khan, were particularly concerned about their compatriots in South Africa.²³² Thus when South Africa introduced a new piece of anti-Indian legislation—the 1946 Asiatic Land Tenure and Indian Representation Act—Nehru seized on the issue to push his anti-colonial, anti-racism, and pro-self-determination agenda.²³³ The new Bill, while giving South African Indians the right to vote,

²²⁸ Parekh, *Gandhi's Political Philosophy*, *ibid*, p. 136.

²²⁹ Zachariah, *Nehru*, *supra* n. 217, p. 146 quoting from Nehru's *The Discovery of India*.

²³⁰ Zachariah, *Nehru*, *ibid*, p. 146.

²³¹ Datta, *Indian Non-Alignment*, *supra* n. 212, pp. 10-11.

²³² This might also explain why South Africa opposed Zafrullah Khan's election to the International Court. See the letter to Anthony Bevir, India Office, saying that the UK would support Zafrullah Khan's candidature for the International Court and noting that all dominion High Commissioners had supported him except for South Africa, PREM 8/381, 5 February 1946.

²³³ Mazower, *No Enchanted Palace*, *supra* n. 35, p. 170.

qualified this right to educational, and property qualifications, and residence restrictions, which it was feared would create ghettos. Nehru raised the legislation at the UN General Assembly, where it was debated despite South African opposition that the UN had no right to consider the matter since it was an issue within its domestic jurisdiction. The USSR assisted India in preventing the matter from being rendered before the International Court of Justice, which was the route favoured by the US, Britain, and South Africa, since it thought the legal route “would minimise the political importance of the issue and weaken the prestige of the United Nations”.²³⁴ This resulted in the passage of a resolution, which expressed the opinion that the treatment of Indians in South Africa should be in conformity with the international obligations in treaties between the two countries, and under the UN Charter.²³⁵

In 1955, the famous Bandung Conference took place in Indonesia where 340 delegates from 29 Asian and African countries attended.²³⁶ The Conference agreed that “colonialism in all its manifestations is an evil which should speedily be brought to an end” and declared “its full support of the principle of self-determination of peoples and nations as set forth in the Charter of the United Nations”, which it declared was “a prerequisite of the full enjoyment of all fundamental human rights”. The Conference also “deplored the policies and practices of racial segregation and discrimination”, and made special note, in this regard, of “the peoples of African and Indian and Pakistan origin in South Africa”.²³⁷ In 1960, these goals were reformulated in the form of the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the UN. A year later, the non-aligned movement was formally established in Belgrade in Tito’s Yugoslavia.²³⁸ In 1964, the non-aligned movement met in Nasser’s Cairo where, among other issues, it condemned imperialism in the Middle East, the racist minority regime in Southern Rhodesia, opposed apartheid in South Africa and South West Africa, and called for boycotts and sanctions against the apartheid government. The Conference also expressed its sympathy with the problem of divided nations. It exhorted the countries concerned to seek a just and lasting solution in order to achieve the unification of their

²³⁴ Mazower, *ibid*, pp. 178-179.

²³⁵ GA Res. 44 (1), 8 December 1946.

²³⁶ Odette Jankowitsch and Karl Sauvant (eds.), *The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries, Volume 1* (New York: Oceana Publications, 1978), p. lvii.

²³⁷ The Final Communiqué, April 18-21, 1955, in *The Third World Without Superpowers*, *ibid*, p. lxii.

²³⁸ First Conference of Heads of State or Government of Non-Aligned Countries, Declaration, Belgrade, 1-6 September, 1961, in *The Third World Without Superpowers*, *ibid*, p. 3.

territories by peaceful means.²³⁹ No doubt that Nehru might have been thinking of his own country, Nasser of Palestine, and Nkrumah of South and South-West Africa.

Indeed throughout Southern Africa attempts were employed by the respective white minority communities to maintain political power and thus to subordinate the political aspirations of the black majority. In South Africa this was accomplished at first by “petty apartheid”, and later by the establishment of the Homelands—pejoratively referred to as “Bantustans”. In Rhodesia, white supremacy was accomplished by manipulating the franchise so that only white people were deemed eligible to vote in general elections. Whilst the international community had previously tolerated the efforts by Rhodesia and South Africa to maintain minority rule, these policies were no longer considered politically acceptable following the adoption of the Colonial Declaration in 1960. As more African nations joined the UN, a competition for political power opened up between the US and the USSR who lobbied each of these countries to join their respective rival camps. The US realised that it would not win this contest if the Jim Crow laws, which were mentioned in Part Two, and which were still in force in many states, were not fundamentally reformed. How could the US ever hope to influence the newly emerging African states, when its Ambassadors were refused food in restaurants, beds in motels, the use of public transportation, and whose children could only attend segregated schools and universities? Embarrassing incidents like these provided fodder for the Soviet propaganda mill, which it used to great effect in the newly emerging nations.²⁴⁰

It was out of this ideological contest between the US and the USSR and the associated battle for ideas, that the liberal interpretation of self-determination would ultimately be rejected in favour of the non-aligned understanding of self-determination that was colour blind and that was predicated on equality and majority rule. This found expression in several provisions of UN General Assembly resolution 1541 on the concepts of independence, free association, and integration, which for the first time in the history of international relations used phrases such as “a full measure of self-government”, “the wishes of the people”, “democratic means”, “equal status and rights of citizenship”, “democratic processes”, and “universal adult suffrage” in

²³⁹ Second Conference of Heads of State or Government of Non-Aligned Countries, Programme for Peace and International Co-operation, Cairo, 5-10 October, 1964, in *The Third World Without Superpowers*, *ibid*, pp. 44-52.

²⁴⁰ See Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (New Jersey: Princeton University Press, 2000), particularly Chapter 5, pp. 152-202.

association with the rights that were being granted to non-European peoples.²⁴¹ As Britain soon found out, much to its consternation, the new Kennedy administration was determined to do what it could “to show that they still stand by the beliefs of the Founding Fathers in the rights of nations to freedom and independence”.²⁴² Consequently, the new US administration would not guarantee that it would abstain on future UN resolutions that condemned colonialism as they had done when they abstained from voting in favour of UN General Assembly resolution 1514.²⁴³ Paralleling this ideological contest on the international plane were the efforts of the civil rights movement in the US, where a range of techniques were used to overhaul the Jim Crow laws through the use of public protests, strikes, and court room battles. By the early 1960s, segregation had become such an embarrassment that the US State Department began to actively issue amicus briefs in race relations cases up and down the country advocating civil rights, including before the US Supreme Court.²⁴⁴

The 1960 Colonial Declaration in context

British racial policy in Rhodesia provided the catalyst that provoked the politics that culminated in the Colonial Declaration, widely heralded by international lawyers as being the first international document to recognise that “all peoples have a right to self-determination”.²⁴⁵ When that declaration was being negotiated, drafted, and debated, a heated exchange broke out mired by Cold War politics and the North-South divide in which the non-aligned states attacked the policies of the colonial powers. Significantly, it was the USSR, which paved the way for the adoption of the Declaration.²⁴⁶ Aware that seventeen colonial territories were scheduled to gain their independence in time for admission to the fifteenth session of the UN General Assembly, Soviet Premier Nikita Khrushchev (1894-1971) seized the initiative in what one US diplomat described as “a brilliant tactical manoeuvre” by allocating the question of colonialism directly in plenary session, which was more productive of

²⁴¹ GA Res. 1514, (XV), 15 Dec. 1960.

²⁴² See “US Attitude on Colonialism”, Telegram from Washington to Foreign Office, 1 February, 1961, FO 371/160902.

²⁴³ “US Attitude on Colonialism”, *ibid.*

²⁴⁴ Dudziak, *Cold War Civil Rights*, *supra* n. 240, particularly Chapter 3, pp. 79-114.

²⁴⁵ On the Rhodesian problem see Jericho Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis* (Oxford: Clarendon Press, 1985).

²⁴⁶ Statement by Mr. Zorin, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 939th plenary meeting, 7 Dec. 1960, p. 1187, para. 2.

world headlines, rather than in the Committee, which had been the custom.²⁴⁷ The United Kingdom was particularly perturbed by this strategy since it was the state with the largest number of colonial possessions.²⁴⁸ Although it failed in preventing the Declaration from being debated and adopted, the British Foreign Secretary David Ormsby-Gore (1918-1985), did his best to defend the British colonial record in the UN debate by launching a full frontal assault on the policies of the USSR.

Ormsby-Gore told the Assembly that since 1939, “some 500 million people, formerly under British rule, have achieved freedom and independence, and their representatives sit here”. In contrast, in the same period, “the whole or part of six countries with a population of 22 million, have been forcibly incorporated into the Soviet Union; they include the world’s three newest colonies: Lithuania, Estonia and Latvia”.²⁴⁹ In a sharp exchange of words, Ormsby-Gore’s depiction of British colonial rule bringing millions of people freedom was immediately seized upon by Bulgaria and the Soviet Union who pointed out that Britain only granted those territories independence because it no longer had the money or the military capacity to keep order where wars of national liberation were being waged against it.²⁵⁰ The delegate from Bulgaria even read out aloud extracts from Sir Stafford Cripps and Winston Churchill in which they announced that Britain would have preferred to have stayed in British India but that that they had no choice but to withdraw since they did not possess the military power necessary to maintain their colonial domination of that country.²⁵¹ The Soviet delegate was characteristically blunter, reminding Ormsby-Gore, an aristocrat, whose father had also been a British Colonial Secretary, one who had played a crucial role in nurturing Zionism in Palestine, that many of the leaders of the national liberation movements in India, Burma, Pakistan, and Ghana had spent a

²⁴⁷ See David A. Kay, *The New Nations in the United Nations, 1960-1967* (New York: Columbia University Press, 1970), p. 151.

²⁴⁸ Kay, *The New Nations in the United Nations*, *ibid.*, p. 152.

²⁴⁹ Statement by Mr. Ormsby-Gore, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 925th plenary meeting, 28 Nov. 1960, p. 982, para. 19.

²⁵⁰ According to Anita Inder Singh, Britain’s decision to announce that it would quit India in 1946 was because of the Empire’s inability to deal with large-scale disturbances there. The depletion of manpower, of money, and the loss of loyalty in the Indian Civil Service after the Second World War were all contributing factors. See Singh, *The Origins of the Partition*, *supra* n. 138, pp. 244-245.

²⁵¹ Statement by Mr. Tarabanov, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 929th plenary meeting, 30 Nov. 1960, p. 1037-1038, paras. 48-57.

good deal of their adult lives languishing in British prisons.²⁵² He then mocked the British colonial record in Africa marked by its peculiar penchant for minority rule:

So far as concerns East Africa, which Mr. Ormsby-Gore mentioned, the obvious aim of the United Kingdom Government's policy is to create States or Unions on the lines of the Union of South Africa, that is, ostensibly independent States in which all power and all positions of control are in the hands of the European settlers who constitute a quite insignificant minority of the population. Instead of satisfying the just demands of the peoples of Northern and Southern Rhodesia [modern-day Zambia and modern-day Zimbabwe] and of Nyasaland [modern-day Malawi], the British colonists have in defiance of the wishes of these peoples set up the so-called Central African Federation [i.e. a federation of modern-day Zambia, Zimbabwe, and Malawi], and have extended the power of the upper stratum of the white settlers in Southern Rhodesia to cover Nyasaland [Malawi] and Northern Rhodesia. By this means they hope to carry through their plan to establish in the centre of Africa another racist State on the lines of the Union of South Africa...In its territories in East Africa [Kenya, Uganda, Tanganyika], the United Kingdom has carried out measures by means of which all political power and control has been placed in the hands of the European minority. Thus the "racial harmony" which the colonialists are attempting to ensure in Africa, where the population is 97 per cent African and only 3 per non-African, is one under which the 3 per cent of Europeans and other outsiders are to dominate the 97 per cent Africans, within the framework of so-called independent States.²⁵³

The Soviet delegate added that in Southern Rhodesia "the Europeans who make up no more than 9 per cent of the country's population, now own more than half the total land area, while the Africans, or 90 per cent of the population, are crowded into 22 per cent of the territory's area".²⁵⁴ In highlighting the UK's support for minority rule, the USSR was well aware that it was hitting at the Achilles' heel of British colonial policy, which as explained in Part Two, was based on the principle of aristocracy, the notion of a social contract, and minority rule, which did not go down well with its former colonies, and those still seeking independence. Here we can see the sharpest contrast between the Anglo-American and the Non-Aligned approaches to self-determination. The USSR had clearly abandoned its early support for the liberal approach to self-determination, which it had articulated in Palestine in 1947, by comparing the situation there to its own nationality problem, and was now articulating an understanding of self-determination consistent with the non-aligned approach.

²⁵² Statement by Mr. Zorin, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 939th plenary meeting, 7 Dec. 1960, p. 1189, para. 19.

²⁵³ Statement by Mr. Zorin, *ibid*, 939th plenary meeting, 7 Dec. 1960, pp. 1190-1191, para. 25.

²⁵⁴ Statement by Mr. Zorin, *ibid*, 939th plenary meeting, 7 Dec. 1960, p. 1191, para. 26.

Implicit in the liberal approach to self-determination was the assumption that the white population was in a better position to assume the responsibility of “good government” than the black majority. This might explain the language used by the Rhodesian government when it issued its declaration of independence in 1965, in which it becomes apparent that the people who drafted that declaration only considered white Rhodesians as belonging to the nation. For only white Rhodesians could have “demonstrated their loyalty to the Crown and to their kith and kin in the United Kingdom and elsewhere through two world wars” and were “prepared to shed their blood and give of their substance” for “freedom-loving people”. Despite opting to secede from the UK, loyalty to the British Crown was, however, still key to Rhodesian identity, thus the declaration ended with the words, “God Save The Queen”.²⁵⁵ Thus previous British policy had been reversed. Rather than self-identifying with the European minority and proposing partition to secure that identity, instead the white minority in Rhodesia sought to maintain its identity with the United Kingdom, by maintaining the pre-existing economic, political, and social hierarchy.

The attempt to prohibit partition

Thirteen years after the UN General Assembly passed its resolution recommending a Plan of Partition for Palestine with Economic Union in 1947, that same body would implicitly declare that any further attempts at partition would be contrary to the UN Charter. In the words of the Colonial Declaration: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”.²⁵⁶ Whilst some scholars have interpreted paragraph 6 of that Declaration to amount to a prohibition of secession,²⁵⁷ a closer analysis of the historical context reveals that its drafters had partition, not just secession, in mind. Although partition and secession are linked, the key difference is that the former is externally imposed by a third actor, which results in the division of a nation without its consent. When paragraph 6 is read in conjunction with paragraph 3, it is apparent that in awarding independence, the colonial power was not to partition the territory even if in its

²⁵⁵ For the full text of the declaration see 5 *International Legal Materials* (1966), pp. 230-231.

²⁵⁶ See Art. 6, UN GA Res. 1514, 14 December 1960.

²⁵⁷ See e.g. Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986), p. 101; and Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford: Oxford University Press, 2002), p. 182.

opinion, the minority community was better prepared than the majority, to assume the burden of self-government, because that community was in its view, more advanced in terms of political, economic, social, or educational development, than the majority.²⁵⁸

During the debate in the UN General Assembly on the Colonial Declaration, several states openly singled out paragraph 6 for approval. Unlike paragraphs 3, 4, and 5 of that Declaration which attracted criticism from the colonial powers, paragraph 6 was adopted without controversy.²⁵⁹ Cyprus expressed its view that paragraph 6 was “vital” and “essential in order to counter the consequences of the policy of ‘divide and rule’”.²⁶⁰ Even Pakistan admitted that the provision enunciated in paragraph 6 embodied “an important safeguard”.²⁶¹ The Republic of Ireland concurred: “In Ireland, we have not yet recovered the historic unity of our national territory. We therefore note with particular satisfaction the principle declared in operative paragraph 6...We have every hope that, with the growth of goodwill and better understanding, the unity of our country will be recovered with reasonable speed and in a peaceful and orderly manner, in keeping with the interests of the Irish nation as a whole, and of the United Kingdom as well”.²⁶² Morocco explained that when paragraph 6 was discussed its drafters “had in mind a long list of examples of the partitioning and disruption of the unity of national territories”, although it explicitly mentioned only three examples: Palestine, Katanga, and Mauritania.²⁶³

Article 6 of the Colonial Declaration must be read in light of the provision that was subsequently adopted on self-determination in the Declaration on Friendly Relations in 1970.²⁶⁴ The exact phraseology used in the Declaration on Friendly

²⁵⁸ Paragraph 3 provides that “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence”.

²⁵⁹ Even Michla Pomerance, a fierce critic of the UN, and especially of the very idea of self-determination, admitted that paragraph 6 was “more firmly premised on Charter principles” than most of the other paragraphs in resolution 1514. See Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine of the United Nations* (The Hague: Martinus Nijhoff, 1982), p. 12.

²⁶⁰ Statement by Mr. Rossides, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 945th plenary meeting, 13 Dec. 1960, p. 1255, paras. 92 and 93.

²⁶¹ Statement by Mr. Hasan, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 930th plenary meeting, 1 Dec. 1960, p. 1059, para. 73.

²⁶² Statement by Mr. Aiken, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 935th plenary meeting, 5 Dec. 1960, p. 1139, paras. 112 and 113.

²⁶³ Statement by Mr. Ben Aboud, Agenda item 87: Declaration on the granting of independence to colonial countries and peoples, UN General Assembly, Fifteenth Session, Official Records, 947th plenary meeting, 14 Dec. 1960, p. 1284, para. 158-161.

²⁶⁴ GA Res. 2625, 24 Oct. 1970.

Relations departed slightly from paragraph 6 in stipulating: “Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of *any other* state or country. It is noteworthy that the prohibition of partition in the Declaration on Friendly Relations applied to “other states” and “countries”. In other words, it applied to the situation when a third party or agency made arrangements to divide *another* state or country as distinguished from secession i.e. when part of an existing state breaks away.²⁶⁵ This would have precluded the partitions of Ireland, India, and Palestine that were undertaken by a third party i.e. the UK or by an external agency i.e. the UN. The reference to “a country” was broad enough to apply to any attempts to internally divide a nation and disrupt its territorial integrity, thus precluding the establishment of Homelands in Southern Africa.

The reference to the words “country” and “state” in the Colonial Declaration and the Declaration on Friendly Relations were deliberate.²⁶⁶ The term “country” was broad enough to include any territory that had not yet attained independence in the form of the legal fiction of a state but that broadly constituted a national or political unit. The use of the word state covered those national entities that were already independent. Thus the drafters of these provisions drew a link between a people seeking political control over the integrity of its territory in exercising its right to self-determination and a people who already had acquired independence by exercising self-determination and were constituted as a state. Neither could be divided if the division was aimed at the partial or total disruption of the national unity and territorial integrity of a state or a country. Thus partition was not supposed to affect the national identity of a particular political unit as expressed geographically, whether that particular unit was sovereign or semi-sovereign in the eyes of the colonial powers.

5. South Africa’s Homelands and the failure of partition

The heyday of separate development in South Africa began in 1948 with the election of National Government, which campaigned on a platform of further white-black

²⁶⁵ See The Report of the Special Committee on Principle of International Law Concerning Friendly Relations and Co-operation Among States, (5th Report), General Assembly, Official Records, Twenty-Fourth Session Supplement No. 19, UN Doc. A/7619), 1969. p. 62, para. 179.

²⁶⁶ See The Report of the Special Committee, *ibid*, p. 62, para. 178.

segregation.²⁶⁷ However, as explained in Part Two, the legal and political infrastructure of apartheid was established in South Africa when Britain was the imperial power, and prior to the creation of the Union of South Africa in 1910. After the National Party gained power two divergent views on African policy were given expression in two reports known as the Fagan Report and the Tomlinson Report. The Fagan Report insisted that any colour policy ought to be based on the assumption that there would eventually be a multi-racial society in South Africa in which “the European and Native communities scattered throughout the country...will permanently continue to exist side by side economically intertwined and should therefore be accepted as permanent and as being part of a big machine”.²⁶⁸ In contrast, the Tomlinson Report urged a separation of the races into national homelands—a policy which the Odendaal Commission would also recommend for South West Africa.²⁶⁹ It was the Tomlinson Report of 1954, officially known as “the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa” (hereafter, the “Tomlinson Commission”) that was adopted as official government policy. As Gideon Jacobs explained, “the composition and terms of reference of the Commission made its findings in favour of the Government’s ‘apartheid’ or separate development policy a foregone conclusion”.²⁷⁰ Consequently, the Tomlinson Commission, after observing that the partition of British India “was somewhat analogous to our own situation” recommended the creation of separate Bantu Homelands throughout the Union of South Africa to prevent racial conflict and to maintain white supremacy.²⁷¹ Several justifications were advanced for this policy and in opposition to integration, including the fear that the ultimate result of the two races intermixing in South Africa would be “complete racial assimilation, leading to the creation, out of the two original communities, of a new biological entity”.²⁷²

²⁶⁷ For an insightful and concise history of apartheid in South Africa see Nigel Worden, *The Making of Modern South Africa: Conquest, Apartheid, Democracy* (London: Blackwell, 2007).

²⁶⁸ See Gideon Jacobs, “Hazards of the Homeland Policy”, in N.J. Rhoadie (ed.), *South African Dialogue: Contrasts in South African Thinking on Basic Race Issues* (Johannesburg: McGraw-Hill Book Company, 1972), p. 151 at pp. 153-154.

²⁶⁹ See the Report of the Commission of Enquiry into South West African Affairs, 1962-63, RP 12 / 1964. On South West Africa controversy see Anthony A. D’Amato, “The Bantustan Proposals for South-West Africa”, 4 *The Journal of Modern African Studies* (1966), pp. 177-192.

²⁷⁰ Jacobs, “Hazards of the Homeland Policy”, supra n. 268, p. 154.

²⁷¹ See Summary of the Report of the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa (Pretoria: The Government Printer, 1955), p. 104, para. 24.

²⁷² See “Consequences of Integration”, *ibid.*, p. 102, (v).

However, the underlying reason for the homeland policy was the fear of eventual African hegemony due to their superiority in numbers. In this regard the Commission's fears were similar to those of John Locke who, as mentioned in Part Two, helped to draft the preamble to *The Fundamental Constitutions of Carolina* in 1669, which sought to avoid "erecting a numerous democracy". The Tomlinson Commission likewise sought to avoid erecting a numerous democracy by enfranchising Africans since it feared that were they given equal civil and political rights in a single South African state, political power would pass into their hands:

At whatever speed, and in whatever manner the evolutionary process of integration and equalisation between European and Bantu might take place, there can be no doubt as to the ultimate outcome in the political sphere, namely that the control of political power will pass into the hands of the Bantu.

It is possible that European paramountcy might be maintained for some time, by manipulation of the franchise qualifications; but without a doubt the government of the country will eventually be exercised by those elected by the majority of voters. Theoretically, it is possible that the non-Europeans who then constitute the majority of voters, might prefer to have the country ruled by Europeans. Such a supposition appears highly doubtful, and certainly improbable. But, even if such were to be the case, the rulers of a democratic country would have to carry out the will of the majority of the people, which means to say, that the European orientation of our legislation and government will eventually disappear.²⁷³

The Tomlinson Commission thus opted to create Bantu Homelands as a way in which both whites and blacks could exercise their respective, but separate, rights to self-determination in homelands that would resolve the majority-minority conundrum. The Commission recognized that "on the part of the European population, there is an unshakeable resolve to maintain their right of self-determination as a national and racial entity; while on the part of the Bantu, there is a growing conviction that they are entitled to, and there is an increasing demand for, the fruits of integration, including an ever-greater share in the control of the country".²⁷⁴ Accordingly, the Commission interpreted what they understood by the term "self-determination" so that they could align it with their policy of separate development. The Commission applied the idea of self-determination to both communities in separate territorial and political entities linked by an economic union in a single South Africa. This form of *separate* self-determination was similar to the Anglo-American model in that it focused on the

²⁷³ Ibid, p. 103, para. 17.

²⁷⁴ Ibid, p. 105.

separate identity of the communities rather than on population statistics or the territorial integrity of South Africa as a whole. In the context of decolonization this would allow black South Africans to develop according to the customs and traditions of each of the respective communities in which they could develop at their own pace. South Africa hoped that its policy of separate development would produce a new version of apartheid in line with contemporary international standards.²⁷⁵

Presenting the Homeland policy to the UN

In September 1959, South Africa articulated its policy of separate development before the UN by explaining that it was not a new policy, but one that had been pursued by Jan Smuts, who drafted the UN Charter.²⁷⁶ The South African representative explained that both the Bantu who arrived from central Africa and the white settlers who arrived from Europe came to South Africa in the seventeenth century as immigrants. Thus, “the often repeated assertion that the present European descended population of South Africa is aliens and settlers...could equally be applied to the Bantu group that moved down the East Coast from Central Africa later to cross the Limpopo River”.²⁷⁷ As more African states joined the UN and attacked white South Africans as being alien to the African continent, this view would be increasingly reasserted in later sessions of the UN when South Africa forcefully reasserted its view that “...the White population of South Africa is a permanent one whose ancestors came to the country more than three hundred years ago. We are not “colonists”, as is so often erroneously alleged. We cannot return to the countries of our forefathers. We are strangers in those countries, just as the Roosevelts, the Eisenhowers, the Diefenbakers and the Vanderbilts are today strangers in the countries of their forebears”.²⁷⁸ Conversely, the South African representative argued that “...the Bantu, or black, peoples of South Africa are not the original inhabitants of the country. Their ancestors moved southwards from East and Central Africa and crossed the Limpopo River at about the same time as the original Dutch settlers arrived at the Cape”.²⁷⁹

²⁷⁵ See John Dugard, *International Law: A South African Perspective* (Cape Town: Juta, 2000), p. 446.

²⁷⁶ UN General Assembly, Official Records, 14 (1959), 811th plenary meeting—28 September 1959 Mr. Louw (Union of South Africa), pp. 230-231, paras. 64-67.

²⁷⁷ Mr. Louw, *ibid*, paras. 36-7.

²⁷⁸ UN General Assembly, Official Records, 16 (1961), 1033rd plenary meeting, 11 October 1961, Mr. Louw (Republic of South Africa), p. 392, para. 110.

²⁷⁹ Mr. Louw (Republic of South Africa), *ibid*, p. 392, para. 111.

It was directly due to the external pressure being applied from the UN, other African and socialist countries, that in 1959, South Africa passed the Promotion of Bantu Self-Government Act and removed three “native” representatives from the House of Assembly.²⁸⁰ The preamble to this Act provided: “Whereas the Bantu peoples of the Union of South Africa do not constitute a homogenous people, but form separate national units on the basis of language and culture; and whereas it is desirable for the welfare and progress of said peoples to afford recognition to the various national units and to provide for their gradual development within their own areas to self-governing units on the basis of Bantu systems of government ...”²⁸¹ The Act established a number of white Commissioners-General to act as agents of the Central Government in the homelands, and set up eight Bantu authorities.²⁸² It also completed the process of removing African’s civil rights in South Africa with the elimination of the native representatives from the National Assembly.²⁸³ After the Sharpeville massacre in 1960, and after calls to be expelled from the UN, South Africa became a Republic, and its statements became increasingly defensive. The South African representative to the UN complained that the annual sessions of the General Assembly have “provided opportunities for international intrigue and for the formation of racial, geographical, and ideological blocs. Not content with an East-West rivalry, a so called third force seems to be in the process of establishment”.²⁸⁴ Noting that one of the outstanding features of events in Africa had been the twenty-eight African territories that attained independence during the past three years, South Africa attacked the view that representative government was suitable for non-Europeans:

The leaders of the anti-colonial campaign here in the United States, in Europe and also in the General Assembly, labored under the mistaken impression that the parliamentary system of government, born in Britain and adopted by other Western countries, including the United States of America, could be grafted on to the traditional customs and practices of the African peoples—or, shall I say, transplanted to the alien soil of age-old African tradition. It simply does not work that way ... It is a foreign plant that will not thrive on African soil.²⁸⁵

²⁸⁰ See Barbara Rogers, *Divide and Rule: South Africa's Bantustans* (London: International and Defence Aid Fund, 1976), p. 8.

²⁸¹ Quoted in James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), p. 339.

²⁸² See Rogers, *Divide and Rule*, supra n. 280, p. 21.

²⁸³ *Ibid.*

²⁸⁴ UN General Assembly, Official Records, 16 (1961), 1033rd plenary meeting, 11 October 1961, Mr. Louw (Republic of South Africa), p. 388, para. 65.

²⁸⁵ Mr. Louw (Republic of South Africa), *ibid.*, p. 390, para. 86.

This was an argument that was strikingly similar to the arguments which had been advanced by the British colonists in the United States to deny equality to African-Americans, by Balfour to deny granting Irish nationalists self-determination over the whole of Ireland, by the Houses of Parliament in Britain to deny the Arabs the right of self-government in Palestine, and by the Muslim League at its annual sessions in 1930 and 1940 in favour of the partition of British India. Indeed, as in the US, in Ireland, Palestine, and India, at the heart of this argument was the fear of majority rule. For in a parliamentary democracy, political power passes into the hands of the community that could ensure a majority of votes in a general election. This was precisely the prospect that the South African government wanted to avoid. As Dr. Verwoed explained in a 1961 Parliamentary debate in Pretoria, the Homelands were:

... a form of fragmentation which we would not have liked if we were able to avoid it. In light of the pressure being exerted on South Africa there is, however, no doubt that eventually this will have to be done, thereby buying for the white man his freedom and the right to retain domination in what is his country ... If the Whites could have continued to rule over everybody, with no danger to themselves, they would certainly have chosen to do so. However, we have to bear in mind the new views in regard to human rights ... the power of the world and world opinion and our desire to preserve ourselves.²⁸⁶

In 1963, South Africa began to articulate a more sophisticated argument before the UN in support of its Homeland policy, which arose with the announcement that the first of these, the Transkei, would become a self-governing independent homeland.²⁸⁷ As the South African representative told the General Assembly “Africa is not the exclusive preserve of any one race, whatever the general image abroad may be”. Rather, “Africa has over the millennia of recorded history been the home of many widely differing nations.”²⁸⁸ One of the consequences of this was that “the South Africans of European origin have been forged into a single and a distinctive nation. It is no longer a European nation although it is closely linked with Western culture and civilization. It is a nation of Africa, with its roots and traditions deeply embedded in the soil of that continent”.²⁸⁹ Accordingly, “...in claiming for ourselves a distinctive

²⁸⁶ 107 House of Assembly Debates, cols. 4191-93, 10 April, 1961, cited in Dugard, *International Law: A South African Perspective*, supra n. 275, p. 447.

²⁸⁷ For further reading on the Transkei see Gwendolen M. Carter, Thomas Karis and Newell Stultz, *South Africa's Transkei: The Politics of Domestic Colonialism* (London: Heinemann, 1967).

²⁸⁸ UN General Assembly, Official Records 18 (1963), 1236th Plenary Meetings, 10 October 1963, Mr. Jooste (Republic of South Africa), p. 3, para. 25.

²⁸⁹ Mr. Jooste (Republic of South Africa), *ibid*, p. 3, para. 30.

destiny of our own, we do not deny to the emerging Bantu nations their right to achieve distinctive destinies of their own—each in his own homeland with its own culture, heritage, language and concept of nationhood”.²⁹⁰ It was upon this basis that “each nation” would be afforded the opportunity of achieving full nationhood “within its own traditional homeland with full political equality”.²⁹¹ In the following year, South Africa’s representatives at the UN described this policy in more detail by arguing that South Africa was a multinational rather than a multiracial country, in which the whites, like the Bantu, were a part of Africa. Starting from the premise that whites and not only Africans were also a part of Africa, the representative declared: “We [referring to white South Africans] have been part of Africa for 300 years. And, like any other nation, we too are entitled to insist upon our right of self-determination...”²⁹² This was, in many respects, a reformulation of the argument advanced by the Muslim League in India i.e. that Indian Muslims were not a minority, but a nation. Accordingly, being a nation, white South Africans were entitled to self-determination in South Africa despite only forming a minuscule minority of the population. As the South African representative told the General Assembly:

We are ... not the only nation within the borders of South Africa, living in a traditional territory of its own. For South Africa is, in fact and in the first place, a multinational country rather than merely a multiracial country. Apart from the South African nation of European descent, it includes the homelands of a number of other nations having their own separate identities, each with its own undeniable right to separate nationhood in a land which has always likewise been its own. Here I refer to the various Bantu nations, differing from one another in language, culture, traditions and in everything else that determines national identities, rights and aspirations—differing as do other nations of the world, of whatever race, colour or creed, on whatever continent they may be found. Because of what has happened in the course of history, all these nations are at present still under the sovereignty of the South African Parliament, but progressively they are developing towards self-government and ultimate independent statehood ... our problem in South Africa is different from the so-called racial problems of certain other countries with multiracial populations. In those countries a multiracial structure is not accompanied, as with us, by a multinational character. There may be problems of interracial adjustment, but these are questions of adjustments within the ambit of a single nationhood. The crucial difference is this: our task in South Africa is not primarily that of solving a problem of races; it is a problem of nations, a

²⁹⁰ Mr. Jooste (Republic of South Africa), *ibid*, p. 3, para. 31.

²⁹¹ Mr. Jooste (Republic of South Africa), *ibid*, p. 3, para. 32.

²⁹² UN General Assembly, Official Records 19 (1964-5), 1308th Plenary Meetings, 21 December 1964, Mr. Muller (South Africa), p. 3, paras. 24.

problem of bringing about a situation where peaceful coexistence of the various nationals living in our country will be possible.²⁹³

South Africa cautioned that the multiracial policy being advocated by its critics would “lead to strife and violence”, which would be “in conflict with the Charter”. In its view, a fully integrated multiracial society would completely ignore the rights of the various distinctive nations comprising multinational South Africa.²⁹⁴ Perhaps, anticipating the kind of criticism that was levelled at the UN Partition Plan for Palestine in 1947, South Africa, in advocating eventual independence for the Transkei, stressed that it was “situated in the heavier rainfall belt and in one of the most fertile regions of the country, nearly 17,000 square miles in area”. Accordingly, South Africa justified the establishment of the Transkei before a sceptical UN on this basis as well as on the fact that “the people who will exercise their full political rights as citizens of that country, namely, the Xhosa nation which comprises some 3 million people, constitute almost one third of our total Bantu population”.²⁹⁵ In advancing this argument, South Africa hoped to avoid the odium incurred upon Rhodesia which had opted for the policy of manipulating the franchise to ensure white supremacy.

Accordingly, South Africa announced that ten other homelands were to be established in which each of the South African “nations” would be able to exercise their respect rights to self-determination. These included, in addition to the Transkei, Bophuthatswana, Ciskei, Lebowa, Venda, Gazankulu, Qwaqwa, KaNgwane, KwaNdebele, and KwaZulu. In December 1963, the Transkei was granted “self-government” status and in 1976 it was declared “independent”. In the following years, three other Homelands were also declared independent: Bophutatswana (1977), Venda (1979) and Ciskei (1981). The situation in South Africa was similar in South West Africa, where in 1964 the Odendaal Commission recommended that 40.07 per cent of the territory be allocated for non-white homelands²⁹⁶ whilst the whites were allocated control of 43.22 per cent of the land, even though the majority of the population was African.²⁹⁷ Moreover, the bulk of the industrial and mineral wealth

²⁹³ Mr. Muller (South Africa), *ibid*, p. 3, paras. 25-26.

²⁹⁴ Mr. Muller (South Africa), *ibid*, p. 3, para. 28.

²⁹⁵ Mr. Jooste (Republic of South Africa), *ibid*, pp. 4-5, para. 43.

²⁹⁶ See John Dugard, *The Southwest Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations*, (Berkeley: University of California Press, 1973), p. 238 (citing UN Monthly Chronicle, June 1964, pp. 33 ff.)

²⁹⁷ *Ibid*, see also, I.E. Sagay, *The Legal Aspects of the Namibian Dispute* (Ile Ife: University of Ife Press, 1975), p. 359. In 1965, the UN General Assembly added its protests to that of the Special Committee of 24. GA Res. 2074 (XX), 17 December 1965.

was situated in the areas allocated to the European population.²⁹⁸ In 1968, the South African Government passed the Development of the Self-Government for Native Nations in South-West Africa Act and the homelands established there were divided into ten blocks: Basterland, Bushmanland, Damaraland, East Caprivi, Hereroland, Kaokoland, Kavangoland, Namaland, Ovamboland and Tswanaland—although only East Caprivi, Hereroland, and Kavangoland, were granted self-rule.²⁹⁹

The rejection of the Homelands

In 1971, the UN General Assembly denounced the policy “artificially to divide the African people into ‘nations’ according to their tribal origins” and justify “the establishment of non-contiguous Bantu homelands on that basis” and condemned “the establishment of Bantu homelands and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to territorial integrity of the countries and the unity of their peoples”.³⁰⁰ Two days after the granting of “independence” to Transkei, the UN General Assembly adopted resolution 31/6A (1976), which condemned “the establishment of Bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights”. It further rejected Transkei’s independence as “invalid”, and called upon all governments “to deny any form of recognition to the so-called independent Transkei”. This call for collective non-recognition of the Transkei would be endorsed by the UN Security Council in resolutions 402 (1976) and 407 (1977) when it condemned South Africa for trying to coerce Lesotho to recognise them through closing the border crossings, harassing its nationals, and through applying various forms of economic pressure.³⁰¹ Similar resolutions and denunciations

²⁹⁸ Malcolm Shaw, *Title to Territory in Africa*, supra n. 257, p. 106.

²⁹⁹ See Sagay, *Legal Aspects of the Namibian Dispute*, supra n. 297, pp. 363-369 (describing the homelands of Ovamboland, Kavangoland, Damaraland, Hereroland, the Caprivi Strip, Bushmanland, Rehoboth Gebiet and Namaland).

³⁰⁰ General Assembly Resolution 2775 of 29 November 1971.

³⁰¹ See SC Res. 402, 22 December 1976 and SC Res. 407, 25 May 1977. See Geoffrey E. Norman, “The Transkei: South Africa’s Illegitimate Child” 12 *New England Law Review* (1976–77), pp. 585-646; Donald E. de Kieffer and David A. Hartquist, “Transkei: A Legitimate Birth” 13 *New England Law Review* (1977–78), pp. 428-452; Geoffrey E. Norman, “The Transkei Revisited” 13 *New England Law Review* (1977–78), pp. 792-801; and Merrie Faye Watkin, “Transkei: An Analysis of the Practice of Recognition – Political or Legal?” 18 *Harvard International Law Journal* (1977), pp. 605-627.

were passed by the UN General Assembly calling on all states not to recognise the “independence” of Bophuthatswana in 1977, Venda in 1979, and Ciskei in 1981.³⁰²

International rejection of the Bantustan strategy in Namibia was equally categorical. For instance, in 1965, the UN General Assembly endorsed the findings of the report of the Special Committee on Decolonization, which had condemned the Odendaal Commission for South-West Africa, which had approved of establishing Black Homelands.³⁰³ The UN General Assembly stressed that it considered “any attempt to partition the Territory [of South West Africa] or to take any unilateral action, directly or indirectly, preparatory thereto constitutes a violation of the Mandate [for South West Africa] and of resolution 1514 (XV)”.³⁰⁴ In 1966, the UN General Assembly terminated the Mandate of South Africa over Namibia.³⁰⁵ In 1968, after the South African parliament passed the Development of Self-Government in South-West Africa Act, the UN General Assembly denounced the black self-government plans as being designed to “destroy the national unity and territorial integrity of Namibia”.³⁰⁶ The UN Security Council described the establishment of Bantustans in Namibia as “contrary to the provisions of the United Nations Charter” and condemned the Native Nations Act as “a violation of the relevant resolutions of the General Assembly”.³⁰⁷ In 1976, the UN Security Council declared that, “in order that the people of Namibia may be enabled freely to determine their own future, it is imperative that free elections under the supervision and control of the United Nations be held *for the whole* of Namibia as one political entity”.³⁰⁸ In paragraph 11 (c) of that resolution, the UN Security Council called on the South African Government to abolish the application to South West Africa of “all racially discriminatory Bantustans and homelands”.³⁰⁹

With the collapse of the apartheid system of government and successful negotiations leading to a transfer of power, the Security Council in 1994 welcomed “the establishment of a united, non-racial and democratic government for South

³⁰² See John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987), pp. 98-108.

³⁰³ Shaw, *Title to Territory in Africa*, supra n. 257, p. 106.

³⁰⁴ GA Res. 2074, 17 Dec. 1965, para. 5.

³⁰⁵ Ibid. See also, GA Res. 2145 (XXI) of 27 October 1966 (where the General Assembly terminated the Mandate of South West Africa and assumed direct responsibility for the Territory until its independence).

³⁰⁶ GA Res. 2403 (XXIII) of 16 December 1968.

³⁰⁷ SC Res. 264 of 20 March 1969.

³⁰⁸ SC Res. 385 of 30 January 1976, para. 7 (emphasis added).

³⁰⁹ Ibid.

Africa”.³¹⁰ Accordingly, the Homelands were reincorporated into South Africa.³¹¹ Similarly, no Bantustan in Namibia became an “independent” state due to international opposition. In 1990, Namibia was admitted to the UN as an independent state, its territorial integrity intact.³¹² In this regard critics of the Homeland policy have pointed out that it was not “the people” of South or of South West Africa who, as a whole, were exercising their respective rights to self-determination. Instead, it was the white minority South African government that was exercising “self-determination” by demarcating and delineating the boundaries of each Homeland.³¹³ Indeed, the reality of separate development was that black South Africans who comprised 80 per cent of the country’s population were to be confined to a mere 12-13 per cent of the area of South Africa, whilst the whites who comprised 20 percent would rule over the remaining 88 percent of the land.³¹⁴ The situation was similar in South West Africa where Europeans were accorded control over territory where the main centres of industrial and mineral wealth were located. South Africa was essentially applying the Anglo-American thesis of self-determination to suit its own ends so that those South Africans of European origin were to be granted most of South Africa’s fertile land and access to its vast natural resources whilst the Africans were allocated territory in smaller units, and were expected to travel from those areas to the white areas for work or to labour in factories in the Homelands, where they would be expected to remain.³¹⁵

It has been argued that South Africa was able to advance its theory of separate development because it was speaking of *nations* rather than races. Accordingly, when South Africa’s representative to the UN spoke of granting “every individual the fullest chance of development within his own nation”, he was excluding eight million Africans in White South Africa because they are not “individuals within their own nation”. And when he spoke of “respect for human dignity” he excluded them again because “they are not a nation”.³¹⁶ The South African jurist John Dugard explained

³¹⁰ SC Res. 930, 27 Jun. 1994.

³¹¹ Constitution of the Republic of South Africa No. 108 of 1996, promulgated 8 December 1996.

³¹² SC Res. 652, 17 April 1990. See further, Cedric Thornberry, *A Nation is Born: The Inside Story of Namibia’s Independence* (Winhoek: MacMillan, 2004), in which the author details the negotiations which led to Namibia’s transition to independence.

³¹³ See Henry J Richardson, “Self-Determination, International Law and the South African Bantustan Policy” 17 *Columbia Journal of Transnational Law* (1978), p. 185 at p. 217.

³¹⁴ See Merle Lipton, “Independent Bantustans?” 48 *International Affairs* (1972), pp. 1-19 at p. 3.

³¹⁵ See Christopher R. Hill, *Bantustans: The Fragmentation of South Africa* (London: Oxford University Press, 1964), p. 4.

³¹⁶ See Joes Mervis, “A Critique of Separate Development” in Rhoodie, *South African Dialogue*, supra n. 268, p. 64 at p. 79.

that the Homelands were seen as an escape route for a government whose policies of apartheid and overt racial segregation and discrimination had attracted widespread international criticism and condemnation, particularly from the United Nations.³¹⁷ In this respect, the proceedings brought against South Africa before the International Court of Justice by Ethiopia and Liberia had a direct impact on the South African government who rushed to grant the Transkei “the legal trappings of self-government in 1963”. This was “in order to impress on the International Court of Justice the sincerity of the Government’s intentions in respect of separate development”. He added, “the constitution [of the Transkei] cleverly adopt[ed] the rhetoric of advanced self-government and the uninitiated might be forgiven for believing that the Transkei was given powers similar to those of a state under a federation”.³¹⁸

6. Conclusions

Towards the end of the 1960s, the decade most associated with decolonization, the political practice had changed and self-determination became associated in the minds of many with majority rule, which correspondingly had an impact on the language of diplomacy, which changed as well. In 1964, the Palestine Liberation Organization (PLO) proclaimed in Article 19 of its Charter, that: “The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations; particularly the right to self-determination”.³¹⁹ As Yasser Arafat (1929-2004), the Chairman and Executive of the PLO told the UN:

As a result of the collusion between the Mandatory Power and the Zionist movement and with the support of some countries, this General Assembly early in its history approved a recommendation to partition our Palestinian homeland. This took place in an atmosphere poisoned with questionable actions and strong pressure. The General Assembly partitioned what it had no right to divide -- an indivisible homeland. When we rejected that decision, our

³¹⁷ See generally, John Dugard, “The Legal Effect of United Nations Resolutions on Apartheid”, 83 *South African Law Journal* (1963), p. 44. See also, See Carter, Karis and Stultz, *supra* note 287 at pp. 12-13.

³¹⁸ John Dugard, “The Legal Framework of Apartheid”, in Rhodie (ed.), *South African Dialogue*, *supra* n. 268, p. 80 at p. 91.

³¹⁹ See Leila S. Kadi (ed.), *Basic Political Documents of the Armed Palestinian Resistance Movement* (Beirut: Palestine Research Centre, December 1969), pp.137-141.

position corresponded to that of the natural mother who refused to permit King Solomon to cut her son in two when the unnatural mother claimed the child for herself and agreed to his dismemberment. Furthermore, even though the partition resolution granted the colonialist settlers 54 per cent of the land of Palestine, their dissatisfaction with the decision prompted them to wage a war of terror against the civilian Arab population. They occupied 81 per cent of the total area of Palestine, uprooting a million Arabs. Thus, they occupied 524 Arab towns and villages, of which they destroyed 385, completely obliterating them in the process. Having done so, they built their own settlements and colonies on the ruins of our farms and our groves. The roots of the Palestine question lie here. Its causes do not stem from any conflict between two religions or two nationalisms. Neither is it a border conflict between neighboring States. It is the cause of people deprived of its homeland, dispersed and uprooted, and living mostly in exile and in refugee camps.³²⁰

Similarly, in 1969, Dr. Patrick Hillery, Ireland's Minister of External Affairs, reflecting on the troubles that had engulfed Northern Ireland as well as on Irish history, more generally, informed the UN Security Council that: "Partition was accomplished by the British Government as a concession to an intransigent minority within the Irish nation. Ireland was divided as a result of an Act of the British Parliament in 1920, an Act in favour of which not one Irish vote, either North or South, was cast..."³²¹ In formulating his address Dr. Hillery alluded to the tension between Greeks and Turks in Cyprus and racial tensions in South Africa where partition was proposed before citing Article 6 of the Colonial Declaration.³²²

The opposition expressed to partition in Ireland and Palestine on the basis that it violated the self-determination of the majority was not an argument that was accepted by the colonial powers in 1920. Indeed it was still questioned by many in 1947, when Egypt and Syria attempted to refer the legality of the proposed UN Partition Plan to the ICJ for an advisory opinion. It was only as a result of pressure from the USSR and the non-aligned movement, and the loss of US support during decolonization, that Britain was forced to concede that self-determination applied to the native majority in its colonial territories irrespective of their lack of education and economic development. Accordingly, the attempt to secure minority rule in Rhodesia, South Africa, and South West Africa, faced opposition from the anti-colonial majority

³²⁰ UN General Assembly, Twenty-Ninth Session, 2282nd Plenary Meeting, 13 November 1974, UN doc. A/PV.2282 and Corr.1, para. 35.

³²¹ See Richard J. Harvey, "The Right of the People of the Whole of Ireland to Self-Determination, Unity, Sovereignty, and Independence", 11 *New York Law School Journal of International and Comparative Law* (1990), p. 167 at p. 170 quoting Address by Dr. Patrick J. Hillery, UN Security Council Meeting (Aug. 20, 1969), 24 U.N. SCOR (1503d mtg.) at 4, U.N. Doc. S/Agenda/1503 (1969).

³²² Harvey, "The Right of the People of the Whole of Ireland to Self-Determination", *ibid*, p. 173.

in the UN General Assembly. The British liberal understanding of self-determination tended to favour minority groups that it self-identified with such as the Unionists in Ireland, the Jews in Palestine, and the white European minorities in Southern Africa.

The underlying assumption of those international lawyers who opposed partition is that they believed a nation was being divided, whereas the assumption of those who favoured partition was that there was never a nation to be divided in the first place. Rather, there was more than one nation. For those international lawyers holding the first view, the word partition acquired a pejorative connotation whereas for those holding the latter view it was deemed a practical solution. As mentioned in the Introduction, Elihu Lauterpacht's understanding of self-determination was associated with the liberal Anglo-American approach, which was still the predominant view in 1947. According to this view, self-determination was associated with representative government which was only suited for a people who formed a national cohesive community, who were literate, who understood parliamentary democracy, who were economically developed, and socially advanced. This approach tended to favour vesting political power in elite minorities. In diametrical contrast, Michael Akehurst's understanding of self-determination was influenced by the Non-Aligned approach which became fused with the Marxist-Leninist political theory during decolonization and its understanding of self-determination in which self-determination was a revolutionary right to be granted immediately to all subjugated peoples irrespective of their political, economic, social or educational development. This approach was an all-encompassing mass movement associated with majority rule.

Accordingly, when Lauterpacht and Akehurst were expressing their opinions in the 1960s and 70s, at the height of decolonization, the predominant view then, was majority rule. However, when the UN proposed partition in 1947, the Anglo-American view of self-determination was still predominant as most developing countries were colonies. In fact it was only in 1947 that the notion of majority rule would gain expression in the 3 June Plan when India was partitioned on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims through an analysis of population statistics by geographic district. This was the first time that the principle of majoritarianism was applied to non-Europeans and which would be invoked in subsequent years by Nehru and the non-aligned movement to oppose the partitions proposed in South Africa, and in South West Africa, a view which found expression in both the Colonial Declaration and the Friendly Relations Declaration. It

is therefore surely no coincidence that it was only after 1960 that international lawyers began to concede that self-determination was a rule of customary international law.

CONCLUSION

The postmodern world has to start to get used to double standards. Among ourselves, we operate on the basis of laws and open cooperative security. But when dealing with more old-fashioned kinds of states outside the postmodern continent of Europe, we need to revert to the rougher methods of an earlier era - force, pre-emptive attack, deception, whatever is necessary to deal with those who still live in the nineteenth century world of every state for itself. Among ourselves, we keep the law but when we are operating in the jungle, we must also use the laws of the jungle.

Robert Cooper, Foreign Policy Adviser to Prime Minister Tony Blair, on "The new liberal imperialism", The Observer, 7 April 2002, p. 27.

Whilst the British Empire ended some time ago, and whilst the British influence on international law, although still considerable, is waning, the prevalence of its ideas on empire, nationhood, representative government, and democracy still persist with us to this very day. The American Empire, after all, is a product of British colonial history and democracy is its mantra. And American and British ideas have largely informed the men and women who created the machinery of international organization in the form of the United Nations, and before then in the form of the League of Nations. Then, as now, the fear of the other, of non-Christian societies, who avowedly lack "civilisation", still influences contemporary discourse and policy, especially with the Islamic world. Revolutions are a recurrent theme, as the revolutions and the unrest sweeping North Africa and the Middle East attest. Culture and self-identification between societies, which are considered to have a "shared history", still forms an integral part in the formation of military alliances, and balance of power politics.

For the same reasons, that is, a shared history, it was perhaps inevitable that socialism would sweep across the "Third World" during decolonization. Many of these countries had been subjected to various systems of European imperialism that resulted in the formation of elite systems of government akin to European court societies, which were themselves remnants of European monarchical and feudal civilization. No wonder then that the lonely image of Che Guevara taking on the might of Anglo-American imperialism in America's backyard or in the depths of Africa, would provide ideological inspiration not only in Latin America, but also across the diverse cultures and societies of the Middle East and Asia long after his

summary execution in Bolivia.¹ The only connection all these countries had with his image was that they too had shared in the European colonial experience. They too had struggled against a powerful usurper that had destroyed their indigenous systems of governance, and that had instead established a system of government that placed political power in handpicked and often corrupt former colonial administrators who were culturally closer to the customs and manners of their former colonial masters than with the great majority of people whose lives they were now responsible for safeguarding. No wonder that the colonized resorted to the same methods to destroy the inequalities that had been established by the colonial powers in their societies, which European peoples had resorted to in the nineteenth century to destroy the inequalities that existed in monarchical European states. It was hardly surprising therefore that during the Cold War the colonized would adopt an ideological system like socialism, which, in many ways, was just as alien as the political system that had justified the initial conquest of their lands, because it gave succour to such struggles.

Since 1989, Communism, with a few notable exceptions, has collapsed and the ideology that sustained it no longer has a powerful political sponsor. As Professor Roth observed, with the demise of Communism, and many “Third World” revolutionary regimes, “the partisan stance of the West has naturally come to be advanced all the more as a universal standard, liberal democracy being touted as the ‘emerging’ *sine qua non* of governmental legitimacy in the international community”. And yet, as Professor Roth also noted, “the liberal-democratic discourse prevalent in the West has generally tended to obscure the fact that revolutionary opponents of liberal democracy offer competing conceptions of democracy and human freedom”.² Indeed, and as I have argued in this study, this competing conception of democracy and human freedom is almost as old as liberal democracy itself, and existed in political theory long before Karl Marx ever established his theory of Communism. It was there with Rousseau, and one can even detect “socialist” inclinations in the writings of Puffendorf and Wolff as Professor Richard Tuck has argued, and which

¹ Che Guevara was executed by the Bolivian army with the support of US military intelligence personnel who had been hunting him in the Congo. I have always been struck by the image of Che in the various countries I have travelled to in the Middle East, particularly in Palestine and Lebanon, places that probably never entered his political consciousness or imagination when he was alive.

² Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 2000), p. 76.

was evident in some of the policies adopted in England during the Commonwealth.³ As I explained in Part One these theories emerged after the execution of Charles I in order to justify the Instrument of Government established by Cromwell's Commonwealth, and was later expressed in opposition to the partitions of Poland.⁴ Even Edmund Burke, the defender of the old order and chief opponent of the French Revolution, would have been opposed to contemporary Anglo-American imperialism. Whilst Communism might be dead today, the ideas and spirit of socialism is not and has reasserted itself in various forms in line with other cultural and political systems.⁵

In this regard there is a striking connection between self-determination and democracy. In fact the two are intimately inter-twined. But it is not the type of democracy that most people in the West would recognise today. This is because most people today associate democracy with *liberal* democracy as Professor Roth aptly observed. This system began with the deposition of James II in 1688 and his replacement by the Protestants William and Mary who became sovereign in his stead in conjunction with Parliament, which led to a system of government known as Parliamentary Democracy. This is the democracy that continues to exist today in the United Kingdom. Sovereignty is manifestly *not* vested in the British people but in the Queen and in her representatives in Parliament. This is not just a theoretical anomaly. It has important practical political consequences because it preserves the pre-existing culture of deference, of hierarchy, and ultimately of elitism and indifference, which was forged through the creation of a theory of society based on a social contract that deliberately sought to exclude the vast majority of people from participating in political society. This form of democracy can be starkly contrasted with the variant of

³ See Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), pp. 140-165, pp. 187-191, pp. 231-232.

⁴ I also argued in Part One that what separated the "sociability" of Puffendorf and Wolff from the other "liberals" like Hobbes and Locke who justified colonial conquests was not just a consequence of their moral opposition to wars of glory and imperialist expansion which also threatened the central German states at the time, but was connected to their support for popular sovereignty, which seemed to influence their opposition to balance of power contests between sovereign princes. In this connection Wolff's praise for Confucius, which led to his dismissal at the pain of the halter from Halle is intriguing because of Confucius's support for social harmony, which many have likened to socialism.

⁵ I am thinking here of the Islamic Republic of Iran whose system of government is a mix of religious ideology and totalitarianism through the institution of *velayat-e faqih*, which is strikingly similar to Rousseau's concept of vesting power in a single individual (in this case Khomeini and now Khatami), and to Lenin's theory of the dictatorship of the proletariat to "guide" the revolution and transform a capitalist society into a socialist one (in the case of Iran from a monarchy into an Islamic republic). For a detailed study of the Iranian Constitution see Asghar Schirazi, *The Constitution of Iran: Politics and the State in the Islamic Republic* (London: IB Tauris & Co. 1998), particularly pp. 8-19 and pp. 74-76.

democracy that began with the execution of Charles I in 1649 and led to a chain of events that culminated with the execution of Louis XVI, and which led to the formation of a system of government known as Republican Democracy. A similar system was established in America but in name only. In America republicanism was associated with replacing the British monarchy although as explained in the Introduction no attempt was made to disperse political power amongst the populace. Instead several safeguards were put in place to prevent that. Instead of a House of Lords the American revolutionaries created a Senate, whose only difference with the Lords, was that the senators were elected whereas the Lords were hereditary. The execution of Nicolas II in Russia led to the formation of a system of government known as Communist Democracy. This was inspired by the creation of Cromwell's Commonwealth and the French Republican model but the difference was that it sought to reorient social structure, which Robespierre had failed to accomplish in 1793-4. But in order to accomplish this social transformation Lenin had to theorize his dictatorship of the proletariat modeled on the Committee of Public Safety in revolutionary France in order to transfer political power and the modes of production from the minority ruling elite and vest it in the hands of the masses, the workers, and the poor. The paradox was that in every single one of these cases, political power was withheld from the majority of people whose name was invoked in vain to legitimize these various systems of government. They were democracies in name only. Perhaps, as Rousseau understood, only a nation of gods could be governed democratically.⁶

These differing ideological approaches to “democratic” government lead me to the extract that I quoted in the opening of this Conclusion by Robert Cooper, Tony Blair's former chief foreign policy advisor. In the year prior to the Iraq war, he advocated in a British broadsheet newspaper resorting to “the rougher methods of an earlier era” to deal with what he called “the more old-fashioned kinds of states outside the postmodern continent of Europe”. In other words, Mr. Cooper was justifying the use of force on *ideological* grounds and despite the fact that the use of force for any other reason, other than self-defence, is expressly forbidden by the Charter of the United Nations.⁷ The “rougher methods” Mr. Cooper was referring to include

⁶ Jean-Jacques Rousseau, *The Social Contract* (1762), (Ware: Wordsworth Edition 1998), p. 68.

⁷ The use of force can also be sanctioned by the UN Security Council by a majority of votes plus the concurring votes of the permanent five. The only exception where this is not necessary is self-defence, which can only be exercised according to the Charter language when an armed attack has occurred.

“[armed] force, pre-emptive attack, and deception”—hardly novel or exceptional methods when one considers British imperial history. Indeed there is nothing that Mr. Cooper argued for that would have put him out of step with Gentili’s justification of pre-emption in the sixteenth century to attack the Spanish and Turkish Empires, or with J.S. Mill’s assertion that “[d]espotism is a legitimate mode of government in dealing with barbarians” when he was justifying British rule in India in the nineteenth century.⁸ In fact, Mr. Cooper should be applauded for his honesty, for it is part of a mentality that goes hand in hand wherever liberal democracy rears its head. For Mr. Cooper and his friends will only advise their government to promote peace, prosperity, and freedom in the West, where states “keep the law”, but they will not advise their governments to keep the law when they are “operating in the jungle”. Mr. Cooper’s ideas are strikingly similar to the views that had been advocated by the theorists and jurists of less enlightened times to conquer the New World, to displace the indigenous inhabitants, and to destroy their systems of government. As explained in Part Two, Thomas Hobbes, John Locke, and Emmer de Vattel only envisaged the concept of political society in a form that only accommodated the cultures and communities that they were familiar with from living in Europe. In Europe and amongst Europeans in the overseas settlements like New England English law applied. But English law did not apply to “the barbarians” that already inhabited New England. It is this mentality of “us” and “them” of “our rules” and “*their* rules” of our concern for human suffering only when it impact on “our lives” but not on “*their* lives” or in “*their* countries” that has led to the “humanitarian” bombing of Kosovo, to the invasions of Afghanistan and Iraq, and to the bombing to “free” Libya. It will lead to new conflicts in other parts of the world wherever there is resistance to liberal forms of democracy. And until a new superpower emerges with a new ideology that challenges it, nothing will stop it.

So why is any of this relevant to partition or self-determination? It is relevant because ideological systems that advocate the use of force will inevitable lead to the conquest of new territories. Whilst conquest is outlawed today, for the vast majority of European imperial history conquest was inherently lawful. Conquest only became illegal because of a political theory or an ideology that was created to stop it and which came to fruition through the Marxist-Leninist approach to national self-

⁸ J.S. Mill, “On Liberty” (London: 1859) reprinted in John Gray (ed.) *John Stuart Mill: On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), pp. 14-15.

determination in contrast to the liberal approach that claimed that colonialism and tutelage were necessary to raise the standards of non-European peoples. Partition fractured and dislocated the territorial integrity of a people's homeland through the use of force, through conquest, or as a result of a prolonged military occupation born of conquest. It was as a result of the experiences of conquered peoples that they rose up to throw off the shackles of imperialism that contributed to the emergence of a theory of self-determination that justified the use of force in self-defence in order to regain the freedoms they had lost during the initial conquest and which had been justified by another theory of self-determination based on the notion of self-government. This latter theory was linked to the concept of tutelage and found expression in the League of Nations mandate system and in UN trusteeship system. It was thought that "backwards" peoples needed to be educated to be taught how to raise their living standards in order to participate as full members of the international community. In contrast, the Marxist-Leninist approach considered the concept of tutelage to be condescending and supported immediate independence for all colonies. When Marxism-Leninism became inter-twined with the anti-colonial rhetoric and practice of the non-aligned movement in the 1960s it produced a powerful ideological cocktail that in combination brought European colonialism to an unceremonious end.

Accordingly, partition represented a fissure, rupture, schism, or fault line between two competing and diametrically opposed views of self-determination. These diametrically opposed views of self-determination were the Liberal view, which is associated with representative government and constitutional democracy, and the Socialist view, which for most of the twentieth century was almost exclusively associated with Marxist-Leninist political theory. The liberal approach to self-determination was based on a limited form of politics, which required inculcating in the colonial community Western cultural attributes that encouraged them to "think", to develop "good character", and to behave with "appropriate decorum". This resulted in the emergence of a new aristocracy within the colonial polity, which was invariably formed of a minority caste, class, or religious community that was vested with political authority in order to subdue the majority. In contrast, the Marxist-Leninist approach to self-determination espoused an inclusive form of mass politics in which no fetters were to be placed on a people's right to independent national existence, which was to be granted immediately and unconditionally, irrespective and regardless

of whether the peoples who were to assume power had acquired the economic, political, or social attributes necessary to assume the burden of self-government. Both approaches to self-determination were concerned with identifying the people who could exercise this right. The difference was that the conception of the people in Marxist theory encompassed all economic, political, and social classes, to include the entire people as a united, single, integrated, and complete collectivity, to encompass even those peoples who were viewed as economically, politically, and socially “backward”. In contrast, the liberal approach associated with the Anglo-Americans tended to restrict its conception of the nation to colonial elites that it viewed as having acquired the necessary attributes to maintain the colony’s independence, without threatening the balance of power. The liberal approach to self-determination was an elite movement, in contrast to the Marxian mass movement. Accordingly, the Marxist approach required revolution and immediate independence for all oppressed nationalities regardless of what impact this may have on the balance of power, whereas the Anglo-American approach was based on a hierarchy, which bore a striking resemblance to the evolutionist theories of social Darwinism. The Anglo-American approach to self-determination tended to vest political power in a minority community if the minority was better able to govern than the majority in line with J.S. Mill’s theories on representative government. This envisaged a civilized, cohesive community, well versed in both the machinery and theory of government. This approach put the Anglo-Americans at diametrical loggerheads with the Marxist approach to self-determination that was avowedly based on creating a classless society.

The Anglo-American approach to self-determination was ultimately influenced by the historical development of representative government in England and in the Thirteen Colonies, and later in the Thirteen United States, and was connected to the notion of self-government, which they then projected onto the non-European world in the high period of imperialism. If today, in the aftermath of Communism’s collapse, there is only one view of self-determination – the liberal democratic conception – then there are unlikely to be new partitions because there is no ideology to oppose it unless a new ideology emerges backed up by a superpower that can stand its own ground. Indeed the lack of partition may signify the dawn of a new era, that of the universal monarchy of days gone by, and of unadulterated power, that prompted the humanists in the sixteenth century to argue for a balance of power in the first place, which is now

moribund in the collective security architecture of the UN, which has never stopped the great powers from breaching the use of force provisions in the UN Charter. Is it any surprise the UN's biggest critics today are those that justify wanton aggression and who find the prohibition of the use of force anachronistic and cumbersome? And is it not a paradox that the critics are from the world's most powerful democracy and that they attack an institution built on the foundations of the League of Nations, which had been fashioned by the Anglo-Americans to preserve their vision of the world?

What the history of partition tells us about the evolution of self-determination is that it refers to *the process of state formation* in which pluralities of opinions were expressed and which was linked to the form of government that each state established.⁹ These opinions were also part and parcel of a wider narrative that was dependent upon the dominant political ideology of an epoch. This is because only those views that had the ability to determine the course of international relations had the greatest impact, that is the views of the great powers. This is why the views of the liberal democracies emerged triumphant during the vote in the UN General Assembly on the UN Partition Plan in 1947.¹⁰ It also explains why Britain failed to partition Cyprus in 1957 when Britain was economically, militarily, and even morally (after Suez) at its lowest ebbs, and succumbed to pressure from the Third World and particularly India to maintain the island's territorial integrity. In this connection, I have come across little evidence in my analysis of the state practice of partition to support the view that self-determination "introduced a new criterion in order to judge the legitimacy of power in the international setting: respect for the wishes and aspirations of people and nations".¹¹ If anything, what partition tells us about self-

⁹ Consider the debates on the partition of Palestine and Cyprus at the UN mentioned in Part Three.

¹⁰ And of course one cannot overlook the kinds of economic and diplomatic pressure employed by the great powers to get their way. Indeed, the pressures that the US resorted to, to ensure the passage of the UN Partition Plan in 1947 prompted the US Secretary of Defence, James Forrestal to make the following note in his diary: "I thought the methods that had been used by people outside of the Executive Branch of government to bring coercion and duress on other nations in the General Assembly bordered closely on scandal". See Walter Millis (ed.) *The Forrestal Diaries: The Inner History of the Cold War* (London: Cassell & Co., 1952), p. 346. According to Sumner Welles, the Under-Secretary of State, American officials were exerting all kinds of pressure on recalcitrant states to vote for partition. See Sumner Welles, *We Need Not Fail* (Cambridge: Massachusetts, The Riverside Press, 1948), p. 63. ("By direct order of the White House every form of pressure, direct and indirect, was brought to bear by American officials upon the countries outside the Moslem world that were known to be either uncertain or opposed to partition. Representatives or intermediaries were employed by the White House to make sure that the necessary majority would at length be secured.")

¹¹ Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge: Cambridge University Press, 1995), p. 316.

determination is that it has had very little to do with the wishes and aspirations of people and nations. Moreover, such a view is too simplistic because it does not account for a *plurality* of views. When international lawyers and politicians pontificate about the wishes and aspirations of “the people”, what people do they have in mind? What if those people have different views, and different aspirations? How are these views to be accommodated in a single territorial unit? The answer is to grant them minority rights. But how can this then be described as self-determination?

The answer to this is to give them “internal” self-determination in the sense of allowing the people in question to have a say in the way they are governed. What international lawyers have called “internal” self-determination is contrasted with “external” self-determination, which is understood to relate to the question of independence. But my analysis of the history of partition leads me to conclude that there is no such thing as “internal” and “external” self-determination. Rather these distinctions have been conjured up in the international lawyer’s imagination. This is why I disagree with the late Professor Antonio Cassese’s argument that there is a contradiction at the heart of self-determination. There is no contradiction. Whatever contradiction exists is something international lawyers have created through making an artificial distinction between “internal” and “external” self-determination and by misunderstanding the application, nature, and history of self-determination. Consider the following extract that appears in the Introduction to Professor Cassese’s book:

Let us consider, for a moment, the contradictory nature of self-determination. *Internally*, self-determination could be used and has been used as a vehicle for enfranchisement, for ever expanding circles of citizens against all manner of *ancien régimes*. On this score, the ‘self’ of the nation has shifted: it is no longer embodied in a Monarch ruling over a State but in the citizens of the State. Self-determination is thus the reflection in international law of a movement that begun with the American and French Revolutions and reached its climax in the twentieth-century notions of universal suffrage.

Externally, self-determination has been no less of a challenge to established authority—that of the small circle of ‘civilized nations’ which constituted the international legal order ... self-determination was the vehicle through which this international *ancien régime* could be challenged by the admittance of new

members. One of the major developments of twentieth-century international law has been the expansion of the family of nations to include, sometimes after bloody conflict, States of the so-called Third World—as development in which the notion of self-determination was at the conceptual centre.¹²

The problem with the artificial distinction conveyed by Professor Cassese in the extract above, is that what he describes as internal self-determination is directly linked to its external aspect. The peoples struggling for enfranchisement, which he characterizes as *internal* self-determination, were the same peoples challenging established authority, which he characterizes as *external* self-determination. Unfortunately, Cassese has conflated the American and French Revolutions, and it is his lack of historical knowledge of those revolutions that had led him to create a contradiction that does not exist.¹³ And of course Cassese is not the only international lawyer to have done this. I am only using him as an example. It is part of a general phenomenon. This is because international lawyers by focusing in depth on the political practices adopted by states in particular international institutions over a very limited historical period, which is usually limited to the twentieth century, have missed “the bigger picture”. What Cassese and others have misunderstood is so fundamental that it is a little baffling and worrying that no one else spotted it sooner.

As I explained in the Introduction and in Part One of this thesis, the American and French Revolutions were poles apart ideologically. America did not willingly grant universal suffrage to all its citizens until well into the second half of the twentieth century. Neither did the American revolutionaries aspire to universal suffrage. Martin Luther King was killed as late as 1968 when he said he had a dream of an America in which there would be equal rights and racial equality for all. In sharp contrast to the American revolutionaries, the French revolutionaries did aspire to enfranchise the majority of its citizens—albeit at the time this was limited to adult males. But this was still “revolutionary” in an era when human bondage was still lawful and widely practiced. The American revolutionaries did not aspire to tear down the barriers to social inequality, which is why they did not outlaw the institution of slavery. In contrast the French revolutionaries (at the revolution’s height)

¹² Cassese, *Self-determination of peoples*, *ibid*, p. 5.

¹³ Cassese, *Self-determination of peoples*, *ibid*, pp. 11-13.

abolished slavery, taxed the wealthy, and lowered the price of basic foodstuffs so that the masses that were starving could afford to feed themselves. No such thing ever happened in America. To cite the American Revolution of 1776 as a reflection of a movement that reached its climax in the twentieth-century notion of universal suffrage is just wrong. As I explained in Part Three of this study, what led to universal suffrage in the 1960s was the result of centuries of struggle and strife, primarily from the men and women who were politically aligned to ideas and movements that belonged to the left, to socialism. This is because the liberal approach to self-determination as I explained in Part Two, was based upon the theory of a social contract, which was a contraption designed to exclude undesirables from forming part of political society. The liberal approach to self-determination was like a gentleman's club; not everyone could gain access and there were certain manners and norms that each individual had to adhere to before it could be adopted as a member of the club.¹⁴ In other words, the so-called "external" aspect of self-determination was intimately linked to its "internal" aspect, that is, the struggle for equal rights, which again was a revolution of the left, a revolution that took inspiration from France and later from Russia. Moreover, it was not by chance that the Third World that emerged during decolonization was supported by the USSR, and not by the USA, who for a good part of the 1960s did not even let African Americans use the same facilities—motel, schools, buses, public toilets—as white Americans, just as black South Africans were not allowed to use such facilities in South Africa when it was an apartheid state.¹⁵

We must never forget that historically the liberal democracies never supported majority rule either in their colonies or even, in some instances, in their own societies.

¹⁴ This is why today international organizations like the UN, the WTO, NATO, EU, etc. are effectively gentlemen's clubs or gatekeepers that decide which states can join their clubs and which states must stay out. Today, when the institutionalization of international law is at its apex, the process of becoming a state, that is, self-determination, is meaningless if one cannot join an international organization.

¹⁵ Let me indulge my argument that the distinction between "internal" and "external" self-determination is untenable a little further by referring to South Africa's transition to majority rule. Was this "internal" or "external" self-determination? On the face of it one could argue that it was a classic example of internal self-determination. Majority rule refers to the system of government, which is internal to the state. On the other hand one could argue that it was external self-determination because the question of majority rule in South Africa did not simply affect the internal government of the state (because apartheid South Africa had always claimed to be a Western liberal democracy, with a free press, a capitalist economy, the rule of law, etc.) but led to a complete change in the political orientation of the country's very identity. It also led to territorial changes, since the Bantustans were dismantled and reincorporated into the territory of the Republic of South Africa. Furthermore, South Africa's political transition was spearheaded by a revolutionary vanguard in the form of the African National Congress (ANC), and its allies, in coalition with socialist progressives throughout the Third World.

It was only during the Cold War competition, and after the passage of the 1960 anti-Colonial Declaration by the UN General Assembly during decolonization, and later when the human rights revolution took place as encapsulated in the 1966 International “Bill of Rights” that the liberal democracies belatedly and halfheartedly embraced the notion of equality, which had always been one of the hallmarks of social democratic orthodoxy. Thus, it was only in 1963 that Dame Rosalyn Higgins could explain that the right of self-determination “refers to the right of *the majority* within a generally accepted political unit to the exercise of power”. She illustrated her view by explaining that, “there can be no such thing as self-determination for the Nagas. The Nagas live within the political unit of India, and do not constitute a majority therein”. And yet, as one sharp commentator spotted, Higgins did not comment “on the question why, if the Pakistanis were accorded self-determination, the Nagas cannot enjoy it too”.¹⁶ The international lawyer’s answer to this question is to say that the state practice had changed. What self-determination meant in 1947 was not what it meant in 1963 when Dame Higgins wrote her manuscript. But of course, this does not explain *how* state practice changed. Or *what* brought about that change. International lawyers still need to account for why self-determination in 1947 meant Pakistan but did not mean this for the Nagas or for Turkish Cypriots or for white South Africans or for any other minority that might want to break away to form a separate state. The explanation cannot be found in law. It cannot be found in any notion of “internal” or “external” self-determination. The answer is provided by the history of political ideology that came to a head at the height of the Cold War during decolonization.

Accordingly, whether self-determination is “internal” i.e. to be exercised within the governmental apparatus of the state or “external” i.e. in support of revolutionary movements to achieve national independence – is dependent *not* on international law, *not* even on state practice, but on the *ideological* system adopted by the people concerned. And the ideological system that is adopted by the new political entity upon independence, will, in turn, be dependent upon the political pressures it is subjected to as part of that process. In other words, the so-called “external” self-determination is nothing but Marxist-Leninism, that is, the revolutionary right of *all* peoples to self-determination. Ultimately, the so-called “internal self-determination”

¹⁶ See Vernon Van Dyke, “Self-Determination and Minority Rights”, 13 *International Studies Quarterly* (1969), p. 223 at p. 238 (also providing the reference for the Higgins quote in his response).

is nothing but the liberal democratic right of *some* people to self-determination in the form of *self-government*. The Marxist-Leninist approach to self-determination was attractive to Irish, Indian, Palestinian, Greek-Cypriot, and South African nationalists because it promoted an approach to self-determination based on majority rule and which could be used to attack the legitimacy of the minority ruling aristocracy.

Now that the Western liberal democracies have avowedly embraced the notion of equality, what will be the impact of this on those societies that continue to seek to exclude communities from the body politic on account of their class, creed, or colour? The question is highly pertinent. We are still living with the consequences of British racism as expressed geographically in the early twentieth century in Ireland, and later in Pakistan, in the Middle East, and in Cyprus, through the combined doctrines of *uti possidetis juris* and inter-temporal law. Hundreds of thousands of people died during these partitions, and in India, it is estimated that over a million were killed.¹⁷ Nor has conflict abated in any one of these instances. The question for international lawyers is whether this is a legacy that we wish to preserve in an international society that has repeatedly condemned such practices in other parts of the world, even if, in these particular instances they were lawful, because of the time the partitions took place? Is this even a question that is appropriate for international lawyers, or has the time come to recognise that self-determination is in fact nothing more than a political ideology?

¹⁷ See Madhav Godbole, *The Holocaust of Indian Partition: An Inquest* (New Delhi: Rupa & Co. 2006), pp. 1-2 (“...the biggest price for independence was paid during the partition of India in August 1947 when over a million people died (estimates vary from as low as 200,000 to two million) and nearly eighteen million were uprooted from their homes and hearths and became refugees”.)

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