

**SPECIAL CONTRIBUTION**

**SELF-DETERMINATION OF PEOPLES – ORIGINS, APPLICATIONS AND PROBLEMS IN THE RUSSO-UKRAINE WAR OF 2022\***

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*Self-determination takes its meaning from its context; likewise the word 'people'. This Journal recently published an analysis by Alysoun Boyle of self-determination as applied in private law and to individual mediations. This article concerns the self-determination of peoples referred to in the UN Charter and other public law. Although controversial, the idea has a long history which the author describes. It is relevant to the Ukrainian conflict, as recognised by President Putin; although unfavourably. International law has not developed clear principles and institutions to give the concept meaning and the intended effect. This article describes the work of an expert group of UNESCO (1985-91), which the author chaired, charged with defining who constitute a 'people' and how their self-determination might be achieved. The special urgency of the Ukrainian, Crimean and Donbas war demands fresh attention to the peoples' rights of self-determination. Is the concept a potential solution or part of the problem?*

**I. THE UKRAINE INCURSION OF FEBRUARY 2022**

On 24 February 2022, after months of denial, the Russian Federation launched a military incursion into Ukraine, a contiguous nation-state and member of the United Nations. The attack involved the invasion of territory earlier recognised as part of the nation of Ukraine. That nation had been recognised by the Soviet Union and the Russian Federation (USSR) as part of the Soviet Union, a federal state. The USSR was dissolved in December 1991, including the Ukrainian Soviet Socialist Republic. It became a wholly separate nation later that month.

Much of the residual USSR became the Russian Federation (Russia). The attack in February 2022 was launched by military, naval and air force units of Russia. Under the UN *Charter*, an attack by a member country of the United Nations is forbidden. There are only two exceptions recognised by international law. The first is pursuant to a resolution of the Security Council under Ch VII of the UN *Charter*, absent in that case. The second was pursuant to the right of self-defence. Russia claimed the latter, instancing the encroachment upon Russian territory by adjacent territories. It claimed that Ukraine was threatening its territory by pursuing an application to join the North Atlantic Treaty Organisation (NATO).<sup>1</sup>

No attempt was made by Russia to secure support or approval for its invasion from the Security Council of the United Nations under provisions of the United Nations *Charter*. According to Russia's President, Vladimir Putin, the incursion was not a 'war' but a 'special operation'. *The Economist* newspaper noted that 'tellingly' that

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\* Based on address given to the Law School, University of Newcastle, NSW, on 5 May 2022. Earlier versions were delivered for the University of Queensland and the Law Society of Queensland.

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<sup>1</sup> Stuart Kaye, 'The Russian Invasion of Ukraine in International Law' (2022) 96 *Australian Law Journal* 293, 294-5.

phrase 'was a KGB term, not a military one'.<sup>2</sup> Early in his career President Putin had been an officer of the KGB (1975-1991), then the security and intelligence arm of the USSR, until its collapse. Briefly, he was director of the Federal Security Service (FSB), successor to the KGB. As a result of the collapse of the USSR, the Berlin Wall in the German Democratic Republic (GDR) was dismantled. That became the flashpoint of the dissolution of the USSR. President Putin described that event as 'catastrophic' for international geopolitical affairs, especially for Russia and its place in the world.<sup>3</sup>

Seemingly, an objective of the 2022 attack was to restore to Russia the international power and respect formerly enjoyed by the USSR before its disintegration. The attack was a further step in a number of earlier military actions involving other borderland territories of Russia. These included the former Georgian SSR in 2008; the Crimean Peninsula seized from Ukraine in 2014; and the two breakaway mainly Russian-speaking areas, later proclaimed as independent republics (Donetsk and Luhansk). These existed on the borderland of western Russia and the Eastern Ukrainian region of Donbas. The creation of the two new republics in that region was not recognised by the international community. However, it was recognised by Russia and a small number of states allied with, or sympathetic to, Russia.

The resort by Russia to force of arms, in February 2022 and the immediate invasion deep into the heartland of the Ukrainian nation, was a new development in Europe. An immediate meeting of the UN General Assembly was convened. This was not subject to a 'veto' by Russia, as successor under the *Charter*, to the USSR.<sup>4</sup> This resulted in the adoption by overwhelming vote<sup>5</sup> of a resolution condemning the Russian military incursion. Russia called for immediate diplomatic negotiations. Meetings of Russian and Ukrainian negotiators took place in Turkey over the ensuing months. They were slow in starting. They continued for some time but are apparently stalled.

Notwithstanding the inequality of its military and air power compared with Russia's, Ukraine resisted the invasion. Ukraine's President, Volodymyr Zelensky, rallied the military of Ukraine, and its people, to resist the Russians. Disturbing daily scenes on global television made the deaths and suffering amongst civilians of Ukraine vivid and extremely disturbing. Escalating economic sanctions were quickly imposed on Russia by the United Nations, Europe and other states including Australia. Other borderland states abutting Russia (especially Poland, Hungary and Moldova) immediately admitted refugees without complaint. There are more than 4 million of them as at this time of writing. These Ukrainian citizens availed themselves of 'corridors', intermittently agreed between representatives of Russia and Ukraine for safe transit of civilians out of the combat zone. However, there were only partly safe and secure.

The Russian representatives at the negotiations in Istanbul demanded renunciation by Ukraine of its earlier envisaged application for membership of the North Atlantic Treaty Organisation (NATO). That is a

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<sup>2</sup> The early course of the conflict is described in *The Economist* on 5 March 2022. This is where the words 'special operations' and then KGB provenance were explained. 'When Vladimir Putin Escalates His War, the World Must Meet Him' *The Economist* (London, 5 March 2022) 18.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Charter of the United Nations* art 27(3).

<sup>5</sup> *Aggression against Ukraine*, GA Res A/ES-11/L.1, UN Doc A/RES/ES-11/1 (2 March 2022). There were 141 affirmative votes; 5 negative votes (Belarus; Democratic People's Republic of Korea; Russian Federation; Eritrea and Syrian Arabic Republic). There were 35 abstentions (mostly in Asia and Africa), including China; India; and South Africa.

Western military alliance led by the United States (US), the United Kingdom (UK) and France (three of the 'P5' members of the United Nations Security Council). Russia and China constitute the remaining five 'Permanent Members' of the Security Council recognised in the UN *Charter*.<sup>6</sup> Russia demanded the recognition by Ukraine of the independent republics of Russian-speaking people. They constitute part, but not all, of the Donbas region. The Donbas is an area of Southeastern Ukraine with borders close to Russia and the Black Sea. The 'independent' territories for which recognition was demanded by Russia included Crimea, the Donetsk Peoples' Republic and the Luhansk Peoples' Republic. All of these lands had formerly been included in the Ukrainian nation. Before that, they had at various times all been historical parts of Russia (or 'Holy Russia' as Mr Putin began describing it). They all had large numbers of Russian-speaking people, not all of whom were ethnic Russians. Many of them were ethnic Ukrainians and other minorities, notably Tatars especially in Crimea. Russia demanded adjustment to the international border between Ukraine and Russia so as to terminate what it described as the 'persecution' of the ethnic Russian people living there; to replace and 'de-nazify' the government of Ukraine; and to respond to what it described as 'existential threats' to Russia's security. Repeatedly, Russia demanded respect for, and acknowledgement of, the illegitimacy of earlier NATO expansion up to the borders of Russia and the existential dangers that this posed.

In the view of Russia, expressed by President Putin, the foreshadowed application by Ukraine for NATO membership and the earlier alleged attacks by the Ukrainian government, its military and political leadership against the rights of the Russian-speaking people in borderland territories, all represented an impermissible danger to the Russian Federation and its people. This could not be tolerated by their government. President Putin therefore claimed that Russia was 'liberating' Ukraine from 'Nazis and drug addicts' in the Ukrainian Government. Given the fact that the Ukrainian President Zelensky was himself Jewish and reportedly enjoyed very high support in Ukraine for the leadership he presented against the Russian invasion, the denunciation by Russia of his regime and the reasons advanced to justify the conflict did not gain many international supporters. A larger number of observers in Europe and beyond did, however, question the wisdom and the timing of the advance of NATO, up to the border of Russia.

The Russian leadership did not express its intentions in commencing its military operations in terms of seeking to protect the 'right of self-determination' of the ethnic Russians and Russian-speaking people in Crimea, Donetsk and Luhansk. However, some features of Russia's posture and assertions suggested resonances with that right as it is recognised by international law. Such clues as exist concerning Russia's ultimate war aims appear to indicate that they are seeking to uphold Russia's security and what it sees as the rights of the Russian-speaking minority in Ukraine; and its borderland territories; and the rights and obligations of the Russian state to enjoy safety from dangerous and hostile neighbours.

Following the formation of the USSR in 1922 and in the adoption of the Constitution of the USSR in 1924, Russian (and later Soviet) leaders beginning with Lenin and Stalin, recognised the Ukrainian Soviet Socialist Republic (SSR) with its original borders as a separate territorial entity for legal purposes albeit existing within the USSR. President Putin later accused Lenin, Stalin, and more especially Nikita Khrushchev, of inexplicable attitudes for making gifts of Russian territory and people, to Ukraine, especially (but not limited to) the Crimean peninsula. President Putin expressed his fierce opposition to the impermissible 'gift' of Russian territories to

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<sup>6</sup> *Charter of the United Nations* art 23(1).

Ukraine. In a televised address to the Russian nation on 21 February 2022, on the eve of the invasion, President Putin said:<sup>7</sup>

Two years before the collapse of the USSR [its] fate was actually a foregone conclusion. It [emboldened] the radicals and nationalists including and above all in Ukraine, ... [to] attribute to themselves the merit of gaining independence... Despite all these injustices, deceit and outright robbery of Russia, our people, namely the people [of Russia], recognised the new geopolitical realities that arose from the collapse of the USSR. [They] recognised the new independent states... Russia... being itself in a difficult situation at that time, helped its partners in the CIS [Commonwealth of Independent States], including Ukrainian colleagues, from whom, right from the moment of independence, numerous requests for material support began to arise. [A]nd our country provided such support with respect for the dignity and sovereignty of Ukraine.... which itself was infected with the virus of nationalism and corruption and skillfully replaced the true cultural, economic, social interests of the *people*, the real sovereignty of Ukraine with various kinds of speculation [citing] national soil and external ethnographic paraphernalia.

In order to understand the real causes of the actions of Russia in attacking Ukraine, it is important to dwell a little longer on the text of President Putin's address. It was a lengthy and somewhat disjointed address to the Russian nation and people. It occurred just two days before the invasion by Russian military forces. In a very direct way, the speech gives outsiders, who want to understand the motivations that lay behind what was quickly revealed. Russia's invasion became the most serious and dangerous military conflict between two nation-states on the European continent since the end of the Second World War. Arguably, it was the most serious departure from a rules-based international legal order since the end of the Second World War. It involved risks of possible nuclear and chemical warfare or accidents that were likely to introduce existential dangers not only for Ukraine and Russia but also, potentially, for the whole of Europe and indeed all humanity.

In the same address President Putin invoked the early history of the USSR. He elaborated an explanation for the creation of Ukraine as a separate nation state. He described debates in Russia of the early 1920s by reference to the rights of *peoples to self-determination*:

[M]odern Ukraine was entirely and completely created by Russia. This process began almost immediately after the revolution of 1917. Lenin and his associates did it in a very rude way, [referring to], part of its own historical territories. Of course, no-one asked about anything [including] the millions of people who lived there... [A]fter the October Revolution of 1917 and the subsequent civil war, the Bolsheviks began to [conceive] new statehood. [Q]uite sharp disagreements arose between them. Stalin ... proposed giving the republics... broad powers when they joined the single state. Lenin criticized the plan [but] offered to make concessions to the nationalists... I ask myself, why it was necessary to make such generous gifts? ... After the collapse of the USSR in 1991, this mistake became absolutely obvious. We are going to show you what real decommunization means for Ukraine. In the mid 1980's ... the national

<sup>7</sup> President Vladimir Putin, 'Address by the President of the Russian Federation' (The Kremlin, Moscow, 22 February 2022) <<http://en.kremlin.ru/events/president/news/67828>>.

questions and unfulfilled aspirations of the people of the Union became primarily the growing appetite of local elites. The leadership of the CPSO [resulted in] verbiage about restoring the Leninist principle of national self-determination... The resulting collapse of historical Russia under the name of the USSR is on their conscience.<sup>8</sup>

In short, Ukraine was described by President Putin as a long-time undeserving beneficiary of an unwarranted 'dowry' from the Russian Empire and then from the Soviet era. Ukraine's government had indulged in 'outright robbery of the citizens [of Russia]...'

[It] condemned [them to the mercy of] the lack of ... 'independent courts' in Ukraine. ... 'People who consider themselves Russians and would like to preserve their identity, language [and] culture, were made clear that they are strangers in Ukraine. Russians are expelled from schools, from all public spheres, [even] ordinary shops... There are 'reprisals against the Ukrainian Orthodox Church of the Moscow Patriarchate'.<sup>9</sup>

President Putin also claimed that, after its seizure of Crimea in 2014, the inhabitants of the peninsula had 'made their free choice – namely to be together with Russia'. Moreover, he added, 'We have direct evidence' that 'aggressive actions [by Ukraine] are carried out "with the support of foreign intelligence services".'<sup>10</sup>

President Putin reported his 'fear' of the presence of 'weapons of mass destruction' in Ukraine and also of the 'danger to Russia of NATO's potential military operations'. Ukraine's entry into NATO [would be] a direct threat to Russia's security'. He complained about the 'very reserved' response he had received to a question he had posed to President Clinton of the United States in the 1990s on 'How would America feel about admitting Russia into NATO?' He complained about the United States' withdrawal from the *Intermediate-Range Nuclear Forces Treaty* and other nuclear weapons limitations agreements. He demanded fidelity to the Minsk package of measures (2014-5) which had been designed to settle the situation in Donbas, envisaging adjustment to the border between Russia and Ukraine. He demanded 'immediate cessation of hostilities' on the part of Ukraine, targeted at Russia. Finally, on the eve of invasion, he expressed his confidence in the support of the *citizens of Russia* and 'all the patriotic forces of the country' for the course that he was proposing. All too quickly that course became evident following the Russian military incursion into Ukraine on 21 February 2022.<sup>11</sup>

Many people have recollections of the successive demands made by Germany concerning the alleged injustices that had been imposed on the German nation and people in 1918-20. Eventually these led to the successive demands by Germany, culminating in commencement in September 1939 of the Second World War. Earlier the Rhineland, Austria, the Sudeten Germans in Czechoslovakia, the Danzig Germans in Poland, and Germans in other former German cities and territories in Eastern Europe, all allegedly became necessary to achieve *Lebensraum* for the German people. This would quickly extend to Limberg (now Lviv), in Ukraine.<sup>12</sup> In

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Justin Glyn, 'The Russian View on Ukraine: An International Law Perspective' (2022) 32(1) *Eureka Street* 12.

<sup>12</sup> Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (Weidenfeld & Nicholson, 2016) xxv-xxvi.

effect, if not expressly, Hitler's demands were substantially for the exercise of self-determination by the German people in German borderland territories. This had been denied in the Armistice of 1918; and the Treaty of Versailles of 1919; and other international treaties that had followed. The irredentist language of President Putin on 22 February 2022 bears a notable similarity to the speeches of Hitler in the 1930s. These resulted ultimately in the expanding demands of Nazi Germany leading to the Second World War. After an uncertain start, the Red Army of the USSR played an heroic role in the 'Great Patriotic War' in reversing the early German victories. Great sacrifices were paid in 1941-5 by all of the Allies, but especially by the USSR.<sup>13</sup>

The foregoing chronicle obliges those who criticise President Putin and the Russian state in 2022 for their grossly disproportionate, brutal and dangerous incursions into Ukraine to remember the relatively recent international attempts to establish international principles to govern the resolution of the many borderland disputes that exist in the world. They need to ask themselves whether the Russian incursion into Ukraine in 2022 can draw any support from the 'people's right of self-determination'. And whether that right, properly understood, might afford a possible solution for, or alternative to, armed conflict.

What is the right to self-determination? Who are a 'people' to enjoy such a right? How does the demand for fulfilment of that right respond when it would occasion change to bordering territory, reflected by the creation of a nation-state enjoying national sovereignty and recognition in the international community? How does international law today offer any guidance, or solution, for the peaceful resolution of clashes between nations when one is relying on self-determination of peoples and another is relying on its historical right to national sovereignty? And is resisting resort to arms and the unilateral attempt to alter national borders to reflect the alleged wishes of a 'people' claiming self-determination and independence from its present rulers enforceable, and if so where?

## II. HISTORICAL ORIGINS OF SELF-DETERMINATION

The 19<sup>th</sup> Century was an age of 'New Imperialism' and the expansion of European and other empires over land and 'beyond the seas'. Little time (if any) was then devoted to the idea of the self-determination of people. Many were subjected to the governmental power of imperial states. One of the first explicit references to the concept of self-determination of peoples appeared in an important instrument justifying the severance of links between peoples formerly bound in allegiance to a common nation-state. This was in the United States *Declaration of Independence*.<sup>14</sup> That *Declaration* was adopted on 4 July 1776. It was authored by a committee of five American colonists led by Thomas Jefferson in the then British colonial settlements in North America. They claimed political independence from Great Britain. Drawing upon the philosophical writings of John Locke, that *Declaration* asserted:

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<sup>13</sup> Isabel Hull, 'Except for His Father: A Review of Philippe Sands *East West Street*' (2016) *London Review of Books* 3. She notes that before 1914 Lemberg (later Lwow, Lvov now Lviv) was the fourth largest city in the Austro-Hungarian Empire. At that time, it was half Polish, a quarter Jewish and a fifth Ruthenian (Ukrainian). It fell back and forth between Russia and Austria in the First World War. 'Lemberg ist noch in unserem Bestiz' (Lemberg is still in our possession) because a cliché of Austrian propaganda. The city later passed through Austrian, Russian, Polish, German, Polish and Soviet, ultimately Ukrainian, control.

<sup>14</sup> *Declaration of Independence* (US) 4 July 1776; See Carl L Becker, *The Declaration of Independence: A Study on the History of Political Ideas* (Harcourt, Brace and Co., 1922); Cf William M Wiecek, 'Declaration of Independence' in Kermit L Hall et al (eds) *The Oxford Companion to the Supreme Court of the United States* (OUP, 2<sup>nd</sup> ed, 2005) 255-256.

When in the course of human events, it becomes necessary for one *people* to dissolve the political bonds which have connected them with another, and to assume among the powers of the Earth, the separate and equal station to which the Laws of Nature and of Nature's God, entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation... We hold these truths to be self-evident, that all men are created equal... It is the Right of the *People* to alter or to abolish [their government], laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.

The continuance of slavery in the United States of America, the express differences over the rights and duties of 'people'; and the expressed adherence to the laws of nature, fostered the notion of the consent of, and sovereignty reposed in, the people who were to be so governed. Thus the 'people' assumed priority over the sovereignty of a nation-state; or a Crown; or a prince or monarch. They did so if the existing conditions and institutions of government no longer met the wishes of the 'people' so governed for their life [safety], liberty and the pursuit of happiness.

Unevenly, but persistently, these ideas continued to play a part in the design and operation of the institutions, community and culture of the American republic. The ideas expressed in the *Declaration* had an impact on the French Revolution that quickly followed. It also influenced the assertion of the independence of other colonial states from the metropolitan powers of Spain and Portugal, Central and South America and elsewhere.

Exceptions soon emerged to the notion of 'self-determination'. The United States of America asserted governmental power over the former Spanish colonies in Guam, Puerto Rico, the Philippine Islands and Cuba. The will of those people to be governed by the United States was not, at that time, consulted by the Government of the United States. However, as that country moved to enter the Great War in Europe (1914-1918), President Woodrow Wilson revived the original American commitment to the self-determination of peoples expressed in the *Declaration of Independence*. Specifically, Wilson did so in the *Fourteen Points* that were expressed by him on 4 July 1918, as a basis for achieving peace and diplomacy to bring about an end to the brutality of the Great War.<sup>15</sup>

According to Wilson's statement, new colonial policies that he proposed were to be based on the 'interest of the populations concerned':<sup>16</sup>

A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observation of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the Government whose title is to be determined.

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<sup>15</sup> Thomas W Wilson, 'The Fourteen Points' in Sir Frederick Pollock (ed), *The League of Nations* (Stevens and Sons Limited, 1920) 237, 237.

<sup>16</sup> Ibid 238.

In the aftermath of the War, the *Fourteen Points* were invoked in connection with borderland disputes involving Russia,<sup>17</sup> Belgium,<sup>18</sup> France and Alsace-Lorraine;<sup>19</sup> Italia Irredenta;<sup>20</sup> Austria-Hungary;<sup>21</sup> Rumania; Serbia and Montenegro;<sup>22</sup> Turkey and the Dardanelles.<sup>23</sup> It was declared that each of these territories, with unresolved disputes with neighbours, should be resolved by reference to the same principles. Likewise, the same principle should be applied to newly freed Poland 'which should include the territories inhabited by undisputedly Polish populations and whose political and economic independence and territorial integrity should be guaranteed by international covenant.'<sup>24</sup>

President Wilson, an academic before he entered politics, recognised the need for his *Fourteen Points* to 'sound less like a thesis and more like a practical program'. He asserted that 'impartial justice' was needed to impose such a solution on the many vexatious borderlands that had been thrown into disarray by the Great War. He wrote that there:<sup>25</sup>

must be a justice that plays no favorites and no standard but the equal rights of the several *peoples* concerned.

When it came to enforcing the rights of peoples, Wilson resorted to imprecise and poetic language, expressing his faith in a League of Nations that he proposed to the warring nations. The *Covenant* of the League of Nations was drafted and adopted by the victorious Allies in 1920. However, US ratification failed to gain the approval of the US Senate. Effectively, this spelt an end of Wilson's grand ideas because they had lost their principal disciple and advocate.<sup>26</sup> The League of Nations, without the United States of America, was quickly shown to be powerless to uphold the *Fourteen Points* or the League *Covenant*. The German, Italian and Japanese demands for overseas lands, territories and colonies followed. The first attempt to enshrine the right of self-determination of peoples in international law had largely failed. However, the idea was not so easy to eradicate as President Putin was to illustrate later by reference to the controversies that soon arose in Russia and the USSR. It was to be revived in the aftermath of the Second World War of 1939-1945 which exposed many new (and sometimes identical) problems concerning unsatisfied claims for self-determination in borderland territories, left unresolved in 1945 at the termination of the fighting.

The Second World War was concluded by the unconditional surrender of the Axis powers in 1945. The vanquished states faced an earlier declaration of the Allied war aims expressed by President F.D. Roosevelt (US)

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid 238-9.

<sup>19</sup> Ibid 239.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 239-40.

<sup>22</sup> Ibid 240.

<sup>23</sup> Ibid 239-40.

<sup>24</sup> Ibid 240.

<sup>25</sup> Thomas W Wilson, 'From President Wilson's Liberty Loan Speech, New York, September 27, 1918' in Pollock (n 7) 240-242.

<sup>26</sup> Ibid 241.

and Prime Minister W.S. Churchill (UK) in the *Atlantic Charter*.<sup>27</sup> This was agreed aboard *USS Augusta* on 9 August 1941, in Placentia Bay, Newfoundland. It was made public on 14 August 1941. It contained a number of principal clauses, three of which are presently relevant:

1. No international gains were to be sought by the United States or the United Kingdom;
2. Territorial adjustments must be in accord with the wishes of the *peoples* concerned;
3. All *people* had a right to self-determination.

Churchill was hesitant about some of these principles because of the feared the implications (ultimately realised) for the survival of the British Empire. However, Churchill had no option but to sign the *Atlantic Charter* in order to secure US military support in the prosecution of the war against the Axis powers. Clearly, Roosevelt was influenced in propounding it by the *Fourteen Points* of his then recent predecessor, President Wilson. In turn, the *Atlantic Charter* influenced the language and assertion of key provisions of the UN *Charter* of 1945.<sup>28</sup>

The opening clauses of the UN *Charter* reflected the *Atlantic Charter*. The introductory words, which likewise reflected the writings of John Locke, made clear (as did the *US Constitution* earlier and the UN *Charter* later) that the foundational principle of the document was to be the will of the people affected. The opening words of the *US Constitution* state:<sup>29</sup>

We the *people* of the United States... to secure the Blessings of Liberty to ourselves and our Posterity ... do ordain and establish this Constitution for the United States of America.

The *Charter* of the United Nations asserts similar notions in language relevantly identical:

We the *peoples* of the United Nations

Determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained... have resolved to combine our efforts to accomplish these aims.<sup>30</sup>

<sup>27</sup> Joint Declaration (*Atlantic Charter*) announced by President Franklin D Roosevelt and Prime Minister Winston Churchill, Washington on 24 August 1941; See Joseph P Lash, *Roosevelt and Churchill: The Partnership that Saved the West, 1939-1941* (W.W. Norton & Company, 2006) 400.

<sup>28</sup> *Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom*, signed 14 August 1941, <<https://history.iowa.gov/history/education/educator-resources/primary-source-sets/world-war-ii/atlantic-charter>> ("The *Atlantic Charter*").

<sup>29</sup> *United States Constitution* art II § 2; See Hall (n 6) 955, 958.

<sup>30</sup> *Charter of the United Nations* arts 1 and 2.

Whilst the *Charter* was proclaimed in the name of the *Peoples* of the United Nations and established an organisation whose ends included 'the promotion of the economic and social advancement of all *peoples*', it established a body for the stated objectives as 'an international organization to be known as the United Nations'.

Here, therefore, at the outset of the UN *Charter*, was the tension that was to emerge in the elaboration of the meanings of the stated aim of 'self-determination'. The peoples of the World were to afford the foundation. However, the detail and objectives were to be achieved through an organisation comprising members, all of which were 'nations'. This was to be established on the basis of the principle of the sovereign equality of all nations. The tension is further spelt out in Article 1 of the *Charter*. In expressing the 'Purposes' of the United Nations, these were stated to include:<sup>31</sup>

2. To develop friendly relations among *nations* based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace;

All members of the United Nations agreed, in the terms of the *Charter* to: 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.<sup>32</sup> They were required to commit themselves to:

Refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>33</sup>

Specifically, nothing in the *Charter* was to be interpreted as authorizing the United Nations 'to intervene in matters which are essentially within the jurisdiction of any state'.<sup>34</sup>

As if to make unmistakably plain the primacy of the nation-states in the governance of the United Nations, special provision was made, in the constitution of the Security Council, for five named 'permanent members' (P5). Furthermore, the *Charter* requires that every decision, save for those on procedural matters<sup>35</sup> are to include the 'concurring votes of the permanent members'.<sup>36</sup> Where the interest of a member are 'specially affected', (even if not a member of the Security Council) it could, as approved by the current members, participate without a vote in the discussion of any question before the Security Council.<sup>37</sup> This is why, in

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<sup>31</sup> *Charter of the United Nations* arts 1 and 2.

<sup>32</sup> *Ibid* art 1(2).

<sup>33</sup> *Ibid* art 2(3).

<sup>34</sup> *Ibid* art 2(4).

<sup>35</sup> *Ibid* art 2(7).

<sup>36</sup> *Ibid* art 27(2).

<sup>37</sup> *Ibid* art 27(3).

discussion of questions concerning the conflict between the Russian Federation and Ukraine, the representative of Ukraine regularly addressed the Security Council.

The Russian Federation attended the Security Council (including acting as President of the Security Council) as a 'Permanent Member' in succession to the USSR, one of the original P5 Member countries named in the *Charter*. Because of the Russian Federation's 'veto', under the *Charter*, the adoption of any resolution, participating in debates and the formulation of any proposed actions (other than procedural ones) tend to be affected by the ever-present possibility of the 'veto' belonging only to the P5.<sup>38</sup> No such restriction exists in the case of decisions of the General Assembly of the United Nations.<sup>39</sup> In the creation of the United Nations, no certainty was agreed as to the precise meaning of the 'principle of ... self-determination of peoples' referred to in Article 2.2 of the *Charter* or how it could be fulfilled where there was opposition.

So what is the meaning and ambit of 'self-determination'? What are the several rights of 'peoples', rights of 'members', and the rights of the state parties to the *Charter*? How can the rights and obligations that include 'respect for human rights and fundamental freedoms of all', as addressed to individual human beings, be reconciled with the 'right of self-determination of peoples'? What is to happen if a 'right' of self-determination, invoked under the *Charter*, could endanger the 'principle of the sovereign equality' of all members, where that is contested by a member state within whose borders 'peoples' are found, who are entitled to self-determination? In the event of dispute over the 'right to self-determination' which organs and procedures of the United Nations or of member states shall have the power of decision and enforcement? None of these questions is answered with specificity in the UN *Charter*. Nor are they answered explicitly in any subordinate instruments made under the *Charter*.

Originally, it had been intended to include in the UN *Charter*, articles elaborating the content of 'fundamental human rights'; or the 'equal rights of men and women'; and of 'nations large and small'.<sup>40</sup> In the outcome, the UN ran out of time to complete its draft of universal human rights so that it could be included in the *Charter*. Securing consensus over human rights and also peoples' rights, would have added more time for deliberation than was available in 1945. In the result, the *Universal Declaration of Human Rights* (UDHR) was formulated later by a committee chaired by Eleanor Roosevelt, widow of the late US President.<sup>41</sup> The UDHR was adopted by the Third Session of the General Assembly at a meeting held in Paris on 8 December 1948. The acceptance of the UDHR without a single opposing vote, and almost unanimously, was pronounced by the President of the General Assembly, Dr H.V. Evatt of Australia.

The introductory Preamble to the UDHR foreshadowed that it would deal with the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' as the 'foundation of freedom, justice and peace in the world'. A right to enjoy four basic freedoms that had been propounded during the Second World War by President F.D. Roosevelt, was declared to be 'the highest aspiration of the common people'. Similarly essential was to be the promotion of the 'development of friendly relations between

<sup>38</sup> *Ibid* art 31.

<sup>39</sup> Michael D Kirby, 'The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights' (2015) 89 *Australian Law Journal* 714.

<sup>40</sup> *Charter of the United Nations* preamble, para 2.

<sup>41</sup> *Universal Declaration of Human Rights*, GA Res 2174 (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR'); Hall (n 6).

*nations*'. The achievement of 'universal respect for the observance of human rights and fundamental freedoms' was included in the Declaration of the content of universal human rights. The purpose of doing this was proclaimed to be to secure their universal and collective recognition and observance, both among the *peoples* of Member States themselves and among the *peoples* of territories under their jurisdiction'. Objectives were proclaimed to be for 'all *peoples* and all *nations*', together with the adoption of measures that would ensure recognition and observance of the 'rights and freedoms' which should be 'both among the *peoples* and members *states* themselves and among the *peoples* of territories under their jurisdiction'.

In the closing articles of the UDHR it was declared that:<sup>42</sup>

28 Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

29 (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing the recognition and respect of the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

(3) These rights and freedom may in no case be exercised contrary to the purposes and principles of the United Nations.

It will be remembered that, amongst the purposes of the United Nations there was included the purpose 'to develop friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*'.<sup>43</sup>

The UDHR was not, as such, a treaty that could bind UN member states, to act in accord with, and observe, the stated rights and liberties. However, soon after the UDHR was proclaimed, the UN General Assembly adopted and opened for ratification a number of international treaties. These included the *International Covenant on Civil and Political Rights*,<sup>44</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>45</sup> In the first article common to each of these treaties, exceptionally, there is included an article, expressed in identical terms, referring to the right of peoples to self-determination:

Article 1:

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<sup>42</sup> UDHR arts 28 and 29.

<sup>43</sup> *Ibid* preamble, para 1.

<sup>44</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>45</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

- (1) All *people* 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;
- (2) All *people* may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence;
- (3) The *States Parties* to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the *Charter* of the United Nations.

Whereas most of the provisions of the two *Covenants*, as of the other conventions and treaties that followed, as in the UDHR, referred to individual human rights, declared to be universal and enforceable, the reference in common Article 1 to the 'right of self-determination' is not expressed to be, as such, an individual human right. However, its placement in the two international covenants, and at the outset of each of them, suggests that individuals have participation in, and share enjoyment of, this right. This is because it affords the context in which individual human rights, guaranteed by the United Nations, are to be fulfilled and implemented.

At the time of the adoption of the *International Covenants* in 1966 and 1976 respectively a controversy arose from the references to the 'peoples' right of self-determination'. In the context of the tensions of the Cold War, delegates of the United States of America began to express a critical view of this, 'right' and particularly as it was included in a proposed treaty dealing with universal *human* rights. They suggested that peoples' rights were a decoy, propounded by the Soviet Union and its allies to excuse non-compliance with (and to divert attention from) individual human rights for which, certainly in the case of civil and political rights, the USSR often appeared unenthusiastic.

It was in this context that the United Nations Economic, Social and Cultural Organisation (UNESCO) embarked on an attempt to answer the questions posed above. In particular, to answer the question of who were a 'people' for the enjoyment of the peoples' 'right of self-determination'.

### III. UNESCO'S EXPERT GROUP

In 1980, I was appointed by the Fraser Government to be a member of the Australian National Commission for UNESCO, a statutory body created by the Australian Parliament. In 1983, I participated in the Australian delegation to the General Conference of UNESCO held in Paris late that year. The leader of that delegation was the Hon. Gough Whitlam, past Prime Minister of Australia. The conference occurred just before the United States and the United Kingdom (and later Singapore) withdrew from UNESCO and suspended payment of their contributions as member states. Specifically, at the UNESCO General Conference, the United States delegation moved for the deletion of references to UNESCO's programmatic items referring to peoples' rights.<sup>46</sup> The US delegation expressed concern that the 'rights of peoples' would become a cover to condone the anti-libertarian

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<sup>46</sup> UNESCO Australian delegation report, noted in Michael D Kirby, 'UNESCO and Courage' (UNESCO 50<sup>th</sup> Anniversary Dinner, Australian National University, 4 November 1996) ('UNESCO and Courage').

activities of governments and states, contrary to the human rights of individuals but condoned by the UN because done in the name of poorly defended peoples' rights.

In response to this criticism, the delegate to the General Conference of the Soviet Union stated that, if the 'rights of peoples' were to be reopened and debated afresh, the USSR would seek to add re-consideration of matters such as anti-colonialism, neo-colonialism, and disarmament, of interest to it. Some African states saw the right of self-determination as relevant to the rights of indigenous and colonialized peoples, specifically in apartheid South Africa. I presented on intervention to the General Conference on behalf of Australia.

I accepted that there were possible dangers in the notion of 'peoples' rights' because it was 'too vague and potentially dangerous, meaning all things to all people'. I suggested that unhelpful politicisation of the debate obscured a legitimate 'legal controversy' posed by peoples' rights. I later discovered that my remarks coincided with advice given subsequently to the General Conference by the UNESCO legal advisor, Mr Karel Basak.<sup>47</sup> At the close of the General Conference, the new Director-General of UNESCO referred with apparent approval to the 'Australian intervention' on the need to clarify peoples' rights.

In the result, an expert group was established by UNESCO to elucidate the notion of 'peoples' rights' and specifically the peoples' right of self-determination. The chair of the first meeting of the expert group was Judge Kéba M'baye of Senegal, a judge (later President) of the International Court of Justice. I was appointed a member of the expert group. The second meeting of the group elected me to be chairman. The third meeting, which was held in Budapest, Hungary, elected me to be the rapporteur, with responsibility to draft the group's report to UNESCO on this issue.<sup>48</sup>

At the first meeting of the group, I elaborated my view to the effect that the concept of a 'peoples' right of self-determination' needed further legal elaboration. An Under-Director-General of UNESCO, a Soviet citizen of Armenian ethnicity, appeared before the expert group. He declared that the issue was relatively straight forward. It had a long history (now elaborated above). I suggested that the controversies could not be ignored and that the time might come when the people of Armenia might assert a peoples' right of self-determination in relation to the USSR. This suggestion produced a humorous response on the part of the Soviet and some Eastern European participants. The Armenian official laughed at the possibility that I had raised. He said that, in the Soviet Union, all of the 'peoples' combined in harmony within the large nation-state. This was a beneficial antidote to the narrow nationalism.<sup>49</sup> As this meeting was held only five years before the dissolution of the USSR, I later speculated as to whether the Armenian official ever remembered his exchange with me as fast-developing events came to affect the USSR, including his own Armenian SSR.

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<sup>47</sup> Karel Basak, born Czechoslovakia in 1929. French national from 1946. Appointed official of Council of Europe and later the International Institute of Human Rights, Strasbourg (1969-80); Director of the UNESCO Division of Human Rights and Peace (1980) and later legal adviser to UNESCO. Died 2015.

<sup>48</sup> The UNESCO Secretariat officer was Janusz Symonides, born 1920, died Poland 2020. Director UNESCO Division of Human Rights, Democracy, Peace and Tolerance 1989-2000.

<sup>49</sup> Kirby (n 46) 6.

In light of these proceedings, it is relevant to reflect on the unfolding saga of self-determination of peoples of Armenia. Before the First World War, Armenia had been a part of the Ottoman Empire. Following that War, the Ottoman Empire was dissolved and divided by the Treaty of Sèvres of 1920. Under that treaty, the borders of a separate Armenian Republic were to be drawn up by President Wilson, selected for this task out of gratitude to his *Fourteen Points* and his espousal of self-determination.

A Soviet army invaded and annexed Armenia to Russia and incorporated it under Russian authority. Subsequently, in 1922, a Soviet Federal Socialist Republic of Armenia was established and it 'joined' the USSR. This sub-national entity existed until 1936 when it was divided into separate entities, the Armenian SSR, the Georgian SSR and the Azerbaijan SSR. Thereafter, relatively low-key demands for independence arose against the USSR. These were heightened during the interval when Mikhail Gorbachev served as Party leader (later President) of the USSR (1985-1991).

In August 1990, the Armenian people eventually won their right of self-determination. Later, in October 1991, they asserted their independence and separate statehood. After the USSR was dissolved, Armenia's independence was recognised by Russia.<sup>50</sup> In this way, my speculation of 1984 was fulfilled within an unexpectedly short time frame. However, the achievement of independence became possible only because of an interval of turbulence and weakness in, and fresh ideas from, the USSR. It was achieved as an attribute of the claim by the Armenian people of their right to self-determination which the USSR had been unwilling or unable to contest.

After this short historical interlude, with references to the history of Armenia, I return to the meetings of the UNESCO expert group in the 1980s. The final meeting of the experts took place in Paris in November 1989. At that meeting, I was elected rapporteur to the group with responsibility to draw up the Group's report. The report of the meeting identified its mandate, including the examination of provisions relating to the right of peoples in existing universal international instruments, regional instruments and national constitutions. It also included an analysis of the provisions of earlier UNESCO instruments relating to the 'preservation, safeguarding and development of cultures and cultural identities'. The reference to 'culture' was a reminder of the primary relevant ambit of UNESCO under its constitution.

In these deliberations a recommendation that had been adopted by the expert group addressed the content of the word 'peoples' and the content of the 'right of self-determination'. The group provided a 'description (but not a definition)' of a 'people' for this purpose. It concluded that a 'people' in this context comprised:<sup>51</sup>

1. A group of individual human beings who enjoy some or all of the following common features:
  - (a) A common historical tradition;
  - (b) Racial or ethnic identities;
  - (c) Cultural homogeneity;
  - (d) Linguistic unity;

<sup>50</sup> Glenn E Curtis and Ronald G Suny, 'Armenia' in Glenn E Curtis (ed) *Armenia, Azerbaijan and Georgia: Country Studies* (Federal Research Division, 1995) 1, 15.

<sup>51</sup> UNESCO, Expert Group on Rights of Peoples to Self-Determination, Report 1991.

- (e) Religious or ideological affinity;
- (f) Territorial connections;
- (g) Common economic life;

2. The people concerned must be of a certain number which need not be large (e.g., the people of micro-States) but which must be more than a mere association of individuals within a State;
3. The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that particular groups or some members of such groups, though sharing the foregoing characteristics, might not have that will or consciousness; and (possibly);
4. The group must have institutions or other means of expressing its common characteristics and the will to form a unified identity.

The foregoing description has proved influential. It has been included in subsequent analyses of this concept.<sup>52</sup> Against the background of this ‘description’ and an explanation of the work of the expert group, the group stated a number of additional conclusions:

1. The concept of peoples’ rights is now established by universally recognised international law. Its existence cannot now validly be controverted;
2. Some peoples’ rights are universally accepted. These include the peoples’ rights to existence, the peoples’ right of self-determination and other rights;
3. There is however a continuing and legitimate debate about the precise content of still other rights claimed to be peoples’ rights.
4. The concept is a dynamic one which is in the process of elucidation and clarification;
5. UNESCO is an appropriate forum for such elucidation and clarification, particularly because of the direct relevance of peoples’ rights to cultural identity, educational practices and other established areas of UNESCO’s competence.

It followed from these conclusions that the expert group urged the continuance of the elucidation of ‘peoples’ rights’ including:

1. ...Internal self-determination, especially democratic forms of government;
2. The implications of peoples’ rights to a safe global environment for such issues as the so-called Greenhouse Effect (sic) and global warming;
3. ...in responses to disasters of transnational significance, such as occurred at Chernobyl; and
4. the implications of peoples’ rights to peace.<sup>53</sup>

Amongst the recommendations of the expert group were a number that are relevant to the present context in Ukraine. For example, the group suggested that UNESCO should initiate a study of the relationships that might

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<sup>52</sup> The UN Special Rapporteur Martinez Cobo in a study on discrimination against Indigenous populations and the UN Independent Expert on the Promotion of Democratic and Equitable International Order, Alfred de Zapas, later relied on the ‘Kirby definition’ in their respective reports to the UN General Assembly. See Michael D Kirby, ‘Peoples’ Rights and Self-Determination’ (Institute of Legal Sciences of the Hungarian Academy of Science, International Meeting of Experts Budapest, Hungary, 25-29 September 1991).

<sup>53</sup> *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, UN Doc SHS-89/CONF.602/7 (27-30 November 1989).

exist between *states* (which are the subject of classical international law) and *peoples* (a new subject) warranting exploration of the question whether an international legal order of peoples were to remain independent and separate. Or will these principles penetrate society as between nation-states and be assimilated?

Like a State, 'a people' can only act through human agency. The rules governing the representation of the State in international law are well known. But those relating to the representation of peoples are 'poorly documented'.<sup>54</sup> There was at this time a body, the Unrepresented Nations and Peoples Organisation (UNPO). It was an international civil society organisation. It included representatives of some 'peoples' who then (unknown to themselves) were on the brink of achieving 'self-determination'. These included the Baltic States and Timor L'este. By 1991, Lithuania, Latvia and Estonia had achieved independent status as nation-states along the lines of a pre-existing national existence. To varying degrees, the great majority of their *people* desired the establishment or re-establishment of new and independent states. These devices were quickly followed in ways that were conformable with the criteria proposed by the UNESCO expert group. The Baltic states were undoubtedly 'peoples' according to the description in the UNESCO group's report. With the relatively rapid advent of democratic systems of government, their achievement of self-determination and independence became possible.

The UNESCO expert group examined the foundations (philosophical, political and legal) that underpinned the recognition and protection of the 'rights of peoples to self-determination'. This led to an exploration of several considerations already apparent, including 'cultural identity'; the concept of 'peoples in conditions of extreme poverty'; research on self-determination of Indigenous peoples; exploration of the relationship between peoples' rights and human rights; and how the former could learn lessons from evolution of the latter.<sup>55</sup> Some concern was expressed about the potential dangers of weakening the universality of human rights, namely the global character and indivisibility of human rights. Under the UN *Charter*, the UDHR and developing international law, an obligation had begun to emerge requiring States to 'practise tolerance and live together in peace with one another as good neighbours'. Did such a principle (named in Australia as 'multiculturalism') apply worldwide? And did 'self-determination of peoples' endanger this concept by which self-determination was expressed not by adoption of separate statehood; but by adjustment to living within the one state, including by the adoption of federal arrangements or the recognition of special protected rights of minorities in a larger entity.

Of special concern to the UNESCO expert group was the absence of agreed and determinative institutions and effective machinery to secure the 'rights of *peoples*'. Case studies on instances that had succeeded and others that had failed, were proposed as a topic of separate and later investigation by UNESCO. However, if that study was ever undertaken by UNESCO, its results are unknown.

The rights of peoples was controversial in February 1990 when the report of the UNESCO experts was released. That year witnessed dramatic developments within and around the perimeter of the USSR. The achievement or restoration of national independence of many States on the breakup of the USSR quickly

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<sup>54</sup> Ibid 7.

<sup>55</sup> James Crawford (ed), *The Rights of Peoples* (OUP, 1988).

overtook the intellectual ruminations of the UNESCO experts and their call for further examination of the foregoing issues.

The developments of the modern borders of Ukraine followed, in part, historical predecessors, linguistic majorities and, in one case, a personal decision of a political leader with power to impose its implementation. Nikita Khrushchev was, at this time, the leader of the USSR. He and his family had moved from Russia to Ukraine where he grew up and first became an official of the Communist Party of the Soviet Union (CPSU). Allegedly, in order to celebrate the 300<sup>th</sup> anniversary of a Ukrainian saint, Khrushchev decided that Crimea, despite earlier historical, ethnic and cultural links to Russia, should be assigned to Ukraine in an adjustment to the internal borders of the USSR.<sup>56</sup> No referendum or plebiscite was held in the Russian or Ukrainian SSRs or elsewhere in the USSR, to endorse or accept this 'gift'. President Putin, in his pre-invasion speech, declared his bewilderment about what Khrushchev must have been thinking when he made such a gesture to Ukraine. At the time, it may have been considered a relatively insubstantial gesture, in the context of the practical, political and legal political unity of the USSR.

In the present century, however, quite apart from political and historical considerations, it became known that, adjacent to Crimea, were very substantial underwater petroleum deposits of great value. As well, within Donbas territory lay the sources of water supply to Donetsk, Luhansk and potentially Crimea as well as many Russian-speaking citizens elsewhere in Ukraine. In the purported name of fulfilling the wishes of the Crimean people (many of whom were Cossacks and a large number of Russian speakers), Russia, in 2014, invaded Crimea. It expelled Ukrainian officials and military from the peninsula. At the same time, Russia supported the establishment in Donetsk and Luhansk of separatist enclaves in those districts, also bordering the petroleum-rich Black Sea.

The resulting accretions increased the Russian demands on the larger Donbas region of eastern Ukraine. A popular vote was held in Crimea in 2015. Allegedly, this resulted in confirmation of the Russian annexation of the peninsula. However, few states in the international community have accepted the result of this plebiscite. Ukraine continues to reject the annexure of parts of its former national territory. It also contests the assertion that the transfer of sovereignty had the approval of the people in the affected Donbas regions. It contested the legality of the moves, both in international law and under Ukrainian's own constitutional law.

Although significant numbers of people in Eastern Ukraine speak Russian as their mother tongue (a phenomenon common in borderlands) that does not necessarily mean that they favour their removal from Ukraine and absorption into the Russian Federation. Until a free and fair popular vote, supervised in a proper way, in the territories concerned, it is impossible to be sure how the people affected truly regard the transfer of their nationality, property and governance to Russia. Certainly, no formal internationally monitored act of self-determination has ever been conducted in Crimea or Donbas before Russia resorted to the armed invasion of Ukraine on 24 February 2022.

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<sup>56</sup> Putin (n 7).

Impatient with these developments, conscious of the economic and strategic importance to Russia of Donbas and for other reasons of history, resentment and Russian patriotism, Russia did not stay its hand to persist with efforts to secure a testing of local popular opinion on these issues. Believing that he could achieve 'restoration' of Donbas to Russia by military means, and supposedly expecting that the Russian military would be welcomed with flowers and open arms to return these lands and people to 'Holy Russia', President Putin initiated the military (special) operation. Doing this did not conform to the requirements of the UN *Charter* insofar as it attempted unilaterally and by non-peaceful means to alter the borders of a State party to the *Charter* (Ukraine). It breached many requirements of international human rights law, and the international law of war. Relevantly to this article, it did not conform to the principle of self-determination of peoples, expressed in the UN *Charter*, and clarified by the UNESCO expert group.

#### IV. CONCLUSIONS: A CONCEPT UNDER DEVELOPMENT

In the international crisis concerning the territorial integrity of Ukraine, there have been few references to the peoples' right of self-determination on either side of the conflict. Consideration of this concept by the United Nations expert group, in which I participated, appears to have been overlooked or ignored. UNESCO is a specialized agency of the United Nations. As stated in its constitutional document and title, it is primarily concerned with matters of 'education, arts, sciences and culture'. It is not specifically a political organ of the United Nations.

Nevertheless, UNESCO enjoys almost universal membership amongst the UN states. Its mission grew out of the Second World War. Its purpose was to 'advance peace, sustainable development and human rights by facilitating collaboration and dialogue among nations'.<sup>57</sup> In that pursuit, UNESCO works through five programmatic areas suggested by its title. The preamble to the UNESCO constitution states that: 'Since wars begin in the minds of [people], it is in the minds of [people] that that the defences of peace must be constructed'.<sup>58</sup>

Of the greatest concern to the founders of UNESCO were the deaths and destruction that occurred in the Second World War. The other contextual events included the revelation of genocide (notably in the Holocaust) and crimes against humanity that became clear at the end of that war; and the greatly enhanced dangers of armed conflict presented by new weapons of mass destruction that became available after 1945. These included nuclear, chemical and biological weapons. A commitment was identified to the avoidance of war as a means of resolving conflicts. 'Self-determination of peoples' was identified as a *modus operandi* for achieving some of the more difficult of the UN's foundational objectives. Both from the text of the *Charter* and from the context of its adoption, it must be assumed that the nation-states that joined the United Nations intended the peoples' right of self-determination to be seriously implemented.

Since 1945, large numbers of claims of self-determination have been raised. Some only have been resolved peacefully and satisfactorily. However, any Australian flying over the lands between their country and Europe know how many of such claims are unresolved. They include:

<sup>57</sup> *Constitution of the United Nations Educational, Scientific and Cultural Organization*, opened for signature 16 November 1945, 4 UNTS 275 (entered into force 4 November 1946).

<sup>58</sup> The UNESCO Constitution recited in its Preamble the suffering occasioned by two wars. See also *Charter of the United Nations* preamble.

- \* The self-determination of the First Nations People of Australia itself, within a context of the Australian national polity;
- \* The struggles for self-determination that Indonesia has faced, including in East Timor and Papua;
- \* The claim against Papua New Guinea by people in Bougainville;
- \* The claim for self-determination by the separatist forces in Northern Malaysia and in the southern province of Thailand;
- \* The claims to independence and self-determination by several minority ethnic groups in Myanmar (Burma);
- \* The claims to self-determination of the Rohingya people against Myanmar and Bangladesh;
- \* The claims to self-determination in the Indian sub-continent that occasioned the creation of Pakistan, its border conflicts with India over Kashmir, and the development by both states of nuclear weapons;
- \* Conflicts in Afghanistan, including between Afghani peoples and Hazaras;
- \* The many often still unrequited claims for self-determination in Arab and adjacent lands, including by the Kurds, unrequited since 1918 and by minority groups in Iraq, Syria, the Palestinian people in Gaza and Israel, and minorities in Iran and Iraq;
- \* The Armenian minority in Turkey;
- \* The Chechen, Georgian and Russian-speaking minorities in Russia;<sup>59</sup>
- \* The current claims of people seeking self-determination from France in Corsica; and
- \* In the United Kingdom itself, the claims of Scottish independence, the 'Troubles' in Northern Ireland and also demands for measures of autonomy by the people in Wales. There are many more claims of this kind in former colonial lands; the demands of Quebec and Native American people for self-determination and so forth.

In the conflict with Ukraine, Russia has made occasional references to its substantial nuclear and other weapons.<sup>60</sup> If ever used, these could clearly threaten the survival not only of a powerful country such as Russia, but also a grave threat of danger to neighbours, especially Ukraine. In the event of escalation, mistake or accident, they could endanger the peace of the entire world and the survival of the human species and other living creatures. This is why finding a solution to the underlying *casus belli* in Ukraine arguably requires attention to the issue of self-determination. The danger of the Russia-Ukraine conflict is now potentially an existential threat against which all peoples have, or should have, an interest to urgently find a solution.

The main point of this article has been to draw attention to the root causes of the hostilities in Ukraine that may be found in the Russian demand that people living in the borderlands who speak the Russian language; share the Russian history; who identify with the Russian religion, culture and national pride, should, in defined circumstances, enjoy a right to become (or to be restored) to the Russian nation. So much may be explained by reference to the right of self-determination of the peoples of the Crimean and the Donbas regions of Ukraine. Clearly, the resolution of such a claim, particularly on the part of a P5 member of the Security Council of the United Nations with the world's largest nuclear arsenal must depend not on military conquest by force of arms.

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<sup>59</sup> Ukraine Donbas Russian speaking region.

<sup>60</sup> President Putin and other Russian officials have referred many times to the Russian Federation's nuclear capability.

It must be resolved, if there is time, by a peaceful, authenticated and principled solution based on international law.

The world does not yet have that solution, or institutions or other means to implement it. As with attempts to hold the nations involved in the conflict answerable to the political or judicial organs of the United Nations, these cannot presently, in many cases, be enforced against resistance. Any attempt to secure intervention by the Security Council may inevitably be thwarted by the Russian (and possibly Chinese) 'veto' provided for in the UN *Charter*.

The International Court of Justice may, in limited circumstances, intervene.<sup>61</sup> Recently, since this article was first prepared, it has delivered increasingly emphatic opinions on the right of self-determination.<sup>62</sup> However, any attempt to enforce the orders of that Court would invite either the disallowance or resistance of states parties to those who seek to render them accountable.

Ensuring that the contemporary weapons of mass destruction (particularly nuclear weapons) are quickly brought under the effective control of law, necessitates prompt unity of our species to dismantle the nuclear, chemical and other stockpiles without delay. It requires resort to legal principles and peaceful means of resolving such disputes. Given the self-evident risks, a response should not be beyond the capacity and action of global human society. In searching for the solutions, an ingredient will probably include the people's right of self-determination. Humanity and the United Nations organisations know what must be done. The way forward was identified in the *Charter* of 1945; but not elaborated. True, it was pursued by the post-War dismantlement of the global empires that had earlier oppressed or denied universal rights and led to the demands for self-determination of peoples. Self-evidently, finding solutions for the dangers that now confront humanity is extremely urgent. The conflict between Russia and Ukraine must be solved. Preferably quickly before still more death and destruction. This requires much closer attention to the UN *Charter*.<sup>63</sup> So much appears to be understood by both sides in the Russo-Ukrainian conflict of 2022. However, whether human reasoning and conduct will be wise enough, and speedy enough, to agree upon, and implement, the necessary solutions are still unsure.

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<sup>61</sup> See the International Court of Justice's order of 16 March 2022, ordering that Russia must suspend the military operations in Ukraine decided by 13 to 2 with Judges Kirill Georgian (Russia) and Xue Hanqin (China) dissenting. *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Provisional Measures)* [2022] ICJ Rep 11.

<sup>62</sup> See *Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (International Court of Justice, General List No 186, 19 July 2024) requested by the UN General Assembly on December 30, 2022; delivered on July 19, 2024. The Court concluded that Israel's policies and practices in the Occupied Palestine Territory (OPT) were unlawful under the law of occupation. In paragraph 245, the Court noted that 'Israel has adopted certain policies and practices, including its continued expansion of settlements which are designed to establish facts on the ground that are irreversible, which entrench the annexation of large parts of the [OPT] and impede the exercise of the right of self-determination by the Palestinian people.' In paragraph 261, the Court held that Israel's continued presence in the OPT is illegal because it violates two key principles of international law – the prohibition on acquisition of territory by force and the right to self-determination.

<sup>63</sup> *Charter of the United Nations* arts 1(2), 2(2), 2(3), 2(4), 2(5), 2(6), 11(1), 11(3), 121(2), 23(2), 14(1), 26, 33(1), 33(2), 37 and 39.