PhD thesis

Self-determination of peoples in the context of supranational governance

Benziger, F.

—

Self-Determination of Peoples in the Context of Supranational Governance

by

Felicitas Benziger

M00661260

Dissertation submitted to the School of Law

Middlesex University London

in partial fulfilment of the requirements for the degree of

PhD

June 2023

Supervised by

Professors

Joshua Castellino (Director of Studies)

&

Joelle Grogan (Supervisor)

Abstract

Globalisation has proven to be a strong transformative force in almost all sectors of public life and has also left its mark on international law. The increasing number of supranational organisations being established and their increasing significance as actors that shape international and regional law is proof of this phenomenon. At the same time, self-determination of peoples remains contentious and has in recent history led to new questions emerging in a supranational setting. Catalan independence aspirations within Spain in the European Union (EU), and continued efforts to enable a second Scottish referendum on independence in post-Brexit times show the continued salience of self-determination even in mature democracies. What both cases have in common, is that both regions aspire to either remain in or re-join a supranational organisation, namely the EU. Against this background the lack of research dedicated to reassessing self-determination of peoples as international legal norm in a supranational context is striking. This thesis seeks to address that lacuna, by charting a new trajectory of the principle of self-determination of peoples in relation to supranationalism. It does so by focussing on developments in two regional frameworks: the EU and the African Union (AU). Textual interpretation following the model of Arts. 31 to 33 of the Vienna Convention on the Law of Treaties of 1969 will be the main tool of this research, with special attention paid to historical and contemporary political considerations that may have influenced the interpretation and application of the right to self-determination in different contexts. The discussion on the evolution of the norm itself is of particular interest, as is UN involvement in generating customary international law and state practice, the work on decolonisation, and the interface between self-determination and other concepts (among others human rights, indigenous peoples' rights and development). This thesis aims to add to existing literature by bringing the results gained from looking at the above-mentioned elements together, to (re-) evaluate the interpretation of self-determination in international human rights law. Special consideration was also given to how the concepts of 'nation' and 'state' affect the interpretation of the right to self-determination in international law.

ACKNOWLEDGEMENTS

Writing a doctoral thesis is a challenging endeavour. It may therefore not be surprising that I dedicated the lion's share of my time and energy to this study over the past three years. However, as a fresh PhD student in September 2020 I would soon discover that working on a PhD means more than writing this thesis. Since starting my PhD studies at Middlesex University London, I embarked on a journey I could have never imagined – a journey through which I learned invaluable lessons, met so many fantastic people and grew significantly as a person. It is often said that by working on a PhD as first sizeable independent research work, one becomes an expert in the chosen field of research. Yet I made the experience that not only did I learn very much about my field of research, but I also learned about myself.

It is in this regard in particular that I want to express my infinite gratitude to my supervisors Joshua Castellino and Joelle Grogan. Without them, this work would not be what it is and I would not be where I am today. From the first exploratory discussions leading up to the submission of my research proposal to the final stages of my PhD, Joelle and Joshua supported me on every step of the way. I remember filling in my first survey for Middlesex University a few months after I started my PhD studies. When asked about my supervisors I wrote that "I could not be happier". Without remembering my eulogy verbatim, I do remember that I described them – very informally – as "absolutely amazing". While Joelle and Joshua offered me the guidance I needed, they most importantly not only gave me but created the best possible room for me to develop as an individual. Thanks to their encouragement and unwavering support, I felt confident to explore numerous different directions throughout my research which allowed me to break into uncharted waters. There is much to say about how much of a difference they made to my experiences throughout the past years, more than fits into this brief acknowledgement.

Besides my supervisors, I am sincerely grateful to all the colleagues I met – may this be through my experience of teaching at Middlesex University but also in academia more broadly. Having such a fantastic network made the first steps as individual researcher over the course of a PhD special. I could not have had a better start into academia thanks to them. In particular, I wish to mention Alice Donald, who was among the first persons I met at the start of my PhD studies. It was a wonderful experience to work with and learn from Alice. I am grateful for her steady support, advice, kindness and last but not least for being ready to spontaneously jump in to be my formal Director of Studies for my Viva.

Special thanks are also due to Xuan – for standing firmly by my side throughout this journey, for ensuring that I could focus on my PhD by supporting me so strongly, but also for always having an open ear (or two) for me when I needed it. Your support has meant more to me than you could realise.

Lastly, I wish to thank all the persons closest to me that I did not name here because the list would be very long – my family and friends, who often had to muster patience when trying to make plans that included me, because I was engulfed in my research, and who accompanied me through this unbelievable journey. To my German family in particular, I want to express my deep gratitude for supporting me wherever I go in the most literal sense. Relocating to a different country is an extraordinary experience in its own right, but it is significantly easier knowing that home and family are not bound to one geographic location. I could make this experience because you always cheered me on. I am very grateful for your understanding, encouragement and support throughout.

Felicitas Benziger

Brentwood, June 2023

Table of Contents

List of abbreviations

AACB	African Central Bank Association
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ASF	African Standby Force
AUABC	African Union Advisory Board on Corruption
AUCIL	African Union Commission on International Law
ACtHPR	African Court on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
ASEAN	Association of East Asian Nations
AU	African Union
Benelux	Benelux Economic Union (Belgium, the Netherlands and Luxembourg)
BVerfG	Bundesverfassungsgericht (German constitutional court)
CARICOM	Caribbean Communities
CCJA	Common Court of Justice and Arbitration
CoR	Committee of the Regions
CLARE	Congress of Regional and Local Authorities of Europe
EAC	East African Community
EC	European Community
ECHR	European Charter of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Organization of West African States
EEC	European Economic Community
EFA	European Free Alliance
EU	European Union
ESM	European Stability Mechanism
GC	General Court
HRC	Human Rights Committee
ICJ	International Court of Justice
ILC	International Law Commission
LoN	League of Nations
MEP	Members of the European Parliament
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei

PAA	Pan-African Association
PAC	Pan-African Congress
PAP	Pan-African Parliament
PSC	Peace and Security Council
OAU	Organisation of African Unity
SACU	South African Customs Union
SADC	Southern African Development Community
SCC	Supreme Court of Canada
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UAE	United Arab Emirates
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WGIP	Working Group on Indigenous Populations/Communities
WTO	World Trade Organization

1 Introduction

1.1 Models of supranational governance in international law: the necessity of reinterpreting self-determination of peoples

While international law is relatively staid in developing, its study represents an ever-changing field. Being closely connected to political sciences and international as well as national politics, it is exposed to variances, departures from the old and trends of emerging legal and political concepts and visions.[1] Thus, international law as a discipline must, by its very nature, constantly adapt to stay abreast of current developments, while at the same time, providing the stability expected from a legal system that aims to promote legal certainty.[2] While building on earlier precedents, including loose alliances and trading agreements,[3] one of the most fundamental changes that has characterised international law since the establishment of the United Nations (UN) in 1945, is the rise of formal supranationalism.[4]

Partially anticipating some of the conceptual definitions that will be elaborated on the following pages, supranational organisations are crucially characterised by their ability to issue legal acts that may be binding upon the organisation's member states.[5] As such, a supranational organisation typically possesses its own institutions that may assert their sovereignty towards national institutions and most notably the government of its constituent states. Still, as is often the case in applying theoretical definitions to 'real-life', there are cases where the distinction between supranational and international organisations is less unequivocal. The example of the UN shows characteristics of both, a supranational and an international organisation. While the UN's General Assembly is an example of intergovernmental governance, the UN Security Council has a certain degree of independence from the UN's Member States, that resemble that

[1] About the relationship between international law and political sciences see Christian Reus-Smit (ed.), *The Politics of International Law* (CUP 2004); regarding the concept of self-determination of peoples specifically and the role of politics in relation to it, see Milena Sterio, 'On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule' (2010) 19 Minnesota Journal of International Law 137-176.
[2] On the importance of certainty in the context of international rule of law see David Lefkowitz, *Philosophy and International Law: A Critical Introduction* (CUP 2020) 86-87.
[3] For example, Chad E. Nelson, 'Fears of Revolution and International Cooperation: The Concert of Europe and the Transformation of European Politics' (2023) 32 Security Studies 338 or Alexander Fink, 'Under What Conditions May Social Contracts Arise? Evidence from the Hanseatic League' (2010) 22 Constitutional Political Economy 173.
[4] Eric de Brabandere, 'The Impact of Supranationalism on State Sovereignty from the Perspective of the Legitimacy of International Organisations' in Duncan French (ed.) *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013) 499-450.
[5] See section 3.1; 'member states' is only capitalised in this study where this is based on treaties, like in the cases of the AU, EU and UN, but not when mentioned as a general, abstract entity.

of a supranational institution operating above its member states.[6] Moreover, supranational organisations may pursue various objectives and thus differ in their structures and how their supranational powers are being exercised. For instance, there are those organisations that aim for supranational governance, like most prominently the EU in Europe or the AU in Africa. Others focus on supranational integration in the areas of economy and trade, for example the World Trade Organization (WTO), with no intent to move towards supranational governance in a comparable fashion. Furthermore, supranationalism does not necessarily refer to continental or global supranationalism (e.g. the EU, the AU, the WTO and the UN), but there are also a considerable number of regional organisations that engage in supranational developments. These usually focus on economic integration. Examples of regional supranationalism are the Economic Organization of West African States (ECOWAS) and the Caribbean Community (CARICOM).[7]

Of interest for the present study are those organisations that have formally established forms of supranational governance. Thus, this research focusses on the EU and AU rather than ECOWAS, CARICOM and others, although, as this thesis will touch upon later, self-determination of peoples also plays a role in socio-economic thought as endorsed by Karl Marx and Friedrich Engels.

The proliferation of supranational organisations, especially those that developed forms of supranational governance, affected and is affecting the notions of statehood and national sovereignty in international law and politics. Not only are traditional principles of national sovereignty being met with more and more challenges, but the development of models of supranational governance not merely in number but most notably in significance, amongst other things, has an impact on the relationship between citizens and their state, as well as on how peoples view themselves in relation to the state.

The EU model of citizenship has not replaced, but complemented national citizenship, with EU citizens identifying as both, citizens of their state as well as supranational citizens of the EU.[8] The struggles for Catalan independence from Spain, within a principal objective of retaining EU membership, however, shows that this new model of identity poses challenges that are unprecedented. Supporters of an independent Catalonia invoked their right to self-

[6] See also Babatunde Fagbayibo, 'Common Problems Affecting Supranational Attempts in Africa: Analytical Overview' (2013) 16 Potchefstroom Electronic Law Journal 34.
[7] On the distinction between supranational integration as a process and supranational organisations as entity see section 3.1.
[8] European Commission, *Public Opinion in the European Union – First Results* (European Union 2021) 29.

determination, as did both sides of the Brexit campaign ('Leave' and 'Remain').[9] At the same time, these cases show how self-determination of peoples remains a politico-legal concept that first and foremost pertains to questions of independent statehood. This interpretation of self-determination stems from the early 20th century and was reinforced in the decolonial policies of the UN in the second half of the 20th century. However, as indicated in the beginning of this introduction, the political landscape, in which governing authority operates towards the people, has changed dramatically since then.

Looking at these examples and recalling the ever-changing character if not texts of international law, a discrepancy becomes obvious: while the nature of international law and politics has changed dramatically – including the principle of state sovereignty – self-determination of peoples as norm of international law, has been comparatively stagnant. Whereas it would be inaccurate to state that self-determination of peoples did not evolve over the past decades, despite major developments in international law, it has lagged behind current realities, that are characterised by decreasing national sovereignty against increasing interdependence among states. Whether globalisation is the cause or simply the name of this phenomenon, is a question better left to other fields, but it undoubtedly had effects on international law.[10] Still, many states, scholars and interest groups seeking to claim a right to self-determination for their own purposes, try to reduce self-determination of peoples to questions of independent statehood, restrict it to the colonial context or attempt to base secessionist claims on it.[11] Thus, while international legal mores continue to evolve, active efforts exist to constrain self-determination of peoples as an international norm to very limited contexts. Within this, the idea that self-determination of peoples ought to be explored more deeply in a renewed context of supranational organisations has been neglected. Why this is problematic, is one of the themes addressed in this research.

While self-determination historically responded to the need for emancipation from oppression, from the late eighteenth century onward it gave rise to an increased narrative of nationalism.

[9] While those who wished to leave the EU centred their narrative around "taking back control", those who wished to remain framed self-determination around the narrative of economic prosperity, see also Sergiu Gherghina and Daniel John O'Malley, 'Self-Determination during the Brexit Campaign: Comparing Leave and Remain Messages' (2019) 19 Fédéralisme Régionalisme.

[10] Laurence R. Helfer, 'Understanding change in international organizations: Globalization and innovation in the ILO' (2006) 59(3) Vanderbilt Law Review 651; Christopher Chase-Dunn, 'Twenty-First Century Deglobalization and the Struggle for Global Justice in the World of Revolution of 20xx' in Hosseini S.A. Hamed and others (eds) *Routledge Handbook of Transformative Global Studies* (Routledge 2021) 29-43; see also generally John Baylis, Steve Smith, Patricia Owens (eds) *The Globalization of World Politics: An Introduction to International Relations* (8th edn OUP 2020).

[11] For example, the Catalan, Scottish and Palestinian independence movements.

This narrative instigated construction of artificial historical justifications in the post-colonial era, mainly to reify or justify the drawing of colonial boundaries and the protection of them as sacrosanct under the principle of *uti possidetis*.[12] While the burgeoning nationalism proved to be a useful tool in consolidating political power for the new incumbent governments, this thesis seeks to argue that it did little for the economic development and prosperity of many post-colonial states. Rather, in many cases, colonial legacies that divided entities and communities across national boundaries created tense rivalries and frequent conflict, which further hindered cooperation and mutual development and may have contributed to regional instability spurred by an arms race.

Rather than reifying nationalism as a concept, this thesis focusses on the *de facto* emergence of trade-related supranational organisations, seeking to examine whether this may form an alternative route for accessing the fruits of self-determination. It focusses on the AU and the EU as the most sophisticated in their stage of integration and development of these current ventures and aims to examine whether supranational frameworks (and participation therein) could be an alternative method of self-determination. This research also explores other precedents and antecedents to test whether evidence may exist for the emergence of supranational entities as an antidote to narrow and often recently constructed nationalist narratives that underpin the quest for (separate) statehood.

1.2 Why self-determination of peoples is relevant in supranational organisations

The question of why self-determination of peoples is relevant in the context of supranational governance, can be broken down in two parts. First, why is self-determination of peoples still a relevant research object to consider in the first place? Second, why is self-determination of peoples relevant under the scope of supranational governance?

The first question is a valid and important preparatory step to take in order to come to the second question formulated above. Considering the overwhelming intellectual output on the topic of self-determination of peoples, it is justified to question the necessity of yet another work on self-determination of peoples in international law.

Despite abundant engagement with the concept self-determination of peoples in practice as well as literature, its contours remain heavily disputed. Diverging views exist concerning the precise

[12] See further section 2.3.2.

content of a right to self-determination of peoples, especially outside UN decolonisation,[13] which has even been described as "frustratingly ambiguous".[14] A considerable lack of clarity also exists regarding the precise content of the right to self-determination of peoples.[15] Even beyond the Charter's context, there is still no consensus on what constitutes a people.[16] Given the lack of certainty regarding its terms, James Crawford, designated the right to self-determination as "*lex obscura"*.[17]

To begin with, the continuous impact of the norm of self-determination of peoples keeps it germane to the human rights discourse in international law. The headlines of newspapers continue to be dominated by issues and conflicts involving claims to self-determination of peoples, which in these cases is often framed as a right to secede and establish an independent state. Among myriads of examples are the Nagorno-Karabakh dispute in Azerbaijan,[18] the Hong Kong protests against a national security law passed by The People's Republic of China, which is perceived as effectively undermining Hong Kong's autonomous status,[19] the low-intensity conflict in the Western Sahara[20], and independence movements in Eastern Sudan[21], Catalonia,[22] Scotland,[23] and Kashmir. [24] While some of these movements are entangled with violent clashes with government authorities more than others, all have one thing in common: the individuals forming these self-determination movements believe that their aspirations are grounded in law, more specifically the international right to self-determination of peoples. These examples also illustrate, how nuance upon nuance to the contexts in which self-determination of peoples is being claimed is accumulated. For instance, the Western Sahara case locates the self-determination claims in the context of decolonisation, while this does not

[13] Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) 15.
[14] James Summers, 'The internal and external aspects of self-determination reconsidered' in Duncan French (ed), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law* (CUP 2013) 229.
[15] (n243) 207.
[16] Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds), *International Human Rights Law* (4th edn, OUP 2022) 359-362.
[17] James Crawford, *The Right to Self-Determination in International Law: Its Developments and Future* (OUP 2001) 10.
[18] Aram Araratyan, 'Self-Determination in Nagorno-Karabakh' (*The Guardian*, 4 October 2020); 'Guatemala's Sayaxché Recognizes Right to Self-Determination of People of Artsakh' (*armenpress.am*, 24 October 2020).
[19] Helen Davidson, 'Hong Kong Crisis: At Least 360 Arrested as China Protests Grow' (*The Guardian*, 27 May 2020).
[20] 'Ethiopia Supports Self-Determination and Independence of Western Sahara within Resolution 1514' (Sahara Press Service, 25 October 2020).
[21] 'Eastern Sudan Conference Demands Right to Self-Determination' (*Dabanga Radio TV Online*, 30 September 2020).
[22] Guy Hedgecoe, 'Catalan Independence Talks Are Back - and the Stakes Are High for PM Sánchez' (POLITICO, 14 September 2021).
[23] Craig Meighan, 'Poll Shows Backing for a Second Independence Referendum across the UK' (*The National*, 7 December 2021.
[24] 'Pakistan PM: Talks with India Only If Kashmir "siege" Is Lifted' (*Al Jazeera*, 28 October 2020).

apply to Catalonia and Scotland. Instead, these two cases must be considered as cases in which external self-determination is being claimed outside decolonisation or remedial secession.[25]

In light of the above, the international right to self-determination of peoples is an example of a theoretical construct having real-life impact on society. In that sense, self-determination of peoples became more than an idea of jurists formulated on paper, for many it transformed into what could be considered a societal norm.[26] Nicholas Sambanis, Micha Germann and Andreas Schädel conducted an insightful and much needed study on self-determination movements world-wide, published in 2018, in which they considered data from the time period between 1945 and 2012 to *inter alia* illustrate trends.[27] Since pictures – or numbers in this case – sometimes are more expressive than words, the following figures have been taken from that study to visualise the real-life impact of the legal construct self-determination of peoples:[28]

[25] See, for example, Milena Sterio, 'Self-Determination and Secession under International Law: The Cases of Kurdistan and Catalonia' (*ASIL Insights*, 5 January 2018); David J. Scheffer, 'A New Roadblock for Scottish Independence' (*Council on Foreign Relations*, 9 December 2022).
[26] Cristina Bicchieri, Ryan Muldoon and Alessandro Sontuoso, 'Social Norms' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Stanford University 2018).
[27] Nicholas Sambanis, Micha Germann, Andreas Schädel, 'SDM: A New Data Set on Self-Determination Movements with an Application to the Reputational Theory of Conflict' (2017) 62 Journal of Conflict Resolution 656-686.
[28] The figure and accompanying text have been copied from the report in the previous footnote; table 1 has been taken from ibid 8; figure 1, ibid 9; figure 2, ibid 10.

Table 1. Basic Descriptives.

Self-determination movements (SDMs)	464
Countries	120
Average years of activity	30.15
Ongoing SDMs (2012)	327
SDMs with discontinuous activity	36
Violent SDMs	150
Average years until first violence	6.55

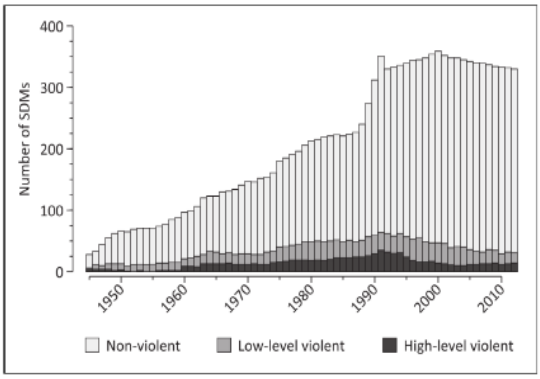

Figure 1. Self-determination movements by calendar years distinguishing between violent and nonviolent claims.

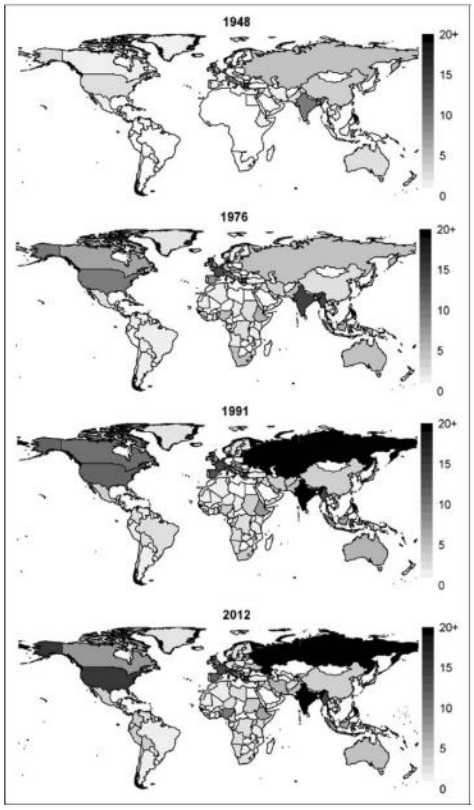

Figure 2. Number of self-determination movements by countries.

These figures, albeit only considering self-determination movements up until 2012, show that the right to self-determination of peoples has profoundly influenced the international community, while also indicating a trend towards the increase of such movements in number.

The second reason why self-determination of peoples remains a subject relevant for research is the fact that many aspects of it remain politically controversial. Suffice it to think of the question of how to define the peoples that may claim it or the disputed doctrine of remedial secession. This thesis argues furthermore that self-determination in the context of supranationalism remains unexplored, this being the gap that this research is targeting.

Obviously, this leads to the second part of the question formulated above, why self-determination of peoples is relevant in the context of supranational governance. This research was inspired by the changed political and legal landscape in international law, as outlined above. Self-determination conflicts erupting from within supranational organisations, such as but not limited to the situation of Catalonia,[29] suggest that exclusive identification with the state may not be a satisfactory answer anymore for many people in order to solve conflicts, thus requiring another solution. This entails that alternative models around a modern form of governance in contrast to traditional statehood may need to be formulated in the context of self-determination theories.

As this thesis moves from more general considerations into specific case studies, the question of relevance will be addressed in greater depth. For the purpose of this introduction, it suffices to summarise key findings made in Chapter 2:

Self-determination of peoples is first and foremost a legal guarantee that accrues to a collective, i.e. the 'peoples'. Secondly, the peoples' constituent autonomous decision-making is protected *vis-à-vis* the governing authority, and that its expression has resonance in all areas, including politics, culture and economy. As such, self-determination of peoples as legal right and/or principle is relevant wherever there is any form of governance being exercised over a people. Supranational organisations exercising governing authority add yet another layer of complexity to the already complex situation in that they require a more nuanced approach to the question of who the entity 'peoples' in this larger context may be, and how the ends and forms of manifestation of a successful exercise of self-determination of peoples is construed.

[29] Most notably the African continent offers a wealth of examples underpinning this hypothesis, see further Mueni wa Muiu, 'The contemporaray relevance of Pan-Africanism in the 21st century' in Reiland Rabaka (ed), *Routldege Handbook of Pan-Africanism* (Routledge 2020) 517-524.

1.3 The approach of this research

1.3.1 Research question

In light of the issues raised in the introduction, this research explores the following question:

What is the role of and how does self-determination of peoples operate as a legal norm in the context of supranational governance and what potential does it hold?

In pursuing this principal research question, this study is premised around addressing a set of subordinate questions, which dictate the structure of the thesis, as articulated in the next section. Broadly, these sub-questions are:

(1) What are the constituents of the principles of self-determination of peoples and supranationalism respectively?

(2) How do these two concepts relate to and what is their relevance for each other?

(3) What models of supranationalism exist in international law and which ones are of interest for the present research?

(4) How is self-determination of peoples interpreted and applied within these models?

1.3.2 Structure

Framing the research questions presented above in methodological terms, in summary, they fulfil the following functions:

1) *conceptualise* self-determination and supranationalism;
2) *analyse* what models of supranationalism are successful in establishing a governance-like structure and how self-determination of peoples is being interpreted and applied therein;
3) *critically assess* the role and operation of the right to self-determination of peoples within the supranational organisations chosen for the case study;
4) *evaluate* the findings with a view to how self-determination of peoples is and could be interpreted in supranational governance models now and in the future.

Considering the thesis as a whole, the objectives of each subordinate research question mentioned above is achieved through a bipartite structure. Thus, roughly, this study can be split up in two essential parts: the first is conceptual in nature, focussing on defining the key terms

and concepts dealt with within the study for the purposes of this research, as well as covering their philosophical and historical bases; while the second half is based on case studies, focussing on two supranational organisations, which are put in direct comparison to each other, namely the EU and the AU.

Emphasis is first placed on the EU as a model of supranational governance, which is then used as a reference point in the comparative study of the role of self-determination of peoples within the AU. There are a number of reasons why the EU serves as entry point before turning to the AU in this study. The main reason is that as it currently stands at the time of research, the EU remains the most sophisticated and developed form of supranational governance. The level of interdependence achieved through continuing European integration is unique in the international community, as is the extent to which European member states have transferred their sovereignty over sensitive areas of governance to the EU, such as fiscal, immigration and employment policies. At the same time, the EU model of European citizenship, the adoption and promotion of *quasi* constitutional European values and the strategic objective to form a European society through targeted measures initiated by the supranational institutions of the EU, are all features that remain unparalleled in other supranational organisations.[30] This is not to say, that a successful form of supranational governance must inevitably develop in that same fashion, but the intense level of supranational integration and the wealth of material that emerged in the duration the EU's existence (in varying forms since 1950), makes it particularly interesting and accessible to studies such as the present one. Moreover, the EU's position as an influential actor in international law and politics also adds to its suitability as primary research object, the more so, since it seemingly served as an inspiring example for other supranational organisations, which emerged subsequently.[31] The EU's most notable counterpart in the comparative part of this study is the AU, which lent itself more than any other supranational organisation to a direct comparison with the EU, arguably being the second most developed supranational governance project on a continental scale that currently exists.

Chapter 2 marks the start of the first, conceptual part of this thesis, aimed at capturing the background and essential characteristics of self-determination of peoples, in order to make the contested concept tangible for this study. The approach chosen combines engagement with the

[30] See further chapter 4.
[31] Such as the AU, but also ASEAN, see also Kevin Bloor, 'Regionalism and the European Union' (*E-International Relations*, 21 May 2022); Iain Begg, 'The European Union and Regional Economic Integration: Creating Collective Public Goods – Past, Present and Future' (EPRS | European Parliamentary Research Service, March 2021) 1, 10; and Fraser Cameron, 'The European Union as a Model for Regional Integration' (*Council on Foreign Relations*, 24 September 2010).

concept of collective self-determination from a socio-economic, historical, political point of view that merge into an assessment from the perspective of international law with a view to grasping the content and applicability of the norm in its current form. Understanding the current interpretation and application of self-determination of peoples in international law is an essential preparatory step, before being immersed into the case studies on the operation of self-determination of peoples within supranational organisations. This is also necessary prior to elaborating arguments as to the requirement of reinterpreting self-determination of peoples for the purpose of supranational governance.

Chapter 3 is also conceptual in nature, engaging with the concept of supranationalism and then relating the theory to the development of supranational organisations to carve out specific parameters for this study. In doing so, this chapter offers a first outlook on different models of supranational governance and their relevance, preparing ground for the supranational organisations that will be featured in part two of the thesis. In that context, the ideas of Pan-Africanism and Pan-Europeanism, amongst others, will be explored and their relation to ideas of self-determination illustrated.

Whereas Chapters 2 and 3 scrutinise the underpinning theories of self-determination of peoples and supranationalism, Chapters 4 and 5 focus on the understanding of self-determination of peoples in specific contexts of supranational governance. Chapter 4 opens the case study part of this thesis by examining self-determination of peoples and supranationalism in the EU. Chapter 5 then proceeds to look at the AU as another model of supranational governance aiming to draw a direct comparison between this model and the discussions of the previous chapter.

The results drawn from the conceptual and case study chapters culminate in chapter 6, which rather than merely reiterating the findings of the foregoing chapters seeks to knit together the theory and practice while suggesting further avenues for research.

1.3.3 Methodology

The study uses classical legal methodology as its main research tool. Namely, literal, systematic, historical and teleological interpretations of relevant treaties, such as the TEU, TFEU and AU Constitutive Act, as well as other written documents, for example reports from the organs and other institutions of the supranational organisations that will be examined within this study. Furthermore, in interpreting the various textual sources considered for this research, the tools and methods of interpretation proposed in Arts. 31-33 VCLT 1969 are taken into

account. In addition to relying on the textual sources just mentioned, this study will also draw on sources of international law as set out in Art. 38(1) ICJ Statute, including international conventions, customary international law, general principles of law and judicial decisions as well as relevant academic literature. However, concerning the literature used, this thesis does not only consider legal literature in the narrow sense, but also draws on literature stemming from political sciences, international relations, history, philosophy and sociology. This approach is justified by the inter-disciplinary nature of this research, which involves questions not only of law, but also, amongst others, politics and philosophy. In fact, questions of supranational governance and its possible implications on the entity 'peoples' are considered predominantly in political sciences, sociology and philosophy, and only recently – and to a considerable lesser extent – within the field of law. Nevertheless, this study is one undertaken in the field of international law, hence overall an emphasis is placed on legal academic literature and approaches.

2 Self-determination of peoples: elaborating on the concept

This chapter's aim is to introduce conceptual clarity concerning self-determination of peoples as one of the two core concepts addressed within this thesis. In doing so, the chapter starts with a brief outline of the historic origins of self-determination of peoples (section 2.1), before determining the content of the concept from different perspectives (section 2.2) and covering the socio-political and philosophical grounds of self-determination of peoples to extract its constituent elements. The legal perspective is included separately in section 2.3 to give the legal norm self-determination of peoples sufficient space to be explored, without entangling the legal side with related interdisciplinary approaches. Section 2.4 concludes the chapter by summarising its key findings.

Despite abundant academic literature, the precise content and exercise of self-determination of peoples outside the contours of decolonisation remains controversial.[32] Similarly, nationalism is considered to encompass a range of different ideas in scholarship.[33] At the same time, both concepts arguably affect each other. It appears that the right to self-determination and ideas of nationalism share an intrinsic link.[34] In fact, self-determination claims are often raised with the desire to establish an independent state through exercise of this right.[35] However, it is crucial to note that the shaping of self-determination notions around the nation construct – and closely related thereto the state – is a phenomenon arising from Eurocentric literature, as nation-state thinking emerged against the European background, while there were other concepts relevant

[32] Beyond the context of decolonisation, scholars appear to seek to reshape self-determination predominantly along the lines of remedial secession, e.g. Glen Anderson, 'A Post-Millenial Inquiry into United Nations Law of Self-Determination: A Right to Unilateral, Non-Colonial Secession?' (2016) 49 Vanderbilt Journal of Transnational Law 1183-1254); or by focussing on its application to specific legal subjects, for example in the realm of indigenous self-determination, see generally Marc Weller, 'Self-Determination of Indigenous Peoples' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 115-149.

[33] Regarding the different possible definitions and meanings of nationalism see Anthony Smith, *Nationalism: Theory, Ideology, History* (2nd edn Polity Press 2010) 15-31.

[34] Similarly, James Summers, 'The Right to Self-Determination and Nationalism in International Law' (2005) 12(4) International Journal on Minority and Group Rights 325: "The right of peoples to self-determination and to determine their political status is closely associated with the doctrine of nationalism."; see also Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice.' (1994) 43 (2) *International and Comparative Law Quarterly* 241-269.

[35] For example, the Scottish National Party (SNP), see Daniel Sanderson, 'Scottish 'people' have the right to self-determination like the Kosovans, SNP claims' (*The Telegraph* 27 September 2022); the Kurdistan Regional Government in Iraq, see 'Iraq refuses Talks with Kurds about Referendum Results' (*Al Jazeera*, 26 September 2017); and very famously Kosovo, see Christopher J. Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (*ASIL Insights* 29 February 2008); a notable exception is the realm of indigenous peoples rights, in which self-determination generally unfolds within the limitations of autonomy and self-government, amongst other things, see further section 2.3.4.

to other parts of the globe.[36] As the subsequent chapter will elaborate upon in more detail, the Ottoman Empire coined the concept of *millet*, while in what can be broadly captured as Southeast Asia the concept of nation-states only gained relevance after contact with European colonialism.[37] The material researched in this chapter concerning the European inspired concept of self-determination of peoples questions the viability and accuracy of the link between thinking exclusively in national units – whether based on ethnic, territorial or other grounds – and then transferring this to interpretations of self-determination of peoples.

2.1 Origin of 'self-determination of peoples' – an inherent flaw?

While traces of the ideology of self-determination of peoples can be discovered in even earlier historic events, the specific term and concept of 'self-determination' originated in Europe after the French Revolution, between 1799 and 1850.[38] It has therefore been significantly shaped against the particularities of this European historical context and by extension its interpretation in the American Declaration of Independence and the decolonisation from Europeans, of the territories that form Latin America. However, in the latter context it is instructive to note that the term 'self-determination' was used in the context of Europe and not, for example, in relation to the Latin American revolutions, which occurred within the same period.[39]

Notably, the European idea of collective self-determination emerged contemporaneously with European nationalism.[40] Around the 18th and 19th century, the latter was based on the thought that distinguishable, homogenous nations exist that have a right to independent statehood based on their nationhood.[41] This specific interpretation of the concept of self-determination is commonly referred to as the doctrine of national self-determination, which accelerated by events in the early 20th century spread over the world and manifested itself in the consciousness

[36] About Eurocentrism in the history of international law see further Arnulf Becker Lorca, 'Eurocentrism in the History of International Law' in Bardo Fassbender and others (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1034-1056.
[37] See sub-section 3.4.
[38] (n36) 39.
[39] ibid.
[40] This study is concerned only with the collective dimension of self-determination, thus the concept of individual self-determination is ignored here; on the history of self-determination from individual to collective right see Eric Weitz, 'Self-Determination: A German Enlightenment Idea Became the Slogan of National Liberation and a Human Right' (2015) 120(2) American Historical Review 462-496.
[41] Jörg Fisch and Anita Mage, *The Right to Self-Determination of Peoples: The Domestication of an Illusion* (CUP 2015) 105.

of various submerged and subjugated identities in different parts of the world.[42] Despite its age and scrutiny, doubts remain about the substantive content of the concept of national self-determination across disciplines, including questions about what constitutes a nation, how it comes into existence and whether it entails a right to independent statehood for every such nation under all circumstances.[43]

That the nation-based idea of self-determination operated upon an inherently flawed line of thought became clear from the beginning. Already early on it contributed to conflicts between European states and lent itself to be misused by imperial powers for the sake of territorial aggrandizement.[44] Furthermore, newly established 'nation-states' like Czechoslovakia and the former Yugoslavia were in fact smaller versions of the larger multi-ethnic empires from which they emerged, such as Austro-Hungary and the Ottoman Empire.[45] This fact was however, overlooked as was the fact that states consisting of a single ethnic group did not practically exist, not even at that time, and were probably not viable if based on strict grounds of pure ethnic homogeneity. From this viewpoint, the concept of national self-determination contributed to gruesome and infamous historical events, during which it formed a welcome tool in the hands of hegemonic heads of state, for example in the lead-up, course and aftermath of the two World Wars.[46] From a German perspective it is particularly sensitive that Hitler demanded the transfer of territories to his sovereignty based on the right to self-determination of peoples.[47] An alarming, modern revival of such ideas is discernible in recent Russian politics of the past decade. The 2014 annexation of Crimea and the questionable referenda held in Donetsk and Luhansk operate on the basis of claiming that these illegal territorial acquisitions align with the principle of self-determination of peoples.[48]

---

[42] Benyamin Neuberger, 'National Self-Determination: A Theoretical Discussion' (2001) 29(3) Nationalities Papers 391.
[43] Karl W. Deutsch and William J. Foltz, *Nation Building in Comparative Contexts* (Aldine Transaction 1996) 1-16; more recently a discussion of issues regarding the nation and related concepts is offered by Joseph Marko, 'What is Wrong with the Concept of Multinational Federalism? Some Thoughts about the Interrelationship between Concepts of (Multi-) Nationalism, Federalism, Power Sharing and Conflict Resolution' (2020) 19(4) Ethnopolitics 416-432.
[44] France, Italy and later the Soviet Union, are a few examples, see further Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 12, 13.
[45] Katrin Boeckh, 'Crumbling of Empires and Emerging States: Czechoslovakia and Yugoslavia as (Multi)national Countries' in Ute Daniel and others (eds) *1914-1918 Online: International Encyclopedia of the First World War* (Freie Universität Berlin 2017).
[46] (n33) 100.
[47] Jörg Fisch, 'Adolf Hitler und das Selbstbestimmungsrecht der Völker' (2010) 290(1) Historische Zeitschrift 290 93-118.
[48] Milena Sterio, 'Do Kurds have the Right to Self-Determination and/or Secession?' (*OpinioIuris,* 28 September 2017); Felicitas Benziger, 'A Closer Look At Recent Self-Determination Issues in Eastern Europe' (*IntLawGrrls,* 25 September 2022).

In cases, such as mentioned above, where territorial expansion is based on referenda there is a blurring of self-determination based on democratic and nationalist ideas.[49] This suggests that there is a connection between the basic democratic idea of referring to the will of the governed and national self-determination, at least to the extent that the expansion and building of a nation is sought to be justified based on the alleged wishes of a population. Still, plebiscites were not the norm in the era of European nation-states and even where plebiscites were held, they were often conducted to confirm an already established result, rather than to assess the genuine will of the people concerned.[50] What can be considered the democratic approach to self-determination was decisively influenced by Woodrow Wilson in the early 20th century, who primarily understood self-determination as self-government. This aspect will be explored in more detail in section 2.2.2.

The above-mentioned example of the new European nation-states that emerged from larger multi-ethnic empires, that in reality were themselves multi-ethnic states, shows the risk of cyclical self-determination claims in the pursuit of ethnic homogeneity.[51] The more so, if the parameters for that homogeneity are highly disputed and uncertain. However, it is not the mere misuse of the concept of national self-determination that renders it flawed. Its fundamental error lies in the inherent idea that one group of people constitutes a nation above all others within the same territorial unit, legitimising the establishment of a state to accommodate that nation. Such thinking of the supremacy of one people due to its characteristic as 'the nation' by its very nature discriminates against numerically, socially or on other grounds, 'inferior' collectives. The more so, if the state as apparatus to govern the people is perceived as being the embodiment of the prevailing group based on its perceived claim to nationhood. Yet, although the times of imperialism are long gone according to the history books, ideas of self-determination linked to nationalist thinking continue to dominate the discussions on self-determination of peoples. Besides the framing of Kurdish independence around the idea of nationhood legitimising claims to statehood other modern examples include the Tamil movement in Sri Lanka and India, Serb and Croat nationalist independence movements in Bosnia Herzegovina and the numerous regional independence movements in Europe.[52] While arguments of ethnic ties are often emphasised in such cases of separatism, closer study of the circumstances suggest that alleged

[49] Similarly, but with respect to nationalism, some scholars distinguish between ethnic and civic nationalism, see further (n33) 47-51.
[50] (n36) 39; arguably this observation applies to the referenda in Crimea, Donetsk and Luhansk as well, showcasing yet another parallel between the instrumentalisation of self-determination of peoples in recent Russian expansionism and during European imperialism.
[51] Benziger (n48).
[52] See, e.g., Jon Henley and others, 'Beyond Catalonia: Pro-Independence Movements in Europe' (*The Guardian,* 27 October 2017).

unifying bonds of a separatist group are in fact not or not only of an ethnic nature. Often, common political interests, religion or other grounds also play a role.[53] However, regardless of whether one frames the nation-concept around ethnicity, religion or culture, the question that arises is as to whether the underlying dissatisfaction motivating groups of peoples to seek their fulfilment in independent 'nation-states' based on claims to self-determination may not be better addressed through other avenues. The alternative approach investigated here is that of supranationalism, to which historical as well as contemporary developments point, and which may offer longer term stability than competing ethnic claims based on inherited boundary lines. The above synopsis of factors underlines the need for considering other approaches to self-determination, an observation that forms the point of departure of this study.

2.2 What is self-determination of peoples: determining constituent elements

Given the contested content and nature of self-determination of peoples across different disciplines, this section determines constituent elements make the concept tangible for the purposes of this study. It does so by approaching the concept of self-determination of peoples from a socio-economic, political and early human rights inspired perspective, while the subsequent section (2.3) engages in detail with the international legal dimension of it.

2.2.1 Self-determination of peoples through a socio-economic lens

While it is not asserted that they were the first persons to present ideas of self-determination from a socio-economic perspective, it is safe to say that Karl Marx and Friedrich Engels made a lasting impact when they published their views on the importance of national liberation movements all over Europe and beyond.[54] Considered the founders of Marxist Communism, Karl Marx and Friedrich Engels greatly influenced subsequent generations worldwide with their economic, political, and sociological views.[55] English translations of their private letters and published works can be found in archives physically and online, published in a 50 volumes strong series titled 'Karl Marx and Friedrich Engels: Collected works', underlining the impact

[53] Marcus Dono, Monica Alzate and José-Manuel Sabucedo, 'Predicting Collective Action in a Secessionist Context: Different Motives for Two Opposed Stances' (2021) 12 Frontiers in Psychology; David Siroky and Namig Abbasov, 'Secession and Secessionist Movements' [2021] Political Science Oxford Bibliographies.
[54] Jack Cohen and others (eds), *Karl Marx and Friedrich Engels – Collected Works* (Lawrence & Wishart 2010) vol 12, xxiv-xxvi.
[55] ibid vol 1, xiii.

of their writings.[56] Marxism significantly influenced the evolution of the concept self-determination of peoples, while also being based on key aspects that remain relevant in light of present-day developments and for this study. Therefore, the starting point for exploring the socio-economic approach to self-determination in this study is Marxism. Since Marx's and Engels' time, Marxism developed into various ramifications making it difficult to synthesise universal statements that characterise it.[57] Consequently, this study focusses on Marx's and Engels' contemporaneous writings, rather than considering later interpretations or and scholarly contributions to their work. The only subsequent development of Marxist thought to be considered in detail in this section is that of Leninism, as this constitutes the second influential doctrine that tangibly affected the interpretation of self-determination of peoples as a concept. In fact, it is impossible to ignore Lenin if one discusses socio-economic approaches to the concept of self-determination of peoples through communism based on Marx. As will be seen on the following pages, Lenin took up fundamental views of Marx and Engels on the nation-concept but translated these into a general right to national self-determination.[58] Beyond that, however, they also held the view that the future of any self-determination movements lay not in the state at a national level, but rather in the overcoming of the state – without dismissing certain functions of the state – and integration on an international plane.

Karl Marx, Friedrich Engels and communist nationalism

A great part of Marx's and Engels' work – and one that links it to ideas of collective self-determination – is dedicated to the question of the "national liberation" (*nationale Befreiungsbewegung*), as they called it.[59] Behind this term stood the idea of the revolting proletariat, which, in the eyes of Marx and Engels had to overthrow the so-called *bourgeoisie* in order to achieve equality.[60] This principle was called the "class struggle" (*Klassenkampf*).[61]

[56] The whole collection is available online at https://archive.org/; the original German version of the collection can be accessed here: http://ciml.250x.com/archive/marx_engels/german/me_werke.html, both archives offer free access.
[57] John F. Henry, 'The Theory of the State: The Position of Marx and Engels' (2008) 37(1) Forum for Social Economics 13-14.
[58] Lenin was convinced that while Marx's views were applicable to the late 19th century, now an adaptation of these views to contemporary circumstances was necessary: "But while Marx's standpoint was quite correct for the forties, fifties and sixties or for the third quarter of the nineteenth century, it has ceased to be correct by the twentieth century.", Vladimir Ilyich Lenin, *Lenin VI,* 'The Right of Nations to Self-Determination' in Julius Katzer (ed), *Lenin: Collected Works,* vol 20 (Progress Publishers 2011) 433.
[59] (n54) vol 12, xxiii.
[60] Friedrich Engels and Karl Marx, *Manifest der Kommunistischen Partei* (Sálvio Marcelo Soares ed, Meta Libri 2008) 21-32.
[61] ibid 21; (n54) vol 28, 507-508.

As emerges from this introduction, Marx and Engels did not abandon the concept of nationalism in the formulation of their ideas and theories. This can be ascribed to the historical context that inspired their ideas. As witnesses of a time in which the concepts of nationalism and the nation state experienced an upsurge,[62] Marx and Engels offered key perspectives in interpreting these concepts. For Marx and Engels, the new ideas of nationalism and the nation state were modern political constructs induced by the surge of capitalism in Western countries and favoured by the collapse of the old feudal system.[63] Considered products of the capitalist system, Marx and Engels did not regard ideas of nationalism as desirable. In fact, they found nationalism and the thinking in small national units to be detrimental for communism and the national liberation of peoples.[64] Taken together with the problematisation of the original idea of self-determination of peoples in the previous section, this represents an early intriguing strand for considering the opposite way, namely supranationalism in research in the field. Yet at the same time, while not agreeing with the ideology, Marx recognised the rising nationalism as an opportunity for the success of the desired class struggle.[65] In elaborating on his ideas, Marx dedicated a notable part of his written works to the question on how nationalist movements ought to be used to solve highly disputed issues such as the so-called "Irish question" or the "Eastern question".[66] Specifically regarding the latter Marx held that the "Slav peoples" should have a right to choose their state form.[67] Going even further, Marx suggested three possible outcomes of the exercise of said right: autonomy, association with another state or independence, depending on each case.[68] To international lawyers, this sounds eerily familiar, for the so-called Friendly Relations Declaration, issued as UN General Assembly Resolution 2625 (XXV) in 1970, echoes this language when it reiterates UN General Assembly Resolution 1541 (XV), which proclaimed that the right to self-determination for colonialised peoples can result in either of these three options.[69] The crucial difference between the Resolution and Marx's view, however, is that

[62] Eric J. Hobsbawm, *Nations and Nationalism since 1780, Programme, Myth, Reality* (2nd edn, CUP 2012) 22-51.
[63] (n54) vol 12, xxvi, xxx.
[64] ibid vol 14, xxvii.
[65] ibid vol 1, xiv, xv.
[66] ibid vol 12, 5.
[67] ibid xxvi.
[68] For example, Marx argued for the unification of Germany, and for the independence of Ireland, but against the unification of Italy. The reason for this seeming contradiction is, that Marx and Engels held a very pragmatic view on nationalism. It was the means for the ends of communism, to be supported wherever it would weaken an established empire, not however for reasons of sentimentality, see, for example, n(54) xxx and S. Ryazanskaya (ed), 'Marx to Engels, November 2 1867', *Karl Marx and Friedrich Engels: Selected Correspondence* (Progress Publishers 1955) 194.
[69] UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625 124: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."; see also UNGA Res 1541 (XV) (15/12/1960) UN Doc A/RES/1541 29.

Marx did not intend this formula to apply as a blanket approach, let alone exclusively within the confined area of decolonisation. Indeed, the Balkans were hardly colonised in the later 20th century UN sense of the term,[70] instead the situation was a result of the slowly disintegrating Ottoman Empire.[71] Regarding the role of national liberation movements in colonised territories, in particular those under British colonial rule, Marx's views reflect two main elements: first, the view that liberation of these territories from their oppressors resulting in independent statehood is necessary for a successful proletarian revolution.[72] Marx envisaged independence for colonised territories as the ultimate solution, an interesting parallel to results and the almost mechanical recognition of the new states emerging from the decolonisation processes administered by the UN. Second, he believed that the emergence of nationalism in powerful European countries, specifically the former colonial powers, would inevitably lead to a reflection of these national aspirations in their colonies, resulting in the long-term in the insubordination and breaking away of the colonies from their respective colonial masters.[73] This represents remarkable foresight on the consequences of colonialism, as following generations should witness them.[74] At the same time, this foresight spells out precisely what nationalism was for Marx and Engels: a modern-day concept to be exploited in the sense of communism.

Taking this into account it is not surprising that both Marx and Engels endorsed the concept of nationalism in their language, despite rejecting it on a philosophical level. For instance, Marx wrote of different nationalities in Türkiye, something he saw as a hindrance for "progress" and "civilisation".[75] He also hinted at a connection between the formation of national entities and linguistic cohesion in the case of the Slavs, considering heterogeneity, especially in terms of language, as inhibiting "national development" and the "spirit of nationality" essential for the formation of national movements.[76] Engels even put forward the notion of historic and non-historic nations,[77] reflecting elements of so-called primordial nationalism. According to Holton,

[70] The area of application for the right to self-determination of peoples within the context of decolonisation is set out in UNGA Res 1514 (XV) (14/12/1960) UN Doc A/RES/1514(XV) 66-67, which refers to Trust and Non-Self-Governing Territories under the UN Charter.
[71] For the impact of policies directed at ethnic homogeneity in the Balkans following the disintegration of the Ottoman Empire see Alexander Korb, 'Homogenizing Southeastern Europe, 1912-99: Ethnic Cleansing in the Balkans Revisited' (2016) 18(4) Journal of Genocide Research 377-387.
[72] (n54) vol 12, xix-xxiii.
[73] (n54) vol 12, xxiii.
[74] ibid.
[75] (n54) 7: "This territory [Türkiye] has the misfortune to be inhabited by a conglomerate of different races and nationalities, of which it is hard to say which one is the least fit for progress and civilization.".
[76] ibid 9, 10.
[77] Charles C. Herod, *The Nation in the History of Marxian Thought. the Concept of Nations with History and Nations without History* (Springer 1976)

primordial nationalism is the assumption that the idea of a nation goes back to the early days of human civilisation, arguing that collective identity formation is an imminent part of human nature, and thus, by extension, the forming of nations is nothing other than an expression of it.[78] What results from this rhetoric is a contrast between the horizontal, internationally oriented communism propagated and the language used in the propagation of this ideology. It must, however, be put in context: Marx only welcomed the surge of nation-states to the extent that they accelerate the development towards the anticipated class struggle. This explains Marx's consideration that a plurality of nationalities was a hindrance for the progress of a civilisation – thus, interpreting 'progress' as progress towards the eventual class struggle.

The nation-state for Marx and Engels was not a goal, but a necessary point of passage for the realisation of the class struggle. This perception is most clearly expressed in the following statement:

> The working men have no country. We cannot take from them what they have not got. Since the proletariat must first of all acquire political supremacy, must rise to be the leading class of the nation, must constitute itself the nation, it is so far, itself national, though not in the bourgeois sense of the word. National differences and antagonism between peoples are daily more and more vanishing, owing to the development of the bourgeoisie, to freedom of commerce, to the world market, to uniformity in the mode of production and in the conditions of life corresponding thereto. The supremacy of the proletariat will cause them to vanish still faster. United action, of the leading civilised countries at least, is one of the first conditions for the emancipation of the proletariat.[79]

Here, it becomes clear that they thought of nationalism as a tool, maybe even a reality imposed by capitalist Western countries, but not as a philosophy that is *per se* supported by communism. Consequently, there is no place for nationalism in Marxist Communism, except where it can be instrumentalised for its ends.[80] Even more radically, Marx and Engels predicted a future without the state as central and power-pooling entity, based on considerations of economic and social pragmatism that include the recognition of increasing international interdependence, which goes hand in hand with the decrease in significance of national borders. This thought is

[78] Robert J. Holton, *Globalization and the Nation State* (2nd edn, Bloomsbury Publishing 2011) 167.
[79] Karl Marx and Friedrich Engels, 'Manifesto of the Communist Party' in *Karl Marx and Friedrich Engels: Selected Works in Three Volumes, vol 1* (Progress Publishers 1973) 124.
[80] (n58) 435.

expressed throughout the Communist Manifesto, but more explicitly discussed in a letter from Friedrich Engels to August Bebel in 1875:

> The free people's state is transformed into the free state. Grammatically speaking, a free state is one in which the state is free vis-à-vis its citizens, a state, that is, with a despotic government. All the palaver about the state ought to be dropped, especially after the Commune, which had ceased to be a state in the true sense of the term. The people's state has been flung in our teeth ad nauseam by the anarchists, although Marx's anti-Proudhon piece and after it the Communist Manifesto declare outright that, with the introduction of the socialist order of society, the state will dissolve of itself and disappear. Now, since the state is merely a transitional institution of which use is made in the struggle, in the revolution, to keep down one's enemies by force, it is utter nonsense to speak of a free people's state; so long as the proletariat still makes use of the state, it makes use of it, not for the purpose of freedom, but of keeping down its enemies and, as soon as there can be any question of freedom, the state as such ceases to exist. We would therefore suggest that Gemeinwesen ["commonalty"] be universally substituted for state; it is a good old German word that can very well do service for the French "Commune."[81]

The extract above shows how Marx believed that ideas of nationalism and faith in small national units would eventually lead to the downfall of the established *bourgeoisie*. The necessary step towards that goal was that the proletariat had to rise to be the leading force within the nation-state as established by the currently dominating class. Only then, in Marx's opinion, could the artificially imposed restrictions of national boundaries and the state as such be overcome. Thus, Marx's thought in horizontal rather than vertical terms – his class ideology applied internationally; it was not confined to the construct of a nation state.[82] Of course, the references to the nation-state by Marx in his writings are evidence that the discussion emerged against the European context, as opposed to other areas. Neither Marx nor Engels elaborated specifically on how exactly, that is through what form, such a stateless future would manifest. However, an evaluation of their writings suggests that while they considered the nation state with its class

[81] Friedrich Engels, 'Letter to A. Bebel' in *Karl Marx and Friedrich Engels: Selected Works in Three Volumes,* vol 3 (Progress Publishers 1973) 34; the German version can be found in August Bebel*, Aus meinem Leben: Zweiter Teil* (J.H.W. Dietz Nachf. GmbH 1911) 318-324.
[82] Joginder Sinkh Saklani, "Marxist Perspective on Nationalism and the Nationality Question" (2009) 70(3) The Indian Journal of Political Science 719-720.

system and steadfast borders a hindrance to free, equal and prosperous development, they did not deny the importance of certain state functions on the path towards a communist, i.e. stateless, future. Concretely, Marx and Engels proposed that after the working class successfully overthrows the *bourgeois* state, it would have to organise itself in a socialist state first before the step towards a communist society can be taken.[83]

In essence it would seem that for Marx and Engels, nationalism was a modern ideological construct, brought by the advance of capitalism in Western countries. While not adopting the ideas of nationalism and the state, Marx and Engels did see the ideology as an instrument to realise the proletarian revolution. Marxist nationalism, however, does not exist in the strict sense of the word. As becomes clear from his numerous publications, Marx had a more international rather than national perception on the proletariat and viewed nationalism as a capitalist corollary to be exploited for the ends of communism. In Marx's line of argument, he considered the effects of internationalisation of trade and thus by extension globalisation as crucial factors requiring consideration in any discussion on the socio-economic and political development of societies.[84] This forms another point of departure for considering supranational ideas in the self-determination debate, as fuelled by globalisation supranationalism appeared to have been the process of choice of numerous states in order to secure prosperous economic and as a result thereof social development.

Lenin's right to national self-determination

Among the most widely referenced publications addressing his doctrine, 'The right of nations to self-determination' that Vladimir Ilyich Lenin wrote in 1914 had considerable impact on the subsequent interpretation and practice of national self-determination.[85] That his work remains relevant becomes clear if one reads the website of the Tamil nationalist movement, where reference is made explicitly to Lenin's right to national self-determination.[86] Furthermore, the

[83] (n57) 21.
[84] (n79) 22-25; for a scholarly discussion on this aspect of Marx's theory see, for example, Susan M. Jellissen and Fred M. Gottheil, 'Marx and Engels: In Praise of Globablization' (2009) 28(1) Contributions to Political Economy 35-46; see also Seongjin Jeong, 'Globalization' in Marcello Musto (ed) *The Marx Revival: Key Concepts and New Critical Interpretations* (CUP 2020) 285-298.
[85] (n58); about the impact of Lenin's ideas see, for example, Michael V. Kryukov, 'Self-Determination from Marx to Mao' (1996) 19(2) Ethical and Racial Studies 352-377.
[86] Nadesan Satyendra, 'Nations & Nationalism' (*Tamilnation.org*, 10 May 2004).

history of the Baltic states and their paths towards independence, e.g. in the cases of Estonia, Lithuania and Latvia, are direct evidence of the impact of Leninist self-determination ideas.[87] From Marx' and Engels' philosophy on the effects of nationalism and their consideration that certain 'nations' should be independent, declaring 'the right of nations to self-determination' is a considerable development. To some extent, it its exactly what Marx foresaw when he wrote that the surge of nationalist feelings would spread and endanger the idea of the nation state as propagated by the powerful Western states.[88] Interesting for this chapter is, how the understanding of the concept of national self-determination evolved through Lenin and what conclusions must be drawn from that development regarding the concept of self-determination of peoples as a whole, but also in the context of supranational developments.

Identifying as a Marxist, Lenin relied heavily on Marx' and Engels' writings in the formation of his ideas. Indeed, their works are abundantly referred to in 'The right of nations to self-determination'. In this book, Lenin claimed to follow the "spirit of Marxism" as opposed to other socialist party comrades at the time.[89] It is therefore worth highlighting the commonalities of both approaches before considering the differences. The basis of Lenin's nationalism is the same as that of Marx: Lenin found that a sense of nationality, i.e. of being one nation, is essential for the germination and success of national movements.[90] Furthermore, like Marx, Lenin viewed homogeneity as a crucial factor in the development of a national identity, when he considered that "the multi-national state represents backwardness, or is an exception".[91] Lenin relates this in particular to the unity of language as the most important factor, again in keeping with Marx.[92] Lastly, like Marx, Lenin too viewed nationalist movements as a pathway to the successful class struggle.[93]

The concept intended to achieve the class struggle in Lenin's view was the right of nations to self-determination. For him, national self-determination meant the separation of *the* nation from the "alien national bodies" and the "formation of an independent national state".[94] It becomes clear from Lenin's writings that he was convinced that this type of what he called "political

[87] See further George Schöpflin, 'National Identity in the Soviet Union and East Central Europe' (1991) 14(1) Ethnic and Racial Studies 14 (1) 3-13.
[88] (n73).
[89] (n58) 50.
[90] ibid 9-14.
[91] ibid 14.
[92] ibid.
[93] ibid 70-71.
[94] ibid 10.

self-determination" was the only correct path worth pursuing.[95] In fact, Lenin heavily criticised the concept of "cultural self-determination", also referred to as the right to "cultural-national autonomy", raised in Marxist thought, which was understood as the "freedom of cultural development to all nations incorporated in the state".[96] Political self-determination, on the other hand, embodied the right to self-determination in its dimension as a right to secession.[97]

Lenin's distinction between 'the nation' from the 'alien nation', taken out of context, could be interpreted as supporting the idea of historically pre-existing nations.[98] However, as a Russian in the early 20th century, Lenin's approach to national self-determination was informed by his socio-cultural background. In Russia possibly more than in other countries at the time, the question of national self-determination was of upmost importance with considerable consequences. In Tsarist Russia the oppression of minorities, including religious groups, such as Muslims and Jews, but notably also other "national groups", such as Poles, Georgians, and Azerbaijanis contributed to the general dissatisfaction and thus the inner disintegration of the empire.[99] Lenin's utmost concern in light of the continuous fragmentation within the Russian sphere was therefore unity, in particular concerning the Communist party, which he thought should unite all workers across national or other boundaries.[100] This led Lenin to distinguish between three categories of countries, to which the right to national self-determination enjoyed different applicability: Western Europe and the United States of America, Eastern Europe (Austria, the Balkans, Russia) and so-called semi-colonial countries (China, Persia and Türkiye).[101] In Western Europe and United States the goal of capitalism and thereby national revolutions leading to independent nation states were processes already completed, thus these nations had already consumed their right to self-determination in Lenin's view.[102] In Eastern Europe and semi-colonial countries, however, the path to national revolution was not yet completed, therefore these countries were yet to make use of their right. Importantly, Lenin considered the fragmentation in smaller national units as necessary in order to reach unity in a

[95] ibid 14.
[96] ibid 11, 33, 36, 63.
[97] ibid 10, 60.
[98] (n78).
[99] (n58) 73; Michael G. Smith, 'The Hegemony of Content: Russian Language as the Language of State Assimilation in the USSR, 1917-1953' and Zaur Gasimov, 'Zum Phänomen der Russifizierungen: Einige Überlegungen' in Zaur Gasimov (ed) *Kampf um Wort und Schrift: Russifizierung in Osteuropa im 19.-20. Jahrhundert* (Vandenhoeck & Ruprecht 2012) 9-25, 193.
[100] See, for example, Vladimir Ilyich Lenin, 'Disruption of Unity Under Cover of Outcries for Unity' in Julius Katzer (ed), *Lenin Collected Works*, vol 20 (Progress Publishers) 325-347.
[101] Vladimir Ilyich Lenin, 'The Socialist Revolution and the Right of Nations to Self-Determination: Theses' in George Hanna (ed), *Lenin: Collected Works*, vol 22 (Progress Publishers 2011) 150-152.
[102] (n58) 432-434.

post-nation-state era.[103] In his mind, giving certain nations the right to national self-determination would satisfy their needs before they eventually realise their desires are better accommodated on a supranational or international plane beyond the restrictions of a national state apparatus.[104]

> Workers who place political unity with 'their own' bourgeoisie above complete unity with the proletariat of all nations are acting against their own interests, against the interests of socialism and against the interests of democracy.[105]

This passage highlights Lenin's overarching goal of party unity and the unity of the international proletariat. By supporting selected national self-determination claims, the Communist party in Russia would gain support from the proletariat and unite workers in one party that – as they would recognise through the party's support of their national movements – supports their aspirations.[106] Furthermore, in doing so, the party was able to adapt to the political climate in Russia, where demands for national self-determination could not be ignored.[107]

Lenin's views were opposed by fellow Marxist Communists at the time, including most prominently Rosa Luxembourg.[108] While in the foregoing analysis of Marx's interpretation of nationalism and the concept of nation states it became clear that the nation state was an abstract ideological concept imposed on reality, Lenin strongly opposed Rosa Luxembourg's critique of the concept of national self-determination as "impractical" and of the national state as nothing but "an abstraction" with no ties to "reality".[109] The concerns voiced regarding the stability and sovereignty of the already existing state, in which different nationalities live, foreshadowed present-day discussions concerning the right to self-determination in its dimension as a right to establish an independent state. Lenin cites Kokoshkin, for example, who expressed concerns that Lenin's concept of political self-determination entails the risk of "disintegration of the state", and that a right to secession within that category would be too

---

[103] Vladimir Ilyich Lenin, 'The State and Revolution: The Marxist Theory of the State and the Tasks of the Proletariat in the Revolution' in Stepan Apresyan and Jim Riordan (eds) *Lenin Collected Works,* vol 25 (Progress Publishers 2011) 447-454.
[104] ibid 50.
[105] Vladimir Ilyich Lenin, 'Theses on the national question' in Robert Daglish (ed) *Lenin Collected Works*, vol 19 (Progress Publishers 2011) 245.
[106] (n58) 23-29.
[107] ibid.
[108] For an overview see, for example, Drucilla Cornell and others, 'Ich Werde Sein' (2018) 3 Luxemburg: Gesellschaftsanalyse und Linke Praxis; or Christian Hofmann, 'Rosa Luxemburg Zur Russischen Revolution' (*Jacobin Magazin*, 8 January 2022).
[109] (n58) 398, 409-414.

ambiguous in its terms to be applicable in practice.[110] Others, like Semkovsky, argued that the concept of political self-determination, if it means independence, misses any solution to the issue of how to deal with groups within the seceding entity, who do not share the desire to separate from the existing state, especially from a Marxist perspective.[111] Similar discussions have been ongoing for decades about the right to self-determination of peoples.

Lenin's perspective of self-determination as a required strike against the established *bourgeoisie,* was a right that was exhausted once exercised, not one that presented a continuing quest for governing legitimacy. Thus, for Lenin the right of nations to self-determination was a disposable right. Despite emphasising that any kind of national movement is only reconcilable with the spirit of communism to the extent that the national movement serves to overthrow the *bourgeoisie,* Lenin did not argue that the right could not be exercised *after* a national revolution had taken place. This may be in line with the overarching goal of proletarian revolution, but the purpose of such revolution in Communist thought would arguably be defeated if the 'successful' revolting group established a new *bourgeoisie.* That would be fatal to the idea of self-determination as a tool for weakening the capitalist national state. In supporting the idea of disposability, Lenin's expressed concerns about the use of the right to national self-determination in political "opportunism".[112]

While some authors think of the doctrine of remedial secession as a modern school of thought,[113] it is possible to see elements of this doctrine already in Lenin's book:

> The bourgeois nationalism of *any* oppressed nation has a general democratic content that is directed *against* oppression, and it is this content that we *unconditionally* support, At the same time we strictly distinguish it from the tendency towards national exclusiveness; we fight against the tendency of the Polish bourgeois to oppress the Jews, etc., etc.[114]

By creating a link between the right of nations to determine their political fate and oppression by the parent state, Lenin reflects a line of thought which is today understood as the doctrine of remedial secession. It is doubted, however, that Lenin intended to restrict what he explicitly named a right to secession, to narrowly confined contexts of remedial secession. Indeed, it can

[110] ibid 420.
[111] ibid 450.
[112] ibid 443, 450.
[113] Simone Van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices* (Intersentia 2013) 110.
[114] (n58) 412.

be assumed that oppression in his view was an almost continuous state of affairs endemic to a dominating *bourgeoisie* and a subordinated proletariat exist. Further, his critique of cultural self-determination, intended to guarantee certain degrees of autonomy to national groups within the state, was condemned for playing into the hands of *bourgeois* nationalism, weakening prospects of a successful proletarian revolution. With such a revolution as its ultimate goal, and the right of nations to self-determination considered a crucial tool, it would be counterproductive to transform the right into a tool that could be circumvented by the entity it is supposed to challenge. Thus, a teleological interpretation leads to the conclusion that Lenin endorsed a doctrine of remedial secession in such broad terms, that it would apply continuously until the class struggle succeeds in all countries.

A few conclusions can thus be drawn of Lenin's interpretation of the right to self-determination. First, that the right accrues to *nations*, not *peoples*, since Lenin sought to instrumentalise nationalism for the ends of communism and for the ends of party unity. Second, that its substantive content was directed at political self-determination, i.e. the right of certain national groups to secede from the parent state. In propagating this interpretation of national self-determination, Lenin refuted attempts of interpreting the right as anything less than secession – dismissing the concept of cultural self-determination, which envisioned granting autonomy rights to national groups to ensure their interests are protected within the already existing state. Despite this, he did not argue that every national movement should be supported, as the overriding purpose of his entire doctrine remains unity among the working class and the Communist party itself. Third, the right to national self-determination was a means to achieve the ends of communism, i.e. to end domination of one class over the other with the exercise of self-determination resulting in independence as a weapon against oppression and a tool for the desired class struggle.

Thus, two strands become visible in these early doctrines of self-determination of nations. First, self-determination was certainly recognised and viewed as a potentially fragmenting force. But in Marxist as well as Leninist Communism this disruption and narrow nationalism was considered a temporary state that would eventually lead to peace and internationalism. Self-determination in these schools of thought had disruptive as well as reconciling functions, with the benefits of the latter deemed as overriding the risk of the former in the long run. Moreover, the focus on nationalism in the self-determination debate was considered a by-product of capitalist developments, with the main consideration being economic and social development, which in Communist thought is long-term better accommodated on horizontal, supra- or

international planes, than within separate national units, given that worker internationalism was central to both Marx' and Lenin's ideas.[115]

2.2.2 Self-determination as early 20th century principle of international law and politics and in the context of emerging international organisations

Following Marx', Engels' and Lenin's socio-economic approaches to self-determination, political figures of the early 20th century began to incorporate the principle of self-determination of peoples into discussions about democratic political thought. The central historic figure in that context is widely considered to be then US President Woodrow Wilson, who introduced the idea of self-determination as a basis for democracy to the wider political discourse, alongside South-African statesman Jan Christian Smuts, who discussed the concept in his elaborations on the future League of Nations (LoN).[116]

Previous sections have shown that the notion of 'nations' was crucial in the contemporary political discourse at the early 20th century, especially in connection with the principle of self-determination. The term 'self-determination of nations' gained practical relevance on the international political plane after the First World War, when the Treaty of Versailles was being negotiated and the map of Europe redrawn.[117] There is a plethora of academic literature on the concepts of national self-determination, and much has been said by scholars of other disciplines about how the principle of self-determination was influenced by Wilson and Smuts and its relevance between the two world wars.[118]

Nevertheless, these two figures were chosen for this section, as they represent two fundamental lines in the discussion on self-determination of peoples in the post-First-World-War period. While Wilson represented the idea of self-determination as self-government, Smuts projected

---

[115] See also 'Letter to the Workers and Peasants of the Ukraine: Apropos of the Victories Over Denikin' in George Hanna (ed), *Lenin: Collected Works,* vol 30 (Progress Publishers 2012) 291-297; John Bellamy Foster, 'Marx and Internationalism' (2000) 52(3) Monthly Review 11-22.

[116] See generally for the impact of Wilson on the concept of self-determination Derek Heater, *National Self-Determination: Woodrow Wilson and his Legacy* (St. Martin's Press 1994) and concerning Smuts, Jan Christian Smuts, *The League of Nations: A Practical Suggestion* (Hodder and Stoughton, 1918).

[117] George W. Wickersham, 'The Peace Treaty – it's Meaning to America. America's "Place in the Sun" due to her Efforts to Secure a Just Peace' in Wilson Lloyd Bevan and Hugo Christian Martin Wendel (eds), *Harper's Pictorial Library of the World War: The Great Results of the War, vol XII* (Project Gutenberg 2013) 172.

[118] Allen Lynch, 'Woodrow Wilson and the Principle of Self-Determination: A Reconsideration' (2002) 28(2) Review of International Studies 419-436; (n44) 19-27; George Curry, 'Wilson, Smuts and the Versailles Settlement' (1961) 66(4) The American Historical Review 968-986.

the principle of self-determination of peoples not on states directly, but on the international organisation they were supposed to establish, namely the LoN.

Self-determination according to Woodrow Wilson and Jan Smuts

The event that linked Wilson to self-determination in public memory is his so-called Fourteen Point Address, a speech held before the two houses of the US Congress which included Wilson's plan on how to re-establish and subsequently maintain peace in Europe following the First World War.[119] Even though it is this speech, that is often referenced to connect Wilson and the concept of self-determination of peoples, Wilson himself did not use the term 'self-determination' in this Address. Without contextual knowledge, it would thus appear incorrect to deduct that Wilson said anything about self-determination in his speech. In seeking to understand why scholars locate the principle (as it was not a norm of international law at the time)[120] of self-determination in the President's speech, two aspects are crucial.

First, it is documented that President Wilson referenced self-determination in numerous other speeches when discussing the reorganisation of Europe.[121] While he did not use this term in his Fourteen Point Address, its content concerns the same situations in which Wilson considered the right or sometimes referred to the principle of self-determination as "imperative" for the reaching of a lasting solution. Concretely, Robert Lansing, Secretary of State under Woodrow Wilson, wrote that the President declared on 11 February 1918 before the Senate and the House of Representatives that "self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril".[122] Second, it is recorded, that Woodrow Wilson – echoing Lenin's language – famously declared that all nations have a right to self-determination, a statement that he later appeared to regret.[123] Furthermore, it was a generally accepted fact that Wilson advocated for the principle of self-determination in the years preceding his Fourteen Point Address.[124] In light of these circumstances, it appears

[119] 'President Woodrow Wilson's Message to Congress (Address of the President, Jan 8, 1918)' (National Archives and Records Administration).
[120] (n41) 126.
[121] See Lynch (n118) 424-426.
[122] Robert Lansing, *Peace Negotiations, a Personal Narrative* (Constable 1921) 85.
[123] Lynch (n118) 426.
[124] A newspaper article from 1920, made available by The Century Ireland Project, reads: "These most recent fears are the result of Allied attempts to resolve the situation that has developed over the future of territories along the Adriatic coast in such a way as would undermine the principles of self-determination that he [US President Wilson] has championed over the last few years.", RTE, 'President Wilson Forces Resignation of His Secretary of State (18 February 1920)' (*Ireland's National Public Service Media | Meáin Náisiúnta Seirbhíse Poiblí na hÉireann*).

erroneous to infer from the president's lacking explicit mention of self-determination that he did not in fact consider it in his speech.

However, it is important to understand what Wilson meant when he talked about self-determination. He developed his notion of the concept with particular regard to the reorganisation of Europe following the First World War.[125] Whether or not, in that context, self-determination in Wilson's view had an ethno-nationalistic dimension, suggesting the reorganisation of Europe in nation-states on grounds of ethnicity, is subject of debate amongst scholars.[126] Without becoming engulfed into this dispute, which is not decisive for the purposes of this study, it is submitted here that an ethno-nationalistic view with relation to self-determination cannot be conclusively excluded. Indeed, it appears that Wilson expressed references to national self-determination in the traditional sense following ethnic determinants for example with regards to the Balkans, Austro-Hungary and the Ottoman Empire.[127] Nevertheless, this was neither the main nor the original element of Wilson's notion of self-determination.

Self-determination for Wilson did not necessarily affect territorial boundaries and the question of the nation-state in an ethnic sense. In Wilson's thought, self-determination equalled self-government and was closely related to democratic ideas of governance.[128] It thus had a civic-democratic, rather than ethnic-nationalist aspect to it, with the latter being more of a concomitant factor of the former. However, as integrative and universal as this civic interpretation of self-determination as self-government might appear on first sight, self-government in Wilson's plan should only be accorded to those considered capable of autonomous self-rule.[129] This is reflected in various speeches and significantly influenced the structure of the Mandate System within the LoN, which divided the territories of the old Austro-Hungarian and Ottoman Empire as well as the territories of the former German territories in different categories of Mandates depending on their status of readiness for self-government from Wilson's and other world leaders' view at the time. Based on this, one may discern an American supremacist attitude in that regard, while some scholars even argue white

[125] See Erez Manila, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (OUP 2007) 60.

[126] Scholars supporting an ethno-nationalistic interpretation of Wilson's principle of self-determination are, for example, Heater (n116); Lloyd Ambrosius, 'Democracy, Peace and World Order' in John Milton Cooper (ed), *Reconsidering Woodrow Wilson: Progressivism, Internationalism, War, and Peace* (Woodrow Wilson Center Press 2008) 225-249; contrary: Trygve Throntveit, 'The Fable of the Fourteen Points' (2011) 35(3) Diplomatic History 445-481.

[127] Possibly influenced by Lenin's approach, see Fisch (n41) 121, 133-137, 158.

[128] Throntveit (n126) 451.

[129] (n125) 60-62.

supremacism was underlying Wilson's civic idea of self-determination considering his racial segregation policies pursued within the US.[130]

Similar views concerning the role and content of self-determination were expressed by Jan Smuts. This is not surprising given the historically supported exchange and mutual admiration between Wilson and Smuts.[131] Smuts was among the most influential persons who promoted the concept of self-determination on a wider political and international spectrum after the First World War. His pamphlet *The League of Nations: A Practical Suggestion*, published in 1918, left a lasting impression on world leaders at the time – including most famously US President Woodrow Wilson.[132] In his "short sketch", which extended over sixty pages, Smuts laid down his propositions about the scope and functioning of a new "world-government", entrusted with the weighty task of guaranteeing a stable and lasting peace in those states appertaining to it, namely the LoN.[133] In setting out the principles of this new entity, Smuts stated that the LoN should be based on the principles of "no annexations, and the self-determination of nations", thereby placing the principle of self-determination at the centre of the future organisation.[134]

In his pamphlet, Smuts used different terms in relation to 'self-determination': *Practical Suggestion* begins with "self-determination of nations", the same expression Lenin used in 1914 in *The Right of Self-Determination of Nations*.[135] Subsequent pages refer to "political self-determination", "self-determination, autonomy and self-government", "the principle of self-determination", and "the self-determination of the autonomous State".[136] The question inevitably arises whether the different expressions were accorded differing content, or whether they were intended synonyms. Despite the different designations, a contextual reading not only of *Practical Suggestion* but also other publications by Smuts suggest that self-determination for him encapsuled essentially free decision-making and autonomous self-government.[137] This is supported by Smuts' references to "the consent of the governed to their form of government" in *Practical Suggestion.*[138]

[130] ibid 62-72.
[131] Curry (n118) 968-986.
[132] ibid.
[133] Smuts (n116) v (Foreword), 30.
[134] ibid 12.
[135] ibid.
[136] ibid 12, 15, 16, 19, 20.
[137] Jospeh Kochanek, 'Jan Smuts: Metaphysics and the League of Nations' (2012) 39(2) History of European Ideas 271.
[138] Smuts (n116) 15.

From today's perspective, Smuts' idea of self-determination as self-government or consent of the governed would be classified as internal exercise of self-determination.[139] Nevertheless Smuts appeared to recognise both modes of implementing self-determination (internally and externally), while not viewing both options suitable to all situations:

> (…) in the future government of these territories and peoples the rule of self-determination, or the consent of the governed to their form of government, shall be fairly and reasonably applied.[140]

Readers of this passage may find themselves faced with the question whether the "or" after "self-determination" is to be read as concretising the content of self-determination, or rather as suggesting an alternative. In the first case, that would mean that Smuts envisioned internal exercise of self-determination in contrast to external self-determination. The second reading would mean that he saw internal self-determination as another possibility of exercising self-determination, besides external self-determination. That Smuts did recognise the possibility of self-determination leading to statehood, and thus its external exercise, becomes clear from his elaborations on Finland, Poland, Czechoslovakia and Yugoslavia, which he considered "sufficiently capable of statehood", while Russia, for example, required a "guiding hand" to reach that stage in the future.[141] Differently again, Smuts also considered that some countries were not capable of stable autonomy let alone statehood, either due to their heterogeneous populations (e.g. Palestine) or because their inhabitants were dubbed "barbarians" (the former German colonies).[142] This categorisation of countries following their perceived eligibility for different forms of self-determination was not only shared by Wilson as portrayed above, but it laid the foundations for the League's Mandate System. Finally, Smuts also speaks of "peoples not yet capable of independent statehood" which further supports this study's position that he did not completely reject the idea of self-determination resulting in independence at some point, albeit subject to Smuts' own assessment as to which countries and their inhabitants were considered eligible.[143]

---

[139] *Reference Re Secession of Quebec* [1998] 2 SCR 217 para. 126; on the distinction between internal and external self-determination see section 2.3.1.
[140] (n138).
[141] ibid 16.
[142] ibid 15, 16.
[143] ibid 28.

This restriction of different modes of exercising self-determination based on Smuts' individual opinion on the level of political development in a certain country poses obvious problems. Such an approach is irreconcilable with the principle of sovereign equality of states, which since 1945 is one of the fundamental pillars of international law agreed upon by UN member states, and efforts to decolonise international law in past decades. Effectively, Smuts' proposed a model of European imperialism when he measured the readiness of countries for different measures of self-determination not only based on the model of European states, but subject to European standards and as deemed fit by leading European statesmen. This is underlined by his explicit references to the Great British Empire as inspiration for the LoN.[144]

Thus, the model of self-determination proposed by Smuts operated within the contours of racism and imperialism and did not aim to be a principle or right extending equal opportunities or treatment *per se*. Rather, it served as a safeguard to prevent the imperial power (the LoN) from repeating what Smuts considered mistakes made by previous empires that in his opinion led to their failure. As such, colonialism did not contradict self-determination for Smuts, as long as it unfolds as a tutelage, presumably acting in the best interest of the colonial territories. Both Wilson and Smuts shared the same views in that regard with a slight difference: while Smuts envisioned a LoN modelled after the example of the Great British Empire, Wilson envisaged a LoN following the US model.[145]

Lastly, it is of interest what entity Smuts considered politically or legally entitled to claim self-determination. The emphasis on the "profound feeling" of the "European peoples" indicates that they were the entity Smuts had in mind when articulated the principle of self-determination of nations as one of the main pillars of the LoN.[146] Considering that Smuts was a South African statesman, one may be tempted to interpret this passage as referring to European peoples in Africa. However, Practical Suggestion contains principles considering not South Africa itself, but in his proposal Smuts explicitly sought to address issues on a global scale and he referred to specific countries, e.g. Europe, Russia, former Ottoman Empire as well as the former German colonies in Africa. A key component in Practical Suggestion Number Three is the requirement of "consent of the governed to their form of government". This suggests Smuts meant inhabitants of a territory of a state, i.e. people who are permanently within a state's jurisdiction, without any look at differing cultural, religious or ethnical characteristics within the group of inhabitants. This represents a difference to the views of Marx and Lenin concerning the

[144] ibid 26, 27; (n137) 270.
[145] Throntveit (n126) 454.
[146] Smuts (n116) 13.

concepts of nationality and nation states: first, they did not speak of peoples, but of nationalities. Second, their focus lay on emphasising differences between nationalities by looking at religious, linguistic and other cultural elements that distinguished one nation from the other in order to find out, where national liberation movements were required to overthrow an already established national capitalist state.

Smuts' differing view and even rejection of ethnic nationalism on the ideas of nationalism is rooted in the experiences of the Great War. Nationalism was perceived as one of the main instigating factors, which threatened peace in Europe. During the war, the notion of so-called *irredenta* experienced growing popularity, and was part of the social and political discourse.[147] The hazard provoked by *irredentism* needed to be defused to avoid a new eruption of conflicts. In fact, in *Practical Suggestion*, Smuts expressed dissatisfaction about a narrow understanding of nations, rejecting this approach in favour of a globalised understanding of nationality under the influence of the *League of Nations*.[148] For Smuts, the "over-strained" and "over-developed" "principle of nationality", was one of the main causes for the outbreak and devastation brought by the Great War.[149]

These factors taken together suggest that Smuts attempted to reshape the term 'nation' bearing in mind the soon to be established LoN. In doing so he used the term to refer to inhabitants of a state territory, including minority groups within the territory. A distinction between individuals belonging to the dominant cultural group and cultural minorities was not made by Smuts when he wrote about self-determination, except where he found an autonomous exercise of self-determination impossible due to the cultural pluralism within a state. On this point, the development from a strong focus on a nation-state for each nationality as promoted by Lenin for the ends of Communism, to Smuts' globalised view of what a nation can comprise, becomes especially visible. This development of the notion of the nation-concept also indicates the transition of a vertical international law system focussing on small national units to a more horizontally orientated international law system. It is hence more obvious to conclude that Smuts intended inhabitants of a state as potential holders of a right or principle of self-determination as opposed to ethnic groups.

[147] Martyn Housden, 'National Minorities as Peacebuilders? How Three Baltic Germans Responded to the First World War' (2018) 43(1) Peace & Change 5-31; for more information see Markus Kornprobst, *Irredentism in European Politics: Argumentation, Compromise and Norms* (CUP 2008).
[148] (n133) 9-12.
[149] ibid 9.

In contrast to an interpretation of setting self-determination on the same footing as the will of the population, stands Smuts' formulation "(…) the only safe and sound principle for the League to hold on to is that of the self-determination of the autonomous State."[150] The emphasis on state autonomy seemingly points more in the direction of state sovereignty and non-intervention, rather than self-determination of peoples as a separate legal guarantee. This however does not contradict the above conclusion. Instead, this single statement should be read as yet another aspect of self-determination in Smuts' view.

Self-determination and seeds of supranationalism in the League of Nations

The aspect that makes Wilson's and Smuts' proposed concept interesting and relevant to this thesis, is that of internationalism, which contained early seeds of supranationalism. Both individuals essentially argued in favour of supranational organisations, without of course explicitly advocating for the supranational models of the EU or the AU as we know them today. Rather, Wilson specifically envisioned an international organisation in the shape of a United-States-of-America-inspired confederation, namely the League of Nations.[151] Both considered that nationalist tribalism hindered progress of civilization.[152] Wilson advocated for the development of a "a moral sense and a community among states", including a supranational executive for the maintenance of international order.[153] Importantly, the establishment of a supranational community of states would not be based on ethnic-nationalist sentiments, but fuelled by a common purpose shared by states' governments. [154] From today's perspective, with the experience of the EU as the entity that coined the term supranational organisation, one could think of economic interests, stability, peace and safety as well as social development as such common interests.

The system and underlying ideas of the LoN showcase characteristics that foreshadowed certain elements of supranational surveillance as they should be agreed upon in Europe following the Second World War. Of course, the LoN was by no means a supranational organisation, nor was there sufficient political will to shape it in that direction. Its purpose and competencies over certain areas, however, can be taken as early indicators where future developments would lead to. Specifically, in the League's Covenant it was stipulated that national armaments should be

[150] (n136).
[151] (n145).
[152] Throntveit (n126) 454.
[153] ibid.
[154] ibid.

reduced to the lowest point possible and that the Council should formulate plans to enable this process.[155] While the members retained their full sovereignty over their military and related economic and industrial branches, they obliged themselves to submit information concerning the status and production of warfare to the League.[156] In doing so, they opened themselves up to a certain degree of interference in their domestic realm, at least from a political perspective. While the sharing of war-relevant information was a considerable step compared to the secrecy in previous years, it opened room for political pressure through "naming and shaming". This idea of establishing some degree of supranational supervision over war-relevant domestic branches was further developed in the European Coal and Steel Community in 1951, as is known today in a more stringent and effective way than the LoN at its time. Another area pointing towards supranational supervision was the submission of member governments under a joint court, namely the Permanent Court of International Justice (PCIJ).[157] This may be seen as an even stronger indicator for fundamental change, especially from the perspective of international law. The establishment of the PCIJ cemented the path towards permanent international adjudicatory bodies started in previous decades through the Hague Peace Conferences.[158] It also confirms the development towards increasing legal supervision over governments' conduct on the international plane and conversely governments' gradual relinquishment of independence from external influence. Besides disarmament and international adjudication, traffic in women and children, opium and other dangerous drugs were also placed under LoN supervision.[159] This too may be seen as an early hint towards the opening of other political areas to supranational intervention as should later be confirmed through the unique development of the EU.

While both Wilson and Smuts embraced internationalism and the establishment of a supranational body on the international plane that would direct and enforce rules among governments, in the form of the LoN, at least Smuts expressed clear ideas concerning the role of self-determination and in this supranational setting. The specific type of supranational governance would be that of an empire and self-determination would be extended to varying degrees in order to ensure the continuity of the empire.

[155] Art. 8.
[156] ibid.
[157] Arts. 13, 14.
[158] See also von Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23(1) European Journal of International Law 10-11.
[159] Art. 23c, d.

2.2.3 The right to self-determination of peoples in the *Åland Islands* case: A link between self-determination and minority rights, and the creation of a wider human rights context

As a historical stepping stone in the evolution of self-determination notions before the establishment of the UN the *Åland Islands* case continues to offer valuable insight in how self-determination may be interpreted and of the mechanisms that could be called upon to ensure lasting peaceful solutions to self-determination conflicts. Its relevance also stems from the situating of self-determination in the context of wider human rights, namely minority rights, at an early stage in 20th century international law.

The *Åland Islands* is one of the most famous cases dealt with under the mantle of the LoN being the first case explicitly addressing the question of the content of a 'right' to self-determination.[160] The case's continued contemporary relevance consists in it representing a landmark in the evolution of the right to self-determination of peoples. Despite its age, the case still offers useful points of reference for the pursuit of two leading questions through this section: what was the content of self-determination of peoples at this point in international law and how did it develop through this case?

At the core of the case stood the question of "whether the inhabitants should be authorised to determine forthwith by plebiscite whether the archipelago should remain under Finnish sovereignty or be incorporated in the Kingdom of Sweden".[161] This question was eventually the subject of two separate reports – the first, from the Commission of Jurists, who sought to determine if the dispute was by its legal nature one of national or international law, and whether it fell within the jurisdiction of the LoN. The second was issued by the Commission of Rapporteurs, examining the question in light of the merits of the case.

The Report of the Commission of Jurists

The question considered by the Commission of Jurists did not reference the term 'self-determination', neither as a right nor as a principle. Instead, the question was embedded – from a systematic point of view – within the terms of the Covenant of the LoN. Art. 15(8), a dispute resolution provision, barred disputes from being settled within an international law setting, if

[160] Thomas Musgrave, *Self-Determination and National Minorities* (OUP 2000) 100.
[161] Report of the Commission of Jurists, League of Nations Official Journal (October 1920) 3; for more background on the history of the Åland Islands relevant to the case see also 8-9 in the same report.

one of the parties to the dispute claimed, and the Council supported the claim, that the dispute fell within domestic jurisdiction. Being a dispute settlement provision with no regard to the specific content of the dispute, Art. 15(8), naturally, did not reveal anything about self-determination as a legal or political concept at that time. Rather, the provision only concerned the legal nature of the dispute.

From today's view a clear separation between the substance of the dispute, i.e. self-determination, and the question of whether the dispute falls within domestic or international jurisdiction, remains difficult to determine. This is due to the evolution that international law has undergone over the past century. Domestic legal systems and international law have become increasingly interwoven, to the extent that nowadays disputes may frequently be triable on both planes.[162] This is substantiated by a famous self-determination case that was decided by the Canadian Supreme Court in 1998, namely *Reference re Secession of Quebec*, where questions appertaining to both national and international law were at issue.[163]

At the time of the *Åland Islands* case, international law was still predominantly seen as the law of states, applying only between states (with the exception of diplomatic protection, which however was still considered a matter of state sovereignty).[164] Given that it was unclear at the time if the principle of self-determination of peoples had legal bearing, it can be said that it was widely considered neither a matter of domestic nor international law, but predominantly a political term. This view, however, was not uncontested. For example, in the *Åland* case Sweden explicitly referred to 'the right to self-determination' and specifically asked if that right could support the Ålander's claim of being entitled to decide upon their state affiliation by means of a referendum.[165] Sweden's submission implies a radical view on what 'self-determination' was then, apparently following the Leninist interpretation of it comprising political and territorial independence. Hence, it becomes clear from this case is that it was not consensus by any means that self-determination suffered a negligible existence as a mere political principle. Finland, on the other hand, argued that the principle of self-determination was not applicable in the case.[166] It is interesting to read that while Finland rejected that it was

[162] The overlapping of the international law system with many domestic law systems results often in contentious court findings, e.g. *Nevsun Resources Ltd v Araya* [2020] SCC 5 1 SCR 166.
[163] (n139) paras. 2, 19, 21, 83.
[164] See also Stephan Wittich, 'Diplomatic Protection' (*Oxford Bibliographies Online*, 12 April 2019).
[165] (n161) 3.
[166] 'Aaland Islands - League of Nations Council - Reports and Proposal Regarding the Rapporteurs Commission Responsible for Studying the Question - Correspondence between the Landsting of Aaland and the Council.' (*UN Archives Geneva*) 1.

a legal right, it did not dispute the existence or significance of the principle of self-determination *per se*, but rather merely argued against its applicability to the case.

The Commission of Jurists seemingly followed the view that the self-determination was a political principle rather than a legal concept when it stated that:

> Although the principle of self-determination plays an important role in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the LoN.[167]

The status accorded by the Commission to self-determination, was that of a "principle" of "modern political thought", thus, not even a legal thought. It would however be wrong to artificially isolate that sentence from its context. The Commission categorised self-determination of peoples as a political principle because the treaty it was asked to consider, the Covenant of the LoN, did not mention the term. In other words, the Commission did not make a general finding that self-determination is nothing but a political principle vaguely existing in "modern political thought" but found that self-determination is a political principle from the viewpoint of the existing law of the LoN, whose legal framework did not reflect this principle. In fact, while determining that self-determination was a term alien to the Covenant, the Commission acknowledged that it had been recognised as a principle of potentially legal relevance in other international treaties. This did not, however, change the existing law as it applied within the LoN. [168] Thus, what the Commission said in its report about self-determination can hardly be generalised as setting out what its legal status was and how it was interpreted in international law at the time beyond the reach of the LoN. A contextual interpretation suggests that the Commission's classification of self-determination of peoples as a significant principle of "modern political thought" only applied within the limits of the LoN system. Therefore, the Commission's finding applies with a restriction, and the report functions as an example of how self-determination was being interpreted within the LoN, rather than a representation of contemporary international law overall or even other law systems and their stance on self-determination.[169] Furthermore, it is important to note that the Commission

[167] (n165).
[168] ibid: "The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.".
[169] While it may be argued that the significance of the League as international organisation at the time was such as to have a guiding function on matters of international law, from a purely systematic point of view, this does not affect the objective fact that the League was one of many legal frameworks with specific and distinct contents. Moreover, even assuming that the League had such a significance, this does not mean, that findings of its organs necessarily reflected concordant views on matters of international law, as the member states could still hold their own views.

reached this conclusion by looking solely at the provisions of the Covenant of the LoN. As a result, the Commission's focus in this section laid on treaty law applicable to the framework of the League.

This result should not be confused with what the Commission said next, with regard to international law in general:

> On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.
>
> Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term "State," but would also endanger the interests of the international community. If this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the National group wishes to be attached, nor by any other State.[170]

Here, the Commission considered international law in general, saying that since "positive international law" was silent on the matter of secession under the principle of self-determination of peoples, it was purely a matter of state sovereignty, which, absent of opposing international law provisions, should not be impaired by settling the issue under international law. According

[170] (n167).

to the Commission, other international treaties seemingly did not address the question of into what ambit a dispute about self-determination falls – domestic or international. Therefore, the Commission reached an *in dubio* conclusion to the benefit of the state, which reflects the *Zeitgeist* of the time, finding that self-determination generally falls into the domestic law sphere, which in the absence of clear provisions cannot be permeated.

An exception to the finding, that self-determination generally falls into the ambit of domestic law can be found later in the same report, which concluded that in the *Åland Islands* case, the question of self-determination, "oversteps considerably the bounds of a question of pure domestic law".[171] The situation found by the Commission to be so exceptional as requiring a special consideration, is that of a state's transition from *de facto to de jure* – thereto the Commission attached a deep political and legal interest.[172] The Commission argued that the privilege of state sovereignty only applied, if the process of state formation was fully completed. Should an entity, however, lack any characteristics of a fully sovereign state, 'the situation is obscure'.[173] Legal interest is attached, according to the Commission, when the process of state creation has not yet undergone the transition from a factual situation to a situation *de jure*, i.e. a fully-fledged state. Summarising, if there is no proper state, no state sovereignty can be impaired, and the matter is not one of exclusively domestic nature, but of international concern.[174] This understanding of the principle of self-determination differs from today's view on self-determination as a collective right possessed by an entity other than a state, and it reflects a state-centric view typical for the time.

Yet, the Commission refers to the principle of self-determination *of peoples.* In the report, it mentioned exemplary manifestations of this principle. On one hand, it recognises an external mode of implementation of the principle of self-determination: explicitly mentioned were the outcomes of independence and association with another state. On the other hand, the Commission also acknowledged an internal dimension of the principle of self-determination. With a view to the protection of minorities within a state, the report set out a legal framework, which resembled that of what would some years later be recognised as the area of human rights.[175] Indeed, the Committee of Jurists emphasised the link between self-determination and the protection of minorities:

[171] ibid 13.
[172] ibid 4.
[173] ibid.
[174] ibid.
[175] ibid.

> The principle recognising the rights of peoples to determine their political fate (…) must be brought into line with that of the protection of minorities; both have a common object—to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics.[176]

It is clear, therefore, that the Commission considered the interests of peoples or groups of peoples of a state under the principle of self-determination. In its report it also talked about "the principle that nations must have the right to self-determination",[177] raising questions about whether the terms 'nations' and 'peoples' were to be regarded as interchangeable. In contrast to this human rights approach, i.e. the shifting away of the focus from the sovereign state towards the rights and interests of its inhabitants, the Commission then again characterised self-determination as 'one of the most important of the principles governing the formation of States'.[178]

Despite renewed emphasis on the importance on state sovereignty, a door was left open to allow for the League's jurisdiction in cases of 'manifest and continued abuse of sovereign power, to the detriment of a section of the population of the State'.[179] This is the sentence which caused many readers to interpret the report as providing for something akin to remedial secession.[180] Caution is required in interpreting this sentence, however. First, the Commission did not say that secession would be allowed in a case of continued and manifest abuse, merely that such a case would be a matter within the ambit of international law. This is still a remarkable finding at a time when the international law system was still predominantly viewed as state-centric. Stating that grave abuse of the population by a state was not an internal matter protected by the respective state's sovereignty, constituted a significant development. Second, it remains doubtful if the Commission really intended to say that a section of the population was allowed to secede in such a scenario, given that it explicitly held that a population or section thereof were not recognised as subjects of international law.[181] Instead, the Commission seemingly

---

[176] ibid.
[177] ibid 5.
[178] ibid.
[179] ibid 3, 4: "The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute, arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations. Such a supposition certainly does not apply to the case under consideration, and has not been put forward by either of the parties to the dispute."
[180] (n113) 125.
[181] (n165): "(…) refusal or grant population right to decide upon their political fate pure matter of state sovereignty (…) if this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the National Group wishes to be attached, nor by any other State."

favoured remedial association over remedial secession when it conceded that 'if it was true that incorporation with Sweden was the only means of preserving its Swedish language for Aaland, we should not have hesitated to consider this option'.[182]

The Report of the Commission of Rapporteurs

Like the Commission of Jurists, the Commission of Rapporteurs found that the legal question before them concerned Finland's state sovereignty.[183] Thus, the Commission of Rapporteurs too reflected a state-centric position in its report. The Rapporteurs also agreed that self-determination of peoples was a principle and not a right within the LoN framework.[184] Even in the conclusion, the Rapporteurs agreed with the Jurists that the Åland Islands question transcended the domestic sphere and hence, that the dispute belonged into the sphere of international law.[185]

A difference to the first report arises over the opinion on whether or not parts of a peoples, i.e. minority groups, can claim the principle of self-determination. As seen above, the Commission of Jurists, while not explicitly saying that the principle of self-determination applied to minorities, established a link between the principle and the protection of minorities. According to the Rapporteurs however, the principle of self-determination only concerned peoples. It found that the characteristics of a peoples were a "clearly defined territory" and "a well-developed national life".[186] In the view of the Rapporteurs, the privileges peoples enjoy under the principle of self-determination cannot apply in the same way to the Åland Islands, which it considered "only a small part of the Finnish territory, and the Åland population only a small fraction of the Finnish nation".[187] It goes on to say that "it is evident, that one cannot treat a small minority, a small fraction of a people, in the same manner and on the same footing as a nation taken as a whole".[188] The fundamental position is thus, that the principle of self-determination does not apply to entities other than peoples. Despite expressing this view, the Commission of Rapporteurs found it necessary to add that the Ålanders, in contrast to the Finnish people, who have experienced oppression by Russia, "have neither been persecuted nor

[182] ibid.
[183] Report of the Commission of Rapporteurs, League of Nations Council Doc. B7 21/68/106 (1921) 2; literally, the Commission called it „the right of peoples to dispose freely of their own destinies".
[184] ibid 3.
[185] (n183).
[186] (n184).
[187] ibid.
[188] ibid.

oppressed by Finland".[189] It therefore concluded that Finland's peaceful attitude overall made it possible to negotiate to reconcile the interests of the Ålanders, namely the protection of their culture and language, with Finland's interest in safeguarding its sovereignty.[190]

This result shows a preference for negotiation over hard legal solutions allowing or rejecting secession in a particular case under the mantle of self-determination. Nevertheless, the report opened the door to an exception to the general principle that minorities are exempt from the principle of self-determination:

> The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.[191]

In line with the Commission of Jurists, the Commission of Rapporteurs acknowledged in its own report that under special circumstances there might be a prospect of remedial secession. Such special circumstances arose if a minority was denied the possibility to protect its own interests in a meaningful way under the regime of a sovereign state. While this caveat may seem revolutionary, expectations need to be dampened: self-determination was not viewed as a right even under these circumstances.[192] Nor can it be inferred from the report that secession was envisioned as an automatism in a case of extreme abuse of sovereign power, or that it was the only possible solution in such a situation.

A last point shall be made about the Commission of Rapporteurs' interpretation of the term "nation". Similar to the first report, not much is said in that regard. Yet, the formulation "it is evident, that one cannot treat a small minority, a small fraction of a people, in the same manner and on the same footing as a nation taken as a whole" implies that a synonymous understanding of the terms "peoples" and "nation" existed.[193] The shift towards 'peoples' rather than 'nations' became stronger in the *Åland Islands* case. Here, the parties refer to the principle of self-determination of peoples with the view expressed that the principle might even be a legal right in international law, able to accommodate potentially secessionist claims. While the latter view

[189] ibid.
[190] ibid 4.
[191] ibid.
[192] The report does not refer to it as a right even when elaborating on circumstances which may give rise to considering claims to secede based on the principle of self-determination.
[193] See also *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)* [2010] ICJ Rep 403, Response Submitted by Finland to Questions of Judge Koroma and Judge Cancado Trindade (December 2009) 3.

did not prevail at the time, the two Commissions in the *Åland Islands* case nevertheless recognised that the principle of self-determination needed to be reconciled with the sovereign rights of states and the interests of minority groups living in the state. It was for the first time in this case, that the link between the principle of self-determination of peoples and minority rights was recognised in international law. Still, both Commissions agreed that in principle minority groups could not bring claims under the principle of self-determination. Furthermore, the Commissions found that the principle of self-determination cannot prevail over a state's sovereign rights, once the process of state creation was completed. In other words, a preference was expressed in favour of the territorial integrity of the state. Despite this finding, both Commissions opened a door for minority groups under the mantle of the principle of self-determination, by holding that manifest and continuous abuse of sovereign power by the state to the detriment of a minority might penetrate the shield of sovereignty which usually blocks international law from adjudicating on such a situation. It is obvious that these considerations concerned the external exercise of self-determination, but the Commissions also recognised internal dimensions of self-determination by holding that the interests of minority groups needed to be safeguarded to certain extents by the state.

The Åland Islands 100 years after the dispute

Following the Commission's findings, it was officially announced that the Åland Islands were to remain under Finnish state sovereignty while autonomy laws should ensure that the Swedish heritage of the population would be preserved.[194] Additionally, in order to ensure the conflict between Sweden and Finland would diminish, a Convention has supported the ongoing neutrality and complete demilitarisation of the Islands since 1921.[195] Given that the Åland Islands celebrated the centenary of that peaceful solution in 2021, the *Åland Islands* case went down in history as one of the success stories of the LoN.[196] There is general agreement in scholarship that the neutrality and demilitarisation of the Islands was a crucial factor for the

[194] 'Decision of the Council of the League of Nations on the Aaland Islands including Sweden's Protest', Minutes of the 14th Meeting of the Council (24 June 1921) League of Nations Official Journal l September 1921.
[195] All international agreements concerning the Åland Islands can be accessed here: Åland Cultural Foundation 'Internationella Avtal Och Dokument Rörande Åland' (*Ålands Kulturstiftelse*).
[196] The UN celebrated the exhibition 'The Åland Islands Solution: A precedent for successful international disputes settlement' in 2012, which underlines the perception of this case as success of the League's dispute settlement in this instance, see 'The Åland Islands Solution: A Precedent for Successful International Disputes Settlement - Remarks by Patricia O'Brien' (*legal.un.org* 2012).

lasting peaceful settlement of the dispute.[197] The solution found to accommodate the Ålanders' autonomy within the EU is particularly interesting for this study. Finland acceded to the Union within the so-called 1995 Enlargement of the EU.[198] In accordance with the Autonomy Act between Finland and Åland, both Finland and Åland acceded to the EU after two referenda – the first, a state-wide referendum and, the second, specifically for the Åland Islands.[199] Because the Åland Islands were concerned about the implications on its autonomy following accession, and considering the need for special regulation flowing from Åland's special status domestically but also in international law according to the Autonomy Act and the Convention on the Islands' demilitarisation and neutral status, a protocol regulates the relationship between the Islands, Finland and the EU.[200] Nowadays commonly referenced as the 'Åland Protocol', it contains certain derogations from the EU Treaties and special agreements concerning the Islands based on Art. 2 of Finland's accession treaty to the EU.[201] The provision that maintains that the Islands are to be legally considered a third territory and as its own national territory vis-à-vis the EU is important, despite the territory falling within Finland's sovereignty and Finland being an EU Member State itself.[202] The Islands' legal status as third territory under the Protocol is significant because it entails an exemption from the taxation system that otherwise applies to Finland as member of the EU.[203] Regarding the Åland Islands' relation to supranational processes while being an autonomous territory within Finland, the Åland Islands have considerable influence on Finland's relationship with the EU. Besides derogations contained in the Åland Protocol concerning the specific parts of the EU Treaties, no international agreements can be concluded by Finland that affect Aland without the Islands' parliament consenting.[204] Thus, overall it appears that while fears existed that accession to the EU and thus participation in the process of European integration would dilute the special status of the Islands, indicators point towards the contrary.[205] Despite these measures being designed to ensure the autonomous

[197] See, for example, Sia Spiliopoulou Åkermark, Saila Heinikoski, Pirjo Kleemola-Juntunen, *Demilitarization and International Law in Context* (Routledge 2018) 1; Thomas Benedikter, *100 Years of Åland's Autonomy* (Lit Verlag 2021) 47.
[198] For details see European Parliamentary Research Service, *The 1995 Enlargement of the European Union: The Accession of Finland and Sweden* (Study by the European Union History Series, Historical Archives Unit November 2015).
[199] Hasan Akintug, *The EU Referendums on Aland: An Overview of the EU Debates in The Aland Parliament During Autumn 1994* (Report from the Åland Islands Peace Institute No. 2 - 2020) 13.
[200] Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 2 - on the Åland Islands, Official Journal C 241, 29/08/1994 P. 0352.
[201] (n199) 12.
[202] (n200) Art. 2 a).
[203] Pertti Joenniemi, 'The Åland Islands: Neither Local nor Fully Sovereign' (2014) 49(1) Cooperation and Conflict 91.
[204] ibid 84.
[205] ibid 92.

status of the Åland Islands, there is continued criticism about Åland's direct participation in decision-making processes within the EU.[206] So far a compromise consists of according the Åland Islands a guaranteed seat at the ECJ in matters that concern them. The Islands claim for a separate seat in the European Parliament, was rejected by Finland.[207] This may fall into continuing discussions on improving democratic legitimacy in the EU.[208]

Overall, it seems that respect for the consent of the Ålanders in matters affecting them is of utmost importance for the success of the solution found since 1922 and it will continue to be a vital aspect if that success is to continue. In that regard it must be emphasised that autonomy is an ongoing process, an observation underlined by the continuous process of negotiating autonomy between Finland and the Åland Islands. This is not only illustrated by the debates surrounding EU accession, but also in current concerns of the Ålanders for a more flexible financial system, a proposition Finland remains hesitant to agree to.[209] While Åland remains significant for various reasons more than a century after the Commission's findings in 1921, its significance for this study lies in the case being a proven example that "sovereignty does not have to be an all or nothing game".[210] As such, the Åland Islands and their autonomy regime operating on a national and supranational plane supports this thesis' proposition that self-determination can be accessed and exercised without it being tied exclusively to statehood in international law and that other avenues are a real alternative option worth considering. In that regard it is also worth noting that the Åland Islands – while unique because of their history and autonomy regulations – are not the only example of self-government within the supranational ambit of the EU. To different degrees, special rules and agreements apply to the Faroe Islands and Greenland, which officially remain under Danish sovereignty.[211] Helgoland is also an interesting example of separate economic regulations within the EU, where despite being a German territory without an autonomy or self-government regime like the Åland Islands, it does not form part of the customs union,[212] nor the German tax territory.[213] From the Åland Islands to Helgoland, it appears there are numerous different examples of how differing degrees of political and economic freedoms can be achieved that may fall under the concept of self-

[206] ibid.
[207] (n199) 12, 13; see also Siobhán Dowling, 'Snuffing out EU Hopes: Tiny Aland Islands Threaten to Reject Lisbon Treaty' (*Der Spiegel*, 13 March 2008).
[208] (n205).
[209] (n203) 89, 90.
[210] ibid 81.
[211] The Home Rule Act of the Faroe Islands, Section 1; Act on Greenland Self-Government (Act no. 473 of 12 June 2009), Chapter 1.
[212] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code Document 02013R0952-20190515.
[213] Also exempt is Büsingen, see 'Deutsches Steuergebiet' (*Zoll online*).

determination, far from the traditional path of statehood – or in the case of Helgoland even autonomy.

2.2.4 Conclusion

The previous sections interrogated the concept of self-determination of peoples from three angles: (1) the socio-economic approach of Marx, Engels and later Lenin, (2) the societal and political norm at the basis of governance, and (3) as an emerging international norm in a wider human rights context.

Marx and Engels did not consider national self-determination through the lens of law. For them, the surge of national ideologies and national movements was a factual occurrence that was to be used for the ends of communism. Marx particularly proposed a concept of collective self-determination following ideas of nationalism for the sake of the class struggle. However, at the end of that process the goal was worker internationalism. Thus, rather than supporting nationalism as ideology on which to base national self-determination claims, it was recognised as important basis on which to build future internationalism. While Lenin followed that line, identifying himself as a Marxist Communist, he took the next step, pronouncing a veritable right of nations to self-determination, thereby embedding it in legal terms. It is notable, that in the works of Marx, Engels and Lenin the term ‘peoples’ was not frequently used. Instead, they preferred the term ‘nations’ and spoke of different nationalities referring to different linguistic or cultural groups. Lenin even developed a clear doctrine of national self-determination. For him, self-determination meant secession. He vigorously rejected attempts to interpret the right to self-determination of nations as anything less than that, opposing the doctrine of cultural self-determination proposed by other contemporary figures and which envisioned safeguard mechanisms for minorities within an already existing state. For the ends of communism and the overarching goal of a proletarian revolution, Marx, Engels and Lenin supported national movements and considered homogeneity paramount for their success. The idea was that newly rising small national units would break up the established, powerful capitalist states, thereby facilitating emergence of an international working class. Thus, at face-value national self-determination had a conflict-triggering nature, but the revolution or disruption was envisaged to result in eventual peace once the nationalist needs of societies were satisfied. As such, self-determination of peoples served two core functions, namely, to be a tool for the workers class against bourgeois oppression, but subsequently also to reconcile. The aspect of reconciliation is imminent in the assumption that following the revolution, international cohesion among the

workers class would prevail over the capitalist state, which by its very nature creates friction between the classes leading to revolution in Marxist thought. More specifically, Marxist Communism is based on the theory that the state as concentrated pool of social and economic power is only a transitionary state that would eventually be replaced by international structures. Furthermore, this approach considers the link between economic pragmatism as the basis for human behaviour and thus by extension society as a whole. These considerations accompanied by Marx's early recognition of the significance of increasing interdependence due to globalisation, become relevant again in the history of the establishment of recent supranational undertakings, namely the EU and the AU. From a socio-economic perspective, self-determination is thus closely related to economic and social development and viewed through the lens of economic and social pragmatism rather than ethno-historic nostalgia.

Against this background, Wilson and Smuts viewed self-determination as a means to stabilise peace after the Great War – mainly focused on Europe, but also internationally. By contrast to the initial conflict-triggering interpretations advocated by Marx, Engels and Lenin, the principle of self-determination propagated by Woodrow Wilson and Jan Smuts was meant to have immediate reconciliating effects. Instead of recognising a right of nations to political self-determination in the Leninist sense, Wilson emphasised the importance of considering the will of the governed in decision-making processes, especially with a view to the former colonies of the defeated states during the First World War.[214] Both Smuts and Wilson referenced 'nations' in relation to self-determination, but their focus on the consent of the governed and the simultaneous use of the term 'peoples' indicated a shift away from the Marxist and Leninist nation-rhetoric. One of the strongest points of contrast, that shows a further development from the Communist approach to self-determination was the idea of creating an international organisation entrusted with supranational surveillance of the international community. While self-determination was not considered as providing for the establishment of international organisations, chronologically, discussions about the establishment of a LoN and more intense engagement with the principle of self-determination of peoples on the international plane coincided. In order to preserve worldwide peace, Smuts found it necessary to leave the old, narrow concept of the nation-state behind, in favour of a broader, more globalised understanding. This is not to say, that Smuts completely abandoned all ideas of nationalism. Instead, he wanted to expand the small national unit with a larger addendum: the LoN. Against that background and considering his support for imperialism it is possible to interpret Smuts'

[214] Of course, as mentioned above, subject to restrictions according to what measure of autonomy a given people was given to decide their fate based on Wilson's propagated concept of self-determination, section 2.2.2.

pamphlet as advocating for a new national identity, namely that of membership to the LoN. The use of various terms (self-determination of nations, political self-determination, self-determination as such, autonomy and self-determination of autonomous states) shows that the concept of self-determination was envisaged to operate differently depending on the context from a very early stage. That self-determination varied in its content according to which situation it was meant to apply to is highlighted by the different measures considered available to countries based on their perceived stage of readiness for certain measures of self-determination. Under this early 20th century political approach to the concept, self-determination of peoples comprises the following key aspects: consideration of the consent of the governed in international law, most importantly concerning the establishment of the new states following the First World War, and peace by satisfying the immediate desires of the peoples concerned by the post-war territorial politics.

Wilson and Smuts did not advocate self-determination as a right, but a principle. In this context, they considered internal dimensions of self-determination and avoided touching on the question of secession, while at the same time considerations concerning the effect of applying the principle of self-determination to territorial boundaries were included in the Treaty of Versailles and the restructuring of Europe.[215] The question of territorial independence based on the principle of self-determination arose again in the *Åland Islands* case. While Sweden argued that it was a right, the dominant view considered self-determination a principle, generally beneath a state's sovereign rights. Both commissions involved in the case expressed a clear preference for measures of internal self-determination, which would leave the territorial integrity of states untouched. At the same time, they elevated the then political principle of self-determination by situating it into the wider context of international human rights law. The commissions did so by linking access to secession based on the principle of self-determination to a state's shortcomings in providing sufficient protection to a group of peoples within its internal governance system.

Despite notable and obvious differences, the different angles analysed above share commonalities. Throughout all approaches, self-determination of peoples was accorded the same functions: to legitimise governing authority, to function as a weapon against oppression, to protect group rights based on collective identity, to serve as a means towards prosperous socio-economic development and most importantly to reconcile (after the envisioned class

[215] (n126) 479-481; see also, for a historic analysis, Eckart Conze, *Die Große Illusion: Versailles 1919 und die Neuordnung der Welt* (2nd edn, Siedler 2018).

struggle, the First World War, and as subsequent pages will show, also after decolonisation). The foregoing sections also emphasised how self-determination of peoples can be deeply disruptive if based on nationalist-supremacist ideologies. However, early on its potential beyond the nation-unit dimension was recognised. In fact, all three approaches analysed above recognised the increasing interdependence through developments in international trade and politics and as a result the importance of considering more global views on peoplehood for the sake of stability and prosperity. As such, all approaches have in common that they consider the overarching idea of above-state-level-integration and self-determination as a path towards it: in Communist thought this is embodied by the international workers class, while in early 20th century political thought this was in certain respects embodied by proposed frameworks of international, i.e. shared governance through the LoN (even though it fell short of initial expectations in practice). Under all approaches, self-determination of peoples is the principle meant to unite rather than divide, at least in the long run, and respect for a 'nation's' or people's right to self-determination is recognised as crucial factor for stable peace.

2.3 The right to self-determination of peoples in international law

While the first half of this chapter approached the concept of self-determination of peoples from the perspectives of neighbouring disciplines by focussing on early developments of the concept, this section analyses it purely from the perspective of international law. The establishment of the UN and the adoption of the UN Charter, signalled a new era of international law, reorienting its legal system towards a more global human rights inspired approach as opposed to the previous almost exclusive focus on states as central entity in international law.[216] The work of and within the UN continues to influence our understanding of what self-determination of peoples can comprise. Consequently, this section starts by tracing this evolution and capturing the *status quo* of the principle and right to self-determination within arguably the most significant international organisation, which has left its own imprint on the right. Section 2.3.1 below assesses the content of the principle of self-determination as articulated in Art. 1(2) UN Charter, with particular focus on the intent of the drafters compared to how it is interpreted now, while section 2.3.2 traces the right to self-determination of peoples in UN decolonisation. Section 2.3.3 relays the content of the right in international human rights law drawing on the two human rights covenants, the International Covenant on Civil and Political Rights (ICCPR)

[216] Kate Parlett, *The Individual in the International Legal System* (CUP 2011) 3-4.

and the International Covenant on Economic and Social Rights (ICESCR).[217] Section 2.3.4 briefly analyses the right to self-determination of peoples in the framework of indigenous peoples' rights in international law. Section 2.3.5 concludes the legal exploration of the concept of self-determination with considerations concerning its status as peremptory and customary norm in general international law.

2.3.1 Self-determination of peoples as provided for in Art. 1(2) UN Charter[218]

With the adoption Art. 1(2) UN Charter, the principle of self-determination of peoples was expressly recognised in a multilateral treaty for the first time.[219] Art. 55 UN Charter too mentions the right, however, without directly focussing on the substance of self-determination of peoples as such.[220] Rather, Art. 55 mentions it as one of the principles fundamental for the promotion of international economic and social cooperation within the UN. Hence, this section solely engages with Art. 1(2).

Art. 1(2) UN Charter provides:

> The purposes of the United Nations are… 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.

Based on the mere wording of the provision, three main findings can be gathered: first, neither self-determination nor peoples are defined. Second, self-determination of peoples is one of the means to "develop friendly relations among nations", this, amongst other things, being the declared object and purpose of the Charter. Third, self-determination is not considered a right, but a principle. Thus, a reading of Art. 1(2) UN Charter does not reveal the substance of the principle of self-determination of peoples proclaimed therein. In fact the use of the term 'self-determination of peoples' in Art. 1(2) UN Charter caused considerable controversy during the drafting process. From the beginning, there was confusion about its meaning and content, resulting in a dispute about to whom the principle of self-determination of peoples applies to and what it entails. Over the years, practice in UN law and policies, have carved out its meaning

[217] UNGA Res 2229A (XXI) (20/12/1966) A/RES/2229; UNGA Res 2200A (XXI) (16/12/1966) A/RES/2200A
[218] This section draws partially and builds on the author's master's thesis submitted to University College London for the attainment of the degree LLM International Law under the title 'Justification of External Self-Determination under Art. 1 (2) United Nations Charter outside the Context of Decolonisation'.
[219] Elizabeth Rodríguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law' in Fernando Tesòn (ed) *The Theory of Self-Determination* (CUP 2016) 217.
[220] See also Stefan Oeter, 'Self-Determination' in Bruno Simma et al *The Charter of the UN: A Commentary*, vol I (3rd edn, OUP 2012) 316.

and content. Analysing the text of Art. 1(2) UN Charter, two questions guide this sub-section: First, what is the meaning of the term 'peoples'? Second, what is the content of the principle of self-determination of peoples?

This section follows the general rules on treaty interpretation as set out in Art. 31 VCLT. Thus, this analysis starts from the Charter's "ordinary meaning" considering its "context" and its "object and purpose". The *travaux préparatoires* will be considered as supplementary means of interpretation, as provided for in Art. 32 VCLT, should the interpretation reached by using the means set out in Art. 31 VCLT remain "ambiguous or obscure" or "lead to manifestly absurd or unreasonable results". Because this section aims to conceptualise self-determination of peoples, rather than engaging in a historical assessment of the drafting process of Art. 1(2), it draws on the supplementary notes published by the UN, which compile UN General Assembly and the UN Security Council deliberations concerning implementation of the provision.

'Peoples' in Art. 1(2) UN Charter

Given the lack of further definitions within the UN Charter, a veritable cacophony of views on what the term 'peoples' encompasses arose. Since its adoption, several scholars, interpreted 'peoples' in Art. 1(2) UN Charter as equalling 'states', reaching this result via different reasonings.

Hans Kelsen was among the first scholars to propose such a reading when he considered the phrasing "equal rights and self-determination" as a new expression for "right to sovereign equality of states".[221] He reached this conclusion by looking at the reference to 'nations' in Art. 1(2) UN Charter, which he understood as meaning simply 'states', since these were the only entities capable of concluding the treaty in international law.[222] Based on this line of thought, Kelsen assumes that 'peoples' mentioned in combination with self-determination is another word for 'nations', and can thus only mean 'states'.[223] Kelsen's interpretation hinges on the observation, that since states were the only recognised subjects of international law out of the three entities mentioned in the Charter (states, nations and peoples) they must mean one and the same thing. This conclusion is unsatisfactory, as it does not explain, why the drafters opted for the use of three different terms, if what they meant were 'states'.

[221] Hans Kelsen, *The Law of The United Nations* (Stevens&Sons Limited 1950) 52, 53.
[222] ibid.
[223] ibid.

Based on a similar argument, Jean-François Guilhaudis too held that 'peoples' and 'nations' in Art. 1(2) are used as synonyms for 'states'.[224] He based this interpretation on the preamble of the Charter, in which the parties to the treaty refer to themselves as "we the peoples of the UN". However, as in his view not peoples concluded the treaty, but their representative governments – in other words states – the wording and context suggests that 'peoples' should be interpreted as meaning 'states'. Nevertheless, this approach as well does not explain why the Charter includes three different terms if they mean one and the same thing.

More recently another scholar, Elizabeth Rodríguez-Santiago, argued that the French version of Art. 1(2) UN Charter suggests that 'peoples' and 'states' are used synonymously:

> (…) *développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes, et prendre toutes autres mesures propres à consolider la paix du monde*.[225]

Rodríguez-Santiago argues that "*leur*" refers to "*peuples*". She contends that because the first half of the sentence refers to the equal rights among member states, as a logical consequence the right to self-determination is also envisaged only for states.[226] Such a reading relies on an assumption that predetermines the result that 'peoples' is a synonym for 'states'.

Today, it is commonly accepted that Art. 1(2) UN Charter emphasises the equality of all peoples, in order to ensure that no peoples will be denied access to self-determination guarantees based on alleged grounds of inferiority.[227] It is therefore out of question that Art. 1(2) UN Charter refers to peoples and not to states. This aligns with the drafters' intent as emerges from the preparatory works concerning the San Francisco Conference in 1945. The text was finalised through deliberations at the San Francisco Conference, which stretched over two months. While earlier drafts were presented that had emerged from a series of previous conferences, the terms "based on respect for the principle of equal rights and self-determination of peoples" were only introduced at the 1945 San Francisco Conference, thereby making this part of the drafting history particularly relevant for this study.[228] The proposal to introduce these

[224] Jean-François Guilhaudis, *Le Droit des Peuples à disposer d'eux-mêmes* (Presses Universitaires de Grenoble 1976) 169.
[225] 'La Charte des Nations Unies' (*United Nations*).
[226] (n219).
[227] Rüdiger Wolfrum, 'Purposes and Principles, Article 1' in Bruno Simma and others (eds), *The Charter of the UN: A Commentary,* vol I (3rd edn, OUP 2012) 115.
[228] Department of Public Information United Nations, *Yearbook of the United Nations 1946-47* (Lake Success, New York 1947) 18.

words was forwarded by the four governments that participated in the Dumbarton Oak Conversations, namely the United States of America, the United Kingdom, the Soviet Union and China.[229] What led the four to include the principle of self-determination of peoples in Art. 1 is not discernible in the San Francisco documents , where the four governments agreement is recorded.[230] Resistance against the proposal was voiced by Belgium, which considered 'peoples' as referring to a group which does not identify as a part of the state.[231] To avoid any such inferences, Belgium proposed an amendment to Art. 1(2) UN Charter, suggesting a synonymous interpretation of the terms 'peoples' and 'states'.[232] That this proposal was rejected in the drafting process further undermines the above-presented views.[233] Crucially, it becomes clear from the work of and within drafting Commission I, that peoples, nations and states were considered different entities. During the first meeting of the Commission on 14th June 1945, President presented the Commission's work with the words:

> It [the Preamble] is not only drafted in the name of the peoples of the United Nations – which is already an indication that we are considering not so much the official states and governments as the human collectivities of the peoples who are forming the bulk of the states.[234]

Even though this was said in relation to the preamble and not Art. 1(2) UN Charter, there are no indications in the drafting history that support a different interpretation of the terms in other places of the UN Charter. As a result, the terms 'states' and 'peoples' cannot simply be equated. This conclusion is further affirmed by Committee I/1, which clarifies in relation to Art. 1(2) UN Charter "that what is intended by paragraph 2 is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights, therefore, extends in the Charter to states, nations, and peoples".[235] the Committee's reply again distinguishes between states, nations and peoples. Already the controversy about the meaning of the terms on its own shows that they were not intended to be interchangeable.[236]

Since it is established that Art. 1(2) UN refers indeed to self-determination of peoples and not self-determination of states and considering the history of UN decolonisation, one may be

[229] UNCIO III, 622 Doc. 2 G/29.
[230] ibid.
[231] UNCIO VI, 300 Doc. 374 I/1/17.
[232] ibid.
[233] Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) 74-75.
[234] UNCIO VI, 12 Doc. 1006/I/6.
[235] UNCIO VI, 704 Doc. 723 I/1/A/19.
[236] Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) *The International and Comparative Law Quarterly* 541.

inclined to think that inhabitants of colonial territories or peoples under foreign domination or exploitation where the entity in mind of the drafters. According to the supplementary notes, colonial peoples are nowadays read into the provision, although Art. 73 UN Charter establishes a special regime for that context. Interestingly, however, none of the parties involved in the debate about the meaning of the term 'peoples' in Art. 1(2) UN Charter considered peoples of former colonies.[237] Instead, they referred to groups within a state generally.[238] This indicates that at least as far as Art. 1(2) UN Charter is concerned, the principle of self-determination was not accorded the limited context of decolonisation.[239] This is further supported by a systematic argument, as all provisions specifically addressing non-governing and trust territories within the UN system, are compiled in Chapters XI and XII of the Charter. Notably, in both chapters, self-determination of peoples was not included in the final text, nor are any references made to Art. 1(2).[240]

The general discussion concerning groups living within a state may raise questions as to whether the principle of self-determination of Art. 1(2) UN Charter includes minorities. In light of the findings in the *Åland Islands* case, which established a link between minority protection and the principle of self-determination at the time of the LoN, this appears plausible. However, several reasons speak against such an interpretation of Art. 1(2) UN Charter. First, the UN Charter does not deal with minority rights as such. Instead, it contains a reference to human rights in general in Art. 1(3) UN Charter. In 1992, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities reflecting the earlier Art. 27 ICCPR,[241] recognised the broad legal framework within which the current minority rights system of the UN operates.[242] While today it is undisputed that minority rights are human rights,[243] the predominant view is that minorities cannot be considered peoples.[244] Hence, regardless of a precise definition they are considered different legal entities. This observation is important because it entails that minorities cannot base a claim on the principle of self-determination under Art. 1(2) UN Charter.[245] Second, the historical circumstances that led to

[237] (n44) 39.
[238] ibid 39-40.
[239] ibid 39-43.
[240] (n220) 316.
[241] UNGA Res 47/135 (18/12/1992) A/RES/47/135.
[242] United Nations Human Rights Office of the High Commissioner, 'About Minorities and Human Rights' (*United Nations OHCHR*).
[243] Ulrike Barten, *Minorities, Minority Rights and Internal Self-Determination* (Springer 2015) 137.
[244] Rosalyn Higgins, 'Self-Determination and Secession' in Julie Dahlitz (ed) *Secession and International Law Conflict Avoidance – Regional Appraisals* (Asser Press 2003) 30-33.
[245] However, the SCC in *Reference re Secession of Quebec* held that ""a people" may only include a portion of the population of an existing state" (n139) para. 124.

the establishment of the UN do not support such a reading. As is apparent from the preparatory works and the preamble of the treaty itself, the UN Charter was created after the experience of two devastating world wars. The guiding spirit behind its creation was to preserve global peace by attempting to establish a set of rules which permit every people to enjoy a fulfilled life.[246] The Charter even addresses "the peoples" directly in its preamble, and it becomes clear from the preparatory works that this was a deliberate choice.[247] Against the background of the debates reflected in the documents on the 1945 San Francisco Conference and the historical background of the UN, it is very unlikely that "peoples" as used in the UN Charter included minorities. In the preamble, reference is made to peoples represented by their respective governments. Third, in the preparatory works minorities are considered, but never used in the same sentence with peoples and there cannot be found any indication that the term 'peoples' was understood to include minorities.[248]

Lastly, it is essential to know how far the scope of application of Art. 1(2) UN Charter reaches. It could be argued that the provision only extends its reach over a limited contingent of peoples, namely only peoples of UN member states,[249] whereas Cassese argues that Art. 1(2) UN Charter applies universally.[250] Starting from the mere wording of Art. 1(2) UN Charter, no restriction to a specific people is suggested. Read together with the preamble, however, the expression "we the peoples of the United Nations" could be interpreted as only including populations of UN member states. During the San Francisco Conference, the formulation of the preamble caused considerable controversy. The Netherlands pointed out that, at least speaking for their constitutional requirements, "the people" are not competent to conclude international treaties binding on their government.[251] It was therefore proposed to append the phrase "through our representatives assembled at San Francisco".[252] As can be seen from a look at the present UN Charter, the formulation proposed found its way in a modified version to the bottom of the preamble. Therefore, "we the peoples of the United Nations" means the populations of those states who are members of the UN.[253]

There are, however, indications that the term "peoples" has a different meaning in Art. 1(2) UN Charter than it has in the preamble. Contrary to the preamble, Art. 1(2) UN Charter does not

[246] UNCIO VI, Doc. 1006, I/6.
[247] ibid.
[248] See also (n44) 42.
[249] Kelsen (n221) 6-8.
[250] Cassese (n44) 46.
[251] UNCIO VI, 366 Doc. 817/I/1/31.
[252] ibid.
[253] Rüdiger Wolfrum, 'Preamble' in Bruno Simma and others (eds) *The Charter of the United Nations. A Commentary*, vol I (3rd edn, OUP 2012) 103.

refer directly to the government representatives present at the 1945 Peace Conference. Moreover, Art. 1 sets out guiding principles on how UN members interact with other members of the international community generally. The wording "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" suggests that the term "nations" is not limited to UN members states only. If such a restriction had been intended, a more specific wording would have been chosen. Such an interpretation is further supported by the consideration that the purpose of the UN is to maintain international peace. Moreover, Art. 1(2) UN Charter reflects the recognition that all peoples are "equal". Hence, any distinction between peoples of UN member states and peoples of states who did not ratify the Charter would seem contradictory to this principle and defeat the purpose of eliminating discrimination of different peoples.[254] This, however, applies only in so far as the drafters did not intend to proclaim merely the equality of peoples of UN members. Possibly, equality was not envisaged to comprise non-UN members. Considering the historical background of the Charter and its object to secure international peace, such a conclusion is, however, doubtful. The maintenance of international peace and security is better aided presuming that literally, all peoples are equal as opposed to just peoples of those states which ratified the Charter. Accordingly, the right to self-determination embedded in Art. 1(2) must be respected regarding all peoples, and hence applies universally.

The previously noted shift in language referring to self-determination at Wilson's and Smuts' time continued with the establishment of the UN. While in previous decades reference was often made to self-determination of 'nations', the UN Charter and surrounding debates have adopted the expression 'self-determination of peoples'. There are many explanatory approaches for this occurrence, but a significant part of the answer can doubtlessly be found in a statement given by US representative Virginia Gildersleeve at the San Francisco Conference in 1945, which makes it clear that the UN Charter was hoped to appeal to "common man", a term that seems much closer to what one associates with 'people' than 'nations'.[255] It is hence arguable that, at least in the UN Charter, the concept of 'nations' seems to be directed to state structure, i.e. peoples organised in a state, without, however, replacing the state as a separate notion and legal entity in international law.[256]

---

[254] See (n227) 115.
[255] "We had hoped that the Preamble might be so simple and clear and moving that it might hang upon the wall of every home in all our member nations, and be understood by common man everywhere, and warm their hearts and strengthen them after the long exhaustion and sorrow of war.", UNCIO VI, 19 Doc. 1006, I/6.
[256] So, for example, Walker Connor, 'Ethno-Nationalism' in Myron Weiner and Samuel P. Huntington (eds) *Understanding Political Development* (Paperback 1994) 196-220; for further insight into the terminological discussion see (n78) 163-167.

The meaning of 'self-determination'

It has become standard practice in international law to draw a distinction between internal and external self-determination when trying to clarify its content.[257] Internal self-determination is usually defined as "right of participation" of peoples concerning the legal and political arrangement of a state.[258] External self-determination, on the other hand, is predominantly equated with a "right to secession".[259] External self-determination can, however, also result in different outcomes. The 1970 UN General Assembly (UNGA) resolution 2625 (XXV) recognises "the establishment of a sovereign and independent State" and "the free association or integration with an independent State" as "modes of implementing the right of self-determination".[260] All these processes share a common feature: either a new member of the international community comes into existence or a former member of the international community ceases to exist. Consequently, the exercise of external self-determination inevitably affects the relation between the state concerned and the international community (third states). Summarising, external self-determination concerns the peoples' exercise of their right to self-determination in relation to the international community,[261] while internal self-determination reflects the relationship between a people and its state *inter se*.[262] Furthermore, the right to internal self-determination is nowadays understood as a continuous right, while the right to external self-determination – the more contested mode of implementation – can only arise in certain situations, e.g. cases of decolonisation or controversially remedial secession. Yet, the distinction between internal and external self-determination is not always obvious. For example, in *Reference re Secession of Quebec*, the Supreme Court was faced with the issue of determining whether or not it had jurisdiction to give an advisory opinion on the question of whether Quebec could unilaterally secede from Canada under international law.[263] Despite the explicit reference to international law, the Court considered it a matter of domestic law, given

[257] n(245); Peter Hilpold, 'Secession in International Law: Does The Kosovo Opinion Require a Re-Assessment of This Concept?' in Peter Hilpold (ed), *Kosovo and International Law* (Brill 2012) 48-50; Gudmundur Alfredsson, 'The Right to Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 45-53; Michla Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff 1982) 37.
[258] David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 237; (n233) 14.
[259] Andrew K. Coleman, *Resolving Claims to Self-Determination* (Routledge 2013) 1; Hilpold (n257) 49.
[260] (n69).
[261] Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 101.
[262] (n113) 60.
[263] (n139) paras. 16-23.

the relevant questions involving Canadian constitutional law.[264] Furthermore, it is important to keep in mind that these designations do not refer to different rights of self-determination, instead they merely describe how the right to self-determination can be exercised.[265]

As far as the application of Art. 1(2) UN Charter to practice to practice is concerned, the UN's supplementary notes consider the principle of self-determination relevant in connection to colonial, foreign and alien occupation, military intervention, anti-terrorism (namely national liberation movements) and as a distinct right of indigenous peoples.[266] Thus, it appears that the provision is considered to represent the gateway to more specific self-determination guarantees in designated contexts.[267] Interestingly, the supplementary notes elaborate on the right to self-determination under Art. 1(2) UN Charter as opposed to the principle, confirming its status in current international law as norm with *erga omnes* and *ius cogens* character, that is not subject to veto within the UN organs.[268] Despite the recognised relevance of self-determination to colonial, foreign and alien occupation, it is the dominant view that Art. 1(2) UN Charter does not address the external exercise of the right.

In fact, the preparatory works regarding Art. 1(2) UN Charter imply that the drafters envisaged an internal mode of manifestation of the right to self-determination. Countries like Venezuela, Colombia, and Egypt shared the concerns expressed by Belgium that setting self-determination of peoples as the basis for friendly relations between states would be dangerous. However, to minimise the risk they did not consider that the right to self-determination was to be applied only in situations of decolonisation.[269] Not even Belgium itself seemed to have considered colonies in any manner in its amendment proposal.[270] Instead, concerns only regarded national minorities within a state's territory.[271] Colombia argued that if the right to self-determination of peoples were to mean a right to secede, including it in the Charter would be paramount to opening the door to "international anarchy".[272] Colombia did, however, signal consent if the right to self-determination was to mean "the right of a country to provide its own government".[273] According to the definition provided at the beginning, a right to self-government or to participate in a state's political process is tantamount to a right to internal

[264] ibid para. 23.
[265] Raič (n258) 227.
[266] 'Art. 1(2), Repertory, Suppl. 10, vol. I (2000-2009)' (*legal.un.org*) paras. 13-17.
[267] See also ibid para 14.
[268] ibid paras. 19-24, 26-27.
[269] (n238).
[270] (n237).
[271] ibid.
[272] ibid 39-40.
[273] ibid.

self-determination. Consequently, Colombia consented to include the right to self-determination only insofar as it covers internal self-determination. Egypt, on the other hand, feared that the principle of self-determination could be abused as a veil to initiate military invasions, similar to Hitler's method of invading countries on the ground of alleged reasons.[274] These concerns lead Committee I/1 to clarify in its report that "the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession".[275] In a separate report, the same Committee furthermore explained "that an essential element of the principle in question is a free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their ends by Germany and Italy in later years".[276] Additionally, it has been emphasised throughout the San Francisco Conference, that "self-determination" must be interpreted narrowly.[277] Thus, when the principle of self-determination was included in Art 1(2) UN Charter, it was explicitly excluded that it could justify secessionist movements. The drafters did, therefore, only intend to provide for a right to internal self-determination.[278]

2.3.2 The right to self-determination of peoples and the decolonisation policies of the UN

UN decolonisation constitutes a specific context, in which the right to self-determination of peoples received distinct content and application through the extensive practice of various UN organs. These are mainly the UNGA, UNSC and the ICJ, while smaller institutions within the UN, such as the UN Special Committee on Decolonization (SCD), also engaged with the right in this context. It is important to be aware that UN decolonisation constitutes its own category, as from a broader point of view almost every group of peoples could raise the claim to have been colonised in the course of history. 'Decolonisation' in this study refers to the UN's decolonisation regime related to the trusteeship system and non-self-governing territories (NSGT). NSGT within the UN system are "territories whose people have not yet attained a full measure of self-government" (Art. 73 UN Charter), while Trust Territories are NSGT placed under the administration of the Trusteeship Council (see Art. 75 UN Charter).

[274] ibid 40.
[275] UNCIO VI, 296 Doc. 343 I/1/16.
[276] UNCIO VI, 455 Doc. 944 I/1/34 (1).
[277] ibid.
[278] Dietrich Murswiek, 'The Issue of a Right to Secession – Reconsidered' in Christian Tomuschat' (ed) *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 34-35; Stefaan Smis, *A Western Approach to the International Law of Self-Determination: Theory and Practice* (Vrije Universiteit Brussel 2001) 204; contrary: Buchheit (n233) 73; (n160) 181-182.

Self-determination in Non-Self-Governing Territories and under the UN Trusteeship System according to the UN Charter

The legal framework establishing the system concerning NSGT and Trust Territories consists of Chapters XI and XII UN Charter. Particularly relevant are Arts. 73 and Art. 76(b) UN Charter. Remarkably, although it is well-established that these chapters deal with it, 'self-determination' is not mentioned in any of the provisions constituting both chapters.[279] While Art. 73 UN Charter with regards to NSGT promises:

> ...to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement,

Art. 76(b) UN Charter determines "self-government or independence as may be appropriate" as "the basic objectives of the trusteeship system". It appears that the drafters at the San Francisco Conference – possibly inspired by Wilson's understanding of the concept – thought of self-determination of peoples as first and foremost meaning self-governance, without envisaging a veritable right to independent statehood.[280] Despite this, the high number of former NSGT and Trust Territories having achieved independence over the past decades contributed to the impression that territorial and political independence are the utmost objectives of decolonisation. As the drafting history already shows, this is not wholly accurate. Neither Art. 73 nor Art. 76(b) UN Charter include an obligation that the decolonisation process – and more specifically UN trusteeship – must result in independent statehood.[281] Instead, they expressly reference self-government or independence while also acknowledging the possibility of other outcomes agreed upon in the individual trusteeship agreements. Furthermore, it fell within the responsibility of the Trusteeship Council following Art. 87 UN Charter to supervise the administration and progress of Trust Territories.[282] The Council reported any progress to the UNGA, which according to Art. 85 UN Charter retains ultimate control over the Trusteeship Council. In fact, in the course of UN decolonisation it was the UNGA which usually terminated

[279] Pomerance (n257) 9.
[280] Ulrich Fastenrath, 'Ch. XI Declaration Regarding Non-Self-Governing Territories, Article 73' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary*, vol II (3rd edn, OUP 2012) 1831.
[281] Higgins (n244) 24; Anthony Whelan, 'Self-Determination and Decolonisation: Foundations for the Future' (1992) 3(4) Royal Irish Academy 25.
[282] The Council completed its work in 1994 and is since then left without responsibilities, see 'Trusteeship Council' (*United Nations*).

a trusteeship through resolutions declaring that the objectives of the trusteeship had been reached.[283] Thus, despite the overwhelming number of Trust Territories having reached independence, legally, Art. 76(b) UN Charter in particular does not accommodate secessionist claims *per se*, but independence was subject to further requirements.[284] Rather, the decolonisation legal regime of the UN Charter entitles colonial peoples to be consulted about their freely expressed wish by which means they prefer to exercise the right to self-determination accorded to them. However, when they were found to be ready to be extended the full right to exercise collective self-determination, was subject to assessment by the respective UN bodies.[285] In this respect, another continuation of Smuts' and Wilson's proposed concepts of self-determination subject to supranational supervision is discernible.

Self-determination of peoples in the 1960 Resolutions 1514 (XV) and 1541 (XV) and the principle of uti possidetis

Because UN decolonisation constitutes a distinct category and the right to self-determination was shaped by the above-mentioned bodies in a particular way limited to this context, a fragmented picture of UN self-determination emerges. Art. 1(2) UN Charter sets out the principle of self-determination of peoples for all peoples and without setting a restricted context for its application. This is also systematically emphasised by the provision's placement in chapter I concerned with purposes and principles of the UN. As a principle, self-determination in Art. 1(2) applies to all peoples and only provides for its internal guarantees. As right in the context of decolonisation, on the other hand, Arts. 73 and 76(b) UN Charter specify that it applies only to colonial people, i.e. inhabitants of NSGT and trust territories, and that it includes the option of its external exercise.

Yet, as noted above, Arts. 73 and 76(b) UN Charter do not recognise a right to self-determination explicitly. Thus, the wording draws into question why commonly reference is made to the right to self-determination in the context of UN decolonisation. In a similar vein, the UK disputed that self-determination of peoples was a right at the time in question in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (2018). This caused the ICJ to address the contentious question of when self-determination of peoples emerged as a right in the UN decolonisation context. The Court confirmed that the

[283] Dietrich Rauschning, 'Ch.XII International Trusteeship System, Article 75' in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary,* vol II (3rd edn, OUP 2012) 1855 para 19.
[284] It is also disputed if 'secession' is the correct technical term for decolonisation, e.g. Higgins (n244) 35.
[285] (n220) 319.

chronological starting point for determining when self-determination of peoples crystallised as a right in the context of UN decolonisation was the 1960 UNGA Resolution 1514 (XV), titled "Declaration on the Granting of Independence to Colonial Countries and Peoples".[286] Famously, it was declared therein that all peoples have the right to self-determination.[287] The Resolution marks a development from the original decolonisation framework set up through chapters XI and XII UN Charter when it proclaims independence as the preferred outcome of decolonisation.[288] This line of thought was continued with the adoption of Resolution 1541 (XV), which followed only one day after Resolution 1514 (XV).[289] Principle VI details that successful promotion of NSGT can result in emergence as, free association with or free integration with an independent State.[290] Noticeably, internal exercise of the right to self-determination is not addressed in the Resolution. This shows that external self-determination was now seen as primary legal means for colonial peoples, signalling an unequivocal development from the initial intention of chapters XI and XII, which envisaged internal or external self-determination as alternative outcomes of successful decolonisation.[291]

With the focus on territorial independence, the right to self-determination stands in obvious tension with other principles of international law equally upheld in the UN Charter: sovereign equality of states, non-use of force, non-intervention and territorial integrity.[292] Taking account of this tension, Resolution 1514 stipulates in point six that

> 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.

In addition to that, paragraph seven recalls that all peoples, besides enjoying a right to self-determination, possess a right to sovereignty and to territorial integrity of the state they live in. Furthermore, in light of the emphasis of the right to exercise self-determination of peoples externally in cases of decolonisation, some interpreted the UN Resolutions as shaping UN decolonisation to become a reversion of the historic injustice perpetrated through colonisation, which aims at the re-establishment of the status *ex ante*.[293] In practice, this idea was quickly

[286] (n70).
[287] ibid 66.
[288] Whelan (n281) 32; *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)* [2010] ICJ Rep 403, para 79.
[289] UNGA Res 1541 (XV) (n69) 29-30.
[290] ibid 29.
[291] Cassese (n237) 42; Pomerance (n279) 11-12.
[292] Art. 2 (1), (4), (7) UN Charter.
[293] Pomerance (n279) 44.

abandoned in favour of the *uti possidetis* doctrine. Under this view, the safeguards of paragraphs six and seven only applied to trust territories as they existed at the time of the Resolution, but not before.[294] Thus, under the principle of *uti possidetis* the external boundaries of a former colony are immune to the exercise of the right to self-determination and therefore remain immutable.[295] While some argue that the UN adopted both approaches in practice – reversion and *uti possidetis* - in the majority of cases the principle of *uti possidetis* was followed.[296] This was reinforced by the ICJ's jurisprudence in key cases such as *Western Sahara* (1975), in which the Court implicitly rejected the proposed doctrine of complete reversion, and *Frontier Dispute* (2013), in which the Court confirmed the universal application of *uti possidetis* in all UN decolonisation cases.[297] Moreover, African states appeared to express their preference and support for the principle of *uti possidetis* being applied in decolonisation cases within Africa, when they adopted the Cairo Resolution of 1964, in which they pledged to respect the borders existing on the achievement of national independence.[298] While political interests involving the new nation-state building in Africa arguably played a role in the expression of preference for it, *uti possidetis* was viewed as the more practicable and less conflict-causing solution to issues arising from decolonisation. It was considered the external exercise of the right to self-determination would inevitably affect peoples in neighbouring territories, whose right to self-determination must equally be considered.[299] Furthermore, *uti possidetis* avoided further conflicts with the principles of state sovereignty and territorial integrity. As such, the doctrine takes account of the fact that the right to self-determination is a relative right, that even in the special context of decolonisation, which seeks to reverse a historic injustice, must be balanced against the right to self-determination held by other potentially affected peoples as well as other principles of international law.[300]

The two Resolutions offered grounds to believe that they made room for a right to secede in cases of decolonisation. However, it is questionable, whether external exercise of self-determination resulting in independence really are cases of secession *per definitionem*. The resolutions themselves do not refer to secession in this context.[301]

---

[294] ibid.
[295] (n220) 323.
[296] (n293).
[297] Whelan (n281) 35; *Western Sahara* [1975] ICJ Rep 12; *Frontier Dispute* [2013] ICJ Rep 44 para 20.
[298] This is the interpretation supported by the ICJ in general, however, Judge Yusuf considered the principle enshrined in the Cairo Resolution to be different in scope and nature than *uti possidetis juris*, see *Frontier Dispute* (ibid), 'Separate Opinion of Judge Yusuf' para. 6.
[299] *Frontier Dispute* (n297) paras. 20, 23.
[300] Pomerance (n279) 46.
[301] Against considering such cases as secession Higgins (n284).

Despite the new direction taken concerning the right to self-determination in Chapters XI and XII UN Charter through Resolutions 1514 and 1541, this does not affect the interpretation of Art. 1(2) UN Charter. This is because these resolutions are not concerned with the right to self-determination in any other contexts than decolonisation, with which Chapters XI and XII deal specifically. Following this interpretation, self-determination of peoples has different meanings within the UN Charter depending on the legal provision in the context of which it is being viewed. While Resolutions 1514 and 1541 address the right to self-determination of peoples in the context of decolonisation, Art. 1(2) UN Charter does not. As seen above, the drafting history does not support an interpretation that external self-determination was included in Art. 1(2) UN Charter. Neither does subsequent application of the provision suggest that external self-determination claims can be based on it. In light of this, it is surprising that the supplementary notes to Art. 1(2) UN Charter include all applications of self-determination of peoples under the provision, without differentiation to its context-specific application.

Self-determination of peoples and the impact of the Friendly Relations Declaration: introducing a right to secede?

Rather than being limited to decolonisation, UNGA Resolution 2625 – more commonly known as the Friendly Relations Declaration – concerns principles of international law significant to the development and maintenance of friendly relations among states. As such, it refers Art. 1(2) UN Charter when it stipulates that "by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development".[302] Following the above-offered definitions, the references to "determination of their political status" and "without external interference" suggest that the Resolution addresses internal as opposed to external self-determination. This is supported by the separate confirmation that:

> The establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.[303]

[302] UNGA Res 2625 (n69) 123.
[303] ibid 124.

The separate acknowledgement of the possibility to exercise the right to self-determination of peoples externally in a separate paragraph underlines that the opening paragraph referring to Art. 1(2) UN Charter was indeed limited to the internal dimension. It also offered a basis for understanding the right to self-determination as including a right to secede beyond the UN decolonisation regime.[304] This, however, is mitigated by the Resolution's expressed preference for internal self-determination as primary mode of exercising the right, due to the placement of references to internal self-determination at the beginning of the Resolution. Furthermore, such a reading of the Resolution matches the content of the principle of self-determination in Art. 1(2) UN Charter, which according to widespread scholarly opinion does not accommodate claims to external self-determination.[305]

At the same time, Resolution 2625 contained a controversial paragraph, on the grounds of which some discerned support for the doctrine of remedial secession:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. [306]

This paragraph was read as implying that the option to exercise external self-determination depends on whether or not a state conducts itself in compliance with the principle of equal rights and self-determination.[307] Because it is the condition of compliance with this principle on which the right to exercise self-determination of peoples externally arguably depends, the latter is considered a remedy against violations of the principle. Thus, beyond UN decolonisation, the right to self-determination can – if at all – only be implemented in its external dimension in cases of non-compliance with the principle.[308]

The debates in the lead up to the Resolution's adoption show that the issue of unilateral secession alluded to in the above-quoted paragraph was discussed extensively without a

[304] (n113) 44-45.
[305] See section 2.3.
[306] UNGA Res 2625 (n69).
[307] (n113) 104.
[308] Buchheit (n233) 220-223; (n44) 118-119; Stanislav V. Chernichenko and Vladimir S. Kotliar, 'Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends' in Julie Dahlitz (ed) *Secession and International Law: Conflict Avoidance – Regional Appraisals* (Asser Press 2003) 78-79; (n113) 98.

consensual result.[309] This shows that the option of unilateral secession – including in the form of the proposed doctrine of remedial secession – cannot be completely discarded.[310] This result raises the question of what inspired the radical change from the explicit rejection of secession in 1945 in the context of Art. 1(2) UN Charter to the adoption of Resolution 2625 in 1970. It is, however, important to distinguish between Art. 1(2) UN Charter and international human rights law as larger system. Resolution 2625 did not directly affect the interpretation of Art. 1(2) UN Charter, with regards to which any relevance of external self-determination was explicitly rejected. Rather, it had an impact on the right to self-determination of peoples as collective human right such as included in joint Art. 1 International Covenant on Civil and Political Rights/ International Covenant on Economic, Social and Cultural Rights (ICCPR/ICESCR), which had a different drafting history.[311] From a general perspective on international law, a clear trend was visible, that signalled the development of the international legal system to becoming more human rights-oriented.

A close reading of Resolution 2625 raises the question whether the contentious paragraph entails that external self-determination is only justified as a remedy against violations concerning the principle of equal rights and self-determination of peoples as such or whether it may also be exercised against other infringements on human rights more broadly, as long as a particular groups is targeted.[312] Yet, even in the context of a strict violation of only the principle of equal rights and self-determination of peoples questions remained as to what the requirements were that had to be met to potentially justify recourse to external self-determination outside UN decolonisation cases.[313] This application of the self-determination is often remedial secession. Because it evidently contrasts at least the principles of sovereignty and territorial integrity, many scholars seek to tame the doctrine by formulating strict application requirements: unilateral secession must be viewed as a remedy of last resort and only be directed against systematic, flagrant violations of fundamental human rights in the context of which a peaceful solution within the existing framework is excluded.[314] Other

[309] (n304).
[310] (n219) 224.
[311] See further section 2.3.3.
[312] This would result in the further question, if the principle of equal rights is not always affected where a particular group is targeted with a view to human rights infringements.
[313] Argyro Kartsonaki, 'Debating the Right to Secede: Normative Theories of Secession' in Peter Radan and others (eds) *The Routledge Handbook of Self-Determination and Secession* (Routledge 2023) 191-202; Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6(1) St Antony's International Review 39-40.
[314] (n44) 118.

scholars, however, contend that "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be regulated internationally".[315]

Despite attention from scholarship, this interpretation of self-determination remains of little relevance in practice. The most significant case in which the doctrine of remedial secession was referenced, was the *Kosovo* case.[316] However, as is well known, the ICJ refused to engage with the doctrine in its advisory opinion by considering elaborations on it irrelevant to the question submitted to the Court.[317] With no international treaty recognising unilateral or remedial secession, virtually no state practice and avoidance to touch the matter by international courts and tribunals, the interpretation's future role remains questionable.[318]

As such, Resolution 2625 introduced a new angle to the discourse on self-determination of peoples, by suggesting the exercise of external self-determination in cases beyond UN decolonisation and by alluding to a link between the principle of equal rights and self-determination to the wider international human rights framework. Whether or not one supports the concept of remedial secession, the tension that it creates between the self-determination of peoples and other principles of international law remains problematic. One thing even supporters of the concept agree upon is that it must be balanced carefully and applied restrictively if it is not to endanger international peace and security.[319]

UN self-determination and decolonisation today

With the Trusteeship Council having officially finished its job,[320] and only 17 NSGT left on the UN's list,[321] there is a tendency to view the chapter of UN decolonisation as closed.[322] The more so, as the NSGT left have proven to be the most difficult ones, where hopes of reaching a successful outcome under the UN decolonisation framework have continuously diminished over the past decades. Among the NSGT left on the list are highly contentious cases such as the

[315] James Crawford, *The Creation of States in International Law* (2nd revised ed, Clarendon Press, Oxford 2006) 390; similarly, Peter Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 Chinese Journal of International Law 55; (n160) 210.
[316] E.g., the Netherlands, *Written Statement of the Kingdom of the Netherlands* (17/04/2009) para 3.7.
[317] *Kosovo* (n288) paras. 51, 82, 83.
[318] However, Buchheit argues that the cases of Biafra and Bangladesh point towards acceptance of the international community regarding the doctrine of unilateral secession under certain circumstances, (n233) 221-222.
[319] *Kosovo* (n288), Separate Opinion of Judge Yusuf para 10.
[320] (n282).
[321] 'Non-Self-Governing Territories | The United Nations and Decolonization' (*United Nations*).
[322] "(…) the strength of the call for decolonisation has subsided in recent years.", Oliver Turner, "Finishing the Job': The UN Special Committee on Decolonization and the Politics of Self-governance' (2013) 34(7) *Third World Quarterly* 1194.

Western Sahara, the Falkland Islands/Malvinas, Gibraltar and New Caledonia.[323] With UN decolonisation seemingly losing importance due to the decreasing number of affected countries, it could be concluded that the right to self-determination in this context is slowly becoming obsolete.[324] Against this there remain NSGT to which the right does apply in the specific context of UN decolonisation. Second, a reinterpretation of the UN decolonisation regime and how the right to self-determination of peoples can be applied therein seems pertinent to address issues arising from neo-colonialism.[325] In fact, it is even questionable whether all transitions from NSGT to fully sovereign states can be really considered cases of successful decolonisation.[326] Turner even criticises "the excessively narrow and increasingly outmoded (…) prescribed solution for NSGT", namely independence, association with or integration in another state.[327] In that regard, the UN Special Committee on Decolonization (SCD) was criticised as leading NSGT to independence without offering further assistance once they lose their NSGT status. Instead, numerous former NSGT were left to deal with inherited conflicts from their colonial history by themselves.[328] The SCD's task is to monitor and stimulate the implementation of UNGA Resolution 1514 (XV) from 1960. However, criticism has been raised concerning the SCD's narrow understanding of colonisation, which fails to capture present day situations of neo-colonisation through, for example, economic power.[329] While it is true that a modern interpretation of colonisation is warranted to account of new forms of colonialism, the SCD would arguably need a new mandate as the one assigned to it in 1961 did indeed not envisage any further interpretations of colonialism than those intended by UNGA Resolution 1514 (XV), which was restricted to traditional cases of territorial colonisation. Furthermore, it is doubtful whether the right to self-determination of peoples as shaped through the above-analysed UN Resolutions adopted concerning the UN decolonisation efforts would then simply apply unchanged to cases of neo-colonialism. Given the different impact of neo-colonialism through various forms on peoples, responses trough the principle or the right to self-determination respectively would have to adapt. Such adaptation requires a rethinking of traditional approaches to self-determination of peoples, including questioning whether the independent

[323] (n321).
[324] See also Peter Hilpold, 'The Right to Self-Determination: Approaching an Elusive Concept through a Historic Iconography' (2006) 11 Austrian Review of International and European Law 26.
[325] (n322).
[326] ibid 1199-1200.
[327] ibid 1198.
[328] Suffice to consider the fate of many post-colonial African but also Asian states, see further Frederick Cooper, 'Decolonization and Citizenship: Africa between Empires and a World of Nations' and Karl Hack, 'Decolonization and Violence in Southeast Asia: Crises of Identity and Authority' in Els Bogaerts and Remco Raben (eds), *Beyond Empire and Nation: The Decolonization of African and Asian societies, 1930s-1970s* (Paperback 2012) 39-67 and 137-166.
[329] (n322) 1999.

national state is the best medium to address issues arising from remnants of colonialism and new challenges produced by neo-colonialism.

2.3.3 Self-determination of peoples in the ICCPR and ICESCR

Besides the UN Charter, the principle and right to self-determination of peoples are anchored in other international treaties. This section focusses on the two human rights covenants ICCPR and ICESCR, that were adopted in 1966. After the UN Charter from 1945 they are the next treaties to explicitly reference self-determination of peoples in their joint Art. 1(1):

> 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.

Art. 1(1) shows the range of aspects that may fall under the concept of self-determination, namely political, economic, social and cultural development. Based on this list, scholars like Jane Hofbauer distinguish between political, economic, social and cultural self-determination respectively, considering that self-determination as a right encapsulates a people's ability to act freely within these categories.[330] Thus, what distinguishes joint Art. 1(1) from Art. 1(2) UN Charter or the right to self-determination of peoples in the context of UN decolonisation as developed through UNGA Resolutions is the explicit recognition that collective self-determination may be relevant and therefore applicable to contexts other than political or territorial independence. Art. 1(1) ICCPR/ICESCR also introduced the notion of a right to development within the right to self-determination of peoples.[331]

Art. 1(2) of the ICCPR/ICESCR also features an added element. The provision emphasises free control over natural resources as falling within the ambit of self-determination of peoples, especially where access to resources is essential for a people's survival:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and

[330] Jane A. Hofbauer, *Sovereignty in the Exercise of the Right to Self-Determination* (Brill 2016) 69.
[331] See further Roman Girma Teshome, 'The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?' (2022) 22 Human Rights Law Review 9-11.

> international law. In no case may a people be deprived of its own means of subsistence.

To understand the context against which these new aspects were introduced to the concept of self-determination of peoples, as well as their original meaning, this section will start by looking at the drafting history of joint Art. 1. This will be followed with a comparison between the initial intent of the provision and its interpretation after the adoption of UNGA Resolution 2625 in 1970, while also offering a brief evaluation of landmark cases that have impacted the interpretation and application of the article. The section concludes with an assessment of the relation between the right to self-determination enshrined in Art. 1 ICCPR/ICESCR and the principle and right to self-determination developed in the context of the UN Charter.

Content of Art. 1 based on drafting history

Art. 1(1) ICCPR/ICESCR proclaims that "all peoples have the right to self-determination". The Soviet Union played an important role in the drafting process of the Covenants. Its most significant legacy is perhaps the inclusion of collective rights in the Covenants, which in the mind of 'Western' countries should only have provided for individual human rights.[332] It was the Soviet Union which proposed to insert a provision enshrining the right to self-determination of peoples, based on its view that respect for individual human rights depended on respect for the right to self-determination of peoples.[333] The recognition that the right to self-determination of peoples is not only a tool in the process of UN decolonisation, but that it had wider ramifications in and significance for international human rights law, marked a crucial stepping stone in the evolution of the concept. Indeed, as chapter 5 will explore in more depth, the African interpretation and application of the right to self-determination of peoples is greatly influenced by that understanding.

As far as the legal subject of the right to self-determination is concerned, the Soviet Union's draft proposal was concerned with colonial peoples and minorities. While it was not suggested that minorities are peoples with access to the right to self-determination as such, the draft appeared to consider the protection of minority rights as related to the discourse on self-determination of peoples, as both were mentioned together.[334] After the Soviet proposal was

[332] (n44) 47 ; similarly argues also Fisch n(41120) 9.
[333] ibid; this is also confirmed in HRC, General Comment No. 12: 'Article 1 (Right to Self Determination)' CCPR_GEC_6626_E (1); see also Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (CUP 2020) 127.
[334] UN Doc 1950 Annexes A/C.3/L.96 17.

rejected by the Drafting Committee, Afghanistan and Saudi Arabia initiated a procedural draft resolution requesting the Commission on Human Rights to consider how the right to self-determination may be protected in human rights law.[335] As the drafting process progressed, two camps formed: on one side stood those countries according to whom only colonial peoples held the right to self-determination. On the other side were those countries who envisioned a broader scope for the right by extending it to "peoples oppressed by despotic governments".[336] In the end, the latter prevailed.[337] Thus, among features introduced to the self-determination discourse through the adoption of joint Art. 1 was the acknowledgement that the right in the context of the two Human Rights Covenants is not limited to the context of decolonisation, but that it is applicable to peoples oppressed by their governments more broadly – in any territories, not just NSGT or Trust Territories.[338] In that sense, joint Art. 1(1) has the same scope as Art. 1(2) UN Charter in so far as both provisions aim to comprise all peoples. Yet, given the initial proposal's reference to minority rights, it must be emphasised that the majority of countries explicitly rejected the inclusion of minorities under the right to self-determination of peoples. This is underlined by the inclusion of Art. 27 in the ICCPR which addresses the rights of minorities separately without reference to Art. 1.

The concept of freedom features heavily in the history of the substantive discussions concerning the codification of the right to self-determination of peoples. In fact, Art. 1(1) ICCPR/ICESCR concretises the right to self-determination as the right to "freely" determine political, economic, social and cultural development. This is understood to mean freedom from interferences by domestic authorities as well as from external influences.[339] Under this view, the right to self-determination is mainly a defensive right. Furthermore, the right to self-determination of peoples in the two Human Rights Covenants was unequivocally envisaged as a permanent right.[340] Thus, unlike in the context of UN decolonisation, where the right is forfeited once exercised,[341] joint Art. 1 ICCPR/ICESCR constitutes an ongoing positive obligation of states to comply with the right to self-determination of peoples. Above that, the intended interrelation between Art. 1 and the rest of the rights set out in the ICCPR/ICESCR embeds the right to self-determination of peoples in a wider human rights context. In fact its placement as the primary article of the Human Rights Covenants is significant in signalling that self-determination was

[335] n(44) 48.
[336] ibid 49.
[337] ibid 51.
[338] Marc Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 32.
[339] n(44) 53, 55.
[340] ibid 54; see also (n113) 40.
[341] This is not to say that the UN principle of self-determination does not continue to apply.

considered a precondition for the other individual human rights set out in the treaties. For instance, an individual right to freely express one's (political views) (Art. 19 ICCPR) or to vote (Art. 25b) and participate in public affairs (Art. 25a) can only unfold where a people is granted the right to freely determine their political, social, cultural and economic development. Conversely, a people cannot be considered to enjoy the right to self-determination if an individual appertaining to that group is denied the above-mentioned individual rights.

The inclusion of the right to freely dispose over natural resources in the provision on self-determination of peoples caused significant controversy. At the time, this new addendum to the right to self-determination of peoples was welcomed by former and then-still colonial territories with a view to ensuring a people on a certain territory could not be "deprived of its own means of subsistence" as experienced partially during colonisation.[342] Against this some delegates argued that such a right could lead to unilateral termination or renunciation of already existing international agreements concerning access and exploitation of resources in foreign territories.[343] It was also held against the provision that it was likely to deter foreign investors and could potentially encroach on measures intended to support developing countries.[344] For good reason, these objections did not prevail in the end. Suffice it to recall that Art. 1(2) ICCPR/ICESCR is unequivocally formulated as a right to protect peoples from deprivation of their sustainable livelihood. As such, there can be no logical conflict with measures evidently assisting their development which is part of the right to self-determination of peoples of Art. 1(1) ICCPR/ICESCR.

Lastly, Art. 1(3) ICCPRI/ICESCR legally conjoins the right to self-determination of the two Conventions to the principle – and in the decolonisation context right – of self-determination of the UN Charter. The fact that an initial qualification to Art. 1(3) as only applying to states directly participating in the Trust Territory and NSGT regime of the UN was unsuccessful, emphasises that the provision is clearly understood as extending to all states.[345] Hence, it creates a positive obligation on all states to promote the realisation of the right to self-determination of peoples. It also indicates yet another step in the evolution of the concept of self-determination of peoples in international law towards a norm of fundamental value. UN Charter stipulates respect for human rights in Art. 1(3). The two human rights covenants, known as ICCPR and

[342] Taylor (n333) 130.
[343] ibid 131.
[344] ibid.
[345] ibid 131-133.

ICESCR can be considered concretisations of the human rights obligations assumed under the UN Charter since they were adopted by the UNGA.[346]

To conclude, the question of whether a claim for external self-determination can be based on this provision outside the decolonisation process still needs to be addressed. Minorities were explicitly excluded as legal subjects of Art. 1(1) ICCPR during the drafting process.[347] As regards external self-determination, it emerges from the preparatory works that "the article was not concerned with minorities or the right of secession, and the terms 'peoples' and 'nations' were not intended to cover such questions."[348] In summary, during the drafting process, a limitation of the right to self-determination in Art. 1(1) ICCPR to the colonial context was discussed but explicitly rejected. Thus, in light of the drafting history, Art. 1(1) ICCPR, like Art. 1(2) UN Charter, concerns only internal self-determination and is in this regard not limited to the colonial context. Art. 1(3) ICCPR/ICESCR does offer an added dimension, referring to the UN Charter in matters potentially concerning external self-determination as part of the UN decolonisation regime.

The right to self-determination of peoples under joint Art. 1 in practice

Practical application of joint Art. 1 confirmed the differentiation between internal and external self-determination, although the Human Rights Committee (HRC) appeared to find it difficult to draw the line between internal self-determination and minority rights in General Comment No. 23.[349] In essence, the HRC found the distinction between Art. 1 and Art. 27 to lie in the entity each provision encompasses: while Art. 1 applies to peoples, which may consist of a part of a state's population, but excludes minorities, Art. 27 applies to individuals that are members of a minority.[350] In fact, jurisprudence shows that applications by individuals under Art. 1 were rejected, with minority rights addressed under Art. 27.[351] Despite this, in *Apirana Mahuika et al v New Zealand* (2000) the HRC found that it may consider Art. 1 in a case concerning Art. 27 in the merits of the case and that it this did not pose an admissibility issue if a party to the

[346] Philip Alston, Ryan Goodman, *International Human Rights* (OUP 2013) 277; UNGA Res 2200A (XXI) (16/12/1966) UN Doc A/RES/2200A(XXI)[A].
[347] (n44) 27, 32.
[348] ibid 27.
[349] Katherine Del Mar, 'The Myth of Remedial Secession' in Duncan French (ed) *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013) 137.
[350] ibid; see also *Chief Ominayak and the Lubicon Lake Band v. Canada* (Communication no. 167/1984) CCPR/C//38/D/167/1984 (1990) para. 13.3; *Ivan Kitok v Sweden* (Communication no. 197/1985) CCPR/C/33/D/197/1985 (1988) para. 6.3.
[351] (n349) 129.

dispute bases a claim on Art. 27 in conjunction with Art. 1.[352] Furthermore, the HRC found that Art. 1 "may be relevant in the interpretation of other rights protected in the Covenant, in particular article 27".[353] The concrete way, in which Art. 1 is relevant in such cases, however, remains vague.[354]

Because of the explicit link between joint Art. 1 and the UN Charter, the above-analysed developments forming part of the UN decolonisation regime also affects interpretation of the right to self-determination in the context of the two Human Rights Covenants, at least with regards to Art. 1(3). The ICCPR was adopted in 1966, hence, at a time where the right to self-determination was exclusively applied in the process of decolonisation. While the two UN General Assembly Resolutions 1514 and 1541 were already adopted when the Covenants entered into force, the Friendly Relations Declaration was only issued in 1970, after the adoption of the human rights covenants. The changes brought by adoption of this Resolution also potentially affected interpretation of joint Art. 1 in that the same discussions on whether a right to remedial secession was introduced became pertinent in the context of the two Human Rights Covenants.[355] Proponents of the application of remedial secession point towards the development of the international law system from being state-centric to becoming human-rights-centric, which suggests that a presumption that the state has a specific "*raison d'être*", namely to provide an environment which allows all members of a state's population to enjoy fundamental human rights.[356] Consequently, a state becomes legitimised as sovereign only if it duly respects these rights.[357] Thus, the emergence of the human rights system in conjunction with the content of the Friendly Relations Declaration according to scholars arguing in favour of remedial secession, opened the door to the possibility of remedial acts falling under the right to self-determination as exercised by peoples whose rights are egregiously denied by their state. Despite its potential, practice under joint Art. 1 has not yet substantiated such interpretations.

Instead, the HRC appeared to address a different part of the scholarly debate, namely whether or the right to self-determination requires state to adopt a 'Western-democratic' structure in

[352] *Apirana Mahuika et al v. New Zealand* (Communication no. 547/1993) CCPR/C/55/D/547/1993 (2000) para 3.
[353] ibid para 9.2.
[354] See also Taylor (n333) 134.
[355] General Comment No. 12 (n333) para 7.
[356] (n113) 110; Christian Tomuschat, 'Self-Determination in a Postcolonial World', in Christian Tomuschat (ed) *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 9.
[357] Michael P. Scharf, 'Earned Sovereignty: Juridical Underpinnings' (2003) 31 Denver Journal of International Law and Policy 381-385.

order to fulfil its obligations deriving from the right.[358] A considerable number of eminent international law scholars interpreted the HRC's General Comment No. 12 from 1984 on the right to self-determination of peoples as confirming that it must be interpreted in context with the rest of the Covenant.[359] The importance of interpreting and applying Art. 1 in the context of related provisions was seemingly confirmed again in *Gillot v France* (2002), where the HRC linked Arts. 1 and 25 ICCPR again. Notably, the HRC considered that "it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated".[360] Nevertheless, while indications seem to support the view that the standard for internal self-determination of peoples is Western electoral democracy, it is submitted here that such a result is questionable and should inspire debate on a reconsideration of the meaning of internal self-determination. First, it elevates one form of governance to being the true form of self-determination, which in itself harbours the danger of neo-colonisation through imposition of political standards and traditions that may not align with how peoples elsewhere conceive of self-determination. Second, it ignores the part of self-determination which is traditionally defined as self-government, under which peoples are free to choose their form of political governance. While it may appear inescapable that the path to ascertain which form of governance a people desires is through electoral democracy, such a view eliminates the freedom of choice in selecting what form of governance a people may aspire for. It also bars other forms of governance system from fulfilling self-determination obligations, even though these may equally or better accommodate fundamental human rights.

In recent years the value of Art. 1(2) has risen significantly in importance, not least because of growing scarcity which is reflected in numerous cases based on this provision involving claims brought first and foremost by indigenous peoples.[361] Particularly relevant in the context of ICESCR, General Comment No. 26 establishes a direct link between access to land and self-determination of peoples.[362]

Finally, due arguably to insufficient reporting under the provision, there is a lack of empirical information on how states implement joint Art. 1 in practice as well as how they interpret obligations flowing from it.[363] This is further complicated by states reporting information

[358] See, e.g. Glen Anderson, 'Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?' (2016) 34(1) Arizona Journal of International and Comparative Law 25, 26.
[359] ibid 28, 29; see General Comment No. 12 (n333) para 2.
[360] *Gillot v France* (Communication No. 932/2000) CCPR/C/75/D/932/2000 (2002) para. 13.4.
[361] Taylor (n333) 131.
[362] G2300035.pdf (un.org).
[363] Taylor (n333) 134, 135.

relevant under other provisions rather than the right to self-determination as such, namely mainly Arts. 25 and 27 ICCPR. However, this may be inspired by the decisions linking Arts. 25 and 27 to Art. 1 considered above and could be corrected by the HRC by requesting clarifications on certain issues or by issuing a directive clarifying what states are expected to report under Art. 1.[364] Such a way of reporting under Art. 1 may be indicative of how submitting state parties interpret the content and application of the right to self-determination of peoples in the Covenant.

2.3.4 Indigenous Self-Determination

Context-specific development of self-determination of peoples can lead to different results, as visible in the realm of indigenous peoples' rights. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP)[365] in 2007 effectively recognised indigenous peoples' right to self-determination with its content elaborated upon at UN level marking a significant milestone in the history of indigenous peoples' rights as well as the history of self-determination of peoples.[366] It also marked the first time that peoples other than inhabitants of former colonies or states as a whole, were expressly accorded the right to self-determination.[367] This achievement is significant, despite the non-legally binding character of the UN Declaration.[368]

Besides UNDRIP provisions which specifically address indigenous peoples, it should not be disregarded that joint Art. 1 ICCPR/ICESCR explicitly refers to "all peoples". Nevertheless, through the drafting of Art. 3 UNDRIP (the provision on self-determination) the right to self-determination extended to indigenous peoples received specific content. While this should not be misunderstood as a 'second-class' right to self-determination nor a restricted one applicable to indigenous peoples, specific parameters do apply.[369]

---

[364] ibid 135.
[365] UNGA Res 61/295 (02/10/2007) A/RES/61/295.
[366] Dorothée Cambou, 'The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective' (2019) 23 The International Journal of Human Rights 34, 35.
[367] ibid 35.
[368] See also Erica-Irene Daes, 'An Overview of the History of Indigenous Peoples' Self-Determination and the United Nations' (2008) 21(1) Cambridge Review of International Affairs 23.
[369] Martin Scheinin and Mattias Åhren, 'Relationship to Human Rights, and Related International Instruments', in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2017) 72.

On reading Art. 3 UNDRIP, the content of the right to self-determination in the context of indigenous peoples' rights does not appear to differ from the general international right to self-determination appertaining to all peoples. Art. 3 UNDRIP proclaims:

> Indigenous peoples have the right to self-determination. This guarantees the right to freely determine their political condition and the right to freely pursue their form of economic, social, and cultural development.

The provision does not state which mode of exercising self-determination is included, or that external self-determination is excluded. However, Art. 4 UNDRIP states:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

This raises the question whether Art. 4 UNDRIP contains a qualification of the right to self-determination extended to indigenous peoples. The drafting history clearly reveals that such a reading of Arts. 3 and 4 UNDRIP was not intended. Instead, the right to self-determination enshrined in UNDRIP should be interpreted as the prerequisite essential for the enjoyment of other indigenous rights with the purpose to "secure their physical and cultural survival".[370] In this context, emphasis is placed on consent, development and land rights, including control over resources, criminal and civil jurisdiction and trade, among other things.[371] Autonomy and self-government are not limited options to exercise indigenous self-determination, but specific expressions of it, that are accorded preference.[372] Erica-Irene Daes, who served as Chairperson of the Working Group on Indigenous Populations and later as Special Rapporteur to the UN Sub-Commission on Human Rights, reported that the Chairperson overseeing the drafting process clarified that secession was not envisaged in Art. 3 UNDRIP.[373] This is underlined by Art. 46 UNDRIP, which references the Friendly Relations Declaration by confirming the principle of territorial integrity. Nevertheless, some scholars uphold that external self-determination cannot be excluded *per se*, as this would be a discriminatory application of the right to self-determination vis-à-vis indigenous peoples.[374] In practice, indigenous peoples themselves predominantly prefer constitutional change rather than territorial independence,

[370] (n368) 14.
[371] ibid 17.
[372] ibid 15.
[373] ibid 23.
[374] (n366) 36.

recognising the advantages of exercising their right to self-determination within an existing state.[375]

In all the brevity in which the right to self-determination of indigenous peoples' was outlined in this section, it shows how self-determination can operate without focussing on territorial boundaries, while still emphasising territorial rights. Arguably, applied in this fashion, conflicts between indigenous peoples and the state they live in were prevented or even solved rather than produced: land rights, sustainability, access to resources. This underlines the future potential of pursuing such options within self-determination and also the feasibility of applying self-determination to reconcile.

2.3.5 Self-determination as peremptory and customary norm in general international law

The adoption of the UN Charter and human rights covenants show how international law evolved to a more human rights-oriented system after the two World Wars.[376] Yet, as noted previously, their provisions on self-determination of peoples reveal different consideration of the norm in both instruments at their time of adoption. While Art. 1(2) UN Charter speaks of a principle, joint Art. 1 ICCPR/ICESCR refers to a right to self-determination of peoples. Besides treaty law, among the other sources of international law from which information about self-determination of peoples as a norm may flow are customary law as well as peremptory norms (*ius cogens*).[377]

The ICJ confirmed in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* that self-determination of peoples was a right under customary international law at latest within the time period relevant to the case, namely 1965 to 1968. Given the context-specific content of the right, one must however clarify what this customary right to self-determination comprises. In *Chagos*, the ICJ accorded the status of customary law only to the right to self-determination as interpreted and applied in the context of UN decolonization (see section 2.3.2).[378] To what extent other contents and contexts of application for the right to self-determination of peoples can also be considered customary international law remains questionable.

[375] (n368) 24.
[376] (n216).
[377] Art. 38 (1) ICJ Statute.
[378] Paras. 144-149, 161.

Regarding the status of the right to self-determination as a peremptory norm, it is disputed whether the right to self-determination constitutes *ius cogens*.[379] Clarity about that question is important, because under the law on state responsibility, third states are under an obligation to intervene if peremptory norms of international law are being violated.[380] Despite the nature of the right to self-determination as peremptory norm being controversial, states have accepted the obligation to respect and promote the right to self-determination under Art. 1(2) UN Charter. A violation of that treaty obligation, therefore, entails consequences under the law on state responsibility even if self-determination of peoples is not considered *ius cogens*.[381]

The ICJ embraced the notion of *ius cogens* rules of international law in paragraph 64 of *Armed Activities on the Territory of the Congo*, where it identified two constituting characteristics: first, to be peremptory, the norm must be recognised as binding on states irrespective of any treaty obligations. Second, the norm must be recognised to have universal character, meaning it must be considered applicable to all States. Despite numerous cases involving questions of self-determination of peoples, the ICJ has so far refrained from expressing a clear position on the question of its status as peremptory norm. In his separate opinion to the Advisory Opinion in the above-mentioned *Chagos* case, Judge Robinson took issue with the ICJ's silence on the matter, presenting evidence to support his opinion that the right to self-determination is a *ius cogens* norm.[382] Despite being reluctant to engage with the question of its peremptory character, the ICJ determined in *East Timor* that the right to self-determination of peoples produces obligations *erga omnes*.[383] Notably, in both cases, Chagos and East Timor, the right to self-determination in the context of UN decolonisation was at issue, which once again underlines that the Court's findings cannot simply be transferred to other contexts of application of the right without further assessment and reasoning. As the Court elaborated in *Barcelona Traction*, rights are considered *erga omnes* if they produce binding obligations towards all states due to the legal interest of the "international community" in the protection of these rights.[384] This categorisation comes very close, yet falls short of considering the right to self-determination of peoples peremptory.[385] In fact, as Judge Robinson explains in his separate opinion, the Court

[379] Juan Francisco Escudero Espinosa, *Self-Determination and Humanitarian Secession in International Law of a Globalized World: Kosovo v. Crimea* (Springer 2017) 17-18.
[380] International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1., Arts. 41, 48.
[381] ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' Art. 12 para 2.
[382] Paras. 49, 83.
[383] Para 29.
[384] Paras. 33-34.
[385] See Separate Opinion Judge Robinson (regarding the Chagos Advisory Opinion (n437)) paras. 62, 76.

"very much wanted to address *jus cogens*, but avoided doing so and instead introduced the concept of obligations *erga omnes*".[386]

Summarising, while the right to self-determination at least concerning its content and application in the context of UN decolonisation constitutes customary international law, its status as peremptory norm of international law remains disputed. Even with the question of its peremptory status left unanswered, it follows from the overall development of international law and the right to self-determination therein that states are no longer unassailable entities which can treat their peoples as they wish without facing consequences under international law.[387] With the rise of scholars and practitioners arguing for the consideration of the right to self-determination as *ius cogens* rule and the ICJ's determination of it producing *erga omnes* obligations, states' responsibilities towards the international community flowing from self-determination of peoples increased over the past decades.[388]

2.3.6 Peoples, indigenous peoples and minorities in international law

Traditionally, the legal subject 'peoples', with all the uncertainties the term entails, is often interpreted including aspects of common culture, language, and heritage and/or along the lines of territorial boundaries. The territorial approach was most prominently applied in the wake of the UN decolonisation efforts: the collective right to self-determination of peoples was bestowed on colonial peoples, which could be identified as such simply due to their location within colonial boundaries. Protected by the principle of *uti possidetis* these boundaries then became the borders of the newly emerged, post-colonial state. It is not a recent finding, as it has been highlighted by numerous scholars across the field, that this strictly territorial approach without regard to the special history and identities of the various groups often located within former colonies represents one of the causes for political unrest in the younger post-colonial states.[389]

Except this example of where the territorial approach has been strictly applied to identify a people as rights holder of the right to self-determination, a hybrid approach of both the territorial and the characteristics approach was predominantly used outside the context of decolonization.

---

[386] ibid para. 56.
[387] Annie Bird, 'Third State Responsibility for Human Rights Violations' (2010) 21 *European Journal of International Law* 883, 887.
[388] ibid 885-896.
[389] For example, Mohammad Shahabuddin, 'Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 Asian Journal of International Law 334-358.

With regards to indigenous peoples, for example, even though their precise definition remains subject of controversy, the working formula proposed by Martínez Cobo is widely deemed as acceptable:

> Indigenous communities, peoples and nations are those which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:
>
> a) Occupation of ancestral lands, or at least of part of them;
>
> b) Common ancestry with the original occupants of these lands;
>
> c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
>
> d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
>
> e) Residence in certain parts of the country, or in certain regions of the world;
>
> f) Other relevant factors.[390]

The territorial component of this approach is reflected in the special relation between indigenous peoples and their lands, but it differs from the territorial approach in the UN decolonisation context in that Cobo's working formula does not equate inhabitants of a certain territory with indigenous peoples. Instead, it is the special relation to the land in combination with a number of 'objective' characteristics, such as language and culture. The most distinctive criterion, however, is probably that of self-identification. Such a subjective element is missing

[390] Martínez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, E/CN.4/Sub.2/1982/2/Add.6 Chapter V.

with regards to colonial peoples: here, the territorial component is decisive of their status regardless of any other characteristics, objective or subjective. Most interestingly, even though colonised people were more often than not also indigenous, their special relation to land was not highlighted in neither the respective Chapters dealing with decolonisation in the UN Charter, nor in the relevant UN General Assembly Resolutions. This rigid approach based on territorial delimitations is reflected in the application of the *uti possidetis* principle, which blindly protects territorial – and possibly maritime – boundaries without regard to historic, cultural, other factors, let alone self-identification as belonging to a certain group. This practice resulted in conflicts in the post-colonial period posing various problems that continue to exist even decades after the respective territories have been formally decolonised. Most importantly, this decolonisation practice led to the emerging of a number of minority groups in the first place.

What distinguishes a minority from indigenous peoples and peoples in international law, is once again contested. However, according to the formula offered in 1977 by Francesco Capotorti, then Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is:

> ...a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[391]

This definition is an example of a pure characteristics approach, with no mention of territory or a minority's special relation to it. Even though it is not included in Capotorti's definition, today it is accepted that the subjective element of identifying as a member of a minority group is also relevant. In that regard, attention must be drawn to a slight but potentially impactful difference in wording concerning the subjective element concerning indigenous peoples and minorities. While indigenous peoples should identify as such, individuals of a minority group, should identify as a member of such a group. Thus, in the definition of minorities, the focus arguably is on the individual rather than the group. The weaker emphasis on collective identity, which potentially could raise claims based on the right to self-determination, may be due to a strategic choice. The predominant position in international law is that access to self-determination of

[391] Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1, para. 568

peoples is barred for minorities. Hence, the right to self-determination, seemingly only remains accessible to peoples, inhabitants of trust and non-self-governing territories and indigenous peoples. Despite this finding, minority groups are granted participatory rights to ensure democratic representation. While such actions arguably fall into the realm of internal self-determination, the resistance to acknowledge any rights based on what is labelled self-determination stems from the fear that minorities could eventually seek to exercise external self-determination, most notably by means of secession. However, history shows that despite the resistance of states in acknowledging a right to self-determination for minorities, minority groups have still seceded and established independent states. In these cases, the groups in question have then simply been recognized as 'peoples' after the successful creation of an independent state. Kosovo is a prominent example where this happened most recently. Thus, there is an interesting discrepancy: despite formally not being entitled to secession on the grounds of self-determination, an action disregarding the "rules of the game" does not seem to affect the situation post-secession, namely the minority's recognition as a people, the entity which is recognized to hold a 'full' right to self-determination.

Overall, the examples above underline that the function of any characteristics proposed to identify a peoples can be reduced in essence as serving to distinguish a perceived "us" against "the others". This distinction of the "us" against "the others" is crucial to the function of the right to self-determination of peoples as a weapon against oppression. In that sense the definition of colonial peoples, indigenous peoples and minorities serves the purpose of clarifying who enjoys special safeguards because the respective entity needs to be protected against (potential) oppression.

Having said that, the determination of what or who constitutes a people is arguably of particular importance if there are secessionist claims involved. However, even beyond secessionist claims, the exact demarcation of a 'people', is necessary as a threshold requirement to enjoy the legal benefits of the right to self-determination.

2.4 Conclusion

In conclusion, self-determination of peoples did not undergo a linear evolution but is a multi-faceted concept that served different underlying narratives – and is likely to continue to do so. To fully understand the role and content of self-determination of peoples as an international legal norm it is important to be aware of its varying content and application depending on the specific context it operates in. In sum, self-determination must be conceived of as both a

principle and right rather than seeking to denominate it as one or the other. In international law it has a dual function with changing implications: as a right it has a clear subject and content, albeit best articulated in the decolonisation context. As a principle, on the other hand, it is more abstract and leaves room for interpretation, arguably hierarchically superior to a right,[392] but also lacks the sharp contours of a right.[393] In further developing contents and interpretations of self-determination of peoples, discussions about the imposition of 'Western' standards through the concept emphasise that it needs to be monitored and reconsidered continuously to ensure it does not transform into a tool of neo-colonialism, by imposing values and standards on peoples that may wish to pursue other avenues. Instead, the focus must stay on ensuring that peoples can indeed freely determine their destiny. So, could it be said that self-determination failed as a method of conflict resolution and has fallen short of the principle of legal certainty? This is not necessarily so, though as Ratner called it, it remains of uncertain legal valence as a principle less rigidly defined precisely to allow for flexible handling of specific situations.[394] This makes it difficult to assess whether it is the principle of self-determination that has failed or the actors that have failed/chosen to apply it.

While self-determination of peoples in international law finds its natural counterpart in the notion of the inviolability of a state's sovereignty and territorial integrity, developments in the interpretation and application of the right in contexts such as indigenous peoples' rights, or the interpretation of the right to self-determination in conjunction with individual human rights in the ICCPR/ICESCR point toward efforts to detangle it from notions of independent statehood. Despite this, in scholarship and jurisprudential contexts in which the right operates, levels other than the national state level remain underexplored.

Overall, all approaches show that self-determination of peoples at its core is constituted by key notions: 1) a weapon against oppression (exploitation, subjugation, domination from entities other than the governing authority but also internally by the state towards its own people), 2) as a means of reconciliation (by giving people the opportunity of consent in hopes to establish and maintain peace), 3) as legitimising governing authority and 4) as a tool on the path towards socio-economic and political development.

[392] Karen Knop, *Diversity and Self-Determination in International Law* (CUP 2009) 35.
[393] (n44) 320.
[394] Steven Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90 American Journal of International Law 597.

3 What is supranationalism: characteristics, origins, forms and challenges

The second concept this study is concerned with is supranationalism. In order to prepare the ground for the case studies of the EU and the AU in chapters 4 and 5, this section will define supranationalism and introduce distinctions between this concept and supranational organisations as related entity in international law (section 3.1). Building up on the findings concerning the status of supranational organisations in international law, section 3.2 analyses what authority these entities have regarding self-determination of peoples from an international legal perspective. Beyond that, this chapter also looks at challenges emerging in successful supranational models by mainly drawing on the experiences of the EU as the most developed supranational organisation so far (section 3.3). Considering its characteristics and challenges section 3.4 highlights why supranationalism is relevant to self-determination drawing on the previous findings, including those on the concept of self-determination of peoples. Based on a comparative analysis of different supranational models that emerged in history, this chapter lays the foundation for the subsequent case studies in chapters 4 and 5, by questioning, whether the European-inspired link between exclusivist nation-state-oriented thinking and self-determination requires rethinking. It also introduces the possibility of considering whether supranationalism applicable to self-determination of peoples is a radically new idea or rather something that history has pointed towards. The last section particularly questions concerning historical antecedents point towards accommodating ideas appertaining to self-determination of peoples in supranational settings, as an idea that emerged but was abandoned in favour of the European statehood model.

3.1 Supranationalism and supranational organisations

3.1.1 Supranationalism – definition and distinction from related phenomena

Supranationalism describes the transfer of authority and sovereignty – whole or in part – from member states to an institution or body they form part of and that operates above the national domestic plane.[395] This process is referred to in literature as 'integration'.[396] Thus, supranationalism is the term given to a specific kind of integration, namely integration above the national level in conjunction with sovereignty transfer to a supranational authority.

[395] Garret W. Brown, Iain McLean, Alistair McMillan, *A Concise Oxford Dictionary of Politics and International Relations* (OUP 2018, 4th ed.).
[396] Tanja Börzel and Thomas Risse, 'Introduction: Framework of the Handbook and Conceptual Clarifications' in Tanja Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (OUP 2016) 8.

This process can manifest in different forms, the most illustrious in contemporary terms being the EU. Because of the EU's success and development as entity in relation to which the term 'supranational organisation' emerged in international law, Eurocentric literature and literature engaging with EU law and politics may give the impression that the EU is either the only existing or the only possible entity qualified to claim the characterisation 'supranational'.[397] This is not the case. While the processes of supranationalism, i.e. supranational integration, may result in the forming of a supranational organisation such as the EU, supranational integration processes from other parts of the world, which may be mentioned as exemplary, not exhaustive list, illustrate the different forms it can take. The United Arab Emirates (UAE), a union of formerly seven independent sheikdoms, chose the path of constitutional federation. Obviously, the UAE are not a supranational organisation, but the forming of the confederation was preceded by a process of supranational integration. However, instead of resulting in a supranational organisation as one would possibly expect considering the experience of the EU, supranationalism in the UAE resulted in a confederation of sheikdoms. The AU, which will be considered more closely in chapter 5, appears to follow the EU model in certain aspects and it remains to be seen where its development eventually leads to.[398] Currently, it can be located at the transitional stage from intergovernmental to supranational organisation, with strong factors underlining its supranational character. CARICOM focusses on economic and to a lesser extent political integration. This unfolds in a very different manner to the EU in its functioning and structure as well as purpose, as the goal is not to establish a supranational governing entity in the EU sense, but mainly an economic body that fosters economic development within the Community. In a similar fashion, the Pacific Alliance limits its regional integration to trade while not appearing to necessarily reject extending supranational integration to other areas.[399]

Despite their differences, all these entities have in common that they chose supranational integration to varying degrees. In this context, it is crucial to distinguish between supranationalism as a process and the emergence of a supranational organisation as one of many potential outcomes of the process. As the examples of CARICOM and the Pacific Alliance show, intergovernmental organisations can engage in supranationalism without this leading to formation of a supranational organisation.

---

[397] Amitav Acharya, 'Regionalism Beyond EU-Centrism' in Tanja Börzel, Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (OUP 2016) 109.
[398] See chapter 5.
[399] Compare the objectives and strategies adopted by the Pacific Alliance as set out on its own website at 'What Is the Pacific Alliance? – Alianza Del Pacífico' (*Alianza del Pacifico*).

Intergovernmentalism emerged as one of the theories of European integration, but some scholars locate it within the school of realism more broadly.[400] From a linguistic approach, *inter* means 'between' while 'governmental' refers to governments. Thus, intergovernmental can be translated as 'between governments'. In fact, intergovernmentalism emphasises the role of national governments as drivers of integration.

Like the previously explained difference between supranationalism and supranational organisations, intergovernmentalism describes the process, while intergovernmental organisations are a product of that process. In international law, intergovernmental organisations are treaty-based associations of states, in which states remain the sovereigns of the treaty constituting the organisation. Interestingly, the UN appears to view the EU as an intergovernmental organisation.[401] The question that arises is whether intergovernmental means full sovereignty and thus excludes supranationalism. As the examples above show, this cannot be true. Furthermore, the UN's classification of the EU as intergovernmental organisation does not necessarily exclude its existence as supranational organisation. It therefore appears more convincing to view supranationalism as a specific form of intergovernmentalism, wherever supranational integration is the aim.

The third significant term in the discourse of integration processes and in order to draw distinctions between them is that of regional integration. Regional integration refers to integration processes occurring – as the name says – in specific geographical regions. At the same time, even in the wide, almost continental context of the EU, reference is made to regional integration.[402] Since regional integration is a broad category that focusses on the geographical reach of the process, it may accommodate intergovernmental as well as supranational developments, depending on the specific case at issue. As such, the EU is a regional and supranational organisation, given its unequivocal aim towards supranational integration and its specific features, while the Association of Southeast Asian Nations (ASEAN) is a regional and intergovernmental organisation. These examples show that regional organisations can be driven by supranational as well intergovernmental structures, or even a combination of both considering that a sharp distinction is not always possible.

[400] See Hans-Jürgen Bieling, 'Intergouvernementalismus' in Hans-Jürgen Bieleing, Marika Lerch (eds), *Theorien der Europäischen Integration* (3rd edn, Springer 2012) 77, 92.
[401] 'Intergovernmental and Other Organizations'(*United Nations*).
[402] Diana Panke, Sören Stapel, Anna Starkman, *Comparing Regional Organizations: Global Dynamics and Regional Particularities* (Bristol University Press 2020) 14.

3.1.2 Supranational Organisations

As indicated in the previous section, the entity supranational organisation is to be distinguished from supranationalism, which is the process a supranational organisation may be the product of. Elaborating further on this definition, this section's purpose is to situate supranational organisations within the system of international law more broadly, in order to understand the status of these entities therein.

Starting from a term that might easily be conflated with supranational organisations, international organisations are defined as international law subjects created by states through international agreements.[403] International organisations include both, intergovernmental and non-governmental organisations.[404] While it might seem to be a natural consequence to characterise supranational organisations as international organisations, there is not only a difference in terminology but also in content. Whereas a supranational organisation may be considered as special manifestation within the broader category 'international organisation', not every international organisation qualifies as supranational organisation.[405] The prefix '*inter*' highlights the nature of international organisations as being the stage of activities *between* states, which decide to cooperate to reach the respective organisation's goals. This applies, for example, to the UN. By contrast, the prefix '*supra*' in supranational organisations means 'above' as opposed to 'between' or 'among'. Supranational organisations differ from the broader term 'international organisation' in that they are vested with a higher degree of sovereign power, first and foremost legislative power, which is something international organisations do not have.[406] This perhaps most important distinguishing factor makes it evident why the EU counts as supranational organisation and the UN, which does not have legislative powers on its own, does not. Because supranational organisations are vested with their own sovereignty by the constituent Member States, they can make independent decisions that may be legally binding towards the Member States.[407] It is this ability that characterises and most

[403] Joxerramon Bengoetxea, 'The EU as (more than) an International Organization' in Jan Klabbers and Asa Wallendahl (eds) *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing Limited 2011) 448, 449.
[404] ibid; for more information on the definition of "international organization", see Stephen Bouwhuis, 'The International Law Commission's Definition of International Organizations' (2012) 9(2) *International Organizations Law Review* 451-465.
[405] For example, Jan Klabbers lists the EU among other examples of international organisations in 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Asa Wallendahl (eds) *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing Limited 2011) 3.
[406] Peter L. Lindseth, *The Oxford Handbook of International Organizations* (OUP 2016) 152.
[407] Guido Thiemeyer, 'Supranationalität als Novum in der Geschichte der internationalen Politik der fünfziger Jahre' (1998) 4(2) *The Journal of European Integration History* 5-6.

obviously distinguishes supranational organisations from other international organisations in international law. Furthermore, supranational organisations often feature a collective body established by the Member States, which serves as a forum for the discussion of interests and settlement of disputes that transcend the national level.[408] The unique relation between supranational and national sovereignty within supranational organisations is likely to create a synergetic effect between the Member States and the supranational body.[409]

3.2 What authority do supranational organisations have regarding self-determination of peoples?

It is unlikely that anyone foresaw the extent to which supranational organisations would rise in significance in international law and politics. Signs for the increasing importance of international organisations became apparent already in 1949, when the ICJ determined that the UN possessed legal personality, making it a subject of international law "capable of possessing international rights and duties" and having the "capacity to maintain its rights by bringing international claims".[410] This recognition of international organisations gaining significance as actors in international law and policy was also reflected in scholarship. Kristina Daugirdas, for example, argues "international organizations 'as such' can contribute directly to the creation of customary international law".[411] This view is seemingly also supported by the International Law Commission (ILC), which in its Draft Conclusions on the Identification of Customary International Law concluded that while states remain the primary actors in the creation of customary international law, in "certain cases, the practice of international organizations also contributes".[412] In that regard, the ILC elaborated further that international organizations possess the ability to create customary international law, not just by virtue of the member states who constitute them, but by virtue of their own practice as an organization.[413] Through this

[408] Individuals working in EU institutions follow the mandate stemming from the supranational organisation and not a mandate from the Member State they come from, e.g. Art. 19(2) TEU regarding ECJ judges.
[409] See further Sergiu Buscaneanu, *Regime Dynamics in EU's Eastern Neighbourhood EU Democracy Promotion, International Influences, and Domestic Contexts* (Palgrave Macmillan 2016) 191-210.
[410] *Reparation for injuries suffered in the service of the United Nations* [1949] Advisory Opinion ICJ Rep 174.
[411] Kristina Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) 31(1) European Journal of International Law 201-233.
[412] ILC, Report on the Work of Its Seventieth Session (ILC Draft Conclusions), UN Doc. A/73/10 (2018) 117-156 (Draft Conclusion 4); in relation to that, see also ibid Comment (4) to Draft Conclusion 4: "[w]hile international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them' - for example, by voting in favour of, or against, the adoption of resolutions by intergovernmental bodies.".
[413] ibid Comment (4) to Draft Conclusion 4.

simple but impactful finding, the ILC confirmed that international organizations have joined the ranks of law-creating actors in international law.[414] The report is remarkable for two main reasons: first, it marks a further departure from the traditional Westphalian model of international law, in which states held the monopoly of international law creation. Given that traditionally one of the constituting elements for the creation of customary law was *state* practice, broadening the field to include international organizations is even more meaningful. Second, considering that self-determination of peoples has the status of being a norm of customary international law, this is a significant development, because it entails that international organizations can produce custom that may affect the customary norm of self-determination of peoples.[415]

Although the ILC referred explicitly only to international organisations in its report, while remaining silent on the matter of supranational organisations, this does not mean the finding is not relevant with regards to these entities. From a classification point of view, and putting the two entities in relation to each other, supranational organisations are a sub-form of international organisations, which might be categorized as the umbrella term in this context. Hence, it can be argued that if reference is made to the larger umbrella term, this includes all sub-forms. Furthermore, supranational organisations also differ from international organisations in that they have a considerably higher degree of sovereign power, even possessing the ability to issue legally binding directives upon Member States. This suggests an *a fortiori* analogy of the ILC's finding: if international organisations, who compared to supranational organisations hold a much lesser degree of sovereign power and are thus less state-like, are considered capable of creating customary international law, then this must apply all the more to supranational organisations, who due to their high degree of sovereign power derived from Member States are more similar to being state-like entities.

Furthermore, according to the UN, the EU specifically cannot only create customary international law, but is also bound to comply with it.[416] Thus, the EU is under the positive obligations to ensure customary international law standards are guaranteed.[417] As positive obligations require the EU to actively shape its legal and political system to accommodate customary international law standards, this opens another door for the EU to exert influence on

[414] ibid 117-156 (Draft Conclusion 4).
[415] On that see further Diane Marie Amann, Ginevra Le Moli, Danae Azaria, Chimene I. Keitner, Scott Dodson, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113(4) American Journal of International Law 784-791.
[416] Israel de Jesús Butler, 'The European Union and International Human Rights Law' (OHCHR, Europe Regional Office) 22.
[417] ibid 23.

the concept of self-determination of peoples within its jurisdiction. The example of its African counterpart, the AU, shows how a comparable organisation can shape the concept through regional legal and political frameworks.[418] In the case of the AU, this happened predominantly through means of regional treaties, mainly the African Charter on Human and Peoples' Rights (hereinafter 'African Charter'). The EU, however, has not acceded to a human rights treaty, which provides for the right to self-determination of peoples. In fact, the only human rights framework the EU is a party to is the Convention on the Rights of Persons with Disabilities (CRPD).[419]

Legally, both the EU and the AU have the capability to conclude treaties in their function as supranational organisations, resulting on binding treaty obligations on their Member States. Hence, they can impact human rights, including the right to self-determination of peoples, through participation in human rights treaties, either at regional or international level. From the perspective of international law, international organisations, including supranational organisations can be parties to international human rights treaties. From the perspective of EU Law, according to Art. 216(2) TFEU the EU may conclude treaties with third countries or international organisations *inter alia* in cases where the treaties constituting the organisation empower it or if this is necessary in order to achieve one of the objectives set out in the treaties. In practice, the EU made use of its ability to become a party to international treaties (as did the AU) for example concerning the WTO and the World Health Organization (WHO). Despite this, the EU considered itself incapable of acceding to human rights treaties based on the reasoning that it is not a state. The UN appears to hold a different view in this regard. In a report concerned with the question of the relation between EU and International Human Rights Law, the OHCHR lists three international obligations imposed directly on the EU: treaties, customary law and de facto succession to obligations assumed by its Member States. Addressing the issue of whether or not the EU as such can become a party to UN human rights treaties such as the ICCPR and ICESCR, the OHCHR argues that based on ICJ jurisprudence "a State may create obligations for itself where it makes a public declaration that is sufficiently specific and is accompanied by an intention to be legally bound".[420] It is notable that from the perspective of the OHCHR the EU can be treated as a state in this regard without further discussion. This also underlines the *a fortiori* argument presented above concerning the ability of supranational organisations to create customary international law. The report furthermore

[418] See further chapter 5.
[419] The treaty and parties that acceded to it can be accessed at the UN Treaty Collection online at 'United Nations Treaty Collection' (UNTC).
[420] (n416).

contends that the EU could in any case "unilaterally act as if it were bound" by UN human rights treaties by implementing respective internal measures.[421] Lastly, beside questioning the EU's purported argument that in order to accede to UN human rights treaties an amendment of the treaties constituting the EU may be necessary, the report concludes that unquestionably the organisation de facto succeeded to the obligations flowing from UN human rights treaties assumed by the EU's Member States based on Art. 351 TFEU.[422]

By comparison, the AU established an elaborate treaty framework, in which it participates as supranational organisation, mainly in the OAU/AU Treaties, the ACHPR and related Protocols.[423] However, no comparable provision to Art. 216(2) TFEU or 351 TFEU exists. This is likely due to the lesser degree of supranationalist development of the AU compared to the EU. Thus, as evidenced by the established treaty framework of the AU, the chosen path to interact with regional human rights law appears to be the conclusion of treaties on a regional and continental level based on supranational AU initiative. Still, the most obvious influence the AU exerts on the concept of self-determination of peoples takes place through the organisation's active engagement with it on a legal and political level, as chapter 5 will analyse in more depth. This constitutes a notable difference to the EU, which as noted previously, refrains from such active involvement in this regard.

Thus, in conclusion it is clear that supranational organisations – if they choose to make use of it – possess considerable authority regarding self-determination of peoples.

3.3 Supranationalism and the state: sovereignty tensions and the question of the exercise of power

3.3.1 Supranationalism as a challenge to national sovereignty

One of the recurrent challenges supranational entities face – one that needs to be addressed in discussions about locating self-determination of peoples on a supranational plane – is that their establishment is often accompanied by a sense of a "loss of power" by the joining state.[424] Stephen Krasner, for example, enlists EU Member States under the category of states "without autonomy", noting that "despite the fact that the member states of the Union cannot independently enter into agreements in many issue areas, their international legal sovereignty

[421] ibid 22, 23.
[422] ibid 24, 25.
[423] See further AU, 'OAU/AU Treaties, Conventions, Protocols & Charters' (*African Union*).
[424] Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2007) 3; Stephen Krasner, 'Recognition: Organized Hypocrisy Once Again' (2013) 5(1) International Theory 172.

has never been questioned".[425] He raises this point in connection with exploring the perceived "hypocrisy" concerning the recognition of states in international law.[426] Krasner depicts a position exemplary for a Westphalian interpretation of sovereignty based on notions of absolute independence from any external influence.[427] While from an abstract point of view such a rigid notion of sovereignty has the benefit of offering a solid foundation for a theoretical approach, the Westphalian approach fails to address the impact of globalisation and the proliferation of international supervision through legal regimes and their courts and tribunals.[428] Without overstating the effects of globalisation as a force that changed almost every aspect in international law and politics, such a view disregards reality in so far as that the degree of international integration in many essential areas renders it almost impossible for a state to exist in complete isolation from external factors. Suffice it to mention the realm of international human rights, which by its very nature requires a certain level of intrusion in 'internal' state matters. The ICJ's recognition of *ius cogens*[429] and obligations *erga omnes,*[430] as well as the development of the doctrine of the responsibility to protect[431] – just to mention a few – by their very nature require external interference from other members of the international community if the respective preconditions are fulfilled. Besides the area of international human rights, international trade has also led to the establishment of a transnational set of treaties producing legal obligations for the State Parties, that often find themselves in a position where they are subject to external influences. One example is the WTO, which besides being based on an elaborate set of rules by which state parties are obliged to abide also possesses its own jurisdictional body with the power to settle disputes between state parties and adjudicate over violations of trade rules arising from the treaty.[432] Consequently following through with Krasner's line of argument, all state parties to international treaties establishing regimes with international or supranational supervision instances would have to be considered 'without

[425] Krasner n(424) 173; (n4) 499-519.
[426] ibid 175.
[427] Krasner notes that "there has been no challenge to the international legal sovereignty of the members of the EU because it has not been in the interests of any party to make such a challenge", ibid 173.
[428] Regarding shortcomings of the Westphalian approach to modern international law see also Turan Kayaoglu, 'Westphalian Eurocentrism in International Relations Theory' (2010) 12(2) International Studies Review 193-217.
[429] For example, in *Armed Activities on the Territory of the Congo (New Application 2002) Democratic Republic of the Congo v Rwanda* [2006] ICJ Rep 6 para. 64.
[430] Very famously recognised in relation to the right to self-determination of peoples in *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90 para. 29.
[431] See International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (Report of December 2001).
[432] Further see Lorand Bartels, 'Jurisdiction and Applicable Law in the WTO' 2014 University of Cambridge Legal Studies Research Paper Series, Paper No. 59/2014; and Debra P. Steger, 'The WTO in Public International Law: Jurisdiction, Interpretation and Accommodation' (Institute of International Trade Law and Development, University of São Paulo, in collaboration with the WTO Appellate Body, 2005) 1-17.

autonomy'. This judgement however, disregards the fact that despite transferring sovereignty and competencies to other bodies, states remain the masters of the treaties and continue to exercise considerable sovereignty in national as well as international questions, not least because they remain the source of power for the international legal entities they compose.[433]

As final point to conclude this series of examples, international migration may also be named as one of the factors considerably eroding rigid interpretations of Westphalian sovereignty as far as it is based on the conception of nation states. The notion of the nation state characterised by the predominance of an ethnic majority is a European invention from the past.[434] However, increasing transnational migration alongside intermarriages between communities challenges the cultural and ethnic homogeneity formerly perceived and is forcing the political leadership to accommodate the interests of a growing part of the population of new voters. Migration is also important in terms of a diaspora identity, which possibly produces sentiments of community and thus collective identity across state borders. This is not only interesting from a sociological point of view but can also have impacts from an international law perspective. Examples are the solidarity voiced by certain states with ethnic minorities in other countries, often in relation to minority and other human rights.[435] All these factors render an interpretation of sovereignty as meaning the isolated existence of a state in terms of complete freedom from external influence impractical and unworldly.

3.3.2 Sovereignty: a contested concept

Returning to the idea that the strengthening of supranationalism inevitably entails a loss of sovereignty of states participating in this process, Brexit is a very recent example that reflects the conflict between national interests of member states in terms of safeguarding their own interpretation of sovereignty and supranationalism. The perception that by leaving the EU Great Britain would regain the sovereignty it allegedly lost to the EU through its accession, was one of the driving factors in the political Brexit campaign.[436] At the same time, this is a typical conflict any international or supranational organisation has to face – the accusation of overstepping competences or acting *ultra vires* falls into the ambit of two international law subjects fighting over questions of sovereignty, namely the question of 'who has the power' to

[433] (n4) 499-503.
[434] See chapter 2.
[435] Furthermore, see Myron Weiner, 'Peoples and States in a New World Order?' (1992) 13(2) Third World Quarterly 317-333.
[436] The website *UK in a Changing Europe* (ukandeu.ac.uk) has collected a great deal of material documenting the entire Brexit process.

act and to what extent, but also the question of who is to be held responsible for certain actions. As the latter point already indicates, this entails consequences for questions on state responsibility.

Sovereignty is by no means a clear-cut term, but an abstract concept, that can but does not necessarily manifest itself in a *de facto* manner. One interpretation of sovereignty is reflected in the ICJ Advisory Opinion on the question of whether or not the decolonisation process had been lawfully completed in Mauritius. In that case the ICJ concluded that Mauritius holds the sovereignty over the Chagos Archipelago. Given that the process of decolonisation had not been lawfully completed, the British were under an obligation to immediately cease their illegal administration of the island.[437] Yet, until this day, the United Kingdom refuses to comply with the conclusions reached by the Court to withdraw its unlawful administration. This case offers two possible interpretations of sovereignty: legal sovereignty as determined by the Court on the one hand, meaning authority that is legally justified, and *de facto* sovereignty by the British on the other, meaning the actual exercise of administrative power over the territory. This case is just one example that illustrates how elusive the idea of sovereignty can be in practice and how it lends itself to different perceptions.[438] In light of how difficult it is to clearly define sovereignty, many scholars from various disciplines have for a long time attempted to make the concept tangible. Thus, it is not only legitimate but also crucial to pose the question what is meant by 'sovereignty' when politicians or heads of states complain a lack thereof in the context of their membership in supranational organisations.[439]

3.3.3 Reconciliatory approaches to the tension between nationalism and supranationalism

As *inter alia* the Brexit discourse mentioned above shows, the classical nation-state is often perceived as the ultimate example of 'sovereignty'.[440] Whether such an interpretation of sovereignty is topical in international law and politics today, is, again, disputable, but it does not change the fact that this seems to be what many governments and individuals have in mind when talking about sovereignty.[441] The problem is that the traditional notion of the nation-state

[437] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 95 paras. 175-183.
[438] For example, Sarooshi lists "internal", "external", "political", "legal", "indivisible", "divisible", "governmental", and "popular" sovereignty as just a few examples of the existing varying categories, n(424) 4.
[439] See Samantha Besson, 'Sovereignty in Conflict' (2004) 8(15) European Integration Online Papers sections 3.2.1.1–3.2.1.5.
[440] (n424) 5.
[441] Similar disputes concerning the question of sovereignty in terms of Westphalian state sovereignty also exist in the Pan-African and Pan-Arabian dispute; more on this sub-sections 3.4.4 and 3.4.5.

does not reflect reality anymore – if it did so to begin with is also questionable. A homogenous nation-state is extraordinarily rare, the more so in a globalised world characterised by close transnational interconnections and movements. Dan Sarooshi suggests a better approach to the perceived conflict between nationalism and supranationalism as two opposite ends:

> Instead...of characterizing the nation-State as an 'exemplar' it may be more accurate to describe it as being a reference point since it does not provide the desired end-point but rather the starting point for the contestation of sovereignty within international organizations. (…) This approach that the sovereignty of States is only the starting point of reference for contestation within international organizations, does not, it should be emphasized, mitigate the important role of States *as actors* in contesting sovereignty within international organizations. The lower level of government has in history always played an active and important role as a safeguard against the capacity of the more recently established, higher, level of government to establish and enforce problematic conceptions of sovereignty. This is particularly relevant in the context of global institutions where maintaining the system of national autonomy is so essential if the evils of excessive centralization are to be avoided.[442]

Sarooshi's approach has the advantage, that it allows recognition of the opportunity supranational entities offer in terms of fostering an exchange of ideas and values, thus possibly resulting in renewed 'legitimacy' stemming from the agreement on certain values and how they are to be incorporated by the supranational organisation, without discarding traditional Westphalian views completely, because member states remain essential and their views are being considered on the supranational stage. In that sense, Sarooshi's proposition can be considered reconciliatory between supranationalist and nationalist views. It also shifts the focus and thereby the narrative from ethnicity or cultural identity debates to questions of governance and legitimacy. Looking at it from the perspective of self-determination of peoples, the issue of 'the state versus people' lies at the very heart of the norm.[443] As identified in Chapter 2, one of the constituent values of self-determination consists in its nature as a weapon against oppression by the state. Under that premise, a closer look at the relation between peoples and states is indicated.

[442] (n424) 6.
[443] See chapter 2.

3.3.4 Supranationalism, self-determination and the relation to democratic legitimacy

In the school of Realism, the state is viewed as a unitary voice somewhat distinct from people.[444] The criticism of a perceived "democratic deficit" often stems from traditional realist interpretations of international law, drawing on the notion of the nation-state as exemplary and only legitimate authority over its citizens.[445] Again, this is a recurrent issue famously discussed in the context of the EU, for example.[446] And often, albeit not exclusively, Member States' own interest in maintaining or even establishing their predominance within the regional sphere of the supranational association lies behind these disputes on perceived lack of democratic legitimacy. Because what a Member State is really saying when the question of legitimacy or competence is raised, is "do you have the power to act?" as opposed to the Member State itself. In short: it is a power struggle between the national and the supranational unit.

With self-determination of peoples at the heart of this project, the question inevitably arises as to what the relation between supranational organisations, member states and peoples is. As a first step, and starting from realist views as presented above, the relation between peoples and states shall be elaborated upon first.

On a simplified level, states do not exist as real organisms beyond their existence as institutions built upon a thought construct. People make states, thus by extension every decision made by heads of states as the government, are also decisions made by people.[447] When speaking of "a decision made by people", one of the first ideas coming to mind is that of democratic systems, which at least in the global West are often perceived as the model system that allows for citizens to participate in the political process of the state. It is, however, important to note that self-determination of peoples does not require a specific political governance system. In fact, Art. 1(1) ICCPR/ICESCR spells out the underlying idea of self-determination, which simply provides that peoples have the free choice to decide their fate in the international order, free

[444] See, for example, Alexander Wendt, *Social Theory of International Politics* (CUP 1999).
[445] (n442).
[446] E.g. Jan Pieter Beetz, 'From Practice to Principle and Back: Applying a New Realist Method to the European Union's Democratic Deficit' (2018) 66(2) Political Studies 339-355; Henrik Bang, Mads Dagnis Jensen, Peter Nedergaard, ''We the People' v 'We the Heads of States'': the Debate on the Democratic Deficit of the European Union' (2015) 36(2) Policy Studies 196-216; for a view that argues in favour of the alleged democratic deficit see Andrew Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union' (2002) 40(4) Journal of Common Market Studies 603-624.
[447] This follows the spirit of Cicero in *De Re Publica*, Book 1, Chapter 39: "*Est igitur res publica res populi.*" (e.g. in Günter Laser (ed), *De Re Publica* (Reclam 2014); in terms of linking ideas of what the relation between the state and people is to the works of ancient philosophers, there is also a wealth of literature on to what extent Thucydides' *History of the Peloponnesian War* serves as predecessor of modern realism in international relations or even neorealism, see, for example, Jonathan Monten, 'Thucydides and Modern Realism' (2006) 50(1) International Studies Quarterly 3-25.

from external interference or subjugation.[448] Under that premise, even a dictatorship can be an expression of self-determination, if the people choose so. Then, the question comes back to an issue of legitimacy - what legitimises a government or, in case of supranational organisations, a government-like entity? The answer is not the political system as such, but a compound of variables.

It would be wrong to equate democratic governance systems with self-determination of peoples; not every democracy *per se* fulfils self-determination guarantees, and self-determination does not require democracy.[449] This could be elevated to a supranational level where the founding of the European Economic Community (EEC) was arguably only possible because peoples had *not* been asked. In fact, the French Parliament declined to join the EEC in 1954.[450] Yet, this event did not make France's accession to the EEC, which later became the EU, a violation of self-determination as an international law norm.

Concerning the question of sovereignty in the setting of supranational organisations, Sarooshi correctly concludes that sovereignty can "legitimately be contested" in supranational organisations which "exercise conferred powers of government", and that given the uncertainty, states cannot claim to enjoy a prerogative in terms of sovereignty within their own national borders as opposed to supranational entities.[451]

In the second chapter, the idea of self-determination as a concept consisting of constituent values was introduced. Samantha Besson suggests a similar approach to sovereignty and identifies self-determination as one of the essential values on which sovereignty rests:

> As a normative concept, the concept of sovereignty expresses and incorporates one or many values that it seeks to implement in practice and according to which political situations should be evaluated. These values are diverse and include, among others, democracy, human rights, equality and self-determination.[452]

---

[448] "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.".
[449] See further Thomas Christiano, 'Self-Determination and the Human Right to Democracy' in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 459-480.
[450] "The culmination of the Second World War generated a widespread feeling that there had to be a way of organizing international affairs so as at least to reduce, if not eradicate, the possibility of such national conflict recurring on this scale. This explains the founding of the United Nations in 1945, where the guiding rationale was to provide a forum in which disputes could be resolved through dialogue, rather than conflict, and to institutionalize a regime of international peacekeeping and dispute settlement where force was required. The guiding rationale for the establishment of the UN remains relevant, notwithstanding debates as to its subsequent successes and limitations.", Catherine Barnard and Steve Peers, *European Union Law* (3rd edn, OUP 2020) 15.
[451] (n424) 7.
[452] (n439) section 3.1.

Such thinking is not alien to international human rights law. In fact, the idea of sovereignty being conditional upon the adherence to certain guarantees, or as Besson suggests values, can easily be embedded in a human rights setting.[453] Similar interpretations are reflected in the aforementioned doctrine of remedial secession, which also recognises an element of conditional sovereignty of the state: in cases of egregious human rights breaches, especially concerning self-determination, the state loses the protection it formerly possessed as a 'sovereign state', therefore paving the way for an oppressed group of individuals to secede from the oppressor state.[454] Returning to the discussion on sovereignty, the *Solange* judgments of the German constitutional court (*Bundesverfassungsgericht*), concern precisely a question of sovereignty.[455] In the two judgments, sovereignty questions – i.e. the absolute supremacy of EU Law as enunciated by the European Court of Justice (ECJ) in *Costa/ENEL* (1964) – are linked to a debate on values that need to be embodied by the EU to allow for such supremacy in the context of German constitutional law (more specifically, concerning certain minimum guarantees upheld through the *Grundrechte*).[456]

As explored further below, this interpretation of sovereignty as requiring compliance with certain values, poses yet another challenge for supranational state associations of a supra-state like nature such as the EU, because they require a consensus on what these values are.[457] Poland's and Hungary's opposition to the EU's interpretation of the rule of law can be seen as a contestation about sovereign values at a supranational level. It is submitted here, that it is paramount for the future success of supranational organisations like the EU to find a way to offer an institutional framework that allows for the challenging and shaping of such values. Suppressing such much-needed debates signifies endangering the entire project of the EU as supranational entity.

Concluding, self-determination is one of the values that sovereignty is expected to provide and embody. Therefore, it is important to understand the connection between self-determination and sovereignty as two concepts that are not strictly defined. Building up on this finding, chapters 4 and 5 look at some of the issues raised above in an abstract fashion in more detail and in the context of the EU and the AU respectively.

[453] See also (n424) 9, 10.
[454] (n439) sections 2.3.1 – 2.3.3.
[455] *Solange I* [1974] BVerfGE 37, 271 ; *Solange II* [1986] 2 BvR 197/83.
[456] *Flaminio Costa v ENEL* [1964] ECJ C 6-64.
[457] (n424) 10.

3.4 The intersection between supranationalism and self-determination of peoples: historical precursors and examples from practice

As portrayed beforehand, self-determination is defined as including the option of 'integration with an existing state', though that was traditionally understood as one emerging entity choosing a formal union with another.[458] In post-colonial literature the only two 'viable' options were secession from a former colonial power to form a new state (as happened with the majority of former colonial territories), or in rare instances, free association with a larger neighbour (e.g. the Cook Islands and Niue with New Zealand).[459] However, in some cases two entities also merged to form a new state (e.g. Upper Volta and Gold Coast). It would seem that the idea of several units, be they states or sub-states,[460] merging to form a customs union or supranational entity has not been explored as a viable idea, despite strong historical movements towards this direction in Pan-Arabism and Pan-Africanism. Both efforts floundered, with many reasons given including legacies of 'divide and rule politics', 'sanctities of borders' and need to maintain peace and security.[461] Pan-ideologies emerged in different parts of the globe at similar times. Their rise underscores the necessity to consider models that supersede the national sphere of the independent state. From this starting point, this study explores an alternative trajectory for self-determination: the idea of self-determination of peoples as a means of integration and reconciliation against historical and socio-economic vulnerabilities, expressed through supranational integration that transcends the notion of the 'national' and its accompanying near exclusive focus on self-determination as a legal concept viewed primarily as concerning statehood in one way or the other.

It has been highlighted on the previous pages that self-determination of peoples as a normative and ideological concept encompasses a wide range of aspects that go well beyond the late 19th/early 20th century focus on nations and statehood. Chapter 2 highlighted freedom from oppression and reconciliation as constituent elements of self-determination of peoples. These aspects are furthered and expressed through the phenomenon of supranational integration, transcending the notion of mere national self-determination and defusing the focus on self-determination as a legal concept being viewed first and foremost as affecting statehood. In fact, in considering the EU as a prototype of a supranational organisation, Leo Tindemans already

[458] See further A.J. Christopher, 'Decolonisation without Independence' (2002) 56(3) GeoJournal 213-224.
[459] (n322) 1196.
[460] The term is used in this thesis as encompassing all political units smaller than a state, thus including, for example, federal states (e.g. the constituent states of the United States of America) and provinces (e.g. in China).
[461] See, for example, Michael N. Barnett, 'Sovereignty, Nationalism, and Regional Order in the Arab States System' (1995) 49(3) International Organization 479-510.

recognised the significance of economic pragmatism in the pursuit of supranational integration, on which the theory of self-determination proposed here is based:

> (…) the internationalization of economic life makes our system of production ever more dependent. Our States seem very weak to face these challenges alone. What weight 40 isolated voices have unless they are those of the super powers?[462]

Views as that voiced by Tindemans are a continuation of Marx's recognition that globalisation requires changes in socio-economic theory.[463] Thus, pragmatic realism points in favour of the argument forwarded in this study that the option of locating self-determination of peoples on a supranational plane should be considered, as the state at a national level is unable to face certain challenges on its own. While such an approach remains underexplored in literature, historic supranational models indicate that the idea proposed here has real practical relevance and draws on a rich history. Recent supranational projects like the EU and the AU can be seen as consequence of previous supranational attempts, in that they constitute next steps in a history of supranational development. The important questions – which this section addresses – are what approach to supranationalism these historic models espoused, what they can tell us about self-determination of peoples in that context and why they did not last or develop further. This sub-section focusses on Pan-Africanism and Pan-Europeanism in preparation of deeper engagement with the EU and AU respectively in chapters four and five. Other instances of pan-movements or governance that point in favour of supranationalism are considered briefly to show the widespread thinking in diverse geographical contexts. Because chapter four engaging with the EU immediately follows, this section will open with references to those other systems and movements but conclude with Pan-Africanism and Pan-Europeanism to allow for a more seamless transition.

3.4.1 The Ottoman Empire and its *millet* system: supranational identity and a religion-based model of self-government

Founded in 1299 by Osman I, a leader of tribes in Anatolia (Türkiye), and lasting six centuries until its disintegration after the First World War, the Ottoman Empire is known as one of the

[462] Leo Tindemans, "Report by Leo Tindemans, Prime Minister of Belgium, to the European Council' (29 December 1975) Bulletin of the European Communities, Supplement 1/76 28.
[463] See chapter 2, sub-section 2.2.1.

longest-lasting dynasties in history.[464] Despite its numerous struggles incentivised by external as well as internal factors, the Ottoman Empire must overall be considered successful, as it managed to survive over centuries and expand significantly before its eventual decline.[465] Given that it operated as an empire in terms of political governance, it is surprising that the Ottoman Empire is considered within a chapter on supranationalism in this study. In a Smutsian sense, Empire and supranationalism are not necessarily mutually exclusive.[466] However, more importantly, the supranational characteristic of the Ottoman Empire can be seen in the creation of a supranational identity, namely that of *Osmanlı milleti*.[467] In that regard, it is important to build up on the earlier findings of this chapter regarding the difference between supranational organisation and supranationalism as a process. Evidently, the Ottoman Empire was not a supranational organisation, nor did it seek to be anything but an empire. However, in its functioning and daily politics it operated on the basis of supranational integration processes. The emphasis on one supranational identity was one of the integration policies adopted by the Empire in its quest to create and maintain a sufficient degree of social cohesion among its diverse population. At its peak, the Ottoman Empire spanned three continents (Africa, Asia and Europe).[468] Other such policies concerned the fragmentation of its legal system. In order to accommodate the needs of its diverse population, the Ottoman Empire allowed several sets of law to operate simultaneously, depending on the socio-cultural identity of each group of people. For example, dynastic law co-existed with religious law and *Qadi* (judges) would consider local traditions and customs in applying the law, rather than focussing on establishing one central, precedent-based system of law.[469]

The principle of self-determination of peoples would not explicitly be of significance during most of the Empire's existence, but gained importance towards its end. As political leaders like Woodrow Wilson sought to base their external policies on the emerging principle of self-determination of peoples, the principle became decisive for the fate of the Empire when the redistribution of its constituting territories and colonies was discussed.[470] In previous centuries, without explicitly referring to self-determination of peoples, the Ottoman Empire's governance

[464] It lasted for more than 600 years, for a historical reappraisal of the Empire's entire history see Caroline Finkel, *Osman's Dream: The History of the Ottoman Empire 1300-1923* (Basic Books 2005).
[465] ibid 1-5.
[466] See chapter 2, sub-section 2.2.2.
[467] Isa Blumi, 'Race, Gender, and Difference: Ottoman Empire' (Suad Joseph ed, *Encyclopedia of Women & Islamic Cultures*, 1 January 2009).
[468] (n464) 5.
[469] See also Haim Gerber, 'Law in the Ottoman Empire' in Anver M. Emon and Rumee Ahmed (eds), *The Oxford Handbook of Islamic Law* (OUP 2015) 475-492.
[470] See, for example, K. Sarwar Hasan, 'The Doctrine of Self-Determination' [1962] Pakistan Horizon 186-187.

system was comparably progressive in that it showed precursors for the principle's application in practice under the viewpoint of self-government.

The term *millet* in Turkish language translates to English as 'people' or 'nation'.[471] Within the Ottoman Empire, *millet* referred to the system established for the administration of non-Muslims in the Empire.[472] Each non-Muslim religious group was assigned one *millet*, regardless of ethnicity. Thus, the millet system was based purely on religion as opposed to ethnicity. In that regard, even if one translates *millet* as nation, the fundamentally different connotation to the term in the Ottoman Empire must be borne in mind. Each religious group was given permission to self-govern within their millet, under the leadership of their respective religious head, referred to as *milletbashi*.[473] However, the seat of all *milletbashi* was centralised in Istanbul.[474] Notably, the *milletbashi* did not only provide religious leadership, but were also entrusted with secular matters, such as the civil administration of their *millet*.[475] However, such apparently progressive policies concerning self-government should not take away from serious issues with their implementation. One example to underline the problematic and contradictory approach to self-government within the Ottoman Empire is the *Devshirme* system. The *Devshirme* system forced Christians to concede a certain number of their male children to the Empire, who would for the most part end up in the Ottoman military.[476] Other instances that highlight how the Ottoman Empire fluctuated between diversity and its own hegemonic interests include the Armenian genocide and politics of repression vis-à-vis other religious groups.[477] Despite this, the approach of self-government was not linked to territorial, national or statehood considerations and worked effectively for a significant time period of the empire's existence; proving the viability of the idea of pursuing self-determination guarantees beyond the national state. The Ottoman Empire also evidenced how a supranational identity did not have to clash with smaller collective notions of the self, long before other and new attempts in that regard were made through different routes many decades later in the form of the EU.

---

[471] Stefanos Katsikas, '*Millets* in Nation-States: The Case of Greek and Bulgarian Muslims, 1912-1923' (2009) Nationalities Papers 37 (2) 178.
[472] ibid.
[473] ibid.
[474] ibid.
[475] ibid 178, 179, 180.
[476] Norman Itzkowitz, *Ottoman Empire and Islamic Tradition* (University of Chicago Press 1972) 49-60.
[477] Jonathan Endelman, 'In the Shadow of Empire: States in an Ottoman System' (2018) 42 Social Science History 820, for a view contesting the Armenian genocide see in particular footnote 3; particularly regarding the issue question of genocide vis-à-vis the Armenians at the hands of the Ottoman Empire see Vahagn Avedian, 'State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide' (2012) 23 European Journal of International Law 797-820.

The decline of the Ottoman Empire can be attributed to the emerging principle of self-determination at the beginning of the 20th century. Towards the end of its existence, the Ottoman Empire embraced stronger centralisation tactics and increasingly perceived 'tribalism' as a threat to its hegemony.[478] These strengthened centralisation politics were met with resistance by the diverse population and eventually culminated in the Balkan Wars 1912-1913 as a result of which the Ottoman Empire lost territory on the European continent.[479] Nationalist feelings were also awoken among Balkan and other territories under Ottoman dominion, fuelled by the self-determination rhetoric emanating from US President Wilson.[480] The content of self-determination as propagated by Wilson was understood differently by groups within the Ottoman Empire and other states, such as the British Empire, with Russia deliberately fuelling nationalist sentiments to weaken the Empire and subvert its sovereignty so as to create opportunities to expand its influence.[481]

Nevertheless, this religion-based type of supranationalism operated successfully over centuries in administrating the Ottoman Empire's multi-ethnic, multi-linguistic, multi-cultural and multi-religious population. The Ottoman empire was so large and diverse it had to be governed by *millets*. This indicates the viability of an alternative path to the fruits of self-determination than independent statehood, especially where a large and diverse population exists. Because of the course of history, namely that the Ottoman Empire allied with the losing side of the First World War, such approaches were usurped by the victor's strategies of nationalism in pursuit of their own hegemonic plans, which is why the idea of governance and self-determination in relation to anything else but an independent state was not further explored.

3.4.2 Pan-Asianism

Pan-Asianism is among early ideas of joint supranational integration in the pursuit of stability and development. Pan-Asianism is an umbrella term comprising movements and ideas towards greater unity among Asian peoples, politically, economically or socially.[482] This idea gained traction among Asian states in the face of Western imperialism and colonialism, which posed a

[478] Endelman (ibid) 819; Nora Elizabeth Barakat, 'Making "Tribes" in the Late Ottoman Empire' (2021) 53 International Journal of Middle East Studies 482-487; Erol Ülker, 'Contextualising 'Turkification': nation-building in the late Ottoman Empire, 1908–18' (2005) 11(4) Nations and Nationalism 617-618.
[479] Ülker (ibid) 618.
[480] (n41) 154-159.
[481] Yiğit Akın, 'The Ottoman Empire: The Mandate that Never Was' (2019) 124(5) American Historical Review 1696.
[482] Christoph W. A. Szpilman and Sven Saaler, *Pan-Asianism: A Documentary History*, vol 1 (Rowman & Littlefield 2011) 17-18, 27-35.

threat to their freedom and existence.[483] Another factor supplementing the desire for Pan-Asian alliances was increasing international trade, which required Asian states to reconsider their position in the world, albeit this arguably only gained traction at a later point.[484] The strongest unifying factor however, was probably the perception of Western expansionism as a common enemy.[485] In fact, Pan-Asianism experienced a considerable uprise as a reaction to the Opium War 1839-1842 between China and the British Empire.[486] Cross-fertilisation from other pan-movements emerging around the same time frame, namely Pan-Africanism and early tendencies of Pan-Europeanism probably also affected the popularity of Pan-Asian ideologies.[487] Numerous Pan-Asian associations were founded in different Asian countries during the early 20th century.[488] In view of the rising pan-ideologies throughout the globe, Karl Haushofer, a scholar in the field of international relations, suggested already in the first half of the 20th century that "international relations would come to be dominated by regional blocs".[489] Thus, incentives to consider approaches to shared prosperous development and political integration beyond individual, national states, were already observed about one century ago, when it only started to emerge.

As several scholars from different fields pointed out, the notion of 'nation' was imported to Asia from Europe during the 19th century.[490] The almost immediate emergence of Pan-Asian ideas "reflected reservations about the concepts of nation and nationalism" among Asian communities.[491] Instead, a different form of nationalism developed in Asia that was characterised by a transnational element of Pan-Asian solidarity, in an effort to strengthen their position to gain independence from the Western colonisers.[492] Towards the end of the 19th century, with Japan expanding its influence and gaining strength, hopes of the liberation of other Asian colonies was placed in Japan.[493] This hope was fuelled by the Pan-Asian rhetoric entertained by Japan in its expansionism, eventually deflated when it crystallised that rather than becoming the liberator for its Asian neighbours, Japan sought to fulfil its own dream of

[483] ibid 17.
[484] See also ibid 49; Lee Yong Leng, Economic Aspects of Supranationalism: The Case of ASEAN (1983) 2(1) Political Geography Quarterly 22-23.
[485] (n483).
[486] ibid 20.
[487] Christopher W. A. Szpilman, Sven Saaler, 'Pan-Asianism as an Ideal of Asian Identity and Solidarity, 1850–Present' (2011) 9(17) The Asia Pacific Journal 4, 9.
[488] ibid 5.
[489] ibid.
[490] (n482) 20.
[491] ibid 36; (n487) 4.
[492] (n487) 4.
[493] ibid 39-40.

imperialism.[494] The exploitation of Pan-Asian ideologies by Japan was mirrored by the exploitation of pan-Europeanism by Nazi-Germany shortly after.[495] In both cases, narratives of pan-ideologies were used to justify each state's own irredentist ambitions. Thus, it becomes clear that the notion of regional or continental identity and above-national-level-integration harbours both, a chance for development through cooperation and a risk of misuse in a bid to legitimise hegemonic aspirations.[496] This is certainly the case where full national sovereignty is being retained, which is why in Europe the path towards supranational governance was chosen, as will be explored later in this chapter. Nevertheless, in historical scholarship, it is established that Pan-Asianism was presumed to operate on the basis of "equal relations among Asian nations".[497] In conclusion, Pan-Asian regionalism emerged and survived as an ideology until present day, because it was recognised as a guarantee for smaller Asian nations not to be colonised or dominated by more powerful states, may these be from other parts of the world or even other Asian neighbours, such as China or Japan.[498]

The continued desire and need for regional integration in Asia manifested in the establishment of intergovernmental organisations aimed at furthering integration in various areas, but chiefly economic integration. The two landmark organisations to be mentioned in this context are ASEAN and the South Asian Association for Regional Cooperation (SAARC). ASEAN in particular was modelled after inspiration from the EU and ambitious goals for its mission were set out.[499] At the time of its foundation in 1967 one of its main objectives was to increase economic and cultural cooperation among the Member States to further development.[500] The other important component that pushed originally Indonesia, Malaysia, the Philippines, Singapore and Thailand to form ASEAN, was political pragmatism (in 2023, ASEAN counts ten Member States, in addition to two observer states and the so-called 'Plus Three', China, Japan and South Korea).[501] Given the dwindling influence of Western politics in preventing the spread of influence of Communist Asian states, these five non-communist states joined to increase their ability to withstand outside pressure to conform with either the Communist East or the West.[502] In fact, the important geo-political location of ASEAN states allows for access

[494] ibid 35-40; (n482) 4, 5.
[495] See sub-section 3.4.6.
[496] (n487) 9.
[497] ibid 10.
[498] see also (n482) 46-47, 52.
[499] Anja Jetschke and Philomena Murray, 'Diffusing Regional Integration: The EU and Southeast Asia' (2012) 35 West European Politics 174-175.
[500] (n484) 22-23, 26; see also Art. 1 (2) ASEAN Charter.
[501] 'ASEAN Member States' (ASEAN.org); 'ASEAN Plus Three' (ASEAN.org).
[502] (n484) 21.

to the sea, making them crucial for trade and consequently a target for external desire to exert and expand influence.[503] Despite the realisation, that these interests were better accommodated at a regional rather than national level, Asian states rejected transferring any of their sovereignty to a supranational institution, insisting on strict non-interference in national matters which have stalled supranational integration.[504] While this 'ASEAN way' of approaching integration allowed for its diverse members to find common ground on some issues due to the elimination of any threat to their sovereignty, it is to be expected in the foreseeable future, that the guarding of own national sovereignty will continue to halt supranational developments.[505] This is exacerbated by challenges arising from ASEAN's complex relation with China as suggested by many scholars.[506] As such, conflicts over the South China Sea and their solution will be crucial to meaningful cooperation in the future. Overall, Pan-Asianism and its course in history serves as an example of how supranational identity formation and regional integration can be exploited, but in spite of this Asian states appear to have recognised it in principle as an opportunity for solidarity and collective growth.

3.4.3 Pan-Americanism

Similar to Pan-Asianism, Pan-Americanism is characterised by opposition against external influences from outside the continent on the one hand, and overbearing hegemonism from immediate neighbours on the other hand.

When Simón Bolivar convened the first Pan-American Congress in 1826, the main concern was to ensure the independence of Latin American states from the European colonial powers.[507] Politically, Bolivar's Pan-Americanism was intended to result in the United States of South America.[508]

A second impulse for Pan-American ideas was promoted by the USA with the adoption of the Monroe doctrine. Under the Monroe doctrine, any European intervention in the affairs of American states was automatically considered a hostile act against the USA. What initially seemed like a generous and well-intended gesture of support for Latin American states was

[503] ibid 22.
[504] (n402) 102, 103;
[505] (n503).
[506] See, for example, Shihong Bi, 'Cooperation between China and ASEAN under the Building of ASEAN Economic Community' (2021) 10(1) Journal of Contemporary East Asia Studies 83-107.
[507] Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (OUP 2017) 5; see also International American Conference, 'The congress of 1826, at Panama, and subsequent movements toward a conference of American nations' (Washington Government Printing Office 1890).
[508] Scarfi (ibid) 5, 65.

quickly recognised as part of a larger policy agenda to establish USA dominance on the American continent.[509] Hence, rather than a real pan-movement based on sovereign equality, USA led Pan-Americanism was a means exploited for its own interests.

In the face of increasing dominance asserted by the USA in the name of Pan-Americanism, Latin American states grew sceptical of the ideology and sought to re-interpret it along the lines of genuine multilateralism. Thus, a third impetus for Pan-Americanist movements emerged. From this view, Pan-Americanism stands for Latin-American solidarity as a defence against the USA's dominance on the American continent.[510] With the inclusion of the Montevideo principles on equal and sovereign statehood and the development of international law, Pan-Americanism transformed into a more multilateral version, characterised by a recalibration of the power balance between the USA and Latin American states.[511] It becomes clear from this, that Pan-Americanism relates to fundamentally different ideas that must be distinguished. However, all strands are based on the recognition that regional cooperation and increased integration is key to political stability and prosperous development.

The American continent as a whole has repeatedly experienced waves of new regionalism, which shows that American states continue to pursue this path.[512] This is supported by the overall increase in competences given to regional organisations and their increase in numbers and size.[513] Notably, the Organization of American States (OAS) started to follow an approach similar to the EU and AU (see chapters 4 and 5) having obtained more competences on different issues falling within the wider ambit of 'good governance'.[514]

3.4.4 Pan-Arabism

Pan-Arabism emerged against a background of dynamics that are different from those above. Nevertheless, these movements also share commonalities. The exact meaning of the ideology 'Pan-Arabism' is disputed. Different views exist about how Pan-Arabism is to be implemented politically. While some propose the realisation of Pan-Arabism in the form of one large, regional unified state, others picture a model leaning more towards federalism.[515] A third view, arguably consists in the realisation that 'nation' and 'state' do not need to be aligned (unified)

[509] ibid 162, 164.
[510] ibid 6-9.
[511] ibid 160, 161.
[512] (n402).
[513] ibid 83-88.
[514] ibid 96.
[515] (n461) 480.

but can thrive in a political setting that allows for regionalism while furthering supranationalism as the superordinate identity (i.e. the notion of an 'us' as 'Arabs' despite regional differences in terms of culture).[516] This is an intriguing observation, that holds the potential to serve as an indicator on how supranationalism in relation to the international norm of self-determination of peoples can operate. It also appears to have taken inspiration from the EU supranational identity model, which operates on that precise basis, as will be seen further in chapter 4. One core question concerns the status of religion within Pan-Arabism. In the literature Pan-Arabism is sometimes discussed from the perspective of Pan-Islamism, yet the former is secular while the latter is based on religious grounds.[517] In practice, however, Pan-Arabism is more an ideology that defines the Arab 'nation' as something transcending the boundaries of national states though this is met with resistance by national governments that while supporting Pan-Arab solidarity are interested in maintaining their own exclusive sphere of influence.[518]

Juxtapositioning supranational integration through Pan-Arabism and supranational integration in the EU, key differences are evident. Even though Pan-Arabism has a long history that arguably reaches back further than any notions of Pan-Europeanism as manifested in the EU, the process of creation of a supranational identity and institution evolved quite differently in the Pan-Arab context than in the European context. The EU (including its predecessors) was a conscious establishment after the Second World War to maintain peace among European states.[519] Pan-Arabism, however, is rooted in the notion of an Arab nationality requiring inter-state cooperation, possibly even unification. From this starting point, Pan-Arabism then developed into a less sovereign supranational entity; the United Arab Emirates and the Arab League are examples of the manifestation of Pan-Arabism and the intertwining of nationalism with supranationalism. These manifestations of Pan-Arabism are indicators that nationalism and supranationalism do not need to be mutually exclusive, thus lending support to the theory this study proposes. However, compared to other regional projects, Pan-Arabism until today did not result in the establishment of an organisation with supranational competences, despite the perhaps most well-known Arab regional project, the League of Arab States (often referred to as Arab League) having been established as early as 1945. Many reasons for this have been considered in scholarship, including the proposition that the arguable failure to further regional integration in a way comparable to the EU or AU is intended by Arab states as they find

[516] ibid 510; see also Karen Culcasi, 'Cartographies of Supranationalism: Creating and Silencing Territories in the "Arab Homeland"' (2011) 30 Political Geography 420.
[517] Haifaa A. Jawad, 'Pan-Islamism and Pan-Arabism: Solution or Obstacle to Political Reconstruction in the Middle East?' in Haifaa A. Jawad (ed), *The Middle East in the New World Order* (Palgrave 1997) 99.
[518] (n515) 492-495.
[519] See further sub-section 3.4.6.

themselves in the tension field between pursuing Pan-Arab nationalism and maintaining their own sovereignty.[520]

From the perspective of the international right to self-determination of peoples the historic involvement of Arab states in shaping debates on the norm within the UN is interesting.[521] Many Arab states also support Palestine's struggle for independence in the name of the right to self-determination of peoples with the Arab League itself committed "to the self-determination of Arab Peoples".[522]

3.4.5 Pan-Africanism

The role of Pan-Africanism and Self-Determination of Peoples in Africa

Factors, such as the predominance of scholarly engagement with supranationalism stemming from the global West in academic literature, and the emergence and development of the EU and EU law contribute to the impression that supranationalism is mainly or only about the EU.[523] Therefore, supranationalism is usually not thought of in connection with the African continent straightaway, even though it has played a significant role in African political ideology since at least the 18th century. This was embodied through Pan-Africanism, an ideology that emerged first from the African diaspora[524] as a reaction to the experiences of slavery, exploitation, and a feeling of lost identity from those forcibly removed from their home countries in Africa and subjugated by their colonisers. Despite the term indicating a singular ideology, Pan-African visions and ideas vary, thus, there is no single concept of how Pan-Africanism is to be exercised in practice that applies to this ideology.[525] At a basic level, one can synthesise the motivation of Pan-Africanism as an effort of organising a movement, that unites all those that are 'African' in a bid to strengthen their position and rights towards the international community. In the words of the AU itself, the interpretation of Pan-Africanism the organisation was based on "centred

[520] See further Michael N. Barnett and Etel Solingen, 'Designed to fail or failure of design? The origins and legacy of the Arab League' in Amitav Acharya and Alastair Iain Johnston (eds), *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (CUP 2007) 180-220.
[521] See Cindy Ewing, '"With a Minimum of Bitterness": Decolonization, the Right to Self-Determination, and the Arab-Asian Group' (2022) 17(2) Journal of Global History 263-271.
[522] Kelly-Kate S. Pease, *International Organizations Perspectives on Global Governance* (Routledge 2018) 64.
[523] (n402).
[524] The AU's definition of the term is being followed here: "The African Diaspora consists of peoples of African origin living outside the continent, irrespective of their citizenship and nationality and who are willing to contribute to the development of the continent and building of the African Union.", 'Diaspora & Civil Society Engagement' (*African Union*).
[525] Reiland Rabaka, *The Routledge Handbook of Pan-Africanism* (Routledge 2020) 28-29.

on African socialism and promoted African unity, the communal characteristic and practices of African communities, and a drive to embrace Africa's culture and common heritage".[526]

The early examples of Pan-African movements can be traced as far back as to the 18th century.[527] Early 18th century Pan-African organisations include the 'Sons of Africa', which Hakim Adi considers "one of the first Pan-African organizations".[528] Its members originally came from West African countries who had been displaced to England as a result of slavery and forced migration.[529] The objective of the 'Sons of Africa' was to unite West Africans that shared experiences of forced displacement, slavery and oppression, and to elaborate ways on how to counter these acts. Amongst other things, this group produced letters addressed to the press, and relevant political organs in an effort to strengthen the rights of Africans *vis à vis* their colonisers. Of course, there were also a number of other organisations motivated by and campaigning for Pan-African ideas.[530] What all these organisations had in common is that they were based on similar ideas: to gather and unite those individuals that shared a) a common heritage (i.e. they came from the African continent) and b) a common experience of oppression at the hands of the colonial powers which they sought to cast off.[531] Pan-Africanism is therefore about the identification and promotion of a supranational identity that seeks to unite different communities to strengthen their collective position. Thus, Pan-African supranationalism holds a special meaning in the African geo-political sphere.

Africa is also home to some of the world's oldest regional economic organisations which display features of supranationalism. The South African Customs Union (SACU), established as early as 1910 and based on a treaty stemming from 1889, is considered the oldest customs union in the world.[532] Of course, organisations such as SACU feature an intergovernmental approach in the way they are structured and operate, and thus it may be questionable what relevance they have in exploring supranationalism in an African context. However, considering the definition of supranationalism applied in this study, the fact that these organisations aimed at integration above the state level qualifies them as supranational. They can thus be considered potential forerunners of supranationalism as displayed in the EU nowadays. A closer study on

[526] See the AU's website at https://au.int/en/overview.
[527] Hakim Adi, *Pan-Africanism: A History* (Bloomsbury 2018) 7.
[528] ibid.
[529] ibid.
[530] ibid 7-8.
[531] For more details concerning these organisations and their goals see ibid 7-24; check also James Sidbury, *Becoming African in America: Race and Nation in the Early Black Atlantic, 1760-1830* (OUP 2007); for a history of Pan-African revolutions and their aims see C.L.R. James, *A History of Pan-African Revolt* (PM Press 2012).
[532] See SACU's official website at SACU, 'History of SACU' (*Southern African Customs Union*).

the history and nature of African regional organisations suggests that a distinction be made between organisations influenced by Pan-Africanism, such as the AU, and those that were established as a consequence of the colonisers' efforts to maximise their financial gain by creating functioning economic partners on their colonial territories, such as SACU. In fact, put simply, it could be argued that those supranational organisations with a purely economic nature are by and large products of colonial occupation,[533] while those aiming at political and cultural supranational integration overall, are mostly genuinely Pan-African. An inexhaustive list of these besides SACU, are the East African Custom's Union Collection Centre, or the East African Common Market Organization, the Central African Federation, the Association of French West Africa and the French Equatorial African Federation. Some of these institutions survived and transformed into Pan-African interpretations of the same organisation (e.g. the East African Custom's Union Collection Centre is now the East African Communities (EAC)), while others simply dissolved. Examples of supranational organisations that can be considered Pan-African are the OAU and the AU, but also ECOWAS, the Economic Commission for Africa (ECA) and the Community of Sahel-Saharan States. These organisations were founded by African states in the second half of the 20th century, during or after UN decolonisation. Organisations like ECOWAS and ECA promote regional economic and social development and integration and support the AU agendas and continuing the Pan-African project through a regional approach.[534] African regional organisations also share a link to colonialism from a different angle. Many African states found themselves in a situation where they decided that cooperation, at least at regional level, was the best way to stability, prosperity and freedom from outside interference. Regional alliances like the ECOWAS appear to have had the most success in promising to gain and maintain their recovered independence – not only from a territorial, but first and foremost from a political and economic perspective. ECOWAS' aims are directed towards large-scale regional supranational integration not only with regards to trade, but also include areas such as agriculture, industry and labour. Similar goals are being pursued by the Customs Union of Central African States. While these organisations do not put Pan-Africanism on their banner, they are supranational in nature, in seeking regional cooperation, if not integration *per se*. The proliferation of regional economic communities evidences the emerging view among African states that economic prosperity is paramount for independence, possibly more so than hard borders - which supranational integration weakens. Such a position correlates

[533] See further Ernest Toochi Aniche, 'From Pan-Africanism to African Regionalism: A Chronicle' (2020) 79(1) African Studies 72-73.
[534] See further David Kode, *The Complexity of Democracy-Building in Conflict Affected States: The Role of ECOWAS and the African Union in Cote d'Ivoire* (International Institute for Democracy and Electoral Assistance 2016) 12-13.

with the cultural-legal tradition of many African states pre-colonial invasion. The Senegalese historian Cheikh Anta Diop is one of numerous scholars that presented research evidencing how black African cultures were connected and stemmed from the same source. The scholarship of Diop is a solid base for the argument in favour of supranational continental integration in Africa.[535] Not only was the concept of nation states with steadfast borders a European export imposed on the African colonies, but the assimilation of political and legal systems was a crucial step taken by colonial powers to facilitate the administration and trade. It is telling for the future of supranational governance in Africa, that African states saw their best chances to development not in remaining isolated states like numerous islands next to each other, but in cooperation and supranational integration, whether at regional or sub-continental level.

The history of colonial oppression, exploitation and slavery, installs a special place for self-determination of peoples as an international legal norm in modern African law and political thought. Viewed first as a defence against foreign subjugation, the right to self-determination of peoples in the African context remains interpreted as protecting independent state borders.[536] Combined with reluctance of the majority of African state leaders to compromise aspects of their perception of national sovereignty based on that understanding of self-determination, this interpretation remains a major factor for why supranationalism on the African continent has stalled. Thus, supranationalism and the right to self-determination of peoples, as currently interpreted in the African context, seem to act as somewhat antithetical concepts. While supranationalism corrodes the sanctity of borders and nationalism, African states tend to interpret the right as protecting borders and nationalism, and thus, by extension, the political and economic independence of African states. At the same time, both, supranationalism – as envisioned in Pan-Africanism – and self-determination are concepts aimed at protecting the independence[537] of African states and securing their future development free from external interference.[538]

[535] Moorosi Leshoele, for example, upholds that Diop's research "makes a strong empirical case for political and economic unification of Africa", see Moorosi Leshoele, 'AfCTA, and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?' (2020) Journal of Contemporary African Studies 2.
[536] Chapter 5 on the African Union will explore the approach to self-determination of peoples in the African context in more detail.
[537] Again, "independence" must be understood as something broader than mere territorial independence but including economic and cultural independence as well. From this viewpoint, "independence" is the embodiment of freedom, which might be the more suitable term here, as it accurately captures the intention and will not be confused with mere territorial independence.
[538] „External interference" in this context meaning first and foremost intervention of the kind as experienced at the hands of the former colonial oppressors.

That the spread of Pan-Africanism for the first time introduced an awareness of being 'African' into narratives and minds of Africans themselves is significant from the perspective of the concept of self-determination. Prior to colonialisation such an identification with the whole continent was not prevalent, despite common cultural sources.[539] Inseparably connected to the notion of being African is the question of what constitutes 'Africanness', or, conversely, who is an African to whom the ideology of Pan-Africanism extends. Indeed, this was (is?) a recurring issue in Pan-African debates and projects, such as that of the AU.

Understanding the influences on Pan-Africanism on African supranational integration

The first Pan-African ideas emerged from the African diaspora, hence outside the continent. Pan-Africanism can thus be considered a reaction to forced migration and slavery, as well as attempts to organise a movement to assert an African position in the world, which in history has often been ignored. The strong representation of 'Western' viewpoints in academia and world politics, not only in the past, but until the present, distorts the perception that the world stage is dictated by mainly Europe or the USA, or that in considering African positions in world politics, the only relevant question is which side Africa falls under - the West or East.[540] With China portrayed as the big threat to the old power balance, mainly from a Western point of view, its expanding influence on the continent through investment and trade agreements is frequently dubbed as East "invasion", which some African states and interest holders observe with scepticism.[541]

Albeit having emerged from outside Africa, those diaspora Africans who made it back to the African continent, continued to spread and expand on notions of Pan-Africanism. As a result, the ideology reached also those Africans that did not experience trafficking for purposes of slavery themselves.[542] Thus, Pan-Africanism is not only based on the common experience of slavery, forced migration, etc. as highlighted above, but also on the common wish for freedom from oppression and exploitation of any form, including those that experienced oppression and

[539] (n527) 8.
[540] See, for example, Eleanor Albert, 'China in Africa' (*Council on Foreign Relations*, 12 July 2017); also interesting in this context is the discussion on whether Chinese diplomatic engagements in Africa constitute a "debt trap", Michal Himmer and Zdeněk Rod, 'Chinese Debt Trap Diplomacy: Reality or Myth?' [2023] Journal of the Indian Ocean Region 1-23.
[541] Akol Nyok Akol Dok and Bradley A. Thayer, 'Takeover Trap: Why Imperialist China Is Invading Africa' (*The National Interest*, 31 July 2019); Fei-Ling Wang and Esi A. Elliot, 'China in Africa: Presence, Perceptions and Prospects' (2014) 23 Journal of Contemporary China 1026.
[542] (n527) 9-12.

exploitation in their own home countries, may it be at the hands of foreign powers or their own governments.

Despite this originally broad stance of Pan-Africanism, which by its nature tended to be inclusive, a form of classist Pan-Africanism arose. This stream of Pan-Africanism was particularly widespread among intellectual Africans, which sometimes rejected identification with less educated Africans in their ideas of Pan-Africanism.[543]

The Chicago Congress of August 1893 was perhaps the first Pan-African precursor of organised Pan-African supranationalism as presently embodied by the AU. [544] However, that Congress was predominantly an African American gathering rather than one representing continental Africans. This may explain why it was perceived as having had a Eurocentric orientation and of feeding into the Western coined narrative on the "need to bring 'civilization' and commerce to Africa from outside". [545]The orientation of this early Pan-African Congress ought to be labelled African American rather than truly Pan-African with an emphasis on the prefix -*pan* (the Greek prefix *pan* means 'all', 'whole', or 'all-inclusive').

The first official Pan-African Conference took place a few years later, in July 1900, in London. It was organised by the African Association, the first and foremost preoccupied with injustices committed in British African colonies as well as the Caribbean.[546] The African Association soon became the Pan-African Association (PAA), with one the founders, Trinidadian lawyer Henry Sylvester Williams, decisively coining the terms 'Pan-African' and 'Pan-Africanism' which influenced the modern Pan-African movement. Williams was a central figure for the modern Pan-African movement as he built and consolidated a network among Pan-Africanists. Despite all efforts, the PAA collapsed for uncertain reasons, and no further Pan-African Conferences followed the London Conference. One of the main requests of the London Conference was the demand for self-government for colonies, and different from the Chicago Congress, participants in London did not support the civilizing Africa narrative. In that respect it was less influenced by classist and Eurocentric viewpoints than the Chicago Congress.

Summarising, 18th century Pan-African movements and early precursors of veritable organisations struggled with adequate representation of those considered Africans by the

[543] ibid 11.
[544] ibid 18.
[545] ibid 18-19.
[546] ibid 19.

organisers and struggled with the tension of defending Pan-Africanism as an ideology distinct from Western views on Pan-Africanism.

Modern Pan-Africanism, i.e. movements established on the basis of the ideology after Pan-Africanism, returned following the Manchester Conference in 1945, which is viewed as a landmark in furthering of Pan-Africanism and its effects on the African continent. This conference is of particular interest for this study, since it led to the foundation of the OAU and its successor the AU.

This 'new' Pan-Africanism was and would soon be further influenced by a series of key events on the world scene: the start and expansion of globalisation, the shift away from a bipolar world order (USA v USSR), the turning away from colonialism commencing in the 1960s and 1970s, the experience of two world wars, the cold war, the expansion of international trade, and the foundation of the UN and the EU (including their precursors). In short, the 20th century became the scene of dramatic changes in the power balance on the world scene as well as within national states - both phenomena that influenced Pan-Africanism as a socio-political ideology.

After 1945 debates whether Pan-Africanism only referred to the African continent or included the diaspora were burgeoning, alongside other debates questioning what makes an individual 'African' within the purposes of Pan-Africanism. Such questions were not on the agenda before Pan-Africanist streams returned to the African continent from the diaspora after 1945. Because a majority of attendees of the Manchester Conference were from the continent, post-1945 Pan-Africanism was soon paired with calls for reparations for endured slavery and colonial rule in African countries. At the same time, parallels to communism emerged, as struggles of the working class were recognised as crucial for the successful termination of colonial oppression. Indeed, calls for the working class to start this new class struggle, were soon propagated by important political figures, such as the Ghanaian statesman Kwame Nkrumah, and other respected organisations. The inclusion of previously ignored North Africa in Pan-African visions by the diaspora was another significant development.[547] Calls for unity and independence remained predominant themes at this stage of the Pan-Africanism journey.[548] How Pan-Africanism was to manifest the spirit of independence however remained controversial. Kwame Nkrumah suggested formation of the United Socialist States of Africa as

[547] ibid 129: "One important consequence was that African unity in its continental form also included the states and peoples of North Africa, hitherto often excluded from manifestations of Pan-Africanism in the African diaspora.".
[548] ibid 129-131.

an end goal of successful Pan-African integration.[549] Others sought to mirror the United States of America, in establishing the United States of Africa. Yet others again proposed a Union of African States.[550] The latter proposal was put into practice in July 1961 by Ghana, Guinea and Mali who came together to establish the Union of African States (UAS), mainly in a bid to secure success for their paths as independent states and to strengthen their position towards the former colonial powers. The success of this Union was short-lived; it dissociated two years later in 1963, the year in which the Organization of African Unity (OAU) was established.

Pan-Africanism and self-determination of peoples at the time of the OAU

At the time of its establishment, the main purpose and *raison d'être* of the OAU was to liberate the African continent from even the last trace of colonialism.[551] To attain this objective, the OAU's focus lay on African states rather than individuals.[552] The organisation's goals set out in Art. II(1) of its Charter, chiefly relate to aspects relevant to the independence of African states:[553]

> (a) To promote the unity and solidarity of the African States;
>
> (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
>
> (c) To defend their sovereignty, their territorial integrity and independence;
>
> (d) To eradicate all forms of colonialism from Africa; and
>
> (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

That proliferating Pan-Africanism led to the establishment of the OAU is uncontested and its spirit can be discerned in the just mentioned objectives. As the AU itself recognises,

> ...the OAU was the manifestation of the pan-African vision for an Africa that was united, free and in control of its own destiny and this was solemnised in the OAU Charter in which the founding fathers recognised that freedom, equality, justice and dignity were essential objectives for the achievement of the legitimate aspirations of the African

[549] ibid 131.
[550] ibid 149.
[551] (n13) 10.
[552] ibid 7.
[553] ibid 8.

> peoples and that there was a need to promote understanding among Africa's peoples and foster cooperation among African states in response to the aspirations of Africans for brother-hood and solidarity, in a larger unity transcending ethnic and national Differences. The guiding philosophy was that of Pan-Africanism which centred on African socialism and promoted African unity, the communal characteristic and practices of African communities, and a drive to embrace Africa's culture and common heritage.[554]

The OAU's main institutions were identified in Art. VII OAU Charter, which listed the Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration. Its "supreme organ" was the Assembly of Heads of State and Government, whose task was to "discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization".[555] It also had the power to reassess the function and structure of any other organs of the OAU as well as establish any further specialised commissions as it deemed necessary.[556] The Council of Ministers was made up of all foreign ministers of OAU member states and met twice a year to prepare the agenda for the meeting of heads of state and government.[557] The General Secretariat, headed by the secretary general, was elected by the Assembly of Heads of state, and offered the administrative services to the organization on a daily basis.[558] The Commission of Mediation, Conciliation and Arbitration was charged with the task of settling disputes among the member states.[559] However, due to the OAU's principle of non-interference in the internal affairs of its member states,[560] this dispute settlement mechanism proved largely futile. The same principle also caused other problems for the OAU's effectiveness and its credibility, which was arguably one of the main causes for its downfall. There are obvious similarities between the OAU and AU in terms of structures. Despite the OAU being the AU's predecessor, the two organisations differ in one very important aspect, namely the nature of each organisation. The OAU was not a supranational organisation, though it aimed at continental integration based on Pan-Africanism, but was a typical intergovernmental organisation. Member States' reservations towards transferring governing powers to the organisation and their insistence on non-interference in their respective domestic realms, made

[554] AU, 'About the African Union' (*African Union,* 10 February 2022); see also further (n13) 9.
[555] Art. VIII OAU Charter.
[556] ibid and Arts. XX to XXII OAU Charter.
[557] Arts. XII to XV OAU Charter.
[558] Arts. XVI to XVIII OAU Charter.
[559] Art. XIX OAU Charter.
[560] Art. III (2) OAU Charter.

the OAU fall short of the distinguishing characteristic of a supranational organisation i.e. legislative power and the power to take decisions and enforce them independently from its member states.[561] By contrast the AU as analysed later, was established explicitly and intentionally as a supranational entity.

The concept of collective self-determination within the OAU essentially concerned liberation and safety from external subjugation through independent statehood.[562] Part of the efforts to secure the independence of the 'new' African states was the adoption of the Resolution on the Intangibility of Frontiers 1964.[563] Thus, from these early times of the first post-colonial continental Pan-African organisation, the inviolability of state borders and the priority of territorial integrity were considered paramount for peace and stability and the future development in Africa. In effectively prioritising the *uti possidetis* doctrine in that manner (even without formal endorsement of it), the OAU accepted the risk of internal conflicts and civil unrest due to the arbitrary delineation of African states' territories, probably hoping that these conflicts would fade over time and strengthen African unity in the long run.[564] Ongoing ethnic conflicts and secessionist movements in many African states rebut such a hope.[565]

The reasons which caused the OAU's downfall are manifold and have been the subject of research of numerous scholarly works. The OAU's right to exist was questioned when its declared goal to eradicate all forms of colonialism from Africa was seemingly fulfilled after the apartheid regime was abolished and majority rule was established in South Africa in 1994.[566] A number of conflicts on OAU members' territories remained unaddressed, permanently damaging its reputation among African civilians and others who put their hopes in the organisation. The failure to prevent and address the devastating genocide in Rwanda and the conflict in the Democratic Republic of the Congo further evidenced the OAU's inability to react to crises.[567] Its defence of colonial borders was often perceived as contravening the principle of self-determination and being contradictory to declarations made by the 5th PAC in Manchester in 1945.[568] Even though the African Charter was introduced under OAU authority, the treaty

[561] A contributing factor to the OAU's lack of supranational powers was the deep division among African states concerning the organisation's shape and *modus operandi*. For example, the 'Monrovia bloc', favoured a confederal over a federal approach to maintain states' full sovereignty, see (n13) 3.
[562] (n13) 9, 10.
[563] ibid 12.
[564] (n13) 13.
[565] See also Robert Blanton, T. David Mason and Brian Athow, 'Colonial Style and Post-Colonial Ethnic Conflict in Africa' (2001) 38(4) Journal of Peace Research 473.
[566] (n527) 207.
[567] ibid.
[568] ibid 215, 216.

became famous for breaches rather than compliance, further damaging the OAU's reputation.[569] The organisation was also tormented by constant tensions from within between those who supported official Pan-Africanism and those that endorsed a differing vision which was popular amongst opponents of neo-colonialism and the diaspora. The future challenges were to be discussed at the 7th Pan-African Congress in Kampala in 1994. Leading up to it, several Pan-Africanists tried to promote their interpretation of Pan-Africanism hoping it would shape the future of the next Pan-African organisation. The Nigerian writer Naiwu Osahon stood for a Pan-Africanism that not only excluded but was oriented against Arab North Africans, who Osahon saw as "occupiers" just as illegitimate and unwanted as former colonial powers.[570] The catchphrase "Arabs are not Pan-Africanists" became the dividing line among Pan-Africanists, an issue that fed into questions of who is or is not African within the philosophy of Pan-Africanism.[571] Osahon opposed socialist or Marxist streams within Pan-Africanism, such as those calling for working class struggles.[572] Osahon's opponents criticised his position as "black nationalist bourgeois".[573] The Kampala initiative eventually adopted a different approach from Osahon and his followers, with the decision "to invite governments from Africa and the Caribbean as well as activists of all political persuasions".[574] All citizens of all African countries as well as those of African descent living in the diaspora were also invited to attend, as the organisers of the 7th PAC declared that "being African alone (including being black) does not make one a Pan-Africanist".[575] This view was not uncontested though perhaps the most important outcome of the conference was the joint decision of African states to replace the OAU with what is now the AU. This took place eight years later in 2002. In the AU's own words,

> The decision to re-launch Africa's pan-African organisation was the outcome of a consensus by African leaders that in order to realise Africa's potential, there was a need to refocus attention from the fight for decolonisation and ridding the continent of apartheid, which had been the focus of the OAU, towards increased cooperation and integration of African states to drive Africa's growth and economic development.[576]

Despite this outcome, like other Pan-African Congresses before, criticisms were raised. Some felt that the 7th PAC aligned too much with Marxist and socialist ideologies, others noted its

[569] ibid 215.
[570] ibid 209.
[571] ibid.
[572] ibid 210.
[573] ibid.
[574] ibid 211.
[575] ibid.
[576] (n554).

continued state- and male-centredness.[577] Others were disappointed that the future of the Pan-African organization was decided through a top-down approach, with widespread criticism concerning its Anglophone bias.[578] Thus, despite continued enthusiasm from the majority of Africans for the Pan-African idea, considerable criticisms remained regarding the approach chosen for the 7th PAC.

3.4.6 Pan – Europeanism

The role of Pan-Europeanism and Self-Determination in Europe

Like other pan-ideologies, Pan-Europeanism can be considered a loose term which individual scholars associate with different ideas.[579] Sometimes referred to as 'Europeanism',[580] for some, it forms part of European integration with the goal of Pan-Europe (irrespective of the specific form this may take) at the end of that process.[581] For others, it refers to the general "idea that European nations are part of a common European nation and there is a European culture composed of the different European cultures".[582] As such it may be classified as an expression of neo- or post-nationalism through pan-nationalism.[583] It is important to be cognisant of the fact that ideas of what constitutes 'Europe'[584] in Europeanism evolve over time.[585] Recent contestations of values that supposedly characterise Europeanness show how visions vary. Within the EU this is illustrated by Polish and Hungarian disputation of the content of core so-called European values, such as the rule of law.[586] At the same time, Europeanism should not be equated with the institutional development of the EU. The EU with the institutions existing today represents but one form in which Europeanism can be realised. Europeanism is related to the EU and supranational European integration, while it also has wider meaning and relevance outside the EU.[587]

---

[577] (n527) 212.
[578] ibid 212-213.
[579] Marius S. Ostrowski, 'Europeanism: A Historical View' (2021) 32(2) Contemporary European History 288-289.
[580] ibid 287-304.
[581] ibid 295-299.
[582] Denica Yotova, 'New Forms of Collective Identity in Europe' (2017) 3(1) Journal of Liberty and International Affairs 61.
[583] See also (n579) 303.
[584] Not only through a geographical but social, political and cultural lens.
[585] (n579) 288-295.
[586] See for example, Heather Grabbe and Stefan Lehne, 'Defending EU Values in Poland and Hungary' (*Carnegie Europe*, 04 September 2017).
[587] (n579) 290-299.

Irrespective of a definition, scholarship on Europeanism appears to agree that while singular expressions of ideas concerning European integration or unification can be found as early as the age of Enlightenment (thus, around the 18th century), it consolidated into a tangible form only during the 20th century, specifically between the two World Wars.[588]

Richard Coudenhove-Kalergi was among the first influential individuals to express the idea of Pan-Europeanism by means of a political organisation.[589] In his book, he advocated for the establishment of a "Pan-European Union" in the form of a federal union consisting of liberal democratic states.[590] Crucially, the rationale behind this idea was to create and maintain peace within Europe, while forming an alliance against threats stemming from Russia (at Coudenhove-Kalergi's time of writing).[591] Through the idea of Pan-Europe Coudenhove-Kalergi sought to solve the problems arising from nationalism, which he identified as the chief reason for conflicts in the European geo-political sphere.[592] Such liberal democratic Europeanism must be distinguished from Europeanism rooted in Pan-Germanic racial ideologies as propagated by the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) under Hitler's leadership.

Published at a time when the NSDAP was attracting growing interest in Bavaria and then throughout Germany, Coudenhove-Kalergi's Pan-European ideas fell hostage to Nazi propaganda.[593] As an autarchic Germany gained territories emphasis shifted towards a 'Greater German Empire' ("Großgermanisches Reich").[594] Pragmatic considerations concerning the administration of the 'Empire' led to the embracement of Pan-ideas. Contrasting Coudenhove-Kalergi's Pan-Europeanism, Hitler's Europeanism was essentially Pan-Germanism and driven by racial ideologies of Aryan supremacy.[595] According to Hitler's plans the Pan-German empire consisting of all those national territories considered to belong to the German *Volkstum*

[588] ibid 288; regarding the historical development of ideologies concerning Europeanism see Jonathan White, 'Europeanizing Ideologies' (2020) 27(9) Journal of European Public Policy 1287-1306.
[589] At least from the Italian perspective, Luigi Einaudi already adovacated for the reorganisation of Europe into a federalist system in the newspaper *Corriere della Sera* in 1918. These writings did, however, not have the same impact that Coudenhove-Kalergi's book had, see Charles F. Delzell, 'Altiero Spinelli and the Origins of the European Federalist Movement in Italy' (1993) History of European Ideas 16 (4-6) 767.
[590] Dora Kostakopoulou, 'Had Coudenhove-Kalergi's Pan-Europa Foreseen the United Kingdom's Nationalist Hour (Brexit)?' (2020) European Papers 5 (1) 691.
[591] ibid 692.
[592] ibid; Richard Coudenhove-Kalergi, *Pan-Europa* (Pan-Europa Verlag Wien 1923) IX, 16, 17.
[593] That Hitler was aware of Coudenhove-Kalergi's pan-European ideas and deemed them a threat to his own ambitions is proven by his reaction to them in *Mein Kampf*, see further Martyn Bond, *Hitler's Cosmopolitan Bastard: Count Richard Coudenhove-Kalergi and His Vision of Europe* (McGill-Queen's University Press 2021) xvii.
[594] See Adolf Hitler's „Erlass zur Festigung deutschen Volkstums vom 7. Oktober 1939" in Martin Moll (ed), *„Führer-Erlasse" 1939-1945* (Stuttgart 1997) 100-102.
[595] Jörg Echternkamp, 'Europa unter Nationalsozialistischer Besatzung' (*Bundeszentrale für Politische Bildung*, 30 April 2015).

(peoplehood) would be at the centre of Europe.[596] This included German-speaking territories (Austria, South Tirol), but also Belgium, Czechoslovakia, Denmark, Western Poland, Norway and the Netherlands.[597] Other territories on the European continent would be classified in different types of as 'allied blocs', that were however not considered on par with the German Empire and could serve the function of satellite states as would later occur within the USSR.[598] To ensure economic viability the new German Empire would establish a *Europäische Volkswirtschaft* (European Economic Community).[599] Exploiting pan-European ideas for their own propaganda, the Nazis portrayed themselves as protectors of Europe against Bolshevism.[600]

Thus, two strands of Europeanism developed in a short time frame, Pan-Germanic Europeanism and liberal democratic Europeanism. Scholarship suggests both had an influence on shaping European ideas from the early days of the EEC to today's EU.[601] The ideas depart from essentially different bases and pursue crucially different objectives. While liberal democratic Europeanism is concerned with cosmopolitan ideas and development, welfare and prosperity of European states collectively,[602] Pan-Germanic Europeanism does not seek an equal union, but a European Empire under German hegemony.

Coudenhove-Kalergi's Pan-Europa proposal explains the federalist stream prevalent in the establishment and development of post-war European integration. However, neither Coudenhove-Kalergi nor Pan-German inspired Europeanism proposed supranationalism as the path through which Europeanism should unfold. Instead, the options were limited to federalism or Empire. In light of this it appears surprising that supranational governance became the tool of choice to further European integration.[603] In reality it was compromise that led to its adoption, as the next section will analyse.

Interestingly, Coudenhove-Kalergi's liberal-democratic Pan-Europeanism succeeded Wilsonian proclamations of self-determination of peoples on an international stage. While it can only be speculated how such significant international developments went unnoticed by

[596] ibid; (n594).
[597] (n595).
[598] ibid.
[599] 'Der Nationalsozialismus und der Europäische Gedanke' (*CVCE – Luxembourg Centre for Contemporary and Digital History*, 8 July 2016).
[600] Thomas Sandkühler, 'Europa Und Der Nationalsozialismus: Ideologie, Währungspolitik, Massengewalt' (2012) 9 Zeithistorische Forschungen/Studies in Contemporary History 430.
[601] Concerning a discussion of this question see ibid 428-441.
[602] In fact, Coudenhove-Kalergi considered Pan-Europe „an economic necessity", Patricia Wiedmeier, 'The Idea Behind Coudenhove-Kalergi's Pan-European Union' (1993) 16 History of European Ideas 829.
[603] Kostakopoulous writes that „early Europeanist visions were instinctively supranational", (n590) 297.

Coudenhove-Kalergi, research has not linked the ideas of these two personalities. Coudenhove-Kalergi did not reference self-determination of peoples. It is therefore difficult to determine whether the early 20th century political principle of self-determination concerned with self-government influenced the Pan-European ideas. Coudenhove-Kalergi did, however, refer to Wilson's vision of the LoN and the idea to establish unions of state to ensure peace among them.[604] In fact the emergence of the League is among reasons why he considered a Pan-European union necessary. That organisation was perceived as underperforming and not providing the cohesion required among states to facilitate peace and prosperous mutual development.[605] Instead of the (then only) principle of self-determination of peoples, the integration discourse in Europe was dominated by questions of democracy. The situation remains unchanged until today, where references to self-determination of peoples on at the supranational level are scarce and emphasis is placed instead on democracy as the means of political legitimacy. Considering the different ground on which Wilson's self-determination ideas fell, this can be easily explained. First, that Wilsonian self-determination may be interpreted as differently as either democratic self-government or a right to establish a sovereign state, stems from the diverse functions the principle was intended to fulfil in his vision. European states did not struggle under foreign occupation (only mutual occupation), nor was their statehood contested. As such, the only aspect of Wilson's self-determination that was meaningful was that concerned with democratic ideas. By contrast, African peoples suffered colonialism and slavery because they were initially not considered equal and by extension not eligible to claim respect for their rights under the mantle of state sovereignty. Consequently, the aspect of self-determination that held most meaning from an African perspective was the one that would allow them to seek refuge under the supposed protection of independent statehood. This may be one reason, why the OAU and later AU were founded with explicit reference to the right to self-determination of peoples, while the EU emphasised democracy and human rights instead.

Key differences between Pan-Africanism and Pan-Europeanism become apparent, that explain the different developments that occurred and political decisions taken on the supranational level on both continents. Pan-Africanism emerged as an ideology seeking to establish and strengthen African supranational identity as a response to foreign oppression and exploitation. Pan-Europeanism, on the other hand, rose in relevance because it was considered a necessary step to stop European states from self-destructing due to endless quarrels between them. What links

[604] Coudenhove-Kalergi (n592) 81, 158.
[605] ibid 158, 159.

both pan-ideologies, is that they were recognised as paths towards prosperous development on either continent.

Understanding the influences of Pan-Europeanism on European supranational integration: notions of supranationalism and visions of European integration in the infancy of the European Union

Questions concerning the political form and type of governance of the EU led to diverse ideas and intense scholarly engagement at the outset.[606] So far, this study established that governance and sovereignty relate to self-determination of peoples and because supranationalism in the EU is a form of governance that affects state sovereignty, it is important to observe EU supranationalism separately from self-determination of peoples as a first step, so that the former can be fully understood before considering the role of the latter in relation to it. This section explores the reasons that led European states to embrace supranational integration initially. It then considers other more widely discussed theories of governance and of European integration over which supranationalism seemingly prevailed, at least for now. This facilitates a deeper understanding of the type of supranationalism that emerged over time in the EU. The last section briefly considers contemporary views from scholars and views expressed by Member States on EU supranationalism to complete the picture.

At the commencement of the current governance model, questions around supranational integration, its extent, form and process were disputed.

This sub-section substantiates different visions of how supranationalism was conceived within the EU. Many of these emerged in the EU's early years and continue to be of interest until today. Despite clarity over the reasons for which the EU was to be founded and why it was useful, there were different views on how the project was to unfold over time. Proposed visions ranged from federalism, functionalism and neo-functionalism to different forms of intergovernmentalism. As the EU continues to exist and develop, it remains to be seen, what forms supranationalism in the EU will take in the future. For the sake of this sub-section, a closer look at some of these visions is useful in order to understand the supranational system that currently exists.

[606] Alasdair Blair, *European Union Since 1945* (2nd edn, Routledge 2011) 4-5.

Federalism

While the discipline of political science suggests there are different models of federalism, it is generally agreed that federalism encompasses a system of government in which power is divided between a central authority and its constituent political units.[607] Federal unions vary significantly in form and substance but have a central element in common. They may be constituted as a unitary state with autonomous regions (e.g. Belgium)[608] or of constituent States (for example, the United States of America), Länder (e.g. Austria and Germany), Kantone (Switzerland), Emirates (United Arab Emirates) or Oblast (e.g. Russia, Ukraine, Kyrgyztan). Crucially however the constituent entities of a federal union cannot simply leave the federation based on their wish. In the case of the EU this would mean that something like Brexit would have been at far more complicated, if not impossible, if the EU was a federal union as opposed to it being the supranational organisation it is today.

The differing views on the functioning of the EU concerned, first and foremost the political structure of the organisation, and its theoretical foundation to gain and exercise authority. This disagreement is often reduced to the dualist antagonism between constitutionalism – which is used interchangeably with federalism – and intergovernmentalism.[609] For instance, it is argued by some contemporary populist euro-sceptic parties that the EU should return to what it supposedly originally was: a purely intergovernmental organisation with certain areas of supranational integration.[610] The question is, however, if that was ever the case.

The option of federalism was articulated through the proposal of a federal Pan-Europe as mentioned above, but also in the early years of its consolidation, amongst others by Altiero Spinelli and Alcide de Gasperi, considered by some among the so-called founding fathers (understood in broader sense) of the EU.[611] However, the most impactful argument may be that

[607] For more detail, see Adeleke Olumide Ogunnoiki, 'Federalism as a Political Ideology and System of Government: The Theoretical Perspectives' (2017) 3(9) International Journal of Advanced Academic Research 52-80.
[608] Despite diverging opinions in literature, at least Art. 1 of Belgium's constitution designates it as a federal state.
[609] See, for example, Sergio Fabbrini, 'Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46(9) Comparative Political Studies 1003-1029; for a more general discussion of constitutionalism in international law see also Michel Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25(1) European Journal of International Law 177-199.
[610] Alternative für Deutschland, *Programm für Deutschland: Das Grundsatzprogramm der Alternative für Deutschland* (2016) 17.
[611] (n606) 4; Altiero Spinelli, 'Il modello costituzionale americano e i tentativi di unità europea', essay from 1957, see Andrew Glencross, 'Altiero Spinelli and the Idea of the US Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy' (2009) 47(2) Journal of Common Market Studies 287-307; see also the website https://www.fondazionedegasperi.org (in Italian) for a summary of Spinelli's and De Gasperi's ideas of a federal EU.

even Jean Monnet eminent founding fathers and co-author of the Schuman Plan, which is the foundation on which modern Europe was built – considered a political federation to be the ultimate goal of supranational European integration.[612] In fact, until today federalism is referenced often in the context of supranational governance, especially regarding the EU.[613] Like many other contemporary writings, the arguable godfather of Spinelli's federal Europe ideas, Luigi Einaudi, saw federalism as a means to counteract the "intact sovereignty of states", which he considered the reason for continuous military conflict in Europe.[614]

The Schuman-Plan, which essentially served as foundation of the EEC, was drafted by Robert Schuman in collaboration with Jean Monnet. It admittedly focussed on the aspect of economic collaboration, however it also set a clear preference for a federal union when it declares:

> (...) this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.

In Schuman's and Monnet's vision Member States would almost automatically consent to continue involving other sectors in the process of European integration once they experienced the benefits in one area.[615] For Monnet in particular, "economic integration was always a foundation of political union, with the single market leading to the single currency and eventually a federation".[616] The stagnation of this desired effect led many Member States and scholars to question this approach to European integration and a considerable degree of uncertainty and frustration regarding the future of European integration and the project of the EU as initially proposed by the founding fathers arose.[617]

However, there is also another historical argument that speaks against the assumption that the EU's predecessors were based on pure intergovernmentalism. Monnet deliberately moved away from the concept of intergovernmentalism within the EU, because it was this concept that failed

---

[612] Gilles Grin, 'Shaping Europe: The Path to European Integration according to Jean Monnet' (Jean Monnet Foundation for Europe, Debates and Documents Collection, Issue 7, Lausanne, March 2017).
[613] E.g. Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021).
[614] (n589).
[615] (n606) 8.
[616] European Central Bank, 'The Monnet Method: Its Relevance for Europe Then and Now' (Mario Draghi, President of the ECB, Award of the Gold Medal of the Fondation Jean Monnet pour l'Europe, Lausanne, 4 May 2017).
[617] See, for example, John R. Gillingham, 'The Monnet Method and the Obsolescence of the EU' in Francesco Giavazzi and others (eds), *The Liberal Heart of Europe Essays in Memory of Alberto Giovannini* (Palgrave Macmillan 2021) 81-89; Albert Hayrapetyan, 'Federalism, Functionalism and the EU: The Visions of Mitrany, Monnet and Spinelli' (*E-International Relations*, 21 September 2020).

to secure peace in the inter-war years and that could not provide the necessary impetus for development following two world wars.[618]

The current reality is that Member States remain the main actors deciding on EU policies and how far European integration extends. Despite constitutional streams having left an undeniable mark on the Union's path of evolution, the EU currently remains a hybrid of administrative and constitutional elements, with the administrative nature being predominant.[619] This is the case for one because the Treaty of Lisbon failed to achieve the necessary steps towards more constitutionalisation. While during its drafting it was intended to become a constitutional treaty, it ultimately failed due to resistance from Member States.[620] Thus, there was not sufficient support for the idea of constitutional governance at supranational level among the Union's constituent members at that point in time. Nevertheless, despite the arguable failing of the Treaty of Lisbon this does not mean a definitive renunciation of constitutionalisation.[621] As Christine Reh convincingly argues, constitutionalisation comprises different elements, including symbolic functions, and should be understood as an evolutionary process.[622] The perhaps most important factor showing that the EU has maintained constitutional elements is the crystallisation and emphasis placed on unifying European values. In setting out the basic rules or the code of conduct of the Union, their function is similar to that of a constitution.[623]

In sum, even though its focus was weighted towards the economic cooperation aspect in the EU's early days,[624] the plan was always to bring about a closer integration across policy areas in Central Europe. Not only to put goods essential for waging warfare under supranational supervision, and thereby out of the hands of the national realm which could secretly plot to prepare for and start another war to assert national supremacy,[625] but also to forge a veritable political union. These considerations did not remain in the dark, but were discussed openly and arguably set the entire project towards the establishment of the EU on a certain path.[626] A

---

[618] See also (n616).
[619] Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010) 1: "European governance is *administrative, not constitutional*".
[620] Craig Paul, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 8-10; see also Christine Reh, 'The Lisbon-Treaty: De-Constitutionalizing the European Union?' (2009) 47(3) Journal of Common Market Studies 626 on how the idea of a constitution for Europe gained momentum in the years preceding the Treaty.
[621] Reh (n620) 627.
[622] ibid.
[623] ibid 634, 640.
[624] Indeed, the very demise of these ambitious projects led proponents of European integration to focus more directly on the economic rather than the political, while drawing on ideas that had been discussed when the EPC was being drafted; (n450) 15.
[625] ibid 14.
[626] (n606) 6: „Thus, just as Monnet and Schuman were influenced by the Second World War, it is also the case that the decisions taken at the outset of European integration had a significant impact in determining subsequent

majority of literature views it as established that with the Treaty of Maastricht the path of constitutionalisation towards a federal EU was becoming better crystalised.[627] Yet, this should not be interpreted as meaning that there can or should only be one outcome, namely federalism. Rather it may be considered evidence that both ideas, federalism and a non-state-like organisation of states, were equally considered in the beginning with neither ruled out of question.

This study argues that the fixation on questions of statehood distract from the several governance issues at hand, whether in the discourse on self-determination of peoples or with regards to European integration. From the perspective of self-determination in particular, the step towards federalism would place further emphasis on the condition of statehood to access the fruits of European supranationalism and should therefore be considered critically. This is not to say, that federalism may not bring potential benefits, especially if competences are clearly delineated between the central authority and the constituent states and as a result lengthy and often difficult processes of decision-making are being simplified.[628] At the same time, the fact remains in light of rising nationalist populism in many EU Member States, that there remains a considerable resistance to implement a federal EU. Furthermore, in the spirit of David Mitrany (further below), it is contended here that the establishment of super-state would likely shift existing problems on a larger scale.

Intergovernmentalism

As mentioned earlier, intergovernmentalism is often put in contrast to constitutionalism in debates on the nature of the EU's political system. Intergovernmentalism departs from the principle of the free will of Member States and their ability to agree on governance in certain areas through negotiations, thereby maintaining their original degree of sovereignty.[629] Hence, states remain the primary actors for supranational integration.

The most evident difference to federalism is the absence of a central authority and quite simply the absence of a European state. Instead, intergovernmentalism operates on the basis of equal

decisions. In other words, the work of Monnet and Schuman set the European integration project on a certain path of travel. Consequently, even though the Monnet method may not have been successful, the decisions that were taken in the early years have proven to be very influential. This has been commonly referred to as a path-dependency approach.".

[627] Reh (n620) 639; see also Berthold Rittberger and Frank Schimmelfennig, 'Explaining the Constitutionalization of the European Union' (2006) 13 Journal of European Public Policy 1148 - 1151.

[628] See also (n607) 55, 72, 73.

[629] (n606) 5.

sovereign states that participate in one organisation, that does not challenge their own independent statehood.

Pure intergovernmentalism does not aim for supranational integration, as the idea is to retain maximal national sovereignty in all aspects. In that respect, intergovernmentalism is opposed to the idea of a supranational institution with the authority to issue binding decisions upon Member States. Nevertheless, intergovernmental organisations that exist display varying degrees of supranationalism. Examples such as CARICOM, many of Africa's regional economic organisations, such as ECOWAS and the Pacific Alliance are very different in their organisational set-ups, drive toward supranationalism and sharing of competencies. As a result, it is submitted here that intergovernmentalism and supranationalism are not as contrary or even mutually exclusive as is often suggested in public debates.[630]

Yet it can also be asserted with authority that as the EU currently stands, its nature has unquestionably evolved beyond mere intergovernmentalism. It is often considered the prototype of a supranational organisation, in fact this term emerged against the background of research on European integration.[631] Due to the uniqueness of the EU it was also considered *sui generis*. Despite having transcended the state of intergovernmentalism this does not mean this is an immutable state of affairs. Events like Brexit and suggestions of a potential Polexit in the news[632] underline that the EU as it currently stands is not unchallenged and depending on what Member States decide in the future, a regression of supranationalism cannot be excluded as long as they remain masters of the treaties. This arguable fragility of the EU may be considered one of the disadvantages non-federal approaches carry. However, this study submits that while certainly posing a certain risk, the requirement of continued discourse and recommitment to the supranational project is actually a point of strength.

Functionalism and neo-functionalism

Another view that was proposed concerning the question what governance system the EU should follow is functionalism. Rather than proposing a certain governance system, functionalism is more a theory of supranational integration. David Mitrany can be seen as

[630] See, for example, Virginia Zaharia and Veronica Pozneacova, 'Supranationalism vs. Intergovernmentalism in the Actual Organization of EU' (2020) 6(2) Logos Universality Mentality Education Novelty: Political Sciences and European Studies 47-61.
[631] Babatunde Fagbayibo, *Transcending Member States: Political and Legal Dynamics of Building Contintental Supranationalism in Africa* (Springer 2022) 11.
[632] Adam Easton, 'Poland Stokes Fears of Leaving EU in "Polexit"' (*BBC News*, 9 October 2021).

central figure of this discourse.[633] In his theoretical approach, Mitrany departs from the assumption that human individuals can be "weaned away from [their] loyalty to the nation-state" if they experience the benefits of successful supranational governance.[634] Starting from cooperation in small areas, a snowball effect would then lead to further integration in other areas as well.[635] Mitrany's functionalism was, however, more directed to international bodies like the UN, rather than encompassing regional supranational organisations like the EU. From this starting point, Mitrany's school of traditional functionalism later served as a basis for the development of neo-functionalism, whose focus were regional bodies like the EU.[636] One of the central premises of neo-functionalism is the presumption that any integration process requires negotiations and the making of compromises on the side of the Member States. Starting from less sensitive, and thus litigious, areas, the fact of having agreed to cooperate in some areas would compel Member States to continue furthering cooperation in others as well.[637]

Importantly, and similar to the point made at the beginning of this chapter, one of the things that Mitrany did not want when he proposed his functionalist doctrine, was the reproduction of nationalist sentiments on a larger scale. Namely the creation of a European super-state was not envisaged by him.[638] Considered against the background that the EU was intended as antidote to nationalist supremacism and as an enterprise to ensure that nationalist-supremacist sentiments would never escalate again in the way they did leading to the Second World, such an outcome would in fact render the whole idea behind the establishment of the EU futile, if the organisation itself fed into such sentiments. From a different perspective, it would be unlikely that Member States would agree to trade their own position as only legitimate representative of their citizens, which is their source of power, with a prospect of fading into the background in comparison to a European supra-state that would effectively take their place.

As such, functionalism is a theory of supranational integration that does not define a certain type of governance, but appears to reject the idea of a super-state, which is embraced by proponents of European federalism.

---

633 (n629); see also David Mitrany, *The Functional Theory of Politics* (St. Martin's Press 1975).
634 Paul Taylor, 'Introduction by Paul Taylor' in Mitrany (ibid) x.
635 ibid.
636 ibid xiii-xiv.
637 (n629).
638 (n634, xiv.

From Pan-Europeanism to European supranationalism

The proliferation of supranationalism over the past decades suggests that it carries desirable benefits for joining states. These benefits could be worth being incorporated in the discussion on self-determination of peoples. This section focusses on the context of the EU only exploring the reasons that led European states in 1950 to pursue the path of supranational integration. Hence, the following statements cannot be transferred in their entirety to other supranational organisations. Nor does this study intend to argue that the EU should serve as a blueprint for other regional supranational organisations.

Before the rise of supranationalism, nationalist ideologies were prevalent in international law and policies.[639] In Europe nationalist ideologies had specific effects in Imperial Europe. Through such ideologies states could consolidate their power and justify the creation of unified states, making nationalism a unifying force with a prospect of reducing conflicts between principalities.[640] Nationalism as an ideology was also used to the advantage of groups with the intent of freeing themselves of what was perceived alien control.[641] Beyond that, nationalism brought stability to warring factions through the implementation of a single unifying legal system as opposed to various principalities with their independent legal systems.[642] In that sense, nationalism served functions somewhat similar to the one self-determination of peoples sought to later in history – as a weapon against unwanted control (often in fact occupation) offering a justification to unite communities that shared common features, enabling them to unite under one banner into a single consolidated political unit that could be more robust against opponents.[643] Nationalism also served functions that were included in the reasoning for drove the creation of a supranational system in the EU later: bringing together separate principalities and creating a sense of unity that was deemed crucial in maintaining peace among them. On the other hand, it might be argued that nationalism merely shifted already existing problems from a smaller to larger units, since nationalist sentiments of loyalty now existed in relation to the larger nation-state, causing rivalries with competing nation-states, instead of smaller principalities. Such rivalries were frequently rooted in a race for economic and military

[639] See chapter 2.
[640] (n450) 12: "There was much that was positive about this nationalist sentiment, which was initially directed towards attainment of unified States from disparate principalities and the like, combined with the desire to be rid of foreign control. It was driven, moreover, by the strong feeling that those who shared a common language and culture should naturally coexist in a single political entity, the corollary being that pre-existing boundaries between principalities were 'unnatural' and should not be allowed to impede the natural joinder of those who shared a common linguistic and cultural identity.".
[641] ibid.
[642] Vlad Perju, 'Supranational States in the Postnational Constellation' (2019) *International Journal of Constitutional Law* 17 (4) 1068.
[643] ibid.

supremacy and related thereto fears of becoming a potentially weaker opponent, resulting in being viewed as an easy target in the race to come a dominant imperialist power.[644] This mindset in international relations gained momentum especially in the early 20th century. The arms race between Great Britain and Germany leading to the First World War is a particularly vivid example of this phenomenon.[645] In that context it is also important to note that nationalist ideologies were closely tied to imperialism. Thus, while nationalism may have had the positive effects mentioned above, it was at the same time a means to justify and enable the aggrandizement of one nation over others. However, the downside of nationalism and imperialism only really struck in international relations when it culminated in the horrors of the Second World War. So shaken was Europe from that experience, that thereinafter, heads of states convened and agreed that it was to be avoided that history repeated itself ever again.[646] In that spirit, it can be said that the EU – at the time only remotely anchored in the Schuman Declaration and far from the Union it is today – was founded as an antidote to nationalist-supremacist sentiments.[647] As such, what was to become the EU , started based on a clear agenda from the very beginning. Thus, one could say the main reason that made supranationalism attractive in the case of the EU, was of a strategic nature: behind it was the intention to avoid a resurfacing of a new and in particular German national supremacism in Europe by putting the production of materials relevant for warfare under supranational supervision.[648]

Yet, being an antidote to nationalist-supremacism is not the sole reason why supranationalism was deemed desirable. In fact, choosing supranationalism in order to adapt to changing conditions in international trade and politics appeared almost unavoidable for the old nation states after the Second World War. The process of globalisation, which intensified after the two World Wars, resulted in a higher degree of international and economic interdependence among states. This factual situation required the old nation states to adjust to the new situation to maintain their status and profit from the new rising world order.[649] In EU history, the Benelux agreement of 1944 between Belgium, the Netherlands and Luxembourg is often determined as starting point for the supranational developments in Europe that followed. While the Benelux agreement was intergovernmental in nature, it was a first step towards the realisation that cooperative economic agreements and closer trade relations yielded better results for individual

[644] See generally Barbara Bush, *Imperialism and Postcolonialism* (Pearson 2006).
[645] See also Michael Rapport, *Nineteenth-Century Europe* (Macmillan History of Europe 2005) 353-363.
[646] (n450) 13.
[647] ibid.
[648] ibid; Thiemeyer n(407) 9.
[649] See ibid 7-9, 18.

states. The establishment of the European Coal and Steel Community (ECSC) and later the European Economic Community (EEC) followed that line of reasoning. Of course, besides economic and trade considerations, the ECSC and later the European Atomic Energy Community (Euratom) in particular were founded with the intent of minimising the risk of war among their member states by putting certain production lines under supranational supervision. Overall, economic pragmatism played a significant role in the decision of European states to engage in supranational integration.

Another important factor – related to the economic argument – pointing in favour of supranationalism was the fact that the role of the nation state changed towards taking on more social duties.[650] The transformation to a welfare state requires larger financial expenses, which are difficult to cover within the old model of the more independent nation state.[651] The establishment of interdependent trade and economic unions in particular cushioned the economic impact of the welfare state.

Furthermore, it must also not be forgotten that with the Cold War accelerating shortly after the Second World War, the establishment and strengthening of a European 'bloc' was another strategic advantage for European states to strengthen their position against and between the two old super-powers USA and Soviet Union by consolidating a unified European front.[652]

From a political perspective, and this aspect might be applicable more generally rather than being rooted in one historic context, supranationalism and the creation of a supranational institution and order have the advantage that certain policy decisions, which may be difficult to 'sell' on the national plane, are better accommodated on the supranational plane.[653] Naturally, certain decisions are by their very nature more suited to be made at a supranational plane in the common interest of all, rather than on the national plane. However, some argue, that one factor that made European supranationalism attractive to states was because supranational institutions could represent the ideal scape goat: unlike its Member States, the EU itself does not depend as much on popularity among voters and can therefore afford to be bolder in the issuing of controversial policies.[654] From a political perspective, the argument of the supranational organisation as political scapegoat seems conceivable. In fact, the narratives used by British politicians in the course of the Brexit campaign support it. Slogans like "take back control" and

[650] ibid 9.
[651] ibid.
[652] ibid 13.
[653] ibid 21.
[654] ibid 19.

other narratives served in the course of the 'leave' campaign operated on the basis of framing the EU as the reason for shortcomings at national level (such as underfunding of the NHS).[655] Similar instances – albeit without having culminated in withdrawals from the Union so far – occur in other EU member states as well.[656] These however, are more recent developments and the idea of a supranational scapegoat could likely gain greater more traction as the EU develops towards more supranationalism and less intergovernmentalism.

Lastly, it can be observed that certain elements of supranationalism were intentionally pursued from the very beginning, namely supranational supervision of warfare relevant production chains. Other supranational developments, such as the ability of EU institutions to issue legally binding decisions in various policy areas and the extension of legislative powers to the EU, were arguably the result of compromises between intergovernmental and federalist streams within the organisation.

3.5 Conclusion

This chapter elaborated on the definitions of supranationalism and supranational organisation. It concluded that supranationalism is a process towards higher degrees of above-national-state-level integration characterised by gradual transfers of sovereignty towards an institution established to operate above the national plane. Crucially, this chapter sought to reject the common misconception that intergovernmentalism excludes supranational processes, instead it argued that supranationalism emerges from intergovernmental approaches. In fact, both modes of governance continue to operate within the EU today. Supranational organisations, are entities of relevance to international law, endowed with the ability to not only be the object of international law, but to create it. They are distinguishable from international organisations more broadly in that they can issue legally binding decisions on Member States. While supranationalism can lead to supranational organisations being established, this is not a predetermined result. Hence, it is important to distinguish between supranationalism and supranational organisations.

[655] Steven Kettell and Peter Kerr, *The Brexit Religion and the Holy Grail of the NHS* (CUP 2021) 285-287, 290-292.
[656] E.g. in Germany, where the party Alternative für Deutschland (AfD) sways between campaigning for leaving the EU to arguing that the EU as such does not need to be abolished, but be regressed to an intergovernmental organisation consisting of independent nation states, see the party's manifesto, see Alternative für Deutschland, 'EU & Europa' (*afd.de*, 28 August 2021).

In history, strong movements in favour of models of supranational integration can be observed, some leaning towards supranational organisation stronger than others, but all point towards the relevance of considering supranational approaches to self-determination of peoples. Even though in many instances, such as in the Asian context, alternative trajectories besides European-exported-nationalism were not pursued in practice, the pursuit of multi-national and regional cooperation models underlines the significance of exploring such paths. All pan- and regional movements considered in this chapter have one element in common, i.e. that they are built on the realisation that the national state has limits in furthering socio-economic development and providing stability. Moreover, at least Pan-Africanism, Pan-Arabism and Pan-Asianism emerged against ideas of governance other than the European-style national state being based on notions of supranational identity. However, in all three cases the influences of European colonialism and the course of UN decolonisation which was limited to the three options famously set out in UN General Assembly Resolution 2625 (XXV) from 1970 overrode such notions. Despite this, interest in and support for regional integration survived and continued to develop in different regions of the globe. While many of these regional organisations remain mainly intergovernmental in nature, they do espouse some features of supranational competences (such as supranational/regional jurisdiction through the IACHR, ACtHR or ECJ; or the ability to set binding policy frameworks). Thus, this study tentatively proposes that a trend towards different forms of supranationalism is discernible, the closer study of which offers grounds for further research.

4 Self-Determination of peoples and supranationalism in the European Union

The project of the EU is widely regarded as the most sophisticated example of successful supranationalism.[657] With a 70-year long history of continuous European integration,[658] it lends itself to be the primary object of this research. While it would be incorrect to treat the EU as a standalone example of successful supranationalism, it is true that its system of supranational governance is unique in international law.[659]

In order to conduct a meaningful analysis on the role and significance of self-determination of peoples in the context of EU supranationalism, this chapter starts by briefly touching upon how Member States as well as scholarship appear to view supranationalism within the EU today.[660] Thus, section 4.1 aims to increase understanding of the existing supranational system of the EU, before assessing the role of self-determination of peoples in it. Section 4.2 illustrates the status quo of self-determination of peoples within the EU. In doing so, responses from EU institutions and individuals working in EU institutions to several conflicts related to self-determination are considered in order to reach a better understanding of how self-determination of peoples is viewed at the supranational level and among Member States. Section 4.3 evaluates the current state of subnational level participation in EU governance, arguing that past and present developments lend support to this study's argument that the position of independent states as sole actors in supranational governance is no longer uncontested. This casts doubt on the requirement of independent statehood as a threshold requirement to meaningful participation in the EU. Thereinafter, section 4.4 picks up on one of the main aspects of self-determination of peoples: the question of collective identity for determining peoplehood. Because this thesis researches the interconnection between self-determination and supranationalism as another option for political entities (the focus here being on sub-states) to improve their socio-economic situation, one of the questions pursued in this section is what the significance of the entity 'people' in this new context is and how it may be interpreted based on current developments. In exploring this, the question if European identity as a form of supranational collective identity was intentionally and eventually successfully created, how this unfolded, whether there are sufficient grounds to speak of European identity and if so, what

[657] See, for example, Paul Close and Emiko Ohki-Close, *Supranationalism in the New World Order: Global Processes Reviewed* (Macmillan 1999).
[658] See further August Reinisch, *Essential Questions in EU Law* (2nd edn, CUP 2012) 1-14; European Parliament, *The Historical Development of European Integration* (Fact Sheets on the European Union | European Parliament 2018) 3-22.
[659] The unique features of the EU led scholars to consider it a *sui generis* order, see, for example, Reh(n620) 630.
[660] In this chapter Member State views are considered based on case submissions, statements by political representatives, literature and an integrated view of the political landscape evidenced by past and current events.

constitutes it is explored. The chapter argues that ambitious policies, predominantly pursued by the European Commission to support the creation of 'European culture' as a kind of prerequisite for the formation of a European identity and the discussion on 'European values' play a key role in that respect.

4.1 EU supranationalism and Pan-Europeanism today

The progress of globalisation since the end of the Second World War has been a continuous incentive for states to join the EU, the most recent example being Croatia which joined in 2013. While this incentive often takes the form of economic benefits deriving from participating in an association of states with a shared market and an advanced degree of economic integration, the political advantages of being part of a larger union of states also plays an important role.[661] The continued interest in participating in the supranational project of the EU is apparent from the list of candidate countries in various stages of application and accession as Member States to the organisation. These are currently Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia, Serbia, Türkiye, Ukraine, who are treated as "candidate countries", and Georgia and Kosovo, which are listed as "potential candidates".[662] At the same time, since the entry into force of the Treaty of Lisbon in 2009, euroscepticism in Member States has increased. A surge in nationalist political movements that gained traction among EU citizens has taken place in almost all Member States.[663] The ostensible return to supposedly old notions of national sovereignty reached its temporary high with the United Kingdom leaving the European Union on 31st January 2020, an event known as 'Brexit'. Furthermore, with the ongoing internal rule of law crisis epitomised in Hungary and Poland's rejection of EU foundational values along with internal divisions over tackling global challenges including the environment, mass migration, and economic security, the EU project is being challenged on various fronts. Despite the advanced level of supranational integration, supranationalism and supranational governance cannot be considered a self-evident fact in the EU.

Even though the EU inspired the creation of the term supranational organisation, it remains in the tension field between federalism, supranationalism and intergovernmentalism. Hence, the way in which its supranational governance manifests is potentially subject to change as it continues to develop. Recognising multi-level governance and Europeanisation as theories of

[661] Maria Demertzis, 'Why Do European Countries Join the EU?' (*Bruegel*, 2 December 2022).
[662] EU, 'EU Membership, How to Join, Candidates' (*European Union*).
[663] See further Paul Kubicek, 'Illiberal Nationalism and the Backlash against Liberal Cosmopolitanism in Post-Communist Europe' (2022) 28(3) Nationalism and Ethnic Politics 332-350.

EU supranational integration, it becomes clear that the EU is a melting pot of concepts contributing to its special character. As of today, Member States remain the main actors deciding on EU policies and how far European integration extends. This is firstly because under the principle of conferral, the only competences of the EU to legislate are those which have been voluntarily conferred to it by its Member States. Furthermore, no Member State has transferred their sovereignty over matters of national sensitivity, or core constitutional matters, which consequently constitutes an area of national sovereignty which the EU may not penetrate. Obviously, where the sphere of national sovereignty over constitutional matters starts and where obligations to comply with EU rulings, policies and laws end, cannot always be easily delineated which has led to conflict between national constitutional courts and the EU courts. This can be seen, for example, in the struggle for supremacy between the German constitutional court and the ECJ, which has a long history. More recently, in 2020, the German constitutional court even specified in its *ECB Decisions on the Public Sector Purchase Programme* ruling, that too much power could be transferred to the EU, resulting in a breach of the individual right to democracy anchored in Art. 38 German Constitution.[664]

The second way in which Member States remain the key actors in EU policymaking is through the principle of subsidiarity which ensures that Member States retain a sphere of sovereignty in which EU institutions may not regulate without justification and without observing strict processes. Under the principle of subsidiarity, the EU may only legislate in certain areas of shared competence, which are not matters of its exclusive competence, if "Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level".[665] The conditions under which such an intervention can be carried out are regulated by Art. 5(3) TEU. Moreover, it is notable that national parliaments retain the power to monitor compliance with the principle of subsidiarity (Art. 12(b) TEU) and in case of persistent disagreement, Member States can bring a case before the ECJ for judicial review (Art. 8 Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality).

[664] *Judgment of the Second Senate of 5 May 2020* [2020] Bundesverfassungsgericht (BVerfG) 2 BvR 859/15 para 104.
[665] European Parliament, 'The Principle of Subsidiarity' (*Fact Sheets on the European Union | European Parliament*, 2023).

Third, any amendment of the EU treaties depends on an intergovernmental approach.[666] As provided by Art. 48(4) TEU, Member States' governments must convene to discuss potential amendments, following which they must not only agree to, but also ratify any such amendment in line with their respective constitutional laws. For many states, the process of adopting amendments to the EU treaties can involve plebiscite in the form of national referendums and can also require approval by both national and subnational legislatures. Thereby, Member States remain 'the masters of European Treaties'.

Against, or even because of, the controls which can be exercised by Member States, EU institutions are granted wide-ranging powers that demonstrate the supranational character of the organisation, which remains unique in its specific form in the international landscape. A supranational legislature in the form of the European Parliament, and the regulation of legislative procedures and the division of competences between the EU and its Member States are the first and most obvious sign for its supranational governance system.

In the Treaties establishing the EU, distinction is made between exclusive, shared and supporting competences (Part One, Title I TFEU). Besides the mere fact that EU institutions are extended exclusive competences, two further details in the allocation of competences between the EU and its Member States underline the Union's supranational governing capabilities. In areas of exclusive EU competence, Member States' ability to adopt legally binding decisions – despite acting within their national jurisdiction – depends on the EU's consent (Art. 2(1) TFEU). Notably, the EU enjoys exclusive competences 'internally' (i.e. affecting its own jurisdiction) concerning crucial areas, such as the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the Euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy (Art. 3(1) TFEU). Externally, that is in relation to actors other than Member States, the EU furthermore is given exclusive competence for the conclusion of an international agreement when it is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope (Art. 3(2) TFEU). However, even in areas of shared competence, EU institutions may adopt legally binding acts. Additionally, where shared competence is exercised, Member States are required to only exercise their competence to the extent that the EU has not already

[666] European Parliament, 'Intergovernmental Decision-Making Procedures' (*Fact Sheets on the European Union | European Parliament*, 2023).

done so. Lastly, even where shared competences are concerned, the EU enjoys the prerogative to decide whether it wishes to suspend its own competence to allow a Member State to exercise its competence instead (Art. 2(2) TFEU).

Besides supranational powers regarding legislative acts, the EU also adopted supranational decision-making procedures in areas concerning the budgetary process and the appointment of individuals acting within some supranational institutions, such as the High Representative for Foreign Affairs and Security Policy (Art. 18(1) TEU).[667] Notably, official fact sheets distributed by the European Parliament list areas falling under "quasi-constitutional procedures" (e.g. Art 223 TFEU), which are indicative of the historically strong current towards EU federalism as originally proposed by Pan-Europeanist Coudenhove-Kalergi.

The last decade brought significant challenges to the EU project due to crises that put a strain on the bloc's internal cohesion. Disagreement among Member States on how to approach financial and migration crises created room for more fundamental disagreements on the very foundations of supranational European identity.[668] Contestations of the values that are supposed to constitute Europeanness and increasing distrust in the EU institutions' ability to address fundamental crises formed a fertile soil for growing euroscepticism. Nevertheless, traditional Pan-European ideas with the goal of a Pan-European federation continue to exist and even experienced an unexpected resurgence. Two Pan-European movements were created before the 2019 European Parliament elections, VOLT Europa and DiEM25.[669] In line with traditional, Coudenhove-Kalergi Pan-Europeanism, VOLT Europa advocates for a federal Europe with centralised powers.[670] DiEM25, on the other hand, while also advocating for closer political integration and more impetus towards federalisation, sees the EU's future in a decentralised, "post-capitalist" democracy, with direct participation.[671] There are obvious links to Marxist communism discernible in DiEM25's manifesto, which are underlined by the expressed view that central institutions, that pool power and are not affected by transnational, direct democratic vote pose a hindrance to successful Pan-Europeanism.[672]

[667] See further European Parliament, 'Supranational Decision-Making Procedures' (*Fact Sheets on the European Union | European Parliament*, 2023).
[668] See further sub-sections 4.4.1 and 4.4.4.
[669] See Matas Kudarauskas, 'A Federal Europe: One More Try?' (*Harvard International Review*, 13 December 2021).
[670] Volt Europa, 'The 5+1 Challenges' (*Volt Europa*).
[671] DiEM25, 'Ein Manifesto zur Demokratisierung Europas' (*DiEM25*) 6.
[672] ibid 6, 7, 9.

In political sciences scholarship, Richard Bellamy proposes the model of a republican Europe of fully sovereign states, resulting in a form of governance he calls "republican intergovernmentalism".[673] Positioning himself between internationalism and federalism, Bellamy argues that his model of republican intergovernmentalism can unfold without a loss of sovereignty for participating Member States.[674] Carmen E. Pavel, disagrees with the suggestion of integration without delegation or transfer of sovereignty.[675] In her view, the EU requires a transfer of sovereignty to function, which automatically entails a certain loss from the perspective of the Member State.[676]

Just looking at how the EU functions today contradicts the practical possibility of Bellamy's notion of republican intergovernmentalism while maintaining full national sovereignty. As this thesis has argued, it is true that Member States remain masters of the treaties and as such they retain the final word in an important way, such as modifications of the Treaties. However, this section also carved out the aspects in the EU's daily functioning and its competences that are clearly based on a reduction of national sovereignty in certain areas.

Brexit shows that this can be ostensibly reversed through withdrawal (though still limited by international agreements), but this also proves that as long as Member States participate in the EU, sovereignty is being shifted towards supranational institutions, even if such transfer is based on an intergovernmental approach. In this sense, this thesis agrees with Pavel's view. However, this study goes even further when it observes that the notion of fully sovereign, independent statehood is the barrier that hinders peoples traditionally from accessing the fruits of self-determination. Therefore, it is argued here that federalism is not the ideal outcome of continued EU integration, as it operates by definition on the basis of national sovereignty and clearly delineated statehood. Catalans and Scots – which are mentioned here by way of example without disregarding other peoples raising comparable claims to self-determination – seek independence, because the borders of their parent state constitute barriers to their desire to directly participate in the supranational project of the EU.[677] To diffuse such conflicts, while allowing peoples to enjoy the guarantees of the right to self-determination, it should be considered how the subnational level can be involved in EU politics without making the action

[673] Richard Bellamy, *A Republican Europe of States* (CUP 2019) 11, 210.
[674] ibid 6.
[675] Carmen E. Pavel, 'The European Union and Diminished State Sovereignty' (2022) 25(4) Critical Review of International Social and Political Philosophy 596-603.
[676] ibid 600.
[677] Nicolas Levrat, 'Two Steps Away from Independence…Towards EU Membership' in Coppieters Foundation (ed), *Self-Determination in a Context of Shared Sovereignty: How to Devise a European Approach?* (Coppieters Foundation May 2020) 123.

and extent of such involvement dependent on independent statehood, as required by Art. 49 TEU.

Whether the EU will develop towards federalism, intergovernmentalism or supranationalism without federalism, remains to be seen. As is submitted in the previous chapter, the path of supranational integration does not have to result in federalism and one of the strengths of a scenario other than federalism is that the question of statehood is factored out, and so does not distract from the more pressing issues, like considering how claims related to self-determination from within the EU can be addressed at their root. Transforming the EU into a federal state, as for example proposed by former European Commission president José Manuel Barroso,[678] will not magically mend its problems and challenges. In fact, from the perspective of self-determination, going the route of supranational participation should not be barred by questions of statehood.

4.2 Self-Determination of Peoples in the EU

A look into the Treaties that establish the EU as well as the policy documents that emerged from its supranational bodies disclose that there is no 'EU' right to self-determination of peoples. At least it is not mentioned anywhere explicitly. From an international law perspective this entails that the only way through which self-determination of peoples interacts with the EU sphere of law is through international law itself, namely the international right to self-determination as enshrined for example in joint Art. 1 ICCPR/ICESCR, the principle of self-determination of Art. 2 UN Charter and international customary law.[679] Additionally, the Helsinki Final Act of 1975 affirms the significance and applicability of self-determination of peoples to European states.[680] While this is true viewed through a strictly international legal lens, in studying international organisations – including supranational organisations like the EU – it is insufficient to consider law alone. Instead, the outputs of an organisation are also relevant in understanding how the entity views itself in relation to international law. It also reveals its approach to specific rights. Therefore, this section analyses approaches of EU institutions and individuals acting on the supranational level within those institutions in a bid to reach a better

[678] Telegraph Reporters, 'Europe Must Become "Federation of States", Barroso Says' (*The Telegraph*, 11 September 2012).
[679] About the complexities of the relationship between the EU and international law see Katja S. Ziegler, 'The Relationship between EU Law and International Law' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (CUP 2016) 42-61.
[680] See also (n677) 119.

understanding of how actors on the supranational level of the EU view the right to self-determination of peoples and how, if at all, it is applied.

4.2.1 Why self-determination of peoples is relevant in the EU supranational context

Chapter 2 showed that the right and principle of self-determination is mentioned in several international treaties and has been confirmed by various international institutions. In comparison, the EU's primary law is salient due to the absence of the right. It is this lack of mention that may lead researchers to conclude that self-determination of peoples is irrelevant in this context.[681] Despite this apparent omission, however, it would be erroneous to conclude that self-determination has no role in EU law and policy.

Self-determination of peoples as a right to self-government and political participation

At a closer look, the way the EU developed – with more areas being regulated through and by supranational institutions, laws and policies – the importance of the right/principle to self-determination increased rather than decreased. If one looks at it through the lens of self-determination as legitimising authority as discussed in Chapter 2, the most evident point by which this can be seen, is the pressing issue of legitimisation on the supranational level. This has increased sharply since the global financial crisis in 2008 that caused the EU to adapt new mechanisms to absorb the shocks of the crisis within a very short time, in the course of which is possibly bypassed essential legal and policy mechanisms that were in place before the crisis.[682]

With supranational EU governance proceeding rather than receding, the function of self-determination of peoples as justifying the exercise of authority over EU citizen's aspects of everyday life becomes heightened. Although it was previously found that visions of creating an almost constitutional project existed from the very beginning, one must keep in mind that at the time the EU was founded it was impossible to foresee the dimensions it would reach within the course of a few decades. That said, it comes as no surprise that the treaty framework establishing the EEC and later the EC, the EU's predecessors, did not encompass an entity as political and in its functioning state-like as the EU is today. The EU's development towards more

[681] (n677) 116.
[682] See, for example, Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76(5) Modern Law Review 817-818, 824-826, 830, 835, 840.

constitutionalisation through the Treaty of Maastricht sparked a scholarly debate on the political nature and future of the EU.[683] Even when the TEU was adopted in 1992 – thus before the introduction of the monetary union – the extent of the EU's involvement in sensitive areas of everyday-life concerning fiscal, employment, pension and other laws and policies was not anticipated.[684] In fact, comparing the EU's functioning based on the TEU and the practises it adopted in the wake of the financial crisis, a considerable deviation from a once uncontested balance of duties and competences becomes apparent. These changes took place without involving the citizens concerned, and even more astonishingly, partially passing over the discontent of some of the EU's Member States.

The cleavage became especially evident in the divergent German and Greek positions concerning austerity, the European Stability Mechanism (ESM) and other monetary decisions within the EU.[685] Areas that were once left untouched, most importantly the redistribution of money, are now under EU supervision. Above that, the shifting of control and responsibilities in many areas in an informal manner from the European Commission to the European Council in the past, thereby diminishing the role of the European Parliament, shows how fragile democratic legitimisation and questions of accountability to EU citizens can be in such a supranational governance organisation.[686]

Considering how self-determination can be considered and implemented in supranational institutions can become the golden bridge between peoples in the EU and the EU itself. In democratic systems, the concept of legitimised authority is essential, which is one of the core elements the principle of self-determination comprises. While a distinction must be drawn between a right to democracy and the right to self-determination of peoples, it is undeniable that the latter points towards democratic governance to the extent that it protects a people's ability to participate in decisions affecting their political, economic, social and cultural life.[687]

---

[683] Michael A. Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76(2) Modern Law Review 191-222; Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 German Law Journal 956-967; Michael Keating, 'European Integration and the Nationalities Question' (2004) 31(1) Politics & Society 1-22.

[684] As Jan-Werner Müller argues, it was in fact a conscious decision to establish the EU in its founding years as apolitical as possible, shaping it as an administrative rather than state-like entity, with all the consequences such a choice entails regarding democratic mechanisms and involvement of the public, see Jan-Werner Müller, 'Beyond Militant Democracy?' (2012) 73 New Left Review 44.

[685] (n682) 826-827; see also Darla Cameron, Richard Johnson and Zachary A. Goldfarb, 'Why Greece and Germany Just Don't Get along, in 15 Charts' (*The Washington Post*, 3 July 2015).

[686] (n682) 830-836.

[687] See further Armin von Bogdandy, 'Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area' (2015) 12(4) International Journal of Constitutional Law 1001; however, some scholars refer to a right to democratic self-determination, Ernst-Ulrich Petersmann, 'Why Treaty Interpretation and Adjudication Regime Require 'Constitutional Mind-Sets'' (2016) 19 Journal of International Economic Law 390.

In the context of the EU, where governance is exercised that my affect peoples' freedom to determine their future in these areas not only from national but also supranational authorities, the concept of collective self-determination gains relevance.[688] In international law, the link between a core of democratic participation and the right to self-determination of peoples is recognised through the dimension of internal self-determination, as for example found by the Supreme Court of Canada in *Reference re Secession of Quebec.*[689] The HRC too recognised the link between Art. 25 ICCPR and the right to self-determination in Art. 1 ICCPR, while distinguishing between these two provisions based on the legal subject that can raise claims: while Art. 25 ICCPR applies to individuals, Art. 1 ICCPR applies to peoples.[690] That the EU is perceived as a legitimate authority by its members and peoples was crucial to at least one of its founding fathers: as Mario Draghi emphasised in his 2017 speech "Monnet was concerned very much that the EU is perceived legitimate from a democratic point of view".[691]

Self-determination of peoples as a weapon against (supranational) oppression

Chapter 2 established that self-determination was developed to serve as a weapon against oppression. This can be wielded vis-à-vis internal (from the governing state) or external (from third states) oppression. As such, self-determination relates to the aspect of legitimising authority in that it provides a defence where governance-systems operate that could oppress. In that sense, self-determination of peoples has two functions that are intricately connected: on the one hand, it ensures respect for a people's choice to express by whom and how they wish to be governed. On the other hand, it also ensures that peoples' have a defence available should the governing authority (in case of internal oppression) contravene the former. While the EU initially was perhaps not intended to assert the governance role it has today, the reality now is that regardless of whether one labels it constitutional or administrative, the supranational organisation exercises *de facto* governance to various degrees in different areas. Where authority is exercised there is a danger of power being abused. That this is a real risk, is underlined by the EU's controversial adaptation to the 2008 financial crisis as depicted above. However, the EU's policy of putting financial pressure on Member States to abide too, while

[688] See also von Bogdandy (n687) 988, 989.
[689] (n139).
[690] HRC, General Comment No. 25: 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)' (1996) CCPR/C/21/Rev.1/Add.7 para 2.
[691] (n616).

not illegitimate *per se*, carries an inherent risk of suppressing their voices on the supranational plane.

Self-Determination of peoples and the EU's commitment to respect for human rights

Above that, there are peoples in the EU that claim the right to determine their political future with explicit reference to collective self-determination.[692] Solutions need to be found to make the fruits of self-determination accessible for them, considering that the EU has placed an emphasis on respect for human rights in Art. 2 TEU. Arguably, this is partly granted through citizens' participation in the democratic system of the state they live in. However, as especially the Catalonia case shows, this might not align with the wishes of a group and the dialogue with the state might not be fruitful. Instead of turning a blind eye to these situations or trying to avoid them, the EU as supranational entity that is based on certain values all members agreed to honour should take a more assertive position. As supranational entity the EU has the potential to offer a forum for discussion on these matters. With a view to the future role of the EU, taking such a position might turn out to be crucial if it aims to not simply either reproduce national governance on a larger scale or remain meaningless in these discussions, which could affect its reputation in the long run.

Continuing to ignore self-determination on the side of the EU will eventually result in a denial of this collective human right and thus a breach of one of the EU's own values: respect for human rights. It might also contravene other fundamental European values such as equality and the freedom of these groups to express their own political aspirations and act accordingly. Of course, this presupposes that the values of Art. 2 TEU are interpreted as possessing not only an individual, but also a collective dimension. That this is the case is supported by the rationale behind the adoption of Art. 2 TEU. Art. 2 TEU was introduced to take account of the growing influence supranational legislation and jurisprudence has on fundamental rights of citizens on the national level. It was a direct reaction to jurisprudence of national courts, which retained the right to review EU law to ensure its congruity with constitutional law as well as legal obligations deriving from international human right treaties acceded to by EU Member States.[693]

[692] For example, Catalans and Scots, but also others, see Marc Sanjaume-Calvet, Jordi Mas Elias and Ivan Serrano Balaguer, *Movements for Self-Determination in Europe* (Coppieters Foundation 2022).
[693] European Parliament, 'The Protection of Article 2 TEU Values in the EU' (*Fact Sheets on the European Union | European Parliament*, 2023).

Questions involving self-determination of peoples as unavoidable reality in the EU

Even though the EU as supranational organisation tried not to get involved with the contentious matter of self-determination, in reality, responses from the supranational institutions have been contradictory, ostensibly responding on a case-by-case basis.[694] Concerning the Catalan aspirations to secede from Spain, for example, the European Commission's President Jean-Claude Juncker stated in a press release that "this is an internal matter for Spain that has to be dealt with in line with the constitutional order of Spain".[695] On the other hand, this attitude of staying out of supposedly internal matters seems to have changed regarding Scotland at least since Brexit.[696] The lack of a clear position in the face of such situations involving claims to self-determination by groups within EU Member States potentially leads to fading trust in the supranational organisation and confusion on how to act in these situations.[697] As a result, situations surrounding claims based on the right to self-determination are a fact that cannot be avoided.

Even though it is a highly controversial and sensitive topic that the EU would likely want to avoid given its silence on self-determination generally, the question of national self-determination within the EU cannot be disregarded. The 2017 turmoil in Catalonia following a contested referendum on the region's independence from Spain, resembled a shock wave through the EU Member States and the EU itself. This is not surprising given the existence of various separatist nationalist movements in several (including former) EU Member States: Scotland, Wales and Cornwall in the UK; Flanders in Belgium; Padania in Italy; Catalonia and the Basque Country in Spain (and France); as well as Corsica and Brittany in France. During the dispute in 2017, Catalonia and Spain directed their gaze at the EU in hopes of support for their respective positions, with Catalonia calling for the EU to act as mediator in the conflict. This peak moment of crisis in the EU highlighted the need to deal with questions of national self-determination within the EU. Furthermore, it made it clear that the EU could not avoid being involved in such cases by remaining silent on the right or principle of self-determination in its law and policy.

---

[694] See section 4.2.2.
[695] The Diplomatic Service of the European Union, 'Statement on the Events in Catalonia' (*EEAS*, 2 October 2017).
[696] Glenn Campbell, 'Herman Van Rompuy says Brexit 'has changed EU view of Scotland'' (*BBC News,* 15 September 2019).
[697] Maggie Lennon, 'Stateless Nations in the EU: The Case for an Equal Partnership' in Coppieters Foundation (ed), *Self-Determination in a Context of Shared Sovereignty: How to Devise a European Approach?* (Coppieters Foundation May 2020) 28.

Crucially in a supranational context, self-determination of peoples, and ought not to be restricted to such questions arising only at national level. This is underlined by its functions as a right and principle interrelated with democratic participation, as a safeguard against oppression through state governance, and its nature as an international human right that all EU Member States accepted to respect when they ratified the ICCPR. Instead, self-determination of peoples can operate as a unifying force and in a manner, that does not affect any potential external self-determination claims within the Member States. If at all, interpreting self-determination in the EU context as unifying rather than fragmenting power based on a supranational identity oriented along common values as portrayed above, might be the way forward.

4.2.2 The ECJ and self-determination of peoples

Because the EU Treaties are silent on the matter of self-determination, it is unsurprising that the ECJ did not engage with it in most of its jurisprudence. The first and so far only case in which the Court addressed the right to self-determination of peoples, is *Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* from 2016.[698]

The case concerned the validity of a treaty concluded between Morocco and the EU on reciprocal liberalisation measures on inter alia agricultural and fishery products ('the Liberalisation Agreement').[699] Front Polisario – the national liberation movement representing the Sahrawi people – sought annulment of the Council decision by which the Agreement was concluded, arguing among other things that the Agreement infringed upon the Sahrawi people's right to self-determination to the extent that they had to consent to an agreement inferring obligations on the Sahrawi people as an affected third party to the Agreement.[700] The ruling of the ECJ was preceded by a decision of the General Court (GC) in 2015, which in conclusion annulled not the entire Agreement, but only insofar as it concerns the disputed territory in Western Sahara.[701] The ECJ set aside this previous judgment of the GC,[702] arguing that because the territory of the Western Sahara in question cannot be viewed as forming part of the 'territory

[698] *Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECJ C-104/16 P.
[699] ibid para. 26.
[700] ibid para. 307.
[701] *Front Polisario v Council* [2015] CJEU T-512/12.
[702] (n698) para. 127.

of the Kingdom of Morocco', as mentioned in the Agreement,[703] the Sahrawi people were not affected by the Agreement. As a result, the Court concluded that Front Polisario had no legal standing in the case.[704]

The significance of the 2016 judgment is best understood by summarising the key differences in the approach of the GC and the ECJ to the issue of the Sahrawi people's right to self-determination in this case.

In view of the GC, the Sahrawi have legal personality as a third party through Art. 263(4) TFEU.[705] In a second step, the GC examined whether Front Polisario as representative of the Sahrawi people was directly and individually concerned by the Council decision giving rise to the Agreement. In this respect the GC found that the EU and Morocco had fundamentally different views concerning the status of the disputed territory in question, of which both parties were aware. The EU expressed its commitment to remain neutral and follow the lead of the UN concerning any actions regarding the Western Sahara, while Morocco made it clear that it considers Western Sahara part of its own territory.[706] Despite this disagreement, no interpretation clause was included in the Agreement to clarify the ensure the disputed territory was excluded from it.[707] The EU's failure to insist on the exclusion of the Western Sahara from the scope of the Agreement, according to the GC, amounted to an implicit acceptance that the disputed territory was part of the Agreement.[708] As a result, the provisions contained in the Agreement produced direct legal effects on the Western Sahara and individually on Front Polisario.[709] Despite this, the GC determined that no rules of international law required the Council to consult Front Polisario before the adoption of its decision giving rise to the Agreement.[710] Going further, the GC also considered that neither the European values mentioned in Art. 2 TEU, nor other provisions within the TEU and TFEU, or the Charter of Fundamental Rights or international – as alleged by Front Polisario in its submission – contain an absolute prohibition "which precludes the EU from concluding an agreement with a third State on trade (…) even though its sovereignty over that territory has not been internationally recognised".[711] Instead, the GC found that the Council decision confirming the Agreement did not comply with the duty to ensure that the production of goods stemming from the disputed

[703] ibid paras. 92, 107, 114.
[704] Para. 133.
[705] (n701) paras. 54, 60.
[706] Paras. 74, 75, 100.
[707] Para. 101.
[708] Para. 102.
[709] Paras. 110, 11.
[710] Para. 138.
[711] Para. 146, 215.

territory does not impair the fundamental rights of the Sahrawi.[712] According to the GC, the Council failed to carry out this assessment in a satisfactory manner, resulting in an annulment of the Agreement to the extent that the disputed territory is affected.[713] Thus, in short, the GC partially annulled the Council decision not because of a breach of international law, but based on procedural rules applicable to the internal decision-making process within the Council.

From the perspective of the ECJ, Western Sahara is not encompassed by 'the territory of the Kingdom of Morocco', the entity mentioned in the Agreement.[714] In this respect, the ECJ rejected the GC's conclusion that the EU had tacitly agreed that Morocco extended the interpretation of 'territory of the Kingdom of Morocco' in the Agreement to the disputed territory of Western Sahara by not protesting and by entering in trade relations with Morocco over areas including the disputed territory.[715] Recognising the *erga omnes* character of the principle of self-determination, the ECJ reasoned that all subjects of the international legal order are under an obligation to respect the "separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination".[716] More than that, the ECJ considered the principle of self-determination "one of the essential principles of international law" and emphasised that it "forms part of the rules of international law applicable to relations between the European Union and the Kingdom of Morocco, which the General Court was obliged to take into account".[717] This line of argumentation aligns dogmatically with the *ius cogens* doctrine, while falling short of an explicit endorsement of the principle and right to self-determination as peremptory norm of international law. Still, the value of this finding has even more weight considering the EU's general reluctance to expressly engage with self-determination of peoples. As such, the ECJ judgment is a landmark case because it underlines the applicability of the right and principle of self-determination to the EU, which challenges the view often expressed in scholarship that it has no bearing in the EU.[718]

4.2.3 The EU's approach to contentious self-determination cases

While engagement with self-determination of peoples in EU jurisprudence is sparse, EU institutions such as the European Parliament or individuals working in EU institutions at the

[712] Para. 228.
[713] Para. 247.
[714] Para. 114.
[715] Para. 99.
[716] Paras. 88, 92.
[717] (n698) para. 89.
[718] See also Levrat n(677) 119.

supranational level, such as (former) European Council and European Parliament Presidents, have expressed their stance with regards to contentious questions of self-determination through statements.

The value of these positions lies not in the individual statement, but in their collective position, which may be taken as indicator for how self-determination is being viewed and discussed within EU institutions. Of course, official statements from EU institutions must be attributed higher significance with regards to analysing how the EU as supranational organisation interprets self-determination of peoples, than statements from individual Members of the European Parliament (MEP).

Kosovo

In the case of Kosovo's independence, the majority of EU Member States were quick in expressing support for the newly established state in 2008. The EU as supranational organisation itself hesitated and to date did not formulate a specific position with regards to the status of the Kosovo as independent state. Instead, individual institutions on the supranational level adopted their own responses. While in an initial statement reacting to the declaration of independence in 2008 the Council of the EU announced that "member states will decide, in accordance with national practice and international law, on their relations with Kosovo",[719] it did send a EULEX mission to Kosovo to support the new country's rule of law institutions shortly after.[720] On 5 February 2009, the European Parliament adopted a resolution encouraging EU Member States to recognise Kosovo's statehood.[721] This was only surpassed by another resolution in 2012, in which the Parliament explicitly urged the five Member States that continue to refuse recognition of Kosovo's statehood to change their stance.[722] Continued opposition to recognising Kosovo as an independent state by already existing as well as potential future Member States, such as Serbia, is another stumbling block for unity within the EU. The more so in light of both Kosovo's and Serbia's candidacy for EU membership. However, the Kosovo case yields important insights about Member States' response to a disputed self-determination case, in which the doctrine of remedial secession is at the centre. The responses from EU Member States can be divided in three broad categories: 1) support for

[719] Elitsa Vucheva, 'EU Fudges Kosovo Independence Recognition' (*EU Observer,* 18 February 2008).
[720] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo.
[721] European Parliament Resolution of 5 February 2009 on Kosovo and the role of the EU, B6-0063/2009.
[722] European Parliament, Press Release of 29 March 2012, 'MEPs welcome Progress of Serbia, Kosovo and Montenegro towards joining the EU'.

remedial secession; 2) support for Kosovo's independence through external self-determination without supporting the doctrine of remedial secession; and 3) rejection of the application of the remedial secession doctrine to Kosovo (and generally).

Albania, Estonia, Finland, Germany, Ireland, the Netherlands, Poland, and Switzerland supported the doctrine of remedial secession in their submissions to the ICJ.[723] France – and at the time the United Kingdom, when it was still a Member to the EU – supported Kosovo's independence based on the right to self-determination of peoples but avoided explicitly supporting a right to remedial secession arising from it.[724] Azerbaijan, the Republic of Cyprus, Romania, Serbia, Slovakia and Spain decisively rejected any notion of an international right to remedial secession based on self-determination of peoples.[725] While it can be said that the many submissions in support of Kosovo's secession were likely motivated by a desire to finally put an end to the conflict, the case laid bare the differences of opinion within the EU in the face of self-determination conflicts, at least where the doctrine of remedial secession is at issue. These differences of opinion have prevented the EU from adopting a clear course of action so far. This adds to the political brisance of self-determination conflicts within the EU, which have the potential of significantly driving apart Member States with opposing views on such cases.

Nagorno-Karabakh

Nagorno-Karabakh is another contentious case involving claims to external self-determination to which the EU has reacted through resolutions by the European Parliament, some of which explicitly address the right to self-determination. In a resolution from 2013, the European Parliament stated that it "fully subscribes to the principles of sovereignty, territorial integrity and the right to self-determination of nations".[726] This is one of few statements from EU institutions expressly recognising not only the right to self-determination, but that of nations. The use of the word 'nations' in connection with 'self-determination' rather than 'peoples' is reminiscent of the doctrine of national self-determination stemming from early 20th century, where nationalism and the establishing of singular, independent nation-states were at the centre

[723] See each country's written statement in relation to Accordance with International Law of the Unilateral Declaration (n288), available on the ICJ's website at https://www.icj-cij.org/case/141/written-proceedings.
[724] ibid.
[725] ibid.
[726] European Parliament Resolution of 23 October 2013 on the European Neighbourhood Policy: Towards a Strengthening of the Partnership: Position of the European Parliament on the 2012 Reports (2013/2621(RSP).

of the concept.[727] In 2017 the European Parliament adopted a resolution by a large majority calling for respect for the democratic will and right to self-determination of Nagorno-Karabakh.[728] The discerned link between the right to self-determination of peoples and the expression of democratic will supports the previously discussed notion of collective self-determination as relevant concept in the EU under the viewpoint of a right to democracy and the European value of democracy. Additionally, MEP appertaining to the European Free Alliance Group (EFA) endorsed the right to self-determination of the people of Nagorno-Karabakh, however without further detailing what content they accord to the right in that context.[729]

For instance, MEP Jordi Solé stated:

> However, I also call for the need to recognise and respect the right to self-determination of the people of Nagorno Karabakh, for the need to uphold the democratic will and choices already made several times. This is not only a territorial issue. Disregard for the right to self-determination is at the root of too many conflicts. Without respecting the democratic will of the people of Artsakh, I am afraid that there can hardly be a viable and fair way out of this conflict.[730]

It is noteworthy that this response recognises that the right to self-determination may be an expression of the democratic will of people, thereby setting democracy and self-determination on an equal footing. Jordi Solé also emphasized that the right to self-determination of Nagorno-Karabakh transcends aspects of territoriality. The statement as a whole can be taken as suggesting, that continuous disregard for the right to self-determination of the people concerned led to the conflict, rather than the right to self-determination as such. This is a perspective this study agrees with, as in many self-determination conflicts, calls for territorial independence result from long-term frustration resulting from the perception of the groups involved of not being heard when it comes to the representation of their interests in the parent state.[731]

---

[727] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 International and Comparative Law Quarterly 241.
[728] European Parliament Recommendation of 15 November 2017 to the Council, the Commission and the EEAS on the Eastern Partnership, in the run-up to the November 2017 Summit (2017/2130(INI)).
[729] The Greens/EFA in the European Parliament, 'Respect for Self-Determination Key to Resolving Nagorno-Karabakh Conflict' Press Release of 7 October 2020.
[730] ibid.
[731] For example, Massetti contends that many regional self-determination movements within Europe moved towards secessionism as a result of *inter alia* their limited ability to represent their interests in the European Council, Emanuele Massetti, 'Let Down by Europe? Secessionist Regionalist Parties and the EU's Reactions vis-à-vis Attempts to Achieve 'Independence in Europe'' in Coppieters Foundation (ed), *Self-Determination in a Context of Shared Sovereignty: How to devise a European Approach?* (Coppieters Foundation 2020) 71, 72.

Overall, however, EU remains mainly involved in the Nagorno-Karabakh case as a negotiator. These attempts to reach a solution to the conflict have so far had limited success, if any at all, and took place through formalized frameworks such as the European External Action Service and the OSCE Minsk Group.[732]

Western Sahara

The legal approach of the EU's judiciary was considered earlier (sub-section 4.2.2) and is therefore excluded here. At a political level, the EU expressed a desire to maintain a neutral position vis-a-vis Western Sahara through several of its institutions referring repeatedly to the UN as the leading force in this case.[733] Nevertheless, the EU cannot be considered a neutral observer to the Western Sahara conflict. This is evidenced by its involvement in contentious trade agreements affecting the disputed territory and its peoples.[734] Despite this, while the EU got actively involved in peace-making efforts in other conflicts,[735] such as Kosovo and Nagorno-Karabakh, besides providing financial support to the refugee camp in Tindouf, it failed to do so in the case of Western Sahara. The arguable geographic distance between Europe and the Western Sahara cannot gloss over the EU's involvement in the exploitation of resources falling within the ambit of the disputed territory. Therefore, it cannot be easily justified why the EU chose not to actively engage in and lead peace-making efforts in the region as it did in others. As such, the EU's political approach to the Western Sahara case may be the most obvious evidence of its divided and contradictory handling of self-determination conflicts.

Catalonia

The reactions of the EU and its Member States were considerably more robust and cohesive with regards to an internal self-determination conflict. In light of Catalonia's independence referendum in 2017, EU Member States rejected Catalonia's secession attempt, but emphasised the need for peaceful dialogue over violent conflict.[736] On social media, former European Council President Donald Tusk stated: "Spain remains our only interlocutor. I hope the Spanish

[732] See further the website of the OSCE at <https://www.osce.org/partnerships/european-union>.
[733] E.g. Press and Information Team of the Delegation to the UN in New York, 'UNGA 77 – Fourth Committee: EU Explanation of Position on Western Sahara Resolution' (*EEAS*, 14 October 2022); (n698) para. 79: "of the right to self-determination of the people of Western Sahara, repeatedly recalled by the European Union in its positions on the subject".
[734] Hugh Lovatt and Jacob Mundy, 'Free to Choose: A New Plan for Peace in Western Sahara' (*European Council on Foreign Relations*, 26 May 2021).
[735] E.g. it continues to be engaged in Kosovo, see Press and information Team of the EU Office/EU Special Representative in Kosovo, 'The European Union and Kosovo' (*EEAS*, 20 October 2021).
[736] 'World reacts as Catalonia calls for Independence' (*Al Jazeera,* 28 October 2017).

government favours force of argument, not argument of force."[737] While not referencing neither the right nor the principle of self-determination of peoples, this statement underscored the EU's stance in the dispute. The supranational organisation and its Member States treated the situation as an internal affair of Spain and would not interfere, let alone acknowledge the separatist government by engaging in discussions with it.[738] The EU Commission considered the referendum illegal under Spanish constitutional law and as a result the conflict was considered an internal matter of Spain, that forbids interference.[739] Thus, priority was accorded to Spain's territorial integrity as an expression of respect for Spain's sovereignty. The Vice-President of the European Parliament, Ramón Luis Valcárcel was more upfront in his reaction, considering the Catalan declaration of independence "a coup against Europe".[740] This stands in contrast to the European Parliament's avant-garde attitude regarding the recognition of Kosovo. Referring to the Spanish government's use of force in attempts to contain the conflict, European Commission First Vice President Frans Timmermans told the European Parliament: "It is a duty for any government to uphold the rule of law, and this sometimes requires the proportionate use of force. Respect for the rule of law is not optional; it's fundamental".[741] The Budget Commissioner Günther Oettinger even called the situation in Spain a "civil war" that was planned by Catalonia and in which the EU can only mediate if asked.[742] Overall, the EU's responses to the situation were considerably different to the Kosovo situation; they condemned Catalan secessionist attempts and unambiguously considered the whole affair an internal matter that precluded external interference. Obviously, the circumstances leading to Kosovo's and Catalonia's independence declaration were considerably different, offering grounds for justifying the different reactions.[743] Nevertheless, in both cases there was no acute violent oppression from the side of the parent state, which calls into question why Catalonia was considered an internal matter falling within Spain's sovereignty, but Kosovo was not considered

[737] Charles Michel on Twitter (@eucopresident) on 27 October 2017 at https://twitter.com/eucopresident/status/923914819631271936.
[738] (n695): "this is an internal matter for Spain that has to be dealt with in line with the constitutional order of Spain.".
[739] Saim Saeed, 'Brussels says Catalan Referendum was 'not legal'' (*Politico,* 2 October 2017).
[740] Ramón Luis Valcárcel, 'A Coup Against Spanish Democracy is a Coup Against Europe' (*The Globe and Mail,* 30 September 2017).
[741] Richard Bravo, Jones Hayden, 'EU defends Spain's Right to use 'Proportionate' Force' (*Bloomberg,* 4 October 2017).
[742] Alexandra Ma, 'EU Commissioner says Spain could be on the Cusp of a 'very Disturbing' Civil War' (*Business Insider,* 6 October 2017).
[743] See also Mimoza Ahmetaj, 'Serbia Should Stop Comparing Catalonia to Kosovo' (*EU Observer,* 10 October 2017).

an internal matter falling within Serbia's sovereignty.[744] In fact, Serbia raised this very point in a statement.[745] Tellingly, while most EU countries rejected the notion of a Catalan independence, European regions voiced support, such as Sardinia and Veneto in Italy, once again underscoring the potential impact of self-determination conflicts within the EU.[746]

Scotland

As with the Catalan case with the Scottish independence movements, the EU as supranational organisation has noticeably avoided getting entangled in the conflict of interest between the region and their parent state. Statements issued by individuals and representatives of EU institutions show a tendency to support for parent state in both cases. The most crucial responses to the Catalonia conflict have already been considered above and show strong condemnation of secessionist attempts while emphasising the EU's neutral position. With regards to Scottish independence attempts, a change of attitude is perceivable before and after Brexit. As long as the United Kingdom was a Member State of the EU, efforts were made from the supranational plane to dampen enthusiasm for secessionist attempts by emphasising how difficult the post-secession EU accession processes may be for an independent Scottish or Catalan state, accompanied by warnings that joining the EU as independent states right-away may not be possible.[747] Scottish and Catalan nationalists were told they may need to be independent new states outside the EU for an unforeseeable period of time.[748] This changed with regards to Scotland after Brexit. Former European Council President Donald Tusk suggested after Brexit that the EU as supranational organisation would be sympathetic towards the prospect of an independent Scotland within the EU.[749] Thus, while before Brexit reactions were reserved, they seemed to open once the United Kingdom ceased to be a Member State and the conflict was thereby 'outsourced'. This perception is shared by former President of the European Council Herman van Rompuy in an interview with BBC.[750]

[744] This was an issue discussed in the majority of submissions to *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (n288); see also Daniel Meester, 'The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession' (2011) 48 Canadian Yearbook of International Law 223-243.
[745] 'Serbia accuses World of Double Standards over Catalonia and Kosovo' (*Reuters,* 3 October 2017).
[746] Elisabeth O'Leary, Leah Schnurr, 'Catalan Standoff touches Hearts beyond Spain' (*Reuters,* 6 October 2017).
[747] 'Scottish independence: Scots EU independence plan 'now untenable'' (*BBC News,* 13 December 2013).
[748] William James, 'Barroso ruffles Scottish Feathers over EU Membership' (*Reuters,* 16 February 2014).
[749] "'Empathy' for Independent Scotland joining the EU says Tusk" (*BBC News,* 2 February 2020).
[750] (n696).

Evaluation

EU responses to different self-determination conflicts within and beyond its own borders were mixed. With Kosovo Member States and institutions expressed overwhelming support for secession, with some Member States going as far as endorsing the doctrine remedial secession. A majority of Member States did not consider the formal step of declaring independence as violation of international law, in line with the ICJ's finding. On the other hand, when Catalonia declared independence from Spain in 2017, EU responses ranged from condemnation to avoidance by referring to respect for Spain's sovereignty and leaving Spain to settle the conflict. Throughout the height of the conflict between Catalonia and Spain, references to the right to self-determination were generally avoided by EU representatives. Instead, emphasis was placed on Spain's state sovereignty and the principle of non-intervention in internal affairs. Overall, EU responses to self-determination cases beyond its own borders suggest a more generous approach when it comes to recognising and referencing the right to self-determination of peoples compared to internal self-determination cases. In internal cases of self-determination conflicts, references to the right to self-determination of any party involved appear to be avoided. In many cases, such as Scotland and Nagorno-Karabakh, the perception seems to prevail that expression of the right to self-determination should preferentially occur through democratic processes, rather than through the avenue of national or remedial self-determination and thus the route of independence.

4.2.4 Grounds for a democratic right to self-determination of peoples in the EU?

As alluded to throughout section 4.2.1, besides questions of external self-determination, the right to self-determination of peoples may also play a role through its internal dimension.[751] Particularly in the context of EU integration, the spectre of democratic processes and guarantees as fulfilment of international self-determination obligations raises interesting and important points.

Using the legal approaches to the right to self-determination in the context of indigenous peoples' rights as an example of a framework, internal self-determination aspects have been elaborated in detail and brought to the forefront of self-determination claims, more than in general international law.[752] This made the right accessible to indigenous peoples and

[751] (n139) paras. 121, 126.
[752] Weller (n32) 143-146.

applicable in contentious disputes without raising the fear of opening the Pandora's box of fragmentation.[753] Instead, equal participation and free and prior consent are crucial factors under the indigenous right to self-determination of peoples, alongside autonomy.[754] Such developments in the doctrine of self-determination , have not yet specifically impacted the EU context . Rather, Alfred de Zayas considered the link between democratic and human rights guarantees and the right to self-determination in the context of the EU when he reacted to the 2017 Catalan independence referendum: "the denial of the right of the Catalans to hold a referendum is in itself a serious denial of democracy"[755] and "the European Union is based on three pillars: democracy, rule of law and human rights. When you ignore self-determination, you are violating all three".[756] Despite such contributions, while generally the relation between democracy and self-determination was recognised early on (suffice to remember Wilson's ideas of national self-determination based on peoples' consent), such thoughts have remained underexplored in the practical and theoretical context of the EU.

Further exploring the lure of democracy as a vehicle for self-determination in the EU, one could think of the principle of conferral anchored in Art. 5 TEU. The principle of conferral ensures that the transfer (or conferral) of power to the supranational entity from the Member State in a specific matter is based on its own consent and thus by extension consent of its *demos*. What the principle, however, does not consider, are answers to cases in which groups within that *demos* are not adequately represented.

Coming from the opposite end, one could also contend that Art. 48, the provision regulating the modification of the Treaties, proves that not all democratic sovereignty is given up by the Member States upon joining the EU, as it leaves room to change the Treaty provisions. Still, one might argue that due to the dependence of any changes on majority requirements, it does not allow for a 'real' sovereign act. Nicolas Levrat, for example, holds that "genuine" self-determination only exists where a unilateral decision is possible, otherwise, the situation is one of "co-determination", but not self-determination.[757] He further argues, that states renounce their self-determination by joining the EU, and calls this phenomenon the "paradoxical relationship between the principle of self-determination and the European Integration

[753] ibid, 120, 126-134.
[754] International Work Group for Indigenous Affairs, *Indigenous Peoples' Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination* (2019); HRC, 'Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples' A/HRC/39/62.
[755] Alfred de Zayas, '4 Questions on Catalonia' (*Alfred de Zayas*, 11 November 2017).
[756] Coppieters Foundation, 'UN Expert on Self-Determination Warns EU' (*Coppieters*, 2 February 2018).
[757] Nicolas Levrat, 'The Right to National Self-Determination within the EU: A Legal Investigation' (EU Borders Working Paper 08, September 2017) 5.

process".[758] On one hand this can be considered an accurate observation, if viewed from the perspective of traditional sovereignty. The danger of considering 'full' self-determination as only entailing unilateral actions disregards the whole picture: self-determination is not given up, nor can it be given up, as it is a right held by peoples under all circumstances. The crux about self-determination is that there must be a real option to question the situation as it is and be heard and able to have a real choice. That does not require unilateralism as *conditio sine qua non*. Furthermore, recalling the multi-layered dimension of self-determination, such a viewpoint falls short of considering other avenues through which it might operate. Admittedly, the status quo in the EU does not offer many mechanisms to protect self-determination, as neither the principle nor the right are being explicitly considered. As a result, one can take Levrat's observation as incentive to build more room for self-determination in the EU. However, in isolation, unilateralism in relation to self-determination risks misrepresenting the complex situation of sovereignty and self-determination of peoples in the EU.

The Western Sahara example raised above may signal a tentative indication towards understanding the breadth of self-determination with the emphasis on consent. In its finding, the ECJ held that the Sahrawi people's consent was necessary to the Agreement considering possible effects on their right to self-determination, which remains an unsolved issue.[759] This may be a first subtle sign that by analogy, the consent of peoples within EU may equally have to be required in cases where agreements are concluded affecting their right to self-determination. However, a number of qualifications must be considered for this analogy. First, in the Western Sahara case, the ECJ only considered the Sahrawi people's consent under the question of potentially affected third party considering the relative effects of treaties (Art. 34 VCLT). Thus, this represents a specific context of application. Second, in the Western Sahara case there is no question that the right to self-determination of peoples is at issue. By contrast, in the case of Catalonia, it is highly disputed whether the right is applicable at all. Third, the question of the Sahrawi's peoplehood is not contested, as the inhabitants of the former Spanish colony are considered peoples following Arts. 73, 76 UN Charter and UN General Assembly Resolutions 1514 (XV) and 1541 (XV).[760] This aspect is likely to prove more difficult to determine in EU Member States, especially where a people is not constitutionally recognised.

However, the non-recognition of the significance of the right to self-determination of peoples in the EU supranational context remains prevalent, and as a result these elements have neither

[758] ibid.
[759] (n698) para 106.
[760] (n70); UNGA Res 1541 (XV) (n69) 29.

been sufficiently explored nor formulated. Overall, no distinct European approach emerged under the leadership of the EU. Open questions remain regarding self-determination disputes in EU Member States with virtually no ECJ jurisprudence or supranational policies on these matters that could serve as a guideline. EU reactions to self-determination conflicts have been inconsistent and have ignored these conflicts, and leaving them in the hands of Member State has not proven to contribute to any progress. Above that, the EU's ambivalent position on self-determination of peoples within its own boundaries undermines its stance in the face of international self-determination conflicts.[761]

4.3 The importance of the 'third level' in the EU

Based on the EU's functioning, and its decision-making processes and considering the division of competences in the Treaties as analysed in the first half of this chapter, it becomes clear that the national level, represented by the governments of Member States, is crucial to supranationalism and the development of supranational governance. While this remains true, in literature, the notion of a 'third level' in EU governance became popular with the rise of the concept 'multi-level-governance' in the 1990s.[762] 'Third level' refers to subnational actors participating in EU governance, in addition to the national and the supranational plane. The concept of multi-level governance takes account of the fact that decision-making takes place at different levels in the EU.[763] These different levels, or actors, are seen as interconnected to the extent that decisions on one plane influence the other.[764] A concept rather than a theory as such, multi-governance is frequently referred to in analysing the EU's political system, as this avoids the difficulty of establishing a fitting theorem and making it "increasingly difficult for any one particular theory to offer an accurate picture of the EU".[765]

In this thesis, the argument is raised that national borders and the notion of statehood are entry tickets to meaningful participation in EU supranational developments conflicts with the pursuit of collective self-determination by peoples. The proposal, thus, is to explore participation in supranational developments as alternative method of self-determination, beyond the traditional

[761] Elisenda Paluzie, 'The Catalan Conflict: A Human Rights Issue in the EU' in Coppieters Foundation (ed), *Self-Determination in a Context of Shared Sovereignty: How to Devise a European Approach?* (Coppieters Foundation 2020) 46.
[762] Arjan H. Schakel, 'Multi-level Governance in a 'Europe with the Regions' (2020) 22(4) The British Journal of Politics and International Relations 767.
[763] Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield Publishers Inc. 2001) 2.
[764] ibid.
[765] (n606) 5.

restrictions of independent statehood. Rather than advocating for such a change, however, this section draws on existing facts that suggest this change is already gradually unfolding.

4.3.1 What are the subnational entities in question?

In scholarship, when referring to subnational entities in the context of the EU what is usually meant are regional governments.[766] Yet, in the European Committee of the Regions (CoR) local authorities, such as locally elected political representatives from cities, rather than entire regions, are involved too. In fact, Art. 300(3) TFEU provides that the CoR consists of "representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly". Furthermore, the CoR as well as the 2016 Pact of Amsterdam (*The Urban Agenda for the EU)* are committed to increasing the level of involvement of urban authorities in the EU, particularly with a view to regulations affecting urban areas, funding, and knowledge on how urban areas evolve.[767] The 2016 Pact was established with the awareness:

> (...) that urban areas play a key role in pursuing the EU 2020 objectives and in solving many of its most pressing challenges, including the current refugee and asylum crisis. Urban Authorities play a crucial role in the daily life of all EU citizens. Urban Authorities are often the level of government closest to the citizens. The success of European sustainable urban development is highly important for the economic, social and territorial cohesion of the European Union and the quality of life of its citizens.[768]

This rationale aligns with the point of departure of this thesis, which argues that collective self-determination must be accessible to peoples without the requirement of independent statehood, the more so in contexts of supranational governance, where the subnational level is not only affected by decisions made by the national and supranational plane, but often crucial to their realisation. Consequently, this study follows the example of the CoR in defining subnational entities not only as regional governments, but as also including local authorities. Including local authorities in subnational entities takes account of the fact that peoples are also represented through such smaller authorities as opposed to only regional or national elected governments. At this point, it is worth clarifying that the idea is not to territorially fragment the EU or its

[766] E.g. (n762) 768.
[767] 'Establishing the Urban Agenda for the EU: Pact of Amsterdam' (futurium.ec.europa.eu, 30 May 2016) 3.
[768] ibid.

Member States, but to offer mechanisms, which subnational entities may choose to access to make efficient use of self-determination promises. Obviously, in international law self-determination is only extended to peoples, not any groups and surely not individuals. Therefore, the question of what peoples can claim self-determination in the EU within the model proposed here is relevant, which will be explored in section 4.4.

4.3.2 How do subnational entities participate in EU supranationalism so far?

Before moving to proposals about why and how subnational participation in EU supranationalism could be increased, it is worth considering the mechanisms and options that currently exist, which indicate the existence of such a development.

Since 1994, the CoR is the assembly of regionally and locally elected representatives that has become the EU's advisory body looking after regional interests in EU legislation and policymaking. With the adoption of the Treaty of Maastricht, the CoR was introduced as an advisory body to the EP, the Council and the Commission through Art. 13(4) TEU. According to Art. 300(4) TFEU the members of the CoR are not bound by any mandatory instructions. Instead, they operate independently and in the EU's "general interest".

Composition of the CoR and appointment of members

To facilitate better visualisation of the CoR as an institution, it may be mentioned here that the number of members is limited to 350.[769] Its composition is determined by the Council, which must act unanimously following a proposal from the European Commission. Members of the CoR are appointed for a (renewable) five-year term and Member States submit their list of candidates to the Council.[770] A member of the CoR cannot simultaneously be a member of the European Parliament. While its members are proposed and elected by other institutions (however, regional governments and/or local and regional government associations can propose candidates that may be considered by the national government),[771] the CoR has the authority to elect its own chairman, officers and rules of procedure.[772] The chairman must convene a CoR meeting at the request of the European Parliament, the Council or the Commission, but the CoR may also meet on its own initiative.[773]

[769] Art. 305 TFEU.
[770] Art. 305 TFEU.
[771] In Germany, for example, the Bundesrat can do so, see also (n762) 768.
[772] Art. 306 TFEU.
[773] Art. 306 TFEU.

The CoR's advisory function

The CoR's advisory competence can be classified into two types. Under the first category, it must be consulted by the European Parliament, the Council or the Commission, where the Treaties explicitly provide for it.[774] Under the second category, the CoR's involvement as an advisory body is not mandatory, but subject to these institutions' own assessment.[775]

In exercising its advisory function, the CoR is generally not bound by deadlines, but the European Parliament, the Council or the Commission can set a time limit for the submission of an opinion. Once that time limit expires, these institutions are free to continue without consideration to the CoR, even if the it failed to submit its opinion.[776] The CoR must be informed where an opinion is requested from the Economic and Social Committee pursuant to Article 304.[777] If, in this case, the CoR considers that specific regional interests are involved, it may also contribute an opinion on the matter.[778] In all other general cases, if the CoR deems it necessary, it may also issue an opinion on its own initiative.[779]

Besides such general competences, the CoR's mandatory advisory function is regulated in the TFEU with regard to specific areas. These are matters concerning:

(1) transport by rail, road and inland water way (Article 100 (2));
(2) the issuing of guidelines to be taken into account by Member States and the adoption of measures to encourage cooperation between Member States in their employment policies, excluding measures concerning the harmonisation of laws and regulations of the Member States (Art. 148(2), Art. 149);
(3) fundamental social rights (Arts. 151 and 153(1));
(4) the adoption of implementing regulations relating to the European Social Fund (Art. 164);
(5) the adoption of incentive measures – again, excluding any harmonisation of the laws and regulations of the Member States – concerning policies touching on culture (Art. 167);

[774] Art. 307 TFEU.
[775] ibid.
[776] ibid.
[777] ibid.
[778] ibid.
[779] ibid.

(6) human health protection (Art. 168 (1), (4));
(7) economic, social and territorial cohesion (Art. 172 in conjunction with Art. 174);
(8) trans-European networks (Art. 172 in conjunction with Art. 171(1));
(9) the internal market (Art. 172 in conjunction with Arts. 171(1) and 26);
10) legislation regarding structural funds and the implementation of regulations relating to the European Regional Development Fund (Arts. 177, 178);
11) EU environmental policies (Arts. 191, 192(2));
12) EU energy policies (Art. 194(2)).

It can be seen from these regulations ensuring a higher level of involvement of the CoR as well as from agendas to increase subnational participation in EU legislation, such as the above-mentioned *Urban Agenda for the EU*, that developments away from a strict orientation following national governments acting within the contours of independent statehood have been unfolding since at least the last three decades. The EU explicitly recognises that national Member States governments on their own are insufficient in promoting development at regional and other subnational levels.

By creating the above-observed mechanisms enabling participation of subnational entities, avenues for collective subnational interest representation were put in place. This supports the observation of a shift towards acknowledgement that the independent state is not the only legitimate and capable entity to ensure collective political, social, cultural and economic development. It also suggests that self-determination guarantees can be pursued beyond notions of independent statehood, as exemplified in existing EU subnational participation mechanisms. Such developments do not necessarily undermine the relevance of states as key actors in supranationalism. Rather, it may be argued that increased direct involvement of subnational entities enhances the democratic legitimacy of national governments representing the entirety of peoples living within their state territory. Further, as found earlier, within the EU, strong intergovernmental elements persist in crucial areas that remain in the exclusive realm of Member States governments (e.g. the amendment of EU Treaties). Also, the involvement of the CoR, as described above, remains consultative within the power of EU institutions in determining whether its decisions need to be followed. Consequently from a formal perspective

on decision-making processes involving the CoR, the final word remains with national governments.[780]

Mechanisms for the CoR to defend its interests on the supranational level

Even though national governments remain the key actors in EU decision-making processes (alongside the respective EU institutions), the TFEU includes provisions allowing the CoR to protect the prerogatives given to it. Notably, the CoR is eligible to bring a case before CJEU (Art. 263 TFEU), if it considers that a legislative process did not unfold following the regulations about the involvement of the CoR.[781] The CoR also gained the right to refer cases concerning infringements of the principle of subsidiarity to the CJEU (Art. 8 Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality).[782] The introduction of such defence mechanisms shows how the role of the CoR was continuously strengthened since the Treaty of Maastricht, which underlines the growing relevance of subnational entities in EU governance,[783] that requires reflection in the interpretation and application of the principle and right to self-determination.

Other avenues for subnational participation in the EU

While from the EU's supranational perspective the key institution ensuring representation of the subnational level is the CoR, there are additional avenues through which participation can be ensured. One such way is through regional representatives in Council meetings in accordance with Art. 16(2) TEU, providing subnational entities formal and direct access to EU legislative process,[784] though access is dependent on the respective Member State's national laws. Thus, a mixture of supranational law (in the form of Art. 16 TEU) and national constitutional law may represent another pathway for subnational entities to be involved on the supranational plane outside the CoR. Member States that allow for regional representatives in the Council are

[780] Schakel argues that politically, multi-level governance involves a significant sharing of authority, while agreeing that from a formal perspective the right to make decisions lies with national governments or EU legislative organs (n762) 767.
[781] However, it has not yet made use of that right, see further Salvatore Fabio Nicolosi and Lisette Mustert, 'The European Committee of the Regions as a Watchdog of the Principle of Subsidiarity' (2020) 27(3) Maastricht Journal of European and Comparative Law 284-301.
[782] European Parliament, 'The Committee of the Regions' (*Fact Sheets on the European Union | European Parliament*, 2023).
[783] See also Frederic Eggermont, 'In the Name of Democracy: The External Representation of the Regions in the Council' in Carlo Panara and Alexander de Becker (eds.), *The Role of the Regions in EU Governance* (Springer 2010) 13.
[784] (n762) 769.

Austria, Belgium, Finland, Germany, Italy, Portugal, and Spain.[785] Member States like Germany require the consent of its constituent Länder for the transfer of sovereignty to the EU (Art. 23(1) GG). Germany also follows its national division of competences with regards to the supranational level: for example, if EU laws or policies affect subject matters within the exclusive competence of the Länder, the representative competence of the German national government on the supranational plane is transferred to representatives chosen by the Länder (Art. 23(6) GG). France on the other hand provides less ample involvement of its subnational entities,[786] which underlines how much the process of increasing subnational participation in the EU depends on the cooperation of national governments.

While not providing a mechanism for participation per se, Art. 4(2) TEU describes the EU as striving to be "inclusive of regional and local self-government". This has prompted scholars to observe that "central governments are no longer the only relevant players".[787] At the same time, the process of Europeanisation is also criticised as having affected the power balance to the detriment of regions and in favour of the national level.[788] Arguably, with growing influence of the supranational plane, which is predominantly shaped by national governments, these national governments have become increasingly detached and politically independent from their own subnational domestic actors (regions or other local groups).[789] Such divergent developments underline the complexity of the relationship between various authorities in the EU, which all struggle on different planes for the pursuit of their respective interests.

4.3.3 Reasons underlying the increased participation of subnational entities

The national governments of EU Member States are widely accepted as democratically legitimate representatives of their entire population. Hence, some may question the rationale for increasing the participation of subnational entities in the EU. Especially, since existing mechanisms appear quite extensive. However, conflicts like between Spain and Catalonia, underline that these are not sufficient in all cases, mainly because it remains within the gift of national governments to allow for bar regional representation and participation in the EU. This

[785] A discussion of each state's regional representation is offered by Carlo Panara and Alexander de Becker, 'The "Regional Blindness" of Both the EU and the Member States' in *The Role of the Regions in the European Union* (Springer 2010) 297-346.
[786] See also ibid 302, 304, 311, 315, 317, 327, 334.
[787] Michaël Tatham, 'Going Solo: Direct Regional Representation in the European Union' (2008) 18(5) Regional & Federal Studies 511.
[788] See, for example, Tanja Börzel, *States and Regions in the European Union: Institutional Adaptation in Spain and Germany* (CUP 2001) 163.
[789] ibid 314.

section explores the reasons that moved the EU and some of its Member States to embrace multi-level governance and to actively involve the third level in EU decision-making processes.

The subnational level as key actor in implementing EU policies

With the progressing of European integration since 1950, it was not only national governments that became obliged by EU laws and policies, but also regional and local authorities. At first this passive involvement gradually became more active, as subnational entities took on responsibilities to implement EU policies, especially in States with federal or comparable regional systems.[790] However, even in States with more centralised governance systems, regional and local authorities are affected by supranational decisions. A recent example is the adoption of the Temporary Protection Directive in March 2022. Under the directive, individuals fleeing from the war in Ukraine are granted residence permits for an initial period of one year in the Member State in which they arrive. Regions and cities, however, are the entities taking immediate responsibility for housing and supplying refugees with necessities, while also having "to shoulder the biggest consequences of the economic sanctions" according to a 2022 EU report.[791] While the accommodation of refugees is one particular example, it has been acknowledged in various reports that regions are also key actors in other EU policy areas, such as supporting the "green transition",[792] achieving the EU's sustainable development goals,[793] the formulation and implementation of common standards[794] or transport[795].

[790] Michael Bruter and others, *The Conference on the Future of Europe: Putting Local and Regional Authorities at the Heart of European Democratic Renewal* (European Union 2021) 28; CoR, 'Opinion of the Committee of the Regions of 15 September 1999 on the Implementation of EU Law by the Regions and Local Authorities' (European Union 1999) 3; European Commission, 'European Governance – A White Paper' (2001) Official Journal of the European Communities C 287 9.
[791] Secretariat General of the CoR, *EU Annual Report on the State of Regions and Cities* (European Union 2022) 13, 15-18.
[792] Conference on the Future of Europe, 'Conference on the Future of Europe: Report on the Final Outcome' (9 May 2022) 45.
[793] Ingeborg Niestroy, 'Sustainable Development Goals at the Subnational Level: Roles and Good Practices for Subnational Governments' (Sharing Tools in Planning for Sustainable Development, May 2014) 1.
[794] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committeee of the Regions: An EU Strategy on Standardisation - Setting Global Standards in Support of a Resilient, Green and Digital EU Single Market' (2 February 2022) COM/2022/31 9.
[795] CoR, 'The Future of the EU and the Role of the Regions: Proceedings of a Conference held on 10 April 2018 on Brussels' 4; (n791) 59.

Democratic legitimacy of the EU through more direct participation and transparency

A second significant motive for increasing third-level participation is based on the recognition that higher participation of subnational entities in EU supranational processes furthers its democratic legitimacy.[796] This can be based on different reasons.

First, the fact that the subnational level is affected by EU laws and policies by not only being the receiving party, but crucially being involved in implementing them, justifies and requires more involvement in the lead-up of such laws and policies to ensure they are relevant to the regions and cities they affect and to preserve subnational diversity and take account of specific needs.[797]

Second, subnational authorities are considered essential in bringing the EU closer to its citizens,[798] *inter alia* by enhancing knowledge about the EU and how it operates.[799] This in turn increases transparency and possibly support for the EU among citizens, if tangible, beneficial differences are recognised to stem from the supranational, rather than national level.[800] The 1990s saw a surge of debate, political and academic, concerning the legitimacy of the EU, which turned out to be the rationale for amendments introduced by the Treaty of Amsterdam designed to enhance the EU's legitimacy.[801] It was at that time, when discussions concerning a potential constitution for the EU were seriously undertaken. Eventually, the so-called Constitutional Treaty failed at two referenda in France and the Netherlands, while fifteen Member States ratified it.[802] Although the negative outcomes of the referenda had arguably "little to do with anything new in the Constitutional Treaty", the result was widely perceived as a failing of the EU as constitutional project and the beginning of a deep identity crisis.[803] As such, increased involvement of the third level is a way to address the issue of democratic deficit often raised in the context of EU governance.[804] Subnational involvement also strengthens democratic legitimacy through increased direct participation making the third level a crucial link in the process of European unification.[805] Regions and local authorities are considered important

[796] European Commission (n790) 9.
[797] CoR (n790); see also European Commission (n790) 5, 8, 9.
[798] Assembly of European Regions, 'Declaration on Regionalism in Europe' 2; European Commission (n790) 3.
[799] CoR, 'Opinion: Local and Regional Authorities in the Permanent Dialogue with Citizens' (140th Plenary Session, 12-14 October 2020) CIVEX-VII/001 para 12.
[800] ibid para 2;
[801] (n450) 24.
[802] ibid 27.
[803] ibid 29.
[804] Assembly of European Regions (n798) 4.
[805] ibid 3 (No. 3 in the preamble); CoR, 'Resolution of the Committee of the Regions on 'The outcome of the 2000 Intergovernmental Conference and the discussion on the future of the European Union'' (2001) Official Journal of the European Communities C 253/08 para 17.

forces in the pursuit of European integration due to their closer engagement with citizens and communities.[806] In fact, already in the Declaration on Regionalism in Europe adopted by the Assembly of European Regions in 1996, the explicit political will to further promote regionalism in Europe was expressed. Through stronger regionalism, regions should be enabled to shoulder more responsibility "in a Europe that is closer to the citizen".[807]

Third, at a CoR conference in 2018, the heightened importance of involving the subnational level in EU supranationalism was explicitly linked to growing movements for greater autonomy and independence in several European regions.[808] Closely related to this observation, is the recognition that individuals do identify with their regions as a part of their collective identity.[809] Thus, it can be said that increasing subnational participation takes account of diversity in collective identity within Member States that requires tailored responses. In this sense, this thesis' argument to reconsider the interpretation and application of self-determination of peoples without restricting it within national borders is supported in its rationale by this recognition.

Recognising that inclusion of regional and local governments in EU decision-making is dependant on the willingness of Member States, it can be expressed that Member States "are under an obligation to strengthen interaction" with these entities.[810]

Furthering socio-economic development

The advancement of socio-economic development is a key reason for restructuring EU governance to include the subnational level.[811]

Regions are considered key economic actors as they manage the majority of public investments, and regional and local administrations represent an important level of government in many EU Member States.[812] Economic disparity in different regions is arguably more efficiently addressed by directly involving respective authorities in decision-making processes that affect them.

[806] (n799) 8.
[807] ibid 2.
[808] CoR (n795) 1.
[809] Assembly of European Regions (n798) 3 (No. 6 in the preamble).
[810] European Commission (n790) 2, 9.
[811] ibid 2; see also Congress of Regional and Local Authorities of Europe (CLARE), 'Recommendation 34 (1997) on the Draft European Charter of Regional Self-Government' (Recommendation 1349(1997)) 5.
[812] See further Ambra Kokaj and Blerton Sinani, 'The Multi-level Governance of the European Union: the Role of the Local Government' (2023) 13(1) Juridical Tribune 35, 37.

Ensuring cultural diversity

Higher subnational level involvement is also considered to facilitate promotion and maintaining of cultural diversity.[813] This is particularly important given views that European integration may negatively affect diversity by incentivising harmonisation across various areas, which may wash out distinct cultural differences as a by-product.[814]

Self-determination

Lastly, and most notably considering the rationale of this study, is the fact that subnational participation in EU governance, was explicitly linked to self-determination of peoples in the Declaration on Regionalism in Europe adopted by the Assembly of European Regions in 1996. In paragraph 3 of the preamble the Declaration reads:

> 9. Being aware that the regions, within the national legal order, are an indispensable element of democracy, decentralisation and self-determination, by allowing people to identify with their community and by increasing the opportunities for their participation in public life.

Even though this may be considered a reference in passing, rather than a substantial one, it supports the observation this study makes; namely, that self-determination of peoples is relevant and applicable to supranational governance contexts based on its objectives and functions, and in particular in the context of the EU, where this is traditionally contested.

4.3.4 Strengthening subnational participation in the future

The question of how the participation of the subnational level in EU governance can be strengthened is one that offers grounds for further research. Ideas proposed by scholars include but are not limited to introducing a right to speak for regional representatives at the Council, to extending co-decision rights or even veto-powers to the CoR in addition to its advisory function and to increase the role of regional and local governments in deciding on the lists of candidates

[813] Assembly of European Regions (n798) 2.
[814] See further Lauren M. McLaren, 'Opposition to European Integration and Fear of Loss of National Identity: Debunking a Basic Assumption Regarding Hostility to the Integration Project' (2004) 43(6) European Journal of Political Research 895-912.

for the CoR.[815] Of course, other obvious ways to increase the participation of subnational entities in EU governance is to expand the CoR's involvement in EU legislative processes beyond the currently recognised areas as listed above. It could also be considered to create more institutions for the representation of subnational governments in the EU complementing the work of the CoR.

Rather than focussing on such policy tools, however, this study proposes that a legal tool already exists that could enable peoples in the EU to access supranational governance without making it dependent on the notion of independent statehood. That is the right or principle to self-determination of peoples, which by its object and purpose is suitable to defend the participation of peoples on the subnational level. However, this option remains unexplored so far. Only tentative references to self-determination of peoples are made by scholarship in relation to a right to democracy and the EU itself – as pointed out previously – seeks to avoid controversy by not addressing self-determination of peoples if possible.

4.4 The peoples eligible for self-determination in the supranational context of the EU

If self-determination of peoples is to be discussed in the context of the EU, the meaning and relevance of the entity 'peoples' as right holder needs to be discussed as well. The notion of a European people is often raised in connection with the political concept of a constituting *demos* of the EU on the one hand, and the forging of a European identity on the other hand.[816] EU citizenship is another term usually included in discourses on this topic. The origin of such views evidently lies in the constitutionalist school of thought. As highlighted earlier in this study, self-determination of peoples only applies to those within the parameters of a *people*. Minorities, religious, ethnic or other groups cannot base claims on the right to self-determination of peoples unless they are considered to also constitute a 'people'.[817] Yet, the concept of peoplehood lacks clarity in international scholarship and remains controversial. The more so if applied to so far unresearched contexts of application like that of the EU. Consequently, this section poses the question, how the legal subject of an international right to self-determination of peoples applicable to supranational governance contexts could be defined. It explores this question based on indicators concerning emerging approaches towards the notion of peoplehood from within the EU itself.

[815] (n762) 768-769.
[816] Daniel Innerarity, 'Does Europe Need a Demos to Be Truly Democratic?' (2014) LEQS Paper No. 77/2014 1-7.
[817] Sub-section 2.3.6.

4.4.1 Disentangling citizenship, identity, values, peoples and culture

It is imperative to have clarity about the terms used. Consequently, this section distinguishes five key terms so far used in this chapter, as they are crucial for this sub-section: citizenship, identity, values, peoples and culture. Naturally, there is a connection between these terms, which is often highlighted in research. Gerard Delanty, for example sees "European citizenship" as "important dimension to the integration of European society" as a whole,[818] and Galina Zapryanova and Lena Surzhko-Harned assess how supranational identity impacts cultural values in Europe.[819] Thus, the terms are often used in close relation to each other and while this is for good reason, to allow for more clarity, this section aims to disentangle the terms and highlight their distinct contents. In doing so, it will not be attempted to offer conclusive substantive definitions of these terms. In contrast to the question of self-determination in the context of the EU, where scholarly engagement is comparatively scarce, a substantial body of literature exists concerning attempts to define and distinguish the above-mentioned terms. While literature on the topic shows that this is a difficult endeavour,[820] it is beyond the scope of this thesis to provide steadfast definitions. Instead, a distinction of the five terms based on a functional approach will suffice.

On the surface, the first observation to make is that not all of the terms entail legal consequences. Identity, for example, as a socio-psychological notion, does neither produce rights nor obligations, although, as mentioned earlier, the subjective element of self-identification as belonging to a certain group can be one of many elements viewed as requirements to earn recognition for a certain protected group under the right to self-determination of peoples (e.g. indigenous peoples' rights). Neither does 'culture' in and of itself produce legal rights or obligations, yet it can be protected through legal means, for example in the form of human rights treaties including provisions protecting culture. One example for such a provision is Art. 27 ICCPR, which protects the right of people to enjoy their own culture.

[818] Gerard Delanty, 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1(3) *Citizenship Studies* 285.
[819] Galina M. Zapryanova, Lena Surzhko-Harned, 'The effect of supranational identity on cultural values in Europe' 2016 *European Political Science Review* 547-566.
[820] See, for example, Ted Cantle, *Community Cohesion: A New Framework for Race and Diversity* (Palgrave Macmillan 2008) 127-162.

'Values' are often used as markers for a specific identity, and they capture how a society views itself.[821] Except where certain societal values are explicitly protected, e.g. in Art. 2 TEU, they usually do not possess legal valence, unless values are interpreted as being coinciding with legal principles. It is suggested here, however, to refrain from interpreting values as legal principles, first and foremost because the latter expression already has specific meaning in international law language. *Ius cogens* rights and *erga omnes* obligations, as well as the principle that reparation must be paid for a damage caused, are not societal characteristics, even though they might reflect the principles a society considers just and important, but constitute ratified codes of conduct in an international legal environment.[822] Nevertheless, this thesis upholds that it is conceivable, that legal principles may evolve into societal values. In a certain way, this is what happened in the EU, even though in this example, the introduction of fundamental values happened with the idea of forming a European society already in mind.[823]

'Peoples' only enjoy status as legal subject in international law as far as self-determination is concerned. In constitutional law, peoples are usually referred to as the entity addressed by the constitution and as entity legitimising it (at least in democratic systems). While identity, culture and values might be brought forward in attempts to define a people,[824] these terms are not interchangeable and thus cannot be used instead of people.

Lastly, citizenship simply refers to the formal conferral of rights and duties to an individual in the relation to the state, whose citizenship the individual holds.[825] Citizenship is closely connected to spatial limits, [826] as citizenship is often issued on the basis of *ius soli*, but it may also derive from lineage (*ius sanguinis*).[827] EU citizenship derives from national citizenship and therefore does not strictly fall within either category. Putting citizenship and identity in relation to each other, the latter can be built around citizenship or vice versa.[828]

It is a slightly more complex exercise to put the concepts of peoplehood and citizenship in relation to each other. Often, citizens of a state will be equated with peoplehood.[829] Yet, conflicts surrounding self-determination claims from inhabitants of different states across

[821] Of course, it must be acknowledged that the concept of 'values' is highly contested across disciplines. In that sense, this brief explanation suffices only for the purpose of this thesis. For a general overview over the concept of values in sociology see Eva Jaspers, 'Values' (*Oxford Bibliographies* 2016).
[822] The question at hand is to what extent laws represent morals a community decides to adhere to, see further Garrett Barden and Tim Murphy, *Law and Justice in Community* (OUP 2010) 167-188.
[823] See sub-section 4.4.4.
[824] See sub-section 4.4.1.
[825] (n818).
[826] ibid 286.
[827] See European Commission, 'Ius Soli' (*Migration and Home Affairs/European Commission*).
[828] (n819) 549.
[829] See for example below, page 250.

borders suggest that the same is not true the other way round – a people, with a strong emphasis on the element of self-identification as explained above – does not have to consist of individuals sharing the same citizenship. The notion of *irredentism* is one example of this, as well as ideas of Pan-Africanism or Pan-Arabism.

Summarising, the five elements interlink as follows: culture is frequently used to determine a collective identity. Values, as an essentially contested concept, play a role in either helping to determine culture or identity. Altogether, the three elements serve the purpose of demarcating a collective entity: a certain type of society or a people. Citizenship stands out of all these concepts in that it is most recognised in the legal regime, producing veritable rights and obligations for citizens and their respective state. While from the outside citizenship may be an indication of who potentially constitutes a people, citizenship and peoplehood do not always coincide.

4.4.2 Peoplehood as a multi-layered concept

In considering what entity may qualify for being considered a people, one must distinguish between different perspectives from which it is being observed. Hence, if the right to self-determination is applied to the supranational plane, one must distinguish between different layers of peoplehood that can co-exist simultaneously. That peoplehood can be multi-layered is confirmed by constitutional and international law, where it is recognised that part of a state's population can constitute a people in a legal sense without this affecting the peoplehood of the entire state's population. For example, in federal governance systems, such as Germany, the federal constitution recognises the existence of the German people. This is not affected by the *Länder* constitutions' recognition of, say, Bavarians as a people as well. Similarly, the Cantons of Switzerland recognise the peoplehood of their inhabitants, who jointly constitute the Swiss people. Another example relevant to the EU is Spain, which legally recognises the Catalan people as a nation, while they also form part of the Spanish people. Applied to the supranational context of the EU, a third layer would be added in a similar fashion: European peoplehood could refer to the democratic empowerment of the EU's population, without affecting national or subnational peoplehood.

From the supranational EU perspective, 'peoples' are mentioned in six places in the Treaties: Paragraph 2 of the preamble and Art. 1(2) TEU both address the "Peoples of Europe", while Art. 167 TFEU speaks of "European peoples"; Art. 3(1) TEU mentions "the peoples of the EU" and a few paragraphs below reference is made to "mutual respect among peoples" in Art. 3(5)

TEU. Paragraph eight of the preamble of the TFEU speaks of "the other peoples of Europe". As is often the case in the realm of the law of treaties, other than mentioning these terms, the Treaties remain silent as to their exact content. In the variety of terms there is, however, one difference that stands out: it is the usage of the term "European peoples" or "peoples of Europe" in contrast to "the other peoples of Europe". The introduction of the word "other" in the TFEU's preamble must be understood as opposed to the "Peoples of Europe" or "European peoples" used in other provisions. The question then arises, what the "other" refers to. Possible interpretations include peoples of States that have not yet become Members to the EU or even peoples without their own state, e.g. Catalans.[830] Regardless of any clear-cut answer to these questions, in conclusion the Treaties through their texts do not comprehensively answer the question who the 'peoples' in the EU context are. However, it emerges from the different ways in which peoples are addressed in the Treaties, that the EU recognises the possibility that a plurality of potential right holders of the right to self-determination live within its territory. The way the organisation operates indicates that it does at least consider the populations of its Member States, based on their own constitutional approaches, as 'peoples'. This is supported by the fact that Member States are the constituent entities of the EU and also by the fact that the peoplehood of their populations is constitutionally unambiguous, at least on the national level. When it comes to the subnational level, whether or not subnational entity qualifies as a people arguably depends on the respective Member State as mentioned above.

Applying traditional approaches to defining the people eligible for self-determination in the context of the EU

The international law approaches to define 'peoplehood' presented in Chapter 2 naturally do not consider supranationalism, as they emerged against other backgrounds. Given the high degree of cultural diversity across the EU, these approaches' transferability to a situation of supranationalism is questionable. If one considers the decisive mechanisms for EU governance, the territorial approach to defining a people appears plausible on a first look. It is supported by the fact that the EU's powers only extend over its Member States' territories. Consequently, the territorial approach delimits where European peoples can be located. It is also supported by international state practice.[831] However, the territorial approach depends on the outside borders of the EU and is subject to change in case of enlargements or even withdrawals from the

[830] (n681).
[831] (n236) 549-565, 570-571.

organisation, which can affect its geographical delineation. While it may be useful in theory for the determination of the location of European peoples based on the status quo of the EU's territorial boundaries, the question is what importance is placed on the territorial approach in the context of the EU in practice.

In a world characterised by international migration, it seems that the territorial approach on its own cannot be a constituent element anymore. Otherwise, groups emigrating to other countries would lose their 'membership' of one people and automatically become part of the people of the destination country, which can lead to questionable results. First, it is doubtful whether such an exclusively territorial approach aligns with the subjective self-identification of a group in question. Considering that the right to self-determination appertains to peoples and protects their free decision-making, this subjective element is essential. Second, if one were to consider every individual within the territory of the EU as constituting the European people by virtue of their mere presence, this would lead to the debatable result that tourists or other individuals that arguably do neither identify with the EU nor take part in its governance would be included in the collective 'European people'. Third, the territorial approach raises questions as to what to make of EU citizens temporarily working or living abroad. It cannot be assumed that people no longer identify with a collective or community simply because they spend a certain amount of time in a different country, or in the case of the EU in a different supranational governance system. Fourth, the territorial approach cannot be applied to situations like Brexit, where after the withdrawal of a former Member State, some EU citizens remain in the United Kingdom for various reasons, but arguably still identify themselves as citizens of the EU and maintain ties to it. Conversely, equating EU citizenship with EU peoplehood disregards the subjective element of self-identification and does not offer a solution to situations where individuals may be in the EU without EU citizenship. Often, particularly migrants and refugees are at risk of becoming stateless, but the case of *Janko Rottman v Freistaat Bayern* (2013) evidences how even a former EU citizen can be affected by statelessness.[832]

The European peoples: Who can claim self-determination?

When extending the right to self-determination to the 'European peoples' in the context of EU governance, it is crucial to be aware that this does not necessarily entail collective exercise of the right by the entirety of the people. From the perspective of international law, it is also

[832] *Janko Rottmann v. Freistaat Bayern* [2010] ECJ C-135/08 paras. 6-7, 33-35; see further 'Stateless Refugees and Migrants' (*European Network on Statelessness*).

accepted that parts of a recognised people can practically claim and exercise the right to self-determination. This happened in cases where the parent state consented or dissented. For example, in Kosovo, the application of the right to self-determination of peoples was supported by numerous states, despite resistance from the former parent state and other parts of its population. Similarly, the people of Bangladesh seceded from Pakistan based on the right to self-determination with support from India. Notably, after Bangladesh's independence numerous UN Member States recognised its statehood within a relatively short time frame.[833] Thus, in these cases, the fact that only a part of a constitutionally recognised people claimed self-determination did not appear to negatively affect the possibility to view the entity in question as a people in its own right. Mostly, however, the determination of whether a group constitutes a people eligible to claim self-determination depends on the consent of the state in question and is usually determined before any potential exercise of the right to self-determination.[834] As such, Catalans were constitutionally recognised as a nation by Spain before the controversial independence referendum.

Thus, when applying the right to self-determination to the supranational governance context of the EU, it must be taken into account that the entity peoples can emerge from national and subnational levels. However, it is also thinkable to view the question of peoplehood from an entirely supranational perspective if one considers EU laws and policies promoting European identity and if one focusses on the often-discussed question of a European *demos*. The following section will explore the merits of the latter approach.

4.4.3 Peoplehood in the EU through the lens of *demos*

There might be grounds, arising from a contextual reading of the Treaties' provisions altogether, that at least in the case of the EU there is a close connection between EU citizenship and peoplehood. This close connection is relevant especially regarding the notion of the necessity of a *demos*. This is because under Art. 39 TFEU, "every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament". If a *demos* is understood as the entity giving democratic legitimacy to a government through participation in elections, then EU citizens fill that spot. At the same time, as found in the previous section,

[833] (n236) 568.
[834] ibid 564, 566

citizenship and peoplehood do not necessarily coincide. By extension, this suggests that a further distinction must be made between a *demos* and peoplehood.

The term *demos* stems from democratic political doctrine and it refers to:

> (...) a group of people, the majority of whom feel sufficiently connected to each other to voluntarily commit to a democratic discourse and to a related decision-making process (Cederman 2001, p. 224).[835]

In other words, the term comprises the population eligible to engage in democratic decision-making processes. In contemporary international law, these are usually citizens of a state, in which they may enjoy rights such as to vote or stand in elections. Under this viewpoint, *demos* is congruent with citizenship, if the exercise of democratic rights depends on the latter (which is usually the case, especially in EU Member States). However, special status must be accorded to EU citizenship in this regard, as EU citizens enjoy a right to democratic participation by virtue of having EU citizenship to vote in EU Parliamentary elections in all EU Member States, may this be the Member State whose citizenship they hold, or another Member State, where they currently reside. In this sense, the relationship between EU citizenship and the concept of European *demos* is complex: while all citizens of EU Member States automatically hold EU citizenship and therefore constitute the *demos* of the EU, EU citizenship does not exist without Member State citizenship. It is a complementary type of citizenship and thus one could say the European *demos* too is a complementary one. At the same time, this conclusion is not accurate, as only EU citizens are allowed to vote in EU elections and from this viewpoint it does not have a mere complementary function.

In light of the EU's complex situation, Kalypso Nikolaidis suggested the notion of a *demoicracy*, *demoi* being the plural form of *demos*:

> European demoicracy is a Union of peoples, understood both as states and as citizens, who govern together but not as one. It represents a third way against two alternatives which both equate democracy with a single demos, whether national or European. As a demoicracy-in-the-making, the EU is neither a Union of democratic states, as 'sovereignists' or 'intergovernmentalists' would have it, nor a Union-as-a-democratic state to be, as 'federalists' would have it. A Union-as-demoicracy should remain an open-ended process of transformation which

[835] (n816).

> seeks to accommodate the tensions inherent in the pursuit of radical mutual opening between separate peoples.[836]

The question is, what is being gained through the notion of *demoicracy* from the viewpoint of this study. If the supranational electoral system operates in a similar way to the national plane, the notion of *demoi* is arguably not necessary, because individual citizen's interests can be expressed, that represent diversity. Even in national democratic systems, the *demos* is not homogeneous but diverse. Thus, a national *demos* too could also be called *demoi*. However, as a policy concept, *demoicracy* might still be useful in order to organise and encourage exchange between interest groups across Member States and to linguistically underline that any notions of homogeneous, national collective functioning as *demos* in democratic governance system is not realistic.

It becomes clear from the above, that a *demos* does not require homogeneity. In fact, the very core of democracy revolves around the fact that different views and hence diversity in various aspects exist, which is why majority votes override minority votes and the protection of minorities is a crucial principle of democratic systems. From this perspective, *demos* is close to the concept of peoplehood in so far as it takes account of the fact that even in discussions about the definition of peoplehood it is recognised that too strict of a homogeneous approach would lead to the dubious result that no peoples at all exist given ethnic, religious, cultural, social and political heterogeneity within different groups of peoples. Yet, no one would deny that the British people exist – despite including Welsh, Scottish, Northern Irish and English, even without consideration of the migration of other populations. Similarly, requiring strict homogeneity would cast doubt on the peoplehood of Germans, Indians, US Americans and virtually any other entity living on a state's territory constitutionally considered a people. However, Nikolaidis' suggested *demoicracy* concept aligns with the argument proposed in this study, that not a specific outcome of EU integration is desirable, be this intergovernmentalism, supranationalism in its current form or federalism. Instead, self-determination of peoples has the potential of functioning as a legal norm that requires and ensures the acknowledgement and involvement of different peoples living in the EU, even if they did not create an independent state for themselves.

In sum, it appears that literature on the question of *demos* or *demoi* in the EU accepts it as a fact that peoples (either a singular one or a plurality) are the constituting entity of either concept.

[836] Kalypso Nikolaidis, 'European Demoicracy and Its Crisis' (2013) 51(2) Journal of Common Market Studies 353.

Thus, technically, if a people constitute a *demos*, a *demos* cannot by definition constitute a people, but it consists of it. Yet, while there is disagreement on whether a European *demos* exists, the Treaties constituting the EU clearly recognise that various peoples live within the EU that can constitute it. They expressly recognise the existence of the 'European peoples' (Art. 167 TFEU). Questionable, however, is whether this means the peoples as the constitutionally recognised entity in Member States (i.e. the Italian, French or Polish people), which would coincide with all citizens of a state, or whether it includes the possibility of different peoples existing within one Member State (e.g. Basques, Catalans, Castillians, Galicians, etc.).

From the perspective of democracy, the exact delineation of different peoples is irrelevant, as it only focuses on groups of individuals participating in it, without consideration to a clear definition of peoplehood as required for the purposes of self-determination of peoples. Hence, from the angle of democratic governance and the political sciences, the people required for democracy are usually those recognised in a state's constitution as enjoying rights to participate in the governance system. Self-determination, however, is not the same as democracy, and as evidenced by international jurisprudence and practice, does not equate the constitutionally recognised people of a state with 'peoples' generally. Nor does it restrict peoplehood to constitutional recognition. Consequently, the concept of *demos* relates to that of peoplehood, but the latter differs depending on whether it is viewed through the lens of democratic governance and political sciences or international law.

4.4.4 European peoplehood from the perspective of European identity

The previous section showed that approaching the question of supranational European peoplehood through the lens of the concept *demos* only offers a partial answer. The other perspective through which the question can be explored is that of European identity.

Collective identity is the linchpin of the legal concept of self-determination of peoples as it stands today. Regardless of all the uncertainties revolving around objective criteria for the definition of the entity 'peoples', it is evident that there must be a subjective element to it. As a collective human right, the norm of self-determination is meant to serve the people, hence it is them who need to claim it. If the question whether or not an entity is protected under the norm of self-determination is determined by, for example, states, the norm misses its purpose.

It is not suggested here that one should dismiss any objective criteria, yet it is recognised by now at least in the field of indigenous peoples' rights, that the subjective element of self-

identification is a decisive factor in determining who constitutes a people.[837] This is sensible, given how much depends on the recognition of an entity as a people from the viewpoint of self-determination. Considering that the issue of an entity sharing a collective identity and identifying itself as one people stands at the centre of the norm, it is unavoidable to pose the question, whether there is such a thing as a European identity, and consequently also, whether there even is a European people, that identifies itself as such – as the constituting community of the EU. Then, the second question would be whether the first question has the same meaning in supranational as in national (domestic) contexts. In the domestic context, the entity 'people' has significance on many levels. Beyond being relevant as the source of authority for national governments in democratic systems, it also is the condition for accessing the fruits of self-determination, including internal and external dimensions of the concept.

What constitutes 'European identity': The importance of European values

Approaching the concept *in abstracto* first, the term European identity clearly refers to a concept of collective identity as opposed to individual identity. Nevertheless, both forms of identity are not mutually exclusive, in fact they usually coexist. A characteristic of collective identity is that it becomes part of the "social identity of an individual".[838] As such, consciousness about being a member of a group is a part of the person's individual identity, but it does not replace it. In a similar manner, collective identity flows from a person's individual identity, while remaining distinct. Collective identity consists of both, a cognitive and an emotional element. While the former refers to an individual's consciousness of being a member of a certain group, the latter comprises the feelings an individual connects with the group he or she is part of.[839] Despite there certainly being room for negative emotions, it seems natural that harbouring positive, affectionate feelings towards the group is decisive for the successful creation of a collective identity.[840]

Classifying European identity within the category of collective identity and identifying which policies support the formation of a collective European identity does not help with comprehension of what European identity is, or what elements constitute a European identity.

[837] UN OHCHR, 'Indigenous Peoples and the United Nations Human Rights System: Fact Sheet No. 9/Rev.2' (United Nations New York and Geneva 2013) 2.
[838] Soetkin Verhaegen and Marc Hooghe, 'Does More Knowledge about the European Union lead to stronger European Identity? A Comparative Analysis among Adolescents in 21 European Member States' (2015) 28(2) Innovation: The European Journal of Social Science Research 128.
[839] ibid.
[840] ibid 136-138.

Some scholars attempt to approach this question by introducing more terms. Michael Bruter, for example, differentiates between civic and cultural European identity,[841] where cultural identity captures the belief of individuals that they share "a certain common culture, social similarities, ethics, values, religion, or even ethnicity, however defined".[842]

Civic identity, on the other hand, "corresponds to a citizen's identification with a political system, that is, an acknowledgement that this political system defines some of her/his rights and duties as a political being".[843] Gerard Delanty approaches this by contrasting universalism and particularism.[844] Universalism refers to moral values, rights, or even other legal norms and institutions considered universally accepted by Members of the EU.[845] As such, universalism does not look at particular cultures, but focusses on universally accepted, binding characteristics.

Particularism, by contrast, focusses on cultural heritage, seeking to extract aspects of culture present in European states that can be considered representative for all. This often leads to considering Christian (mainly Catholic) tradition as cultural tradition particular to European countries.[846] Neil Fligstein, Alina Polyakova and Wayne Sandholtz discuss the issue by viewing European identity through the lens of nationalism, comparing European identity and emerging de facto national identity.[847] Others argue that European identity is the combination of historical, geographic and cultural factors which taken together amount to European identity.[848] Each of these approaches has strengths and weaknesses and it is submitted here that it is unlikely one particular approach to the concept of European identity can capture all relevant factors. However, to better understand the particularities of European identity, the next paragraphs will briefly engage with the above-mentioned views emphasising where their underlying assumptions do not fit these particularities.

Basing European identity on geographic factors poses obvious problems that are evident in past and possible future enlargements. Concretely, there are no clear geographical limits regarding the possibilities of the EU to expand or – as evidenced by Brexit – to shrink.[849] Particularly

[841] Michael Bruter, 'Identity in the European Union – Problems of Measurement, Modelling & Paradoxical Patterns of Influence' (2008) 4(4) Journal of Contemporary European Research 279.
[842] ibid.
[843] ibid.
[844] Gerard Delanty, 'Models of European Identity: Reconciling Universalism and Particularism' (2002) 3(3) Perspectives on European Politics and Society 345-359.
[845] ibid 347, 348.
[846] ibid 349.
[847] Neil Fligstein, Alina Polyakova and Wayne Sandholtz, 'European Integration, Nationalism and European Identity' (2012) 50(1) Journal of Common Market Studies 109.
[848] Thierry Chopin, 'Europe and the Identity Challenge: Who Are "We"?' (2018) 466 European Issues 1-2.
[849] See also, albeit from a different angle, (n844) 352.

contested future memberships of countries like Türkiye or the question of how far the Eastern expansion should reach (with some considering inclusion of Eastern European countries already one step too far) show that geographical grounds do not offer an uncontested basis for European identity. Rather, it is controversial in and of itself.

Similarly history does not point to one consistent shape of European identity – not all current EU Member States share historic links and it is not unequivocal as to what kind of historic link should serve as a reference point. The link of involvement in a joint armed conflict and the subsequent joint project of a commitment to peace through economic integration could be a driver. However, this may be extended worldwide, and bv reversing the logic of a shared experience, to European colonisation. Yet, even though the British Empire was once involved in military conflict with the Chinese Empire, no one would go so far as to consider EU membership for China.

It is no secret that in a union of 27 states, there is not one culture but a variety of cultures. Even within one Member State it is hard to single out a single aspect as common culture, as most if not all States are home to different regional customs. In Germany, people in Bavaria in the South and Schleswig Holstein in the North have different customs, dialects and traditions. In Italy, the north south divergence is notable not only in economic aspects but in terms of mentality and cultural variety throughout the different regions. The notorious dispute between Wallonia and Flanders in Belgium is emblematic of how different perceptions of culture may struggle within one State. Practically every Member State of the EU is also home to minority groups:[850] Sinti and Roma migrated from Romania and Bulgaria to other European countries, Sudeten-Deutsche live in Germany and Czechoslovakia, Lusatian Sorbs call Germany, Poland and Czechoslovakia their home, while other recognised minorities within European Member States are, among others, the Corsicans and Bretons of France, Galicians in Spain, Basques and Catalans in Spain and France, and Greeks and Turks in Cyprus. Hence, besides the majority population within Member States, there are numerous smaller groups with their own ideas of culture. Reducing European culture to Christianity, particularly Catholicism, is in itself a problematic conclusion. Suffice to look at the impact of Protestant Reformation from which resulted a predominantly Protestant North in Germany as opposed to its predominantly Roman Catholic South. The obvious problem arising from this approach is the disregard of religious

[850] Although the author decided to use the terms “minorities” or “minority groups”, she is aware that interpretations might vary due to the lack of one authoritative definition. See further, Kristin Henrad, ‘An EU Perspective on New versus Traditional Minorities: On Semi-Inclusive Socio-Economic Integration and Expanding Visions of European Culture and Identity’ (2010) 17(1) Columbia Journal of European Law 64-68.

groups that even without affecting modern European state structure or constitutions, still play a significant role in many European countries' history and culture.

The civic interpretation of European identity fails to answer the question of what to make of diverse governance systems among Member States; for example, federalism, regionalism, centralism, or the fact that some Member States have a constitutional monarchy while others embrace different forms of democracy. It also does not align with the issue that democracy and the rule of law as principles of governance within the EU are contested in their shape and content among Member States.

Considering European identity as an emerging national identity does not sufficiently take into account the above issues that do not arise in this form on a national level. As such, while comparisons between European and national identity can be drawn, it is an analogy with limited applicability. This view does also not have regard to the fact that the EU is not a state, neither does it claim to be, which further casts doubt on the applicability of nationalist identity that developed within and from the notion of statehood to the EU.[851]

Despite the difficulty of grasping concrete elements that constitute European identity, the latter is a concept routinely referred to by scholars and EU institutions alike.[852] Hence, the question remains, how European identity can be determined.

This thesis proposes to approach this issue on the basis of Art. 2 TEU, which sets out the fundamental values of the EU. It is submitted here, that supranational identity – and in that relation also culture – does not and should not follow the same patterns culture and identity follow on a smaller scale. The goal of supranationalism in the context of the EU was to bring the peoples of its Member States closer together in creating a sense of unity without falling into the trap of declaring the supremacy of one nation or one culture above others. It is proposed here that the discussion on European values as markers of supranational identity and a common European culture could bridge the gap between regional, national and supranational differences.

Similar ideas have been proposed by scholars,[853] and such an approach is arguably close to the ideas of the founding fathers, who envisioned an EU united by consensus on certain values: human dignity, freedom, equality, respect for rule of law and human rights. One advantage of resting the edifice of supranational EU identity on fundamental values is that these overarching values are compatible with regional and territorial interpretations of culture without challenging

[851] See also (n844) 348.
[852] See further below sub-section 'The promotion of European identity within the EU'.
[853] E.g. from the perspective of constitutionalisation, Schorkopf (n683) 956-967.

it. In that sense, European identity, if understood as meaning consensus over certain values as guiding principles of supranational governance and society, complements national and regional identities without posing a threat to them.

Historically, and until present day, the EU and its Member States have placed emphasis on the significance of European values. When the values were set out in Art. 2 TEU through the Treaty of Lisbon, it was perceived as a self-description of the Union. The values it spells out are therefore the characteristics that the EU designated for itself as being constitutive of its identity.[854] How strong the significance related to these values is within the EU has led Frank Schorkopf to speak of "value constitutionalism", arguing that these values have the power to serve as analogous to constitutional provisions.[855] Similarly, Francois Foret and Oriane Calligaro uphold that the rhetoric of European values and the way they are promoted by EU institutions shows signs of a "nation-building-style rhetoric … to highlight a European identity".[856]

In fact, the ECJ itself has repeatedly engaged the value rhetoric in the context of European integration in its case law. In its Opinion of 18th December 2014 on whether the EU can accede to the European Charter of Human Rights (ECHR), the Court argued that the EU cannot do so due to its own fundamental values, which form the basis of an independent legal order. In that respect the Court stated that:

> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[857]

In *Opinion 1/17 on the Trade and Investment Treaty between the EU and Canada (CETA)* (2019) the ECJ elaborated:

> That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the

[854] Monica Claes, 'How Common are the Values of the European Union' (2019) 15 Croatian Yearbook of European Law and Policy VIII.
[855] See Schorkopf (n683) 962-965.
[856] Francois Foret, Oriane Calligaro, *European Values: Challenges and Opportunities for EU Governance* (Routledge 2018) 2.
[857] *Opinion of the Court (Full Court) of 18 December 2014 — European Commission (Opinion 2/13)* [2014] ECJ 2015/C 065/02 para. 168.

> founding values set out in Article 2 TEU, which states that the Union 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights', the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas, structured in such a way as to contribute to the implementation of the process of integration described in the second paragraph of Article 1 TEU.[858]

Cases like *Omega* (2014)[859] and *Sayn-Wittgenstein* (2010)[860] suggest that fundamental European values – not necessarily within the limited ambit of Art. 2 TEU, but including other fundamental rights in the EU, such as free movement – offer room for value diversity, to accommodate national (constitutional) differences.[861]

Thus, overall, the idea of using the fundamental values set out in Art. 2 TEU as essential under the characteristics approach, finds support in practice and literature.

From Delanty's point of view, this position would fall within universalism, which taken by itself he considers "culturally too thin".[862] However, it is not clear why a thicker cultural identity would be required. Instead, it is argued here that the cultural flexibility is what characterises EU supranationalism as opposed to traditional national identities, which tend to focus more strongly on common cultural practices. Of course, considering European values analogous to constitutional principles falls into the same trap mentioned above in criticism of the civic identity approach: by essentially considering the EU state like, speaking of quasi-constitutionalism runs the risk of projecting nationalist approaches on the EU, which do not fit its special character.[863] It is, however, important to note that this study does not propose to view the EU through the lens of statehood. In fact, throughout this thesis the opposite has been argued, based on the viewpoint of self-determination of peoples. Labels for European values, such as 'quasi-constitutional' or considering them signs of nation-building rhetoric stem from

[858] *Opinion 1/17 on the Trade and Investment Treaty between the EU and Canada (CETA)* [2019] ECJ Opinion 1/17 OCJ C 369 para. 110.
[859] *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2014] ECJ C-36/02.
[860] *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECJ C-208/09.
[861] See also Schorkopf (n683) 966; Charles F. Sabel and Oliver H. Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 European Law Journal 516.
[862] (n844) 352.
[863] See also ibid 348.

other scholars and while being misleading if one focuses solely on the wording, they harbour some truth, as comparisons to known models are an accepted and sensible research method. In the course of that comparison, however, the evident differences between the EU and traditional nation-state-building should emerge.

Another point of criticism raised by Delanty regarding the universalist approach based on values is that arguably European values are not specifically European, but 'Western' in a more general sense, or even truly universal as they are present in different shapes and to different degrees in all human cultures.[864] This, however, would as the author rightly recognises result in an essentially Eurocentric worldview, which is not what the EU is concerned with, nor should it be its concern. Instead, Art. 2 TEU values are considered 'European' precisely because they shall apply within the EU as opposed being imposed on other entities. Arguing that European values are essentially universal – and ignoring criticisms that may well be raised against such an observation – cannot be viewed as an obstacle to European identity. As the author himself admits later in the same article,

> European identity is not an expression of a shared culture but a recognition of difference consisting of the ability to see the other within the self and oneself as other.[865]

Instead of value universalism, Delanty suggests, that combining universalism with a pragmatic approach that focusses on achievements of EU integration, for example institutions, laws, the common market, the Schengen area or the Euro as common currency, could serve as markers for specific European identity.[866] This is labelled European cosmopolitanism by the author.[867] Pure pragmatism is problematic because these markers are not necessary all characteristics that either the EU itself or its Member States consider as essentially European, unlike Art. 2 TEU, where this is explicitly mentioned. By combining it with universalism, a middle ground between commonly accepted standards as formulated in Art. 2 TEU and more tangible specific manifestations of European supranationalism is created. Be that as it may, in essence, Delanty's proposal does not differ much from the one suggested in this study, except for how it is named. The author too contends that

> European identity must be conceived in terms of a more active model of values. In this view, European identity is not an already existing identity, the property

[864] ibid 347, 348.
[865] ibid 354.
[866] ibid 351-352.
[867] ibid 353.

> of the fiction of a 'European people', but a more diffuse and open ended process of cultural and institutional experimentation.[868]

From this standpoint, which is endorsed in this study, European identity based on values offers a flexible approach, that may even accommodate diverging interpretations of European values to some extent and in so far as this is based on national or regional identity that warrants a certain degree of deviation. For example, 'democracy' in Art. 2 TEU leaves room for different governance systems and practices taking account of variances across Member States. The risk, of course, is that too fragmented of an approach to European values undermines the very foundation of European identity. Section 4.4.5 will explore the implications of building the concept of European peoplehood for the purposes of self-determination around European values in more detail.

Concluding, it must not be forgotten that self-determination of peoples means more than statehood. In this spirit, supranational identity should not be seen as an attempt to shift loyalty away from the nation state to the supranational entity in a bid to replace the nation state with a super-state. Arguably, if the EU is to be a forum for the discussion of different views and the exchange of ideas, it should not become a super-state, but rather remain a supranational organisation with a type of governance that has the possibility of offering an open forum of discussion in conflict cases involving claims based on self-determination of peoples. This position would be thwarted if the EU became too interventionist and too assertive in establishing a collective identity that entirely supersedes national and subnational identities. It is likely such a process would result in Member States mistrusting the supranational organisation for the fear of setting themselves up for defeat in the long run and thereby create instability within the EU. European values can be the glue that holds the EU together, if they are perceived as forming the basis of the 'social contract'[869] at supranational level, setting out the shaping elements of the supranational identity that is envisioned to emerge, without specifying a predetermined result and considering the nuances this section elaborated upon.

How is European identity formed?

The next step is to understand how collective identity might be formed in the context of the EU. There are a number of studies pursuing this question. Soetkin Verhaegen and Marc Hooghe, for

[868] ibid 357.
[869] The term 'social contract' is borrowed from Jean-Jacques Rousseau, *Du contrat social, ou, Principes du droit politique* (1762), see for example https://www.rousseauonline.ch/pdf/rousseauonline-0004.pdf.

example, identify three main streams as potentially having an impact on the creation of a European identity. They distinguish between the economic utilitarianism model, the political trust model and the cognitive mobilisation mechanism. Under the economic utilitarianism model, it is assumed that the economic benefits derived from being a part of the EU encourage a sense of collective identity.[870] According to the political trust model, a sense of European identity is crucially supported by the citizens feeling they can trust the supranational political system.[871] Thus, faith in the supranational governance system leads to a sense of collective identity. The term cognitive mobilisation mechanism refers to education policies aimed at increasing EU citizens' knowledge about the supranational institution and its functioning. It is assumed that the more familiar individuals are with the EU on a cognitive level, the stronger they will identify with it.[872] It can be argued that the EU placed its trust especially in the cognitive mobilisation mechanism as a means to strengthen European identity, as is proven by respective policy and education programmes.[873]

Empirical studies on the success of each of these models suggest that both, the economic utilitarianism and the political trust model do indeed have a measurable impact on citizens identifying themselves as EU citizens.[874] Results concerning the cognitive mobilisation mechanism, on the other hand, which was arguably the approach chosen by the EU institutions, which the next section will consider more closely, suggest that it only has a limited effect as it only appeals to the cognitive side of social identity while leaving out the emotional side as a necessary part of the forming of collective identity.[875]

The promotion and moulding of European identity within the EU

The idea that a European identity exists or even that it should exist is not new. EU institutions included cultural policies early on to pave the way for the creation of a community identity. In order to assess whether there are sufficient grounds to conclude that a European identity exists and its characteristics, this section analyses how the formation of it was promoted in EU policies and laws.

[870] (n838) 128: "(…) identity will be related to a sense of benefits derived from EU membership. Those that stand to gain from further European integration will develop a stronger sense of European identity than those who actually lose out as a result of the process of European integration".
[871] ibid.
[872] ibid.
[873] See, for example, Directorate-General for Communication, 'Europe for Citizens Programme 2007–2013: Programme Guide' (March 2011).
[874] (n838).
[875] ibid 138-140.

The seeds of European identity, which as discussed above includes various aspects such as culture, history or geography, are discernible in the works of the founding fathers. As far as the notion of European culture is concerned, Schuman was influenced strongly by his own religious background. In his vision, the EU should be based on Christianity or Christian values, which should constitute its "soul".[876] This was interpreted by scholars to refer to Europe's emerging identity through the pursuit of supranationalism.[877] Similarly, in a speech in 1952, Jean Monnet remarked: "We are not making a coalition of states, but uniting people."[878] Thus, from the very beginning, the question of the formation of a European identity as a means of uniting the European community has always been present.

In the 1970s, the then Commission of the European Communities' (CEC) produced several reports concerning the prospect of a "Passport Union", using the term "citizens of the Union" and recognising the importance of forming a cultural consensus within the Union for its long-term success.[879] In 1973, the Member States agreed in the Declaration on European Identity that "the principles of representative democracy, of the rule of law, of social justice—which is the ultimate goal of economic progress—and of respect for human rights (…) are fundamental elements of the European identity".[880] This shows that the milestones of Maastricht and Amsterdam were the results of intense preparations that started at least 20 years prior.[881] In 1979, in a bid to strengthen the citizens' connection with the European institutions, it was decided that citizens could now directly elect members of the European Parliament.[882] The Tindemans Report from 1975 in particular included an appeal to consider the citizens' voices more in supranational EC policies.[883] In its report, Tindemans observed a divergence between citizens and EC politicians concerning support for deepening supranational integration: "Public opinion is extremely sceptical on the will to establish a genuine European Union". Nevertheless,

[876] Jeff Fountain, 'A Christian Europe(an): The Forgotten Vision of Robert Schuman' (2011) 36 Encounters Mission Journal 4.
[877] ibid.
[878] Jean Monnet, Speech 30 April 1952 in Washington, see 'Jean Monnet: His Thoughts' (*Jean Monnet House*).
[879] See, for example, European Commission, 'Report of the European Commission 25 June 1975' (*Luxembourg Centre for Contemporary and Digital History*); European Commission, '*Report of the European Commission 3 July 1975*' (*Luxembourg Centre for Contemporary and Digital History*); European Commission, 'Towards European Citizenship' (Report from 3 July 1975, COM (75) 322, Supplement 7/75).
[880] 'Declaration on European Identity' (1973) 12 Bulletin of the European Communities 118, 131.
[881] See also European Council 'Statement from the Paris Summit (19 1o 21 October 1972)' (1972) Bulletin of the European Communities No. 10; European Council, 'Final Communiqué of the Paris Summit (9 and 10 December 1974)' (1974) Bulletin of the European Communities No. 12, European Council, 'Conclusions of the European Council: Fontainebleu, June 25-26' (1984) Bulletin of the European Communities No.6/1984 11: "to strengthen and promote identity and its image both for citizens and for the rest of the world.".
[882] European Parliament, 'The European Elections in 1979' (*EU Citizens' Corner | European Parliament Liaison Office in the United Kingdom*).
[883] Leo Tindemans, 'Report by Leo Tindemans, Prime Minister of Belgium, to the European Council' (29 December 1975) Bulletin of the European Communities, Supplement 1/76.

going forwards, Tindemans proposed that a directly elected European Parliament was of decisive importance for the future development of the EC. In that respect he maintained that:

> (...) the aim of European Union should be to overcome the age-old conflicts which are often artificially maintained between nation States, to build a more humane society in which along with mutual respect for our national and cultural characteristics, the accent will be placed more on the factors uniting us than on those dividing us.

Thus, already in 1975, the idea of working on and strengthening a supranational European identity was recognised as essential step for the future success of the organisation and, most importantly, a term used throughout the report. Democratic elements played an important role as well, as the report identified "listen[ing] to our people" as crucial for overcoming the felt stagnation in the development of the organisation.[884] At the centre of the creation of a sense of common supranational identity stood the identification of values, intended to constitute the unifying factor across peoples in all Member States: "It [Europe] must build a type of society which is ours alone and which reflects the values which are the heritage and the common creation of out peoples".[885] In that respect, Tindemans deemed it crucial for the EU to be present in various areas of citizens' everyday life, such as education and culture.[886] How important the process of unifying peoples to a 'European people' was perceived in the report submitted to the European Council becomes clear by the emphasis placed on creating a European identity. Tindemans explicitly stated that:

> (...) the construction of Europe is not just a form of collaboration between States. It is a *rapprochement* of peoples who wish to go forward together, adapting their activity to the changing conditions in the world while preserving those values which are their common heritage.[887]

As such, Tindemans reinforced the idea of the future EU being more than just an intergovernmental project. In Tindemans' view, the EU's success as securing peace between the Member States required something more than mere economic cooperation and the achieving of wealth and prosperity; crucial for its success was the establishment of a veritable European society.[888]

---

[884] ibid 11.
[885] ibid.
[886] ibid 12.
[887] ibid 26.
[888] ibid.

Tindemans' suggestions that the EU take a greater role in shaping society and doing so amongst other things by incorporating more direct democratic elements in its governance structure was, unsurprisingly, met with apprehension by the Member States.[889] Only 30 years since the end of the Second World War, nation states still adhered to old notions of national sovereignty. An important prerequisite of national sovereignty is that the nation state has the monopoly when it comes to being the entity its citizens identify with in terms of culture and society. Consciousness about a common culture and society is important because it plays a key role in creating a sense of loyalty to the entity representing these values esteemed as characterising the collective identity. The prospect of another entity, in this case the EU, interfering in this 'bubble' and representing a competitor for the citizens' loyalty did not go down well with the majority of Member States at the time. As the final sections of this chapter will further elaborate, even in recent years many of the old sovereignty challenges remain topical.

In the years following the report, despite its mixed reception among heads of European Member States in 1975, the EC attempted to use culture to propel European integration, after the years of stagnation experienced in the 70s. An example of this can be found in the CEC report from 1987, where it stated that "[t]he sense of being part of European culture is one of the prerequisites for that solidarity which is vital if the advent of the large market, and the considerable changes it will bring about in living conditions within the Community, is to secure the popular support it needs".[890] Thus, cultural policy moved more into the focus of European governance as it was recognised as an opportunity to root the EU project deeper into society.[891] In particular the launch of the *Kaleidoscope* programme only a few years later in 1991 reveals the intention to shape the consciousness of a European community among citizens. One of its aims was "to contribute to the enhancement of European citizens' sense of belonging to an emergent multicultural community".[892] To strengthen the sense of a common culture as political

[889] Antonio Tizzano, 'The Tindemans Report' (1976) 2(1) Italian Yearbook of International Law 130-152; see also Juliet Lodge, 'The Tindemans Report and European Union' (1976) 1(3) New Zealand International Review 32-34.
[890] Commission of the European Communities, 'A fresh boost for culture in the European Community: Commission Communication to the Council and Parliament transmitted in December 1987 (COM(87) 603 Final)' (1987) Bulletin of the European Communities, Supplement 4/87, 6.
[891] Clive Barnett, 'Culture, Policy, and Subsidiarity in the European Union: From Symbolic Identity to the Governmentalisation of Culture' (2001) 20(4) Political Geography 409.
[892] Commission of the European Communities, 'Kaleidoscope programme organised by the Commission of the European Community: conditions of participation' (1991) Official Journal of the European Communities C 205, 19.

vehicle for European integration, a narrative of common European heritage in the mission of identifying and forming a European identity within the Union also featured strongly. [893]

This form of identity building in the pursuit of supranationalism carries potential risks that are similar to nationalism. The issue is not the ideology *per se*; just as it is incorrect to categorically condemn all nationalist sentiments as inherently causing violent conflicts, it is also incorrect to blindly hail supranationalism as the cure to all problems experienced due to nationalist supremacism in European history. It is, however, an accurate observation that classical nationalism has run its course, and that the benefits it may have carried once are of little to no use nowadays. Too unitary an approach to determining the content of European culture carries inherent risks to disregard and discriminate against cultural differences. As other scholars have pointed out:

> (...) these seemingly symbolic heritage initiatives on common European Heritage have the potential to produce effects that are at odds with their intentions – rather than contributing to more inclusive ideas of European identity, culture and heritage, they may serve as tools in the negotiation of the Member States' nationalist claims.[894]

This is not to say that the discourse on the establishment of a European identity should be abandoned. Much of its success for the entire EU in terms of maintaining peace and foster prosperity among the Member States depends on the concept of culture and identity pursued. While it is a common view that supranationalism and nationalism are irreconcilable and conflicting concepts, it is submitted here, that this is not necessarily true; both concepts can be brought together, and even accommodate each other if interpreted moderately.

It is thus important to understand the EU's vision of what a common European culture and European identity comprises and how it is meant to be implemented. In 1990, the European Parliament stressed that it pursued an inclusive interpretation of culture. It saw culture as a way to bridge prejudices and promote a higher degree of mutual understanding across the EC, without ignoring cultural differences. In that regard, the European Parliament expressed that "[t]he European 'cultural model' is not all exclusive, still less a 'melting pot', but rather a multivarious, multi-ethnical plurality of culture, the sum total of which enriches each individual

[893] Ana Aceska, Ana-Roxana Mitroi, 'Designating Heritage as European: Between the European Union's Heritage Initiatives and the Nation-State' (2021) 27(7) International Journal of Cultural Policy 881-891.
[894] ibid 882.

culture".[895] By contrast, the Commission focussed on the identification of "common cultural values and roots" instead, without including the caveat offered by the European Parliament.[896] Yet, it is important to notice, that cultural policies administered at the supranational level were always understood to be subsidiary to national cultural policies. In this spirit, EU policies concerning culture were more targeted towards fostering cultural exchange and communication across national boundaries then the imposition of new unifying characteristics.[897]

The Maastricht Treaty in 1992 signposted the most significant step towards the consolidation of a European identity through establishment of EU citizenship, constituting a milestone in the EU's overall evolution. By introducing EU citizenship and preparing the ground for further European integration in other policy areas, it stood for a phase of change. The changes introduced through the Treaty of Maastricht were later further developed in the Treaty of Amsterdam, signed in 1997. Including reforms not only concerning European citizenship, but consumer law and culture, just to mention a few examples, both Treaties addressed the question of the formation of a European identity. Section 4.4.1 drew a distinction between citizenship and identity as two related, but distinct concepts. However, the step to introduce EU citizenship was evidently the result of identity politics of previous decades and also recognised as such by contemporary scholars.[898] In fact, it is argued in scholarship that citizenship, while conferring rights, is also an expression of collective identity and as such more than a legal formality.[899] Thus, citizenship contains two dimensions, one of "individual entitlement" in the relation between the citizen and the state and one of belonging to a community.[900]

The ECJ did not expressly engage with the concept of European identity, but with the legal aspects of questions arising from EU citizenship. Nevertheless, its findings about the relationship between EU and national citizenship offer insights into how supranational and national identity interrelate in the EU, either by considering citizenship as direct expression of

[895] European Parliament of the European Union, 'Additional Opinion on a Fresh Boost for Culture in the European Community' (1990) Official Journal of the European Communities C 62, 28–29.
[896] Commission of the European Communities, 'First European Community Framework Programme in Support of Culture (2000–2004): Proposal for a European Parliament and Council Decision establishing a Single Financing and Programming Instrument for Cultural Cooperation (Culture 2000 programme)' (Communication from the Commission to the European Parliament, the Council and the Committee of the Regions, COM (98) 266 Final, Brussels, 6.5.98) 13.
[897] Council of Ministers, 'European Ministers of Culture Meeting within the Council on Guidelines for Community Cultural Action' (1992) Official Journal of the European Communities C 336, 1–2.
[898] See, for example, Percy B. Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20(3) Law and Philosophy 242.
[899] ibid.
[900] ibid 243.

identity, or by viewing it as otherwise comparable concept. The former interpretation was supported by the ECJ in *Janko Rottman v Freistaat Bayern*, when it held that:

> 24. (…) maintenance of Union citizenship would serve as a basis for demanding maintenance of the nationality of a Member State.
>
> 25. Such a solution would also contravene the duty, imposed on the Union by Article 6(3) EU, to respect the national identities of the Member States, of which the composition of the national body politic is clearly an essential element.[901]

The recognition of multiple levels of identity in the Treaties is supplemented by the ECJ's findings on the how supranational and national citizenship are reconciled. In the same case, the ECJ found that EU citizenship is derived from the nationality of an EU Member State while remaining distinct and without superseding national citizenship.[902]

In *Grzelczyk* (2001), the Court appeared to take an even stronger stance strengthening the status of EU citizenship by finding that: Union citizenship is destined to be the fundamental status of nationals of the Member States". [903] In fact, for a period of time, ECJ jurisprudence embraced progressive interpretations of EU citizens' rights, "extending the social rights of EU citizens beyond national boundaries".[904] However, there is no uninterrupted or consistent trend in the ECJ's jurisprudence in this direction. Recently, a turnaround towards a stricter interpretation of rights arising from EU citizenship has been endorsed by ECJ judges.[905] Such developments concerning the interrelation of rights arising from supranational and national citizenship underline the delicate balance that must be maintained to ensure the compliance with supranational judicial findings and political support for the continued success of the EU.[906]

The CoR in its capacity as an advisory body to the EU Commission, the Parliament and the Council of the EU in all matters concerning legislation affecting regional governments stated that "culture should essentially be regarded as a way of life peculiar to a specific community in that each and every local culture helps to enhance culture in the wider, more general sense".[907]

---

[901] (n832).
[902] ibid paras. 15, 16.
[903] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECJ C-184/99 para. 31.
[904] Michael Blauberger and others, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 Journal of European Public Policy 1423.
[905] See further ibid.
[906] For the factors contributing to the ECJ's 'turnaround', see ibid 1423-1438.
[907] (n891) 417.

Some scholars interpreted this as suggesting an interpretation of culture that is based on "territorially circumscribed communities of shared values".[908]

However, perhaps more desirable than trying to focus on a fixated notion of European culture is an expanded interpretation of Rief's approach. Rief observed that:

> (...) a more important question at this point is whether there is enough political, economic, and cultural self-confidence in Europe to remain open to the influence and impact of those other cultures which may not belong to what are generally regarded as core European traditions, but which are nevertheless present in our societies.[909]

Taking this approach one step further, the crucial aspect for the promotion of European culture is that the supranational organisation represents an open forum for dialogue and exchange to shape European values as an important aspect of European culture.

The Treaty Establishing a Constitution for Europe (signed but not ratified by all EU Members in 2004), was intended to become the pinnacle of European integration efforts, embodying the tangible result of social unification across the Member States. In this spirit, the preamble stated:

> (…) while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny (…).

Notably, the preamble also underlines that the establishment of European values is considered relevant to the foundation of European identity:

> The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels (…).

This link between European values and European identity was upheld in the Treaty of Lisbon, after the so-called Constitution for Europe failed. Through the Treaty of Lisbon, the narrative arguably changed from directly addressing European identity to an emphasis on multiculturalism instead. The TEU's preamble postulates that the EU should draw:

---

[908] ibid.
[909] ibid 422.

> (...) inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

The renewed emphasis of European values, however, rather in connection to culture than identity as such, which is not explicitly mentioned. Art. 3 TEU is sharper in that it explicitly requires "respect [of] its [Europe's] rich cultural and linguistic diversity" as well as demanding to "ensure that Europe's cultural heritage is safeguarded and enhanced".

In fact, the aspect of cultural diversity is reiterated throughout the Treaties. Art. 167(1) TFEU adds:

> The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

These emphases on cultural diversity and – first and foremost – respect for "national diversity" are unsurprising given that the renegotiated version of what should have been the EU's constitutional treaty took place against the background that precisely such a constitution, or in fact, any further moves in that direction, were not welcomed by all Member States. Thus, the Lisbon era is characterised by a perhaps more cautious and less enthusiastic approach than the Maastricht era in terms of supranational identity.

While the idea is not abandoned, the notion of supranational identity is always carefully balanced with emphasis on multiculturalism and respect for diversity throughout the EU, all while references to peoplehood and self-determination are strictly avoided. At the same time, and this is significant for this thesis' argument for more involvement of sub-state entities in the supranational process, recognition that the role of sub-state entities, most notably in the form of regional authorities, is important, has grown in the Lisbon era. The traditional term "Europe of States" has been increasingly sought to be replaced by the term "Europe of regions", thereby acknowledging the importance of including these entities in the supranational decision-making process.[910] In fact, the Treaties do emphasise the significance of the 'third level' in several provisions.[911] Most notable in that regard are Art. 4(2) TEU and the Art. 167(1) TFEU

[910] Laura Tilindyte, *Regional Participation in EU Decision-Making: Role in the Legislature and Subsidiarity Monitoring* (EPRS | European Parliamentary Research Service 2016) 1.
[911] See, also Michael Keating, 'Europe, the State and the Nation' in John McGarry and Michael Keating (eds), *European Integration and the Nationalities Question* (Routledge 2006) 23-34.

mentioned earlier. Both provisions refer to the regional plane as among the "identities" that must be respected.

In the period between the Treaties of Amsterdam and Lisbon, "symbols conventionally associated with nation-states, intent on reshaping the European Identity in a culturalist sense" were introduced.[912] The EU flag, its own anthem, the introduction of a 'Europe Day' every year on the 9th May 9 and EU passports are just a few examples.[913]

Since the early 2000s, the EU pursued several measures within the framework of cohesion policy.[914] Cohesion policy is meant to increase collective solidarity across Europe and thereby strengthen supranational integration on a social level through economic development.[915] In light of the overall history of policies aiming at creating and furthering solidarity and social cohesion across EU Member States it can be concluded that identity politics were consistently pursued. However, the way in which these are implemented changed from explicit engagement with the creation of a European society to multiculturalism and more subtle cohesion policies through economic means. Furthermore, since the Treaty of Maastricht, European citizenship and identity are being discussed in the context of shared values.

Identification with the EU in recent and present time

While promotion of identity politics from the supranational level offers insight into the topic from the perspective of policy making, how these policies are perceived by the target group, that is EU citizens, is vital to assess their success.

The results of the EU Commission's survey (Eurobarometer) from February – March 2021 offer interesting indications concerning how EU citizens feel about and relate to supranational EU governance and the question of a supranational identity.[916] The survey gives researchers an idea of how EU citizens feel about the EU, its policies and their position within and in relation to the Union. While the individuals that participated in the survey cannot be viewed as representing all EU citizens, the survey includes questions that show what elements are

[912] Ugur Tekiner, 'The "European (Union) Identity": An Overview' (*E-International Relations*, 16 April 2020).
[913] ibid.
[914] See further Vicente Royuela and Enrique López-Bazo, 'Understanding the Process of Creation of European Identity – the Role of Cohesion Policy' (2020) 46 Investigaciones Regionales - Journal of Regional Research 51-70.
[915] Gabriela Borz and others, 'EU Cohesion Policy Helps Build a European Identity' (*European Policies Research Centre,* 5 July 2022); see also European Commission, 'New Cohesion Policy' (*European Commission* 2023).
[916] (n8); Eurobarometer surveys after 2021 did not ask these questions but focussed on different topics instead.

considered significant for European identity at least from the perspective of the EU Commission as institution behind the Eurobarometer. Based on the questions posed during the survey, certain elements seem particular significant in determining what European identity is. These are a feeling of connectedness with the EU, and possibly with Europe as well. Interestingly, the positive turnout to the question of whether the participants felt that there are many commonalities across EU citizens was only a little higher. This was seemingly reflected in the feeling of connectedness to the EU which yielded a similar result, while self-identification as EU citizen did not seem to affect these two aspects considerably. It will be interesting to see if and how the answers will be different in future surveys.

A different angle from which one can view the status of European identity within the EU is based on the prominent independence movements of the last years. Numerous regional autonomy and independence movements identify with the EU in so far, that they aim to participate in its supranational governance after autonomy or independence has been achieved. Many of the political groups representing the interests of these regions came together in the European Free Alliance (EFA). In its manifesto, the EFA directly references the right to self-determination of peoples as relevant fundamental right in ensuring the level of participation desired in the EU, without such participation being hindered by the obstacle of statehood as requirement to full participation.[917] Both the Scottish and Catalan independence movements identify with the EU – and they are also mentioned as examples in the EFA's manifesto – because their desire for participation in EU supranationalism is essential to them.[918]

Strong support for the notion of European identity is also observable in EU candidate countries, such as Georgia and Kosovo.[919] In these cases, identification with Europe is closely related to support for (and hopes for support from) the EU as an organisation.

Limits of European identity

Contrasting regional movements within the EU that identify with the organisation in so far as they seek to increase their own direct participation in it, it is interesting to observe that even right-wing EU sceptic parties, while highly critical of the EU as an organisation which is considered too intrusive in the national sphere, engage narratives of supranational European

[917] EFA, '2019 Manifesto European Elections' (*EFA*) 4, 5.
[918] Nikolaos Papadogiannis, 'Is There Such Thing as a "European Identity"?' (*The Conversation*, 21 May 2019).
[919] See also Archil Sikharulidze, 'Opinion: An Alternative View of Georgia's European Identity and Past History' (*commonspace.eu*, 3 September 2021); European Parliament, 'Report on the 2021 Commission Report on Kosovo' (17 June 20212, A9-0179/2022).

identity. For example, the AfD in Germany called upon 'Europeans' to vote for them to preserve European identity as opposed to influences from Islam.[920] A study on right-wing nationalism in the EU also found that nationalist parties exploit notions of European identity to gain transnational support for their causes.[921] Such narratives, similar to the AfD's strategy, follow the line of presenting right-wing parties as protectors of Europe and European identity.[922] This shows European identity to be a complex concept that means different things to different people. It also shows that European values are contested and/or interpreted differently. Most importantly, European identity does not equal identification or even support for the EU.

Identity or self-identification is not the sole characteristic of a people. Hence, the concept of European identity has its limits in establishing what constitutes a European people or European peoples. Additionally, as highlighted throughout this section, many potentially conflicting collective identities co-exist, which may come to the forefront on a case-by-case basis: European, national, regional or local identities cannot be ranked hierarchically. This shows that the concept of peoplehood is characterised by plurality, if one approaches it from the viewpoint of self-identification: a German people can also be a European people as referred to in the TEU, and the Bavarian people (as they are commonly referred to in Bavaria's own constitution and generally within Germany) are German and European.[923]

4.4.5 Values as constituting element of a European people: an emerging concept?

In light of the ongoing controversy regarding the definition of the people within the ambit of self-determination and considering the EU's unique features and development, this section enquires whether there are grounds that suggest a different approach to defining peoples at supranational level is emerging and what the implications of such an approach are. This approach would be specific to the context of EU supranational governance and therefore not easily transferrable to other supranational organisations. Section 4.4.2 established that the territorial approach to defining a people in the EU on its own does not lead to satisfactory results. What remains to balance the territorial approach is the characteristics approach. This

[920] ibid; see also Kirsten Grieshaber, 'US Museum Condemns Use of Its Art by German Far-Right Party' (*Associated Press*, 30 April 2019).
[921] Quentin Liger and Mirja Gutheil, 'Right-Wing Extremism in the EU' (Policy Department for Citizens' Rights and Constitutional Affairs, European Union 2022) 13, 39; see 'Marine Le Pen Rebrands Front National in Push for Support' (*The Guardian*, 1 June 2018) where Marine Le Pen is quoted to have talked about "a veritable European revolution".
[922] See also Manuela Caiani and Manès Weisskircher, 'Anti-Nationalist Europeans and pro-European Nativists on the Streets: Visions of Europe from the Left to the Far Right' (2021) 21 Social Movement Studies 217.
[923] Verfassung des Freistaates Bayern in der Fassung der Bekanntmachung vom 15. Dezember 1998 (GVBl. S. 991, 992) BayRS 100-1-I.

poses the question what characteristics may be useful in defining a European people. The previous section found that in defining European identity common values are consistently used as a reference point. This suggests that in trying to define peoplehood in the EU context for the purposes of self-determination of peoples the best suited approach could also be based on shared European values. This approach can be classified a kind of characteristics approach, oriented along the lines of societal values agreed upon by the Member States, who initially set up the socio-political contract among themselves.

Indications for an emerging value constitutionalism in the EU

There are significant grounds on which the hypothesis of an emerging 'value constitutionalism' can be based .[924] The idea, that constitutional identity through shared societal and legal values can shape and relate to the collective identity of a people is not new, but it has arguably received more attention in the EU context since the German Federal Court's judgment in *Zustimmungsgesetz zum Vertrag von Lissabon*, where it found that the German constitution has a core of constitutional identity that cannot be amended.[925] The first indicators that European values are in the process of transforming into something comparable to constitutional values are the Treaties relevant to the development of the EU accompanied by supranational policies aimed at shaping European identity in relation to common values. Section 4.4.4 already pointed out that at least since the 1970s it became a matter of course within the EU to refer to common values in seeking to identify the essence of European identity.[926] In the Treaty of Maastricht, Member States expressed their commitment to the principles of liberty, democracy, respect for human rights, fundamental freedoms and of the rule of law (preamble). This was expanded through the Treaty of Amsterdam by adding the phrase "which are common to the Member States" (Art. 1(8)). Finally, the Treaty of Lisbon introduced European values as we know them today. In other words, a consistent development towards stronger identification with these values is discernible by considering their development through the Treaties.[927]

[924] The term value constitutionalism is borrowed from Schorkopf (n683).
[925] *Judgment of the Second Senate of 30 June 2009* [2009] BVerfG 2 BvE 2/08 paras. 218, 219, 239, 240, 241, 336; Monika Polzin elaborates that constitutional identity can also relate to other concepts than solely collective identity, see further 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18(7) German Law Journal 1596-1599.
[926] See also Schorkopf (n683) 959.
[927] In fact, the history of common principles and/or values in the EU and its predecessor organisations reaches back even further, see ibid 958-960.

The second indicator is the jurisprudence of the ECJ itself. The ECJ's jurisprudence increasingly adopted the stance of considering the EU as having "its own constitutional framework" as a "community of values".[928] This development arguably culminated in the ECJ's *Opinion on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*:

> The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.
>
> (…) This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[929]

The label 'community of values' is also employed frequently by the EU Commission when referring to the EU.[930]

Another indicator supporting the perception of an emerging value constitutionalism can be discerned in the reactions to perceived systemic breaches of fundamental values including the rule of law. The perception of certain actions by Member States as a breach shows that European values are accepted as fundamental pillars of the EU and that sufficient consensus about their content exists that leads to the evaluation of something constituting a breach. This is supported by attempts to justify alleged breaches making reference to the EU's legal framework.[931]

Echoing the previous sub-section,[932] one advantage of resting the building of supranational EU identity on fundamental values is that these overarching values can be compatible with regional and territorial interpretations of culture without challenging them. In that sense, European

[928] ibid 960, 961.
[929] *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] ECJ Opinion 2/13 para. 110.
[930] See, e.g. Loek Halman and others, 'Atlas on European Values: Change and Continuity in Turbulent Times' (Open Press TiU, Tilburg University 2022) 5.
[931] The Chancellery of the Prime Minister, 'White Paper on the Reform of the Judiciary' (7 March 2018) para. 176.
[932] Sub-section 4.4.4.

identity, if understood as meaning consensus over certain values as guiding principles of supranational governance and society, complements national and regional identities without posing a threat to them.

The question is however, if emerging value constitutionalism as observed in the indicators considered above is support enough to conclude that it can be used as a criterion for identifying a people that may base a claim to participate on supranational governance on the right to self-determination of peoples. In this regard, one must keep in mind that the ECJ's findings as well as other EU institutions' reference to a community of values concern the EU as supranational entity, rather than peoples. Especially in light of the EU's silence on self-determination and lack of explicit engagement with the concept of peoplehood for the purposes of self-determination, it is too early to conclude that European values can serve as an objective criterion for the existence of a people. If anything, this may be an approach in the process of emerging, however, at such an early stage it is not a foregone conclusion, that sharing European values gives rise to a people from the perspective of EU governance.

Implications of building the legal concept of self-determination of peoples around values and counterarguments

As seen above, the fundamental values set out in Art. 2 TEU are constitutive of European identity within the EU. Yet, viewing peoplehood in the supranational EU context through the lens of common values, while carrying benefits as explored earlier,[933] also poses issues that make it questionable whether using shared values as objective element constituting a people is advisable.

One issue concerns the question of just how common these values must be to be considered fundamental European values worthy of being protected by Art. 2 TEU and thereby functioning as constitutive element of a people that may claim a right to participate in EU supranational governance. With Brexit still fresh in everyone's memory, and Poland and Hungary openly challenging the rule of law – one of the values which is considered to be fundamental in Art. 2 TEU – it is obvious that not all Member States, let alone every EU citizen considering the strengthening of nationalist parties in many Member States, agree on the significance, content and immutability of these values. In fact, especially with regards to the rule of law as a value, there are various diverging views on what its precise content is and what may count as violation

[933] ibid.

of that value. Not only is the content of European values contested from the side of the Member States, but arguably even on the supranational side it remains to be determined what exactly amounts to a breach of, for example, the rule of law.[934] Still, despite these disagreements, respect for the values in Art. 2 TEU is one of the entry criteria for accession to the EU, as can be read from Art. 49 TEU.

Another issue relates to the question who wields decision-making power in this matter. Art. 49 TEU only considers and obliges "European States". As such, if national governments do not include subnational entities in the processes leading up to decisions on common European values by their own initiative, the latter are excluded from participating in the value discourse. Thus, by the way the TEU is set up, the prerogative of deciding upon supranational matters lies with national governments. This privileging of national governments carries an inherent risk that subnational views are factored out or considered subsidiarily. However, the question of how common European values are based on how they are decided upon is not only one concerning the relation between national and subnational authorities.

The European values of now Art. 2 TEU are still comparatively young. They were introduced with the Treaty of Lisbon, but their significance was recognised earlier, fuelled by the prospect of two enlargements of the EU: the accession of Austria, Finland and Sweden (Norway applied but failed the referendum) in 1995 and the accession of post-Soviet-Union states among others, that eventually took place in 2004.[935] Thus, the drafting of Art. 2 TEU links to the idea of an EU that was much smaller and less diverse. In fact, the previous sub-section showed that as early as in the 1970s attempts were made to formulate common values constitutive of a European identity, particularly regarding human rights and the rule of law.[936] This was at a time, when events like the East enlargement were not even on the table. As a result, the Member States of the EU as it existed prior to the Treaty of Lisbon and subsequent enlargements decided which values should be elevated to the status they hold today, characterising the EU's identity.

The implications of this become obvious if one looks at the numbers: at the time of drafting of Art. 2 TEU, 15 Member States constituted the EU, whereas now this number has grown to 27. Thus, 12 of the current Member States had no influence on formulating the content of European values. Instead, they accepted them as a condition to join the EU.[937] Looking at the 15 Member

[934] See further Franco Peirone, 'The Rule of Law in the EU: Between Union and Unity' 2019 Croatian Yearbook of European Law 15, 57-98.
[935] (n854) XII; for an overview over all enlargements so far see European Parliament, 'The Enlargement of the Union' (*Fact Sheets on the European Union | European Parliament*, 2023).
[936] See sub-section 4.4.4.
[937] See Art. 49 TEU and the Copenhagen criteria established by the European Council in 1993.

States that drafted the provision, it becomes clear that the values we know today as being 'European' were crucially influenced by Western European countries against the background of their shared historical experiences and political traditions. In a look ahead to some of the implications of value constitutionalism, here possibly lays one of the reasons for the resistance of Eastern European countries in particular against some or all of these values: they simply were not involved in the process of developing these values, and thus the impression could arise that European values were and are rather imposed than actually shared as proclaimed by the Treaties and EU institutions.[938] Of course, one could argue that all Member States acceding to the EU after Art. 2 TEU was adopted knew what they signed up for and freely accepted the terms upon which they entered the contract. On the other hand, it could be argued that the main motivation for participating in the supranational project of the EU was rooted in economic pragmatism and because acceptance of the Art. 2 TEU values is part of the accession process it was rather considered a formal requirement by Member States, who acceded to the EU through the 2004 enlargement.

The third argument raising doubts as to the usefulness of using European values as a reference point for determining peoplehood in the supranational context of the EU concerns the EU's self-imposed commitment to democracy. Democracy requires at least contestation and participation as two fundamental elements that are at its foundation.[939] Not allowing for the renegotiation and thereby the contestation of the content of European values would arguably equal endorsing an approach that contravenes the democratic spirit. In that context, it is again relevant to consider who can and who should decide on European values, as noted above. Including the 'peoples of Europe' in the value discourse would arguably be the strongest expression of their democratic self-determination. The more so considering that the interpretation of fundamental values may vary and also change over time, resulting in a contestation of these. Thus, even though European values are viewed as among the defining criteria for a European people/society, they must allow for debate and change.

Obviously, the difficulty consists in allowing room for discussing European values as markers of a shared supranational identity without eroding the foundations on which it is built. At least to the extent that certain European values have become justiciable norms, their core content cannot be contested. This would, for example, be the case for the rule of law.[940] In a series of

[938] (n854)
[939] Vanessa Alexandra Boese and Matthew Charles Wilson, 'Contestation and Participation: Concepts, Measurement, and Inference' (2022) 26(2) International Area Studies Review 97, 101.
[940] Schorkopf (n683) 961, 962.

judgments, the ECJ confirmed that Art. 19 TEU "gives concrete expression to the value of the rule of law stated in Article 2 TEU".[941] In *European Commission v Republic of Poland* (2019), this was further substantiated by linking Art. 19(1) TEU to Art. 47 Charter of Fundamental Rights.[942] Thus, there is a discernible judicial development towards legalising at least the rule of law as a European value.[943]

Such legalisation arguably results in a certain core content of rule of law that is justiciable and must therefore be immutable for the sake of judicial stability and transparency. In the future it is likely that the EU as a community will need to determine who can decide upon and influence European values and possibly under what circumstances they can be altered. In light of possible accessions by further states such as Türkiye and Ukraine this appears even more pressing. Depending on how constitutional the EU will or will not become, the exact form this could take varies. But it is suggested here, that going forwards, self-determination of peoples as sovereign value requires more involvement of the European people in the process, notably by engaging levels of governance.

Furthermore, there is a fourth aspect that casts doubt on the usefulness of basing European peoplehood on common values. According to Art. 49 TEU, respect for and promotion of the values of Art. 2 TEU is an essential entry requirement. Yet, at the same time, according to Art. 50 TEU any Member State can leave at any time, without necessarily abandoning these values. This might cause potential discrepancies between membership of states in the EU and self-identification of the population as a European people. For example, a large majority of the Scottish people and a considerable proportion of British people in general wished to remain in the EU and they arguably continue to identify with European values even after Brexit.[944] This result can be avoided, however, if one enhances the importance of the territorial component: the respective state must be part of the EU and the population must largely identify itself with European values. Nevertheless, issues could also arise where national governments within the EU challenge and depart from European values, but the majority of the population does not or the population is profoundly divided. A current example that proves that such a scenario is realistic is Poland.[945] This begs the question the 'allowed' room for contestation of values ends and where Art. 7 TEU starts, the more so considering the Polish Supreme Court's finding from

[941] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECJ C- 64/16 para. 32.
[942] Schorkopf (n683) 962; *Judgment of the Court (Grand Chamber) of 24 June 2019: European Commission v Republic of Poland* [2019] ECJ C-619/18 paras. 49, 57.
[943] For the possible reasons see Schorkopf (n683) 965, 966.
[944] The Electoral Commisison, 'Results and Turnout at the EU Referendum' (*electoralcommisison.org*).
[945] Piotr Buras and Pawel Terka, 'Poland under Duda: A Divided Country, Dividing Europe' (*European Council on Foreign Relations*, 14 July 2020).

2019 that Poland might have to leave the EU over its extensive reforms of the judiciary.[946] It becomes clear from the often-cited examples of Hungary and Poland that European values are essentially contested,[947] and that value constitutionalism is an emerging system still in development. Consequently, no steadfast applicability of European values can be expected, except where they started to merge into justiciable norms (such as the rule of law).

Under a fifth aspect, centring the notion of (European) peoplehood around shared values could also intensify already existing sovereignty conflicts between the national governments and supranational institutions. As such, Poland considered the EU as lacking competence to exert any influence on how national matters (in the concrete case the rearrangement of Poland's judiciary).[948] This stance can be founded on Art. 4(2) TEU, which protects the national identities of Member States "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". In fact, in its White Paper on Reform of the Judiciary, Poland explicitly referenced the EU's commitment to respecting national diversity among member states as a justification for its reform under EU Law.[949] Again, this case underlines that Member States interpret fundamental European values differently and that building a supranational collective identity on the perception of shared values goes hand in hand with balancing the notion of what is 'shared' against diversity within the EU.

However, the tension between supranational quasi-constitutional and national and constitutional identity is not limited to the content of Art. 2 TEU or the cases of Hungary or Poland. The German federal constitutional court is known for its back and forth with the ECJ concerning the question of who has the competence to assess what falls within a Member State's national constitutional identity and therefore requires exceptions from the perspective of EU Law and similar cases have arisen in other EU Member States as well.[950] Yet, it is a judgment of the German federal constitutional court that significantly limits the hypothesis that a notion of supranational quasi-constitutional identity based on values may serve as criterion for defining a people from the supranational perspective. In *Zustimmungsgesetz zum Vertrag von Lissabon,* the Court made it clear that the German constitution requires the existence of a distinct German people as wielder of democratic power over any interpretations or amendments to its

[946] 'Poland May Have to Leave EU, Supreme Court Warns' (*BBC News*, 17 December 2019).
[947] Richard Higgott, 'Global Challenges to European, Western, Liberal Values' (*LSE Ideas Ratiu Forum*, 25 August 2021).
[948] (n931) para 207.
[949] ibid para. 176.
[950] See further Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16(4) German Law Journal 917-970.

constitutional identity. Specifically, the court referenced the people's democratic self-determination, which must be safeguarded vis-á-vis a potentially emerging European people.[951]

Lastly, depending on how the narrative surrounding shared European values is framed, there may be a risk that they are interpreted in a sense of moral superiority in relation to other states and organisations.[952] A stance of moral superiority endangers the EU's openness to political diversity and could negatively affect its position as peace-keeping entity in Europe that brings European states closer together. It is also thinkable that in the hypothetic case that the EU develops further into a constitutional state-like entity, that it turns into what it was initially intended to prevent – a super-state with the same weaknesses as any other state.

4.5 Conclusion

Historically, pursuing a form of intergovernmentalism in the EU that leads to supranationalism was a conscious choice to avoid the resurfacing of supremacist nationalism, which prevented peace and stability in Europe for a long time. Rather, supranationalism was chosen as path towards wealth and prosperity. While the EU initially predominantly operated as an economic union, the constitutional visions as well as the idea of constituting a unified European people, culture and values were present from the beginning. Such ideas undeniably left a mark on how its governance developed overall. Indeed, the EU's history confirms that its political integration progressed rather than regressed, despite numerous challenges and crises. Continuously progressing European integration furthered the sense of a common European identity, an important element of which crystallised, namely consensus about certain values as being indispensable for the EU and its members: human dignity, freedom, democracy, equality, respect for the rule of law and human rights.

While this chapter showed that the concepts of *demos*, citizenship, identity, values and people must be distinguished, they are also interrelated. As such, the discourse on a shared European identity is important because self-determination of peoples as a norm revolves around a collective entity, the determination of which depends on objective and subjective elements. Without self-identification under a collective identity there can be no people and hence no self-determination of peoples.

---

[951] (n925) paras. 208, 298, 346-350; see also Claes and Reestman (ibid) 924, 968.
[952] See also Justine Lacroix, 'Does Europe need Common Values?' (2009) 8(2) European Journal of Political Theory 145.

Although self-determination of peoples as a legal norm has not yet received distinct content and application in the EU specific to its particular context of supranational governance, this chapter argued that it plays an important role in the context of supranationalism, as shown by the example of the EU. Self-determination has practical and theoretical relevance within the organisation. This can be based on legal and political thought considering the objective and character of self-determination as principle and right in international law, but also on the fact that subnational groups claiming self-determination are a reality within the EU.

Decades of policies aimed at promoting a European supranational society and efforts to 'bring the EU closer to its citizens' by expanding its democratic processes and by introducing mechanisms enabling the participation of the subnational level suggest that within the EU a form of intergovernmentalism developed that not only leads to supranationalism but is also based on peoplehood. The notion of supranational peoplehood in the EU is still in its early development stages, as opposed to the far more advanced notion of Pan-African identity in the AU as the next chapter will analyse.

While as a result of this its contours remain mostly abstract, tendencies are discernible that shed light on what factors are crucial to the concept. These are *demos*, identity and shared values. Each of these categories is equally in early development stages and it remains to be seen how they evolve in the future. Despite ongoing controversy about each category's specifics within the EU, it can be concluded from its own legal and political approach that any notion of EU peoplehood is based on a civic democratic understanding, as opposed to being ethnicity based or rooted in the distinction of cultural groups. Thus, the relevance of self-determination in the EU is based on the political philosophy of 'the rights of the governed'. Phrased differently, if the EU is recognised as government-like, then the governed carry certain rights. From a political point of view, in a democratic system the people function as the wielder of power, as an entity that vests the government with authority and legitimises it. From a legal point of view, self-determination of peoples is a central part of international human rights law, where it essentially operates as a safeguard for peoples against oppression from (their) governments. Despite this, the EU has so far refrained from embracing a proactive approach in shaping the content of the norm in a manner particular to its supranational governance. Lacking such a distinct shaping, what remains is the right and principle of self-determination of peoples as it exists in international law and respective approaches to the determination of a people.

Notably, the EU's policies towards more inclusion of the subnational level in decision-making processes and the recognition that national governments by themselves do not inherently

guarantee a sufficient degree of direct participation and democratic legitimacy within the EU point towards the consideration that self-determination of peoples does not need to apply within the contours of independent statehood, but that it can include an option for participation in supranational development. In this context, however, due to the special characteristics of the EU as supranational organisation, self-determination of peoples as a legal norm needs to be brought back to its core functions (see chapter 2) as opposed to adding to social, political and territorial fragmentation of self-determination. Arguably, many instances of separatism could be addressed through the option of exercising the right to self-determination as participation in supranational governance. This would, for example, be the case for Catalonia or Scotland.

The developments brought by increasing supranationalism in the EU also potentially point towards an emerging approach of defining peoples that focusses on shared values as constituting a collective entity. However, to avoid value authoritarianism, an approach which is too rigid to values as defining a people must be avoided. There needs to be room for contestation, especially given the European value of 'democracy'. Nevertheless, while facts exist that indicate a system of value constitutionalism may be in the making in the EU, such value constitutionalism is not firmly established yet. Moreover, it is currently being challenged by Member State governments and national parties. What can be taken away from the discussion of emerging value constitutionalism in the EU, however, is the observation that if peoplehood becomes undermined when shared values become eroded, the people(s) must have a say in the determination of these values. Furthermore, neither the notion of European demos, identity nor peoplehood based on values uphold national boundaries. Instead, these concepts suggest a rethinking towards new categories in which self-determination of peoples may unfold, namely beyond notions of independent statehood.

5 Self-Determination of peoples and supranationalism in the African Union

Even though supranationalism, at least in Western scholarship, is not usually thought of in connection with the African continent straightaway, it has played a significant role in African political ideology since at least the 18th century in the form of Pan-Africanism.[953] Whereas in Europe, the EU has shown a path towards supranational integration and is promoting a continental approach, countries in Africa have assembled in a number of regional organisations aimed at supranational integration on a regional level. Some of the most important examples have already been introduced earlier in this study: ECOWAS, EAC, SADC and SACU are just four examples.

When using the term 'supranational' in this context, it simply serves to describe the association of states in an organisation in order to reach any form of integration above the national plane. Using SACU as an example, this organisation showcased integration that aimed at the regional instead of the continental level and focussed on trade and free movement of goods rather than political governance. In cases like this less to no importance is given to the usually required characteristic of the supranational organisation's ability to act 'above' the member states as established with regards to the EU. As a result, SACU engages in supranationalism without fitting the narrow definition of supranational organisation employed in international law literature.[954]

By contrast, SADC, which with 16 Member States overtakes SACU in terms of membership, in its institutional set-up shows more signs of governmental development within the organisation. SADC has its own Parliamentary Forum, consisting of members of parliaments from Member States. Such involvement of democratic elements in the decision-making processes of a supranational organisation appears to point towards governance-oriented supranationalism. Of course it should be noted that the Parliamentary Forum has no legislative functions. In fact legislation as such is not being exercised within and by SADC, but it is rather a policy-creating and implementing organisation.[955] Thus, in analysing supranationalism in Africa, one needs to refine the definition of the term 'supranational' by distinguishing between supranational projects aimed at developing and exercising governance and those that are

[953] See sub-section 3.4.5.
[954] See section 3.1.
[955] See also SADC, 'SADC Institutions'(*sadc.int*) for more information about SADC's institutions and functioning.

supranational because they do aim at some form of integration (often economic in nature) at a level beyond the national state.[956]

In anthropology, scholars Jean and John Comaroff recognised that the direct comparison of European and African approaches is useful as well as essential to understand global processes.[957] They argue that African developments in many respects indicate global processes.[958] Similarly, legal scholars are starting to recognise the gap in research resulting from not recognising the significance of developments taking place in the global South.[959] Thus, echoing the previous chapter on self-determination and supranationalism in the EU, this chapter explores the role of self-determination in forms of supranational governance on the African continent, by focussing on the case study of the AU. This chapter first analyses what visions of supranationalism influenced the establishment of today's AU. In doing so, it evidences how the African continent has shown itself to be a particularly fertile ground for various kinds of supranational projects, be they regional or continental. The chapter then focuses on the African Union and distinguishes the features of the AU from other African supranational projects before addressing with the AU's structure and functioning in more detail. The subsequent sections explore what status self-determination of peoples holds in under AU's law and how this impacts the AU's model of supranational governance and *vice versa*.

At its core, this chapter questions the current interpretation of self-determination from different angles: (a) its exclusive link to statehood and (b) approaches to the definition of 'peoples'. Both ideas are usually linked to national or subnational, but not supranational contexts. In supranational contexts, this chapter argues, self-determination of peoples has the primary function of safeguarding certain human rights standards, as its operation in a context of 'collective' or 'joint' sovereignty, which is not oriented along the lines of national territorial boundaries, requires a more nuanced interpretation. The chapter then contrasts this with the example of the EU where this has meant furthering the idea of an EU of regions by increasing subnational level participation without promoting separatist aspirations. National self-determination, or the splitting up in various independent segments is the opposite of what this study advocates; rather it seeks the realisation of various aspirations in a model of collective or joint sovereignty. The purpose of comparing the EU and the AU in two case studies is to answer

[956] Section 3.1.
[957] Jean and John Comaroff, *Theory from the South: Or, how Euro-America is evolving towards Africa* (Taylor & Francis 2012) 12.
[958] ibid.
[959] Stefan Salomon, 'Self-Determination in the Case Law of the African Commission: Lessons for Europe' (2017) 50 Verfassung und Recht in Übersee 219.

the question of whether the previously identified model is practicable outside the European context and how it could work in other cases.

5.1 Pan-Africanism and the AU

The influence of Pan-Africanism set the AU on a different path than her European counterpart, the EU. These differences shall be explored in this section to deepen the understanding of the AU's supranational development.

The OAU's shortcomings set the background against which the AU was established. The AU carried hopes as the OAU was often seen as essentially a 'club of dictators' who were considered the real decision-makers behind an organisation. The OAU was also viewed as being a neo-colonial institution, that used Art. III OAU Charter defending the sovereignty, territorial integrity and independence of its Member States as justification for ignoring dictatorship and oppression, rather than as an organisation committed to furthering development through Pan-Africanism.[960] Against the backdrop of the OAU's collapse, the AU aspired to be viewed as being more democratic and "people friendly".[961] In fact, the circumstances for the establishment of a fresh Pan-African organisation were arguably better in 2002 than in 1963. With the Cold War over, the new organisation did not find itself in the midst of a bipolar power struggle.[962] The crises that tormented African states in the 90s (for example, Rwanda, Somalia, the DRC, Sierra Leone, and others)[963] were ebbing and the introduction of a new supranational economic organisation in 1991, the African Economic Community, showed that interest remained in pursuing development through supranational projects.[964]

From its official launch in 2002, the AU departed in crucial aspects from its predecessor. First, in contrast to the OAU, the AU made it clear that its vision of Pan-Africanism included the African diaspora.[965] This is why this kind of institutionalised Pan-Africanism is sometimes referred to as the 'third phase'.[966] Second, unlike the OAU (or the EU respectively), the AU

[960] Olatunbosun Adeniyi and others, 'African Union and the Challenges of Development' (2016) 5 (2-3) Journal of African Studies 70.
[961] (n527) 216.
[962] ibid 206.
[963] ibid 207, 215.
[964] See generally Kwaku Danso, 'The African Economic Community: Problems and Prospects' (1995) 42(4) The Politics of Economic Integration in Africa 31-55,
[965] This approach was underlined in Art. 3 of the Protocol on Amendments of the Constitutive Act of the African Union, according to which the AU "invite(s) and encourage(s) the full participation of the African Diaspora as an important part of our Continent, in the buildings of the African Union.".
[966] The first phase is the convening of Pan-African conferences before the establishment of a continental Pan-African organisation, the second phase covers the time period of the OAU, see (n527) 208, 214.

was established with the intention of creating a supranational as opposed to an intergovernmental organisation.[967] While the extent to which this may or may not have been successful offers grounds for debate,[968] this is a considerable difference, because it shows the different origins of each organisation and thus the background of their development. Third, the circumstances surrounding the AU's foundation were considerably different. By 2002, the EU had reached a level of European integration far more advanced than what could have been predicted in 1963, the founding date of the OAU. One may therefore see the AU's ideological basis, namely a common commitment to fundamental values, including democratic governance, respect for the rule of law and human rights, as having been inspired by the successful supranational project of the EU.[969] Fourth, the AU permits collective intervention of Member States in case of grave circumstances, thereby consolidating the contested principle of the right or the responsibility to protect in its framework.[970] Art. 4(g) provides for the right to "intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity", and is supplemented by Art. 4(j), which sets out the "right of Member States to request intervention from the Union in order to restore peace and security". Considering that one of the most significant criticisms directed against the OAU was its inability to act due to its high regard for the principle of non-intervention in Member States' affairs, this is a significant change.[971] The more so, since many leaders of the African states, who previously heavily opposed any intervention from the organisation, remained unchanged.[972]

Nevertheless, even the AU could not disperse some of the criticisms already raised regarding its predecessor. Some took the fact, that Ghaddafi's suggestion of setting the formation of the United States of Africa as one of the organisation's goals was rejected at the Conference in Sirte as a sign that any erosion of individual state sovereignty was not welcome.[973] In fact, despite the aforementioned developments there is a continued emphasis on national sovereignty among

[967] Preamble of the AU Constitutive Act; see also Babatunde Fagbayibo, 'A Supranational African Union? Gazing into the Crystal Ball' (2008) 41 De Jure 496.
[968] E.g. ibid 493-503.
[969] In fact, many scholars argue that the AU modelled its institutional structure after the EU too, e.g. Olufemi Babarinde, 'The EU as a Model for the African Union: The Limits of Imitation' (2007) 7 (2) Jean Monnet/Robert Schuman Paper Series 8-9.
[970] See, for example, Ruben Reiken and Alex Bellamy, 'The Responsibility to Protect in International Law' (2010) 2(3) Global Responsibility to Protect 267-286.
[971] See sub-section 3.4.5.
[972] See 'The African Dictators' (*Africa Facts)*; '10 of Africa's Longest-Serving Dictators' (*African Leadership Magazine,* 27 April 2014).
[973] (n527) 214.

African states.[974] Furthermore, two of the AU's core institutions, the New Partnership for Africa's Development (NEPAD) Agency and the Pan-African Parliament (PAP), have been met with criticism,[975] with NEPAD having been dubbed *inter alia* a neo-colonial development contradictory to the AU's own principles, because it is viewed as operating on the basis that Africa can "renew itself by embracing globalization and partnership with the big powers".[976] Lastly, the AU's commitment to values such as good governance and democracy, were sensed as Eurocentric tendencies, influences on a Pan-African organisation that, once again in history, are not African.[977] These are challenges and concerns that the AU will not be able to avoid in the future, if its interest is to maintain the perception that supranationalism, embodied through Pan-Africanism, is the road to furthering development and improving the situation of African people on the continent.

In essence, AU Pan-Africanism captures the common wish of African state leaders and people to be free from oppression, neo-colonialism, eurocentrism, and the desire to assert an African position in the world. The goal of this third phase Pan-Africanism remains unchanged: African unity. However, it is contested how to reach these goals, which results in sometimes contradictory visions and notions of Pan-Africanism.[978] It is notable that similar contestations in relation to the EU vision, as explored in the previous chapter, have diminished neither its success nor the credibility of its supporters. Nevertheless, the diverging visions for successful Pan-Africanism on the African continent are viewed as the main factor why continental integration similar to that of the EU may not experience the same success.[979] Moreover, the issue of who is African remains a central issue among Pan-Africanists.[980] This controversy not only is about the theoretical definition of the term 'African', but it is related to concerns over what countries, governments, and whether or not and to what extent the African diaspora are to be included in conferences, organisations, and decision-making processes.[981]

---

[974] See also Nicholas Woode-Smith, 'Africa's Obsession with Sovereignty endangers Human Rights' (*Rational Standard,* 26 January 2017).
[975] See sub-section 5.3.4.
[976] (n527) 216; see also Eyob Balcha, 'The African Developmental Conundrum: The Paradox of NEPAD vs. Developmental State Policy' (*Addis Standard,* 27 March 2013).
[977] ibid.
[978] Victor Adetula, Redie Bereketeab, Liisa Laakso, Jörgen Levin, 'The Legacy of Pan-Africanism in African Integration Today' (*The Nordic Africa Institute,* September 2020) 4, 5.
[979] Emmanuel Kisiangani, 'AU and Pan-Africanism: Beyond Rhetoric' (*Institute for Security Studies* 24 May 2013).
[980] (n527) 212.
[981] For example, the AU established the Western Hemisphere African Diaspora Network (WHADN) in 2002, whose task is to explore avenues of collaboration with the African Diaspora in the Western Hemisphere, see further Africa Trade Development Center at <https://africatdc.com/whadn/>.

Based on the common opinion that the EU served as a model and thus greatly influenced the AU's design,[982] one of the challenges perceived for Africa's future is to assert its position instead of seeking to imitate foreign models.[983] Despite this, this study contends that the AU remains different and unique in comparison to the EU, if not for its connection to Pan-Africanist tradition at least because, unlike the EU, the AU was founded with the intention of creating a supranational model, while the EU reached that stage via detours. Pan-Africanism embraces the unification of all peoples of African descent and is thus distinct to traditional European classifications based on racial considerations, precisely because it is not racially motivated, but based on continental origin and the shared experience of foreign oppression. Hence, Pan-Africanism is the opposite of narrow nationalism, a concept exported to the African continent in the course of colonisation, with continuing socio-political implications.[984]

5.2 Comparing supranational models in Africa – what distinguishes the AU?

Like the EU, the supranational project of the AU is situated within the tension field of nationalist against supranationalist streams.[985] Within those supranationalist streams, as mentioned earlier, a distinction between regional supranationalism and continental supranationalism is required. Historically, Pan-Africanism was understood as meaning continental supranationalism, including the prospect of superstate building.[986] However, the perceived lack of success of traditional Pan-African ideas and the influence of colonialism (the British established SACU, France divided African regions into economic unions),[987] promoted a trend towards regional supranationalism, which resulted in the establishment of numerous regional organisations, with different aims and functions.[988] Additionally, the OAU era (1963-2002), during which the organisation remained far from being the continental supranational organisation it perhaps aimed at initially being, further allowed room for supranational developments to take place at

[982] Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge 2019) text at fn 83.
[983] Akpomuvie Orhioghene Benedict, 'Pan-Africanism and the Challenges of Development in the 21st Century' (2010) 4(2) Africana 204, 205.
[984] See further section 5.4.4.
[985] See sub-sections 4.1 and 4.4.4.
[986] Denis Goldberg, 'Traces of Pan-Africanism and African Nationalism in Africa Today' (2017) 64(153) Theoria: A Journal of Social and Political Theory 2: "In outline, the history of Pan-Africanism as a movement is one of people of African descent in the diaspora seeking an identity in the face of oppression and imposed social and economic inequality as Africans. If they could have their own (home) country, they could regain their stature and independence as a people. The Pan-Africanist movement believed that if the peoples of Africa could be united, they would be able to regain their independence.".
[987] Gilbert M. Khadiagala, 'Pan-Africanism and Regional Integration' in Nic Cheeseman, David M. Anderson, Andrea Scheibler (eds), *Routledge Handbook of African Politics* (Routledge 2013) 376.
[988] (n533).

sub-regional levels.[989] In light of the proliferation of supranationalist developments on the African continent, it is essential to identify the distinguishing features between the AU and other, potentially competing supranational projects.

Arguably the oldest example of regional supranationalism on the African continent, SACU, was based on a treaty concluded between the British Colony of Cape of Good Hope and the Orange Free State Boer Republic.[990] Today, the five South African States of Botswana, Eswatini, Lesotho, Namibia and South Africa are all members to SACU. However, in 1992 SADC emerged, now consisting of 16 Southern African Member States and thereby potentially superseding SACU in terms of significance.[991] As a result, there are now two organisations aiming for regional integration among South African states with largely overlapping goals, a situation that raised questions as to the purpose of maintaining two organisations as distinct entities.[992] Both SACU and SADC want to harmonise and facilitate regional trade, fair competition, enhance economic development and support the development of democratic institutions in Member States.[993] Similarly, ECOWAS is a regional supranational trade union counting Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo as members.[994] In the East of Africa, the EAC is constituted of the Republics of Burundi, Kenya, Rwanda, South Sudan, The United Republic of Tanzania and the Republic of Uganda.[995]

Despite these *prima facie* commonalities, regional organisations on the African continent pursue different forms of supranationalism: For example, the EAC explicitly aims at establishing a political confederation of states, forming a 'super-state',[996] and even has its own jurisdictional system and anthem, similar to the EC, and once counted as one of the most successful regional projects alongside the EC.[997] The EAC had shared values, that failed to hold the organisation together, which led to its decline and revival in 2000.[998]

ECOWAS, on the other hand, is focussed on development and economic growth. However, ECOWAS' 2020 aims include a transformation "from a body of states to a community of

[989] (n6) 33.
[990] (n532).
[991] SADC, 'Member States' (*sadc.int*).
[992] Jephias Mapuva, 'Prospects of Amalgamating the SADC and SACU' (*Ideas for Peace,* 19 February 2015).
[993] See SACU, 'Vision and Mission' (*Southern African Customs Union*) and SADC, 'SADC Objectives' (*sadc.int*).
[994] ECOWAS, 'Member States' (*ecowas.int*).
[995] EAC, 'Partner States' (*eac.int*).
[996] EAC, 'Political Federation' (*East African Community*).
[997] (n6) 42.
[998] ibid.

people", thus indicating a certain interest in socio-political development as well.[999] Beyond this, ECOWAS has succeeded in establishing a supranational economic association as well as putting in place a security mechanism that proved successful in the intervention in conflicts in West Africa (Liberia, Sierra Leone, Guinea Bissau).[1000]

SACU by further contrast remains concerned with trade and does not seem to have taken the step of wanting to transform the Union in something else other than a customs union. As such, it is an example of purely trade oriented supranationalism, seeking integration only in that area, despite referencing the importance of democratic institutions in its Member States.

Despite the emergence of SADC, SACU remains a successful regional model of supranationalism, with harmonised competition law, investment and intellectual property rights and relations to external actors such as the EU and the USA.[1001]

L' Organisation pour l'Harmonisation en Afrique du d´Droit des Affaires (OHADA) is a rare example of an organisation aiming at continental rather than regional supranationalism, however with a focus on investment law. The aim is to harmonise investment law on the entire continent.[1002] In the course of seeking to harmonise investment laws, however, the organisation's legal integration impacted the structure and functioning of judicial systems in its Member States.[1003] OHADA can issue acts that are directly applicable in the domestic law of Member States and the Common Court of Justice and Arbitration (CCJA) serves as arbitration centre and Supreme Court for judgments delivered at national level.[1004] Thus, OHADA shows numerous characteristics of legislative supranationalism. At the same time, it should be noted that the AU recognises a number of these regional economic organisations, such as ECOWAS, EAC and SADC, and that Art. 3(l) AU Constitutive Act mandates the harmonisation of the AU's and these regional organisations' integration efforts.[1005] Thus, while they are different, not all of them pose a challenge to AU integration efforts, which may result unintentionally.

Comparing these regional and continental attempts at supranationalism in Africa to EU supranationalism, key differences and commonalities that influence each project become

[999] ECOWAS, 'Vision 2020' (*ecowas.int)*.
[1000] (n6) 36.
[1001] ibid 39.
[1002] See further ohada.org.
[1003] Through its ability to issue Acts that are directly applicable to its Member States, (n6) 44.
[1004] ibid.
[1005] Other relevant treaties regulating the relationship between the AU and these regional entities are the 2008 Protocol on Relations between the RECs and the AU and the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa.

apparent. Before considering the commonalities in structure, it is important to highlight the distinct motivations inspiring the creation and development of both organisations.

Supranationalism in the EU was fuelled by anti-fascism and arose from the wish and need to create and maintain peace in Europe for the prosperity of all European states. In that sense, supranationalism offered European states protection from each other's hegemonic nationalism. The special dynamics between France and Germany influenced decisions made in the EU's development as supranational organisation. Within the EU, supranationalism also incentivised the development of the welfare state in Europe. Above that, the establishing of a 'European bloc' was recognised as necessary to strengthen the independence of European states in the face of the American and Russian blocs during the Cold War.

AU supranationalism was influenced by anti-colonialism and anti-apartheid movements, as well as a wish for protection from outside interference to assert the sovereignty, territorial integrity and the independence of African States. Pan-Africanism is central to AU supranationalism, which envisions the overcoming of "ethnic and national differences" in a move "to embrace Africa's culture and common heritage" and "invite and encourage the full participation of the African Diaspora as an important part of our Continent, in the building of the African Union", economic and social prosperity ("raise living standards of African people").[1006] Similarly, the main engine proliferating regional supranationalism in Africa was the desire of African states to develop and prosper, thereby securing sovereignty and independence. Looking at the rising importance of values such as democracy, human rights, the rule of law and good governance, strongly suggests that the current phase of African integration was and is being modelled after the European model of integration.[1007]

5.3 AU structure and functioning

The AU shows striking similarities to the EU in its institutional structure, a fact that has not gone unnoticed by scholars, who tend to criticise the AU for imitating the foreign supranational model of the EU rather than building its own version.[1008] While this study holds that despite the structural similarities, the AU remains unique and distinct compared to the EU, this section scrutinises the AU's structure and decision-making processes, to increase understanding of the AU's current functioning and institutional challenges as an organisation that continues to work

[1006] Aspiration 5 of AU Agenda 2063 (see fn 1048); AU, 'The Diaspora Division' (*African Union*).
[1007] (n988) 76.
[1008] (n983).

towards becoming the supranational model envisaged in its Constitutive Act and subsequent treaties.

5.3.1 Decision-making within the AU

In terms of structure and functioning the AU resembles the EU, while having unique features.[1009] Certain similarities stem from the fact that they are typical to supranational organisations – the first one having been the EU – and the fact that the AU followed the example of the EU to ensure its future success.[1010] The AU counts 55 Member States, over double the Member States of the EU (27).[1011] With a view to challenges in the decision-making process, as experienced in the EU, this transfers difficulties at a whole different scale, considering that difficulties to agree among the Member States in the decision-making process are considered one of the biggest drawbacks of the EU.[1012] It could also be a sign that the requirement of a unanimous vote is not feasible in the AU context, given that it is already barely feasible within EU.[1013]

Within the AU's Constitutive Act there are different provisions which regulate the vote requirements for each organ's decision-making process. Art. 7, for example, provides that decisions in the Assembly of Heads of State and Government are to be taken by consensus. While consensus is not unanimity, it does, however, require no objection, with abstentions not affecting consensus. Art. 7 takes account of the high threshold of consensus by adding that should it fail, a two-thirds majority will suffice. Similarly, Art. 11 sets out the same voting requirements concerning the Executive Council. Nevertheless, reaching a vote of more than 33 Member States at least remains a challenging task. Despite this challenge, statistical research on performance of decision-making processes (measured through the amount of decision output) of different IOs undertaken by Sommerer et al suggests that the AU is showing a rather positive trend, despite its size and abundance of majority vote requirements.[1014]

[1009] For an overview of the AU's institutional structure see AU Commission, 'African Union Handbook 2022' (African Union 2022) 12.
[1010] See further (n969).
[1011] AU, 'Member States' (*African Union*).
[1012] See, for example, Adrian Blazquez, 'Identifying the EU's Weaknesses in Foreign and Defence Policy: The Struggle to become a more Effective Global Actor' (*Europeum Monitor*, 19 October 2020) 8; Bernd Riegert, 'The 4 Persistent Problems Dogging the EU' (*Deutsche Welle*, 14 September 2021).
[1013] See, for example, 'Should unanimity in the EU Council be abolished?' (*Debating Europe*, 8 November 2022); Jacopo Barigazzi and Jakob Hanke Vela, 'EU's unanimity rules are here for now, despite chatter' (*Politico*, 20 September 2022).
[1014] Thomas Sommerer and others, 'Decision-Making in International Organizations: Institutional Design and Performance' (2021) 17(4) The Review of International Organisations 827-830.

5.3.2 The Assembly of Heads of State and Government

The Assembly of Heads of State and Government (hereinafter: the Assembly) is the AU's legislative organ, which among other things determines the AU's policies, establishes its priorities, adopts its annual programme and monitors the implementation of its policies and decisions.[1015] It can also create any committee, working group or commission as it deems necessary, as well as delegate its powers and functions to other AU organs, as appropriate.[1016] For example, on peace and security matters, the Assembly delegated its powers to the Peace and Security Council (PSC).[1017]

The AU's Assembly does not have a direct counterpart in the EU. In fact, the Assembly combines scopes and functions of both, the EU Commission and the European Council.

In practice, the Assembly has been criticised for its overlapping and at times contradictory engagement with the PSC, the organ the Assembly itself created within its powers under Art. 9 (1) d AU Constitutive Act.[1018] The miscommunication and struggle for authority in disputed cases between the Assembly and the PSC became apparent in cases such as the crisis that unfolded in Burundi in 2015.[1019] The frictions between these two organs resulted in the failure of the AU to deal with the crisis, and the back and forth contributed to its escalation.[1020] Such institutional weaknesses affect the reputation and credibility of the AU as a whole, as the Assembly is its declared supreme organ.[1021] This is evidenced by harsh rejections of AU intervention in crises such as the one in Burundi by Tanzania and South Africa, albeit having initially been in favour of such intervention, after the Assembly and PSC sent contradictory signals as to how the crisis ought to be addressed.[1022]

[1015] Art. 9 AU Constitutive Act; (n1009) 32.
[1016] (n1009) 32.
[1017] ibid.
[1018] The PSC was established by Decision AHG/Dec 160 (xxxvii) of the Summit of Lusaka, July 2001.
[1019] 'World Report 2015: Rights Trends in World Report 2015: Burundi' (*Human Rights Watch*); Paul Nantulya, 'Burundi, the Forgotten Crisis, Still Burns' (*Africa Center for Strategic Studies*, 24 September 2019).
[1020] Paul Nantulya, 'The African Union Wavers between Reform and More of the Same' (*African Center for Strategic Studies*, 19 April 2019).
[1021] See also Paul-Simon Handy and Félicité Djilo, 'The African Union's Peace and Security Dilemma' (*Institute for Security Studies*, 26 July 2021).
[1022] ibid.

5.3.3 The Executive Council and the Commission

The Executive Council's task is to coordinate and take policy decisions in areas considered "of interest to the Member States" (Art. 13 AU Constitutive Act). Art. 13 lists examples of such areas, which include foreign trade, energy, industry and mineral resources as well as food, agricultural and animal resources, livestock production and forestry. The Council is composed of Ministers from the Member States' governments and can be considered the counterpart to the Council of the EU. The Executive Council can delegate its powers and functions to the Specialized Technical Committees as specified in Art. 14 AU Constitutive Act.

In 2013, the Executive Council famously debated the AU's (or Africa's for that matter) relationship with the ICC at its 15th extraordinary session in light of the latter's alleged selectivity in its pursuit of justice targeting predominantly African states.[1023] With regards to self-determination, the Council adopted a declaration at its 23rd ordinary session in the same year (2013), in which it called on Morocco and the Front Polisario to find a solution "which will provide for the self-determination of the people of Western Sahara".[1024] In continuation of this stance in the Western Sahara dispute, the Executive Council also halted two large scale infrastructure projects intended to be conducted on the disputed territory by Morocco. The Council withheld approval for these projects and called upon the two parties in the conflict to find a mutually acceptable solution.[1025]

Recently, disputes concerning Israel's potential status as an observer state to the AU caused considerable friction among Member States. In a turn away from previous rejections of Israel's observer status, Chairperson Moussa Faki Mahamat granted Israel observer status within the AU in 2021, a decision which was not supported by many AU Member States.[1026] Algeria was among the first to firmly reject Faki's motion, referring to Israel's disregard of the Palestinian peoples' right to self-determination, amongst other things.[1027] Numerous other African countries followed suit. Observer status in the AU allows those entities that hold it to participate

[1023] Nan, 'AU Executive Council debates Africa's Relationship with ICC' (*Eagle Online*, 11 October 2013); for the full statement of Council Chair Tedros Adhanom Ghebreyesus see also 'The 15th Extraordinary Session of the Executive Council of the African Union' (*Segun Badmus' Perspectives*)*;* the Assembly later adopted a decision in which it requests the ICC to refer back two cases to Kenya, see Solomon Ayele Dersso, 'The AU's Extraordinary Summit Decisions on Africa-ICC Relationship' (*EJIL Talk*, 28 October 2013).
[1024] Decision on the First Progress Report of the Chairperson of the Commission on the Situation in Western Sahara – Doc. EX.CL/788(XXIII) No. 3.
[1025] Sahara Press Service, 'AU Executive Council rejects Moroccan attempt to pass two projects through Saharawi occupied territories towards West Africa' (*Spsrasd.info,* 5 February 2021).
[1026] 'Israel granted official Observer Status at the African Union' (*Al Jazeera,* 23 July 2021).
[1027] Anouar Diden, 'Israel's observer status: Algeria puts pressure on AU' (*Le Journal de l'Afrique,* 5 August 2021); AFP and Toi Staff, 'Algeria denounces African Union granting Israel observer status' (*The Times of Israel* 26 July 2021).

in the AU's institutions and influence its aims and policies without being a Member State.[1028] Organisations can also be granted observer states, but the accreditation process is different for organisations and states. Conversely, Palestine was granted observer status in the AU in 2013, a decision that solicited praise rather than conflict among African States.[1029]

Considering the possibility of building relations and influencing AU policies, Israel's interest in gaining observer status is evident, especially in light of its longstanding conflict with Palestine, whose position continues to be backed by the AU.[1030] Israel was an observer to the OAU until the AU became operational in 2002, and has since then failed to regain its status.[1031] This shows the stance and determination of AU Member States regarding the ongoing Palestine conflict. Given the lack of agreement on the matter, a vote was expected to be held, which was postponed, due to fears it could cause a significant rift among the AU's 55 Member States.[1032] To alleviate the pressure on the situation, and following strong opposition by influential African states, the Assembly suspended Israel's observer status.[1033]

The AU Commission briefly discussed, it is mandated by the Assembly and the Executive Council. The Commission serves as the organisation's "secretariat" and fulfils the role of custodian of the AU Constitutive Act.[1034]

5.3.4 The Pan-African Parliament

The PAP is meant to be the legislative organ of the AU. Art. 17 provides for the establishment of the PAP, "in order to ensure the full participation of African peoples in the development and economic integration of the continent". At the moment, the PAP does not have full legislative powers unlike its counterpart in the EU, the European Parliament, which has gained increasing legislative powers in various areas since its establishment.[1035] Instead, the PAP is given consultative and advisory powers only. Nonetheless, Art. 2 of the Protocol to the Abuja Treaty

[1028] Draft Criteria for Accreditation of Non-African States (Document EX CL 161 VI_E) Part III.
[1029] Fathya el-Dakhakhni, 'AU grants Palestine Observer Status' (*Egypt Independent,* 27 May 2013).
[1030] See also Michael Bishku, 'In Search of Advantages: Israel's Observer Status in the African Union' (*The Conversation,* 15 August 2021.
[1031] See further, Unit for Political Studies, 'Israeli Observer Status at the African Union: What do They Gain?' (Arab Center for Research and Policy Studies, 8 August 2021) 2-3.
[1032] 'African Union postpones debate on Israel's observer status' (*Al Jazeera,* 7 February 2022).
[1033] Al Mayadeen Net, 'African Union suspends decision to grant observer status to "Israel"' (*Al Mayadeen,* 6 February 2022).
[1034] Art. 20 AU Constitutive Act; see also AU, 'The AU Commission' (*African Union*).
[1035] European Parliamentary Research Service, 'In Focus – the European Parliament has More Power' (*European Sources Online*, 17 March 2014); Julia De Clerck-Sachsse and Piotr Maciej Kaczyński, *The European Parliament: More Powerful, Less Legitimate? An Outlook for the 7th Term* (Centre for European Policy Studies, Working Document No 314/May 2009) 6-12.

relating to the PAP states that "the ultimate aim (…) shall be to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage". Interestingly, both the PAP and the European Parliament face the criticism of insufficient democratic legitimisation, despite the latter having legislative powers, while the former has none.[1036] This shows that the issue of democratic legitimisation will likely not be over for the PAP, once the AU Member States agree to transfer legislative powers to it, but rather, that it will be a recurring criticism that democratic legislative bodies in both supranational organisations will have to keep addressing.

The PAP was envisaged to be more far-reaching than the European Parliament, and different from the latter. The PAP's anticipated final role is recorded in the Protocol to the Abuja Treaty relating to the PAP. According to the AU, the PAP was "set up to ensure the full participation of African peoples in the economic development and integration of the continent".[1037] This remark shows once again, that participation in economic development as well as continental integration, are paramount within the AU and for African states and peoples. It is also reminiscent of internal self-determination, due to the use of the terms "participation", "involved in discussions" and "decision making".[1038]

Unfortunately, the PAP became the scene of violence and discord rather than a scene for unity and democratic process during a session in June 2021.[1039] Members of the PAP physically fought and threatened each other over the question of who would be its next President.[1040] Thus, just as the other AU institutions observed so far, the PAP is marked by internal struggles, which can be traced back to struggles for power among the Member States. By contrast, the peaceful elections of June 2022, showed that the PAP can assert its function as peaceful, democratic organ. In a display of unity and considerable growth since the unfortunate episode in the previous year, the PAP's 2022 election mark a significant progress in the democratisation process of the continent.[1041]

[1036] Svetlozar A. Andreev, 'The EU 'Crisis of Legitimacy' Revisited: Concepts, Causes, and Possible Consequences for the European Politics and Citizens' (2007) 7(2) Political Perspectives 6, 8; Peter Fabricius, 'Africa: The Pan-African Parliament Finally elects a President' (*ISS Africa,* 1 July 2022); see also generally about approaches to the legitimacy crisis of the PAP Ogo Nzewi, 'Influence and Legitimacy in African Regional Parliamentary Assemblies: The Case of the Pan-African Parliament's Search for Legislative Powers' (2013) 49(4) Journal of Asian and African Studies 488-507.
[1037] AU, 'The Pan-African Parliament' (*African Union*).
[1038] ibid.
[1039] 'Pan-African Parliament Brawl Condemned' (*eNCA*, 1 June 2021).
[1040] Dickens Olewe, 'Pan-African Parliament: Punches, Kicks and Death Threats' (*BBC News,* 12 June 2021).
[1041] See also Don Makubaza, 'PAP Elections: Africa the Biggest Winner' (*The Herald,* 02 July 2022).

Member States' reluctance to sign the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (2014), whose Art. 8 would transfer full legislative powers to the PAP, shows their hesitance to fully commit to the Pan-African vision, at least to the extent that it involves power transfers to the supranational organisation.[1042] Until today, only 22 out of 55 Member States have signed the protocol, of which only 14 have ratified it.[1043] Not only did it take 5 years for the 22 signatures to be gathered, the last signature was added in 2019, which underlines the Members' reluctance to extend full legislative powers to the PAP, despite increasing integration in the AU in the past years and the support for plans to deepen that integration in other realms.

5.3.5 The Court of Justice, Financial Institutions and the Economic, Social and Cultural Council

The AU's judicative branch as it currently exists consists first and foremost of the African Court of Human and Peoples' Rights (ACtHPR).[1044] However, should the *Protocol on the Statute of the African Court of Justice and Human Rights* eventually enter into force, a merger of the ACtHPR and the African Court of Justice and Human Rights (ACJ) is envisaged to create the African Court of Justice and Human and People's Rights.[1045] Thus, the ACJ would become the African equivalent to the ECJ.

Within the financial branch, Art. 19(a) calls for establishment of an African Central Bank, an undertaking that has yet to be implemented. It started to take shape in 2018, when the Bureau of the African Central Bank Association (AACB) presented its project concerning the establishment of the African Central Bank in Dakar, Senegal.[1046] Similar to the EU, the AU aims to have a single currency, unofficially referred to as the 'Afro', by 2023.[1047] Thus, while there currently is no equivalent to the ECB in Africa, concrete plans exist as to the creation of such equivalent.

The last institution to be mentioned here is the Economic, Social and Cultural Council (ECOSOCC), whose purpose is to build the bridge between the AU and African Civil Organisations, who sit on the Council. ECOSOCC itself is considered an advisory organ, which

[1042] See the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament.
[1043] See the Status List of the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (27 April 2022).
[1044] The other judicial bodies will be briefly mentioned later, in sub-section 5.4.2.
[1045] See Art. 2.
[1046] See Press Release No. 031/2018 (African Union Directorate of Information and Communication).
[1047] (n960) 71; see also Treaty Establishing the African Economic Community Art. 6 (2) f (iii).

is intended to foster stability and economic growth in the AU through the professional input of regional and continental African Civil Organisations. In this function, ECOSOCC can be considered comparable to the CoR in the EU.

5.4 AU approach to self-determination of peoples

As set out in detail earlier on, self-determination of peoples and the idea of supranational integration hold a special place in African law and policies under the viewpoint of Pan-Africanism. In fact, it is notable, that the African Charter emphasises "peoples' rights" in its title. This section explores the AU approach to self-determination of peoples in more depth. Already *prima facie* the AU shows a different approach to questions concerning self-determination of peoples than the EU. While the EU does not recognise the right anywhere in its Treaties, strategic agendas or reports, the AU explicitly acknowledges in its latest Agenda 2063 that self-determination of peoples is central to the organisation.[1048] In doing so, the AU puts self-determination of peoples at the centre of its system, which by itself is a considerable divergence from the EU model. Additionally, even in other AU resources, the right to self-determination of peoples is referenced on numerous occasions. To understand the meaning of the right to self-determination within the AU framework, this section will take a closer look at the different sources that cite it and their context.

This section investigates whether a new interpretation of the principle of self-determination of peoples is in the making in Africa. More precisely, one that distinguishes between the right to self-determination of peoples as understood within the colonial context, and one that adds the interpretation of self-determination as a political concept as engine for supranational integration to access the guarantees of self-determination: prosperity, control over wealth and resources, freedom of oppression and free development.

The recognition that self-determination of peoples is a dichotomous legal norm is neither new nor particular to the African context. Nevertheless, this particularity is predominantly overlooked or not given the consideration it may deserve. It was Antonio Cassese, who observed in 1995 that "the thrust of self-determination can be chiefly found in a *principle* while there exist only a few *specific customary rules* on the matter".[1049] The dichotomy of self-determination hence consists in its operation as legal principle as well as a right.

Obviously, today more specific treaty rules have been added to the realm self-determination: At the time of Cassese's writing, the international recognition of an indigenous right to self-determination was still highly contested, while it is now articulated in Art. 3 UNDRIP. Similarly, the application of the right to self-determination to minorities, as in Kosovo in Europe

[1048] AU, 'Agenda 2063: The Africa We Want' (*African Union*).
[1049] (n44) 320.

and South Sudan in Africa, was unthinkable in 1995. These cases are by and large considered exceptions that did not affect the way scholarship and international law view the position of minorities in the face of self-determination. Moreover, the circumstances surrounding the independence of Kosovo and that of South Sudan are particular defying their value as precedents for a broader right to self-determination of minorities that includes the option of secession. While in Kosovo an ethnic minority seceded against the will of the parent state, in South Sudan, Sudan recognised and authorised the secession of the former. Hence, despite these cases the relation between minority rights and self-determination remains controversial, although progress has been made with regards to minorities' access to internal self-determination.

Foreseeing this trend, Cassese postulated that:

> (…) it is possible to take an alternative approach consisting of rethinking and constructively welding together the two notions of the self-determination of peoples and the protection of minorities and ethnic groups. (…) any expansions in the scope of self-determination to include ethnic minority groups and others at present not entitled to claim self-determination must be accompanied by a broadening of the concept of self-determination itself (…). The tenacity with which States safeguard their own (and other States') territorial integrity forces this conclusion. As long as self-determination is perceived primarily as a right to independent statehood it will remain more a source of conflict than a substantive component in the settlement of disputes.[1050]

This aligns with the premises this study is based on. As emphasised throughout this thesis, shifting the focus of interpretation regarding self-determination of peoples from territoriality and statehood to its function as giving access to self-governance is crucial to its applicability in the future and its peace-maintaining function. However, this study goes further by suggesting that not only should self-determination not be viewed primarily as a right to independent statehood, but rather than solely considering internal or external self-determination, an option to enable participation in supranational organisations should be considered. As the previous chapter on the EU has shown, such an approach could be fruitful in Scotland and Catalonia. In the AU, it could be a solution to mitigate territorial and ethnic conflicts inherited from colonisation by addressing causes underlying claims to self-determination and by reducing the significance of independent statehood as the gateway to a peoples' free and autonomous

[1050] ibid 349-350.

determination of its political, economic, cultural and social development. This thesis thus suggests a humanitarian and civic understanding of self-determination, rather than a state-centred and ethnic interpretation.

5.4.1 Self-determination and the right to self-determination of peoples in the AU

Not only does the AU engage directly with self-determination of peoples, contrary to the EU, but the plethora of material that emerged from this engagement suggests that in the AU context a differentiated interpretation and application of self-determination of peoples is materialising. The AU's Agenda 2063 is the title given to the strategic framework set up for the AU in 2013, on the occasion of the 50th anniversary of the OAU/AU. Agenda 2063 is one of many strategic frameworks constituting the AU policy-system. Other frameworks include the African Union Ten Years Plan (2013-2023), Agenda 2024: Science, Technology and Innovation Strategy for Africa, Agenda 2030: Scientific and Technological Development and Agenda 2040: Africa Union's Plan for African Children, which all emerged as specific elaborations on issues and topics inspired by the aspirations set out in Agenda 2063.

About the Agenda 2063 the AU declares:

> It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance.[1051]

'Self-determination' is mentioned on its own here and is not referred to as the 'right to self-determination of peoples' as is the case, for example in Art. 20 of the African Charter. In order to illustrate the difference more clearly, Article 20 is reproduced below:

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

[1051] (n1048).

> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

If one compares, how 'self-determination' or the 'right to self-determination of peoples' are used in both sources, one will notice that not only is the concept named differently, but the context in which it is embedded as well. In Agenda 2063 'self-determination' is mentioned alongside unity, freedom, progress and collective prosperity.[1052] This suggests that 'self-determination' in Agenda 2063 is understood in a similar way and as something supplementing the other goals, thus, as a concept fostering the promotion of continental unity, freedom, progress and prosperity. This is supported by the connection to Pan-Africanism emphasised in the Agenda.[1053] If one accepts this reading, the choice to not refer to the 'right to self-determination of peoples' was intentional, as the right to self-determination of peoples is an already loaded term referring to a particular and very contested norm of international law. This is supported by the fact, that in the Agenda distinction is made concerning the right to self-determination when referring to legal contexts (decolonisation).[1054] In a further step, one could reflect on whether 'self-determination' is not being strictly viewed as a legal right but rather as a legal-political principle as opposed to the right to self-determination of peoples. Thus, 'self-determination' might be a legal principle in the process of creation (*lex ferenda*).[1055]

Six aspirations form part of Agenda 2063. Aspiration 2, which is presented under the title "An integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance" reads:

> Since 1963, the quest for African Unity has been inspired by the spirit of Pan Africanism, focusing on liberation, and political and economic independence. It is motivated by development based on self-reliance and self-determination of African people, with democratic and people-centred governance.

[1052] (1048) paras. 19, 66a.
[1053] ibid para. 66(a).
[1054] ibid 22.
[1055] Given the sometimes ambiguous delineation of what makes a *lex ferenda* in international law, see further Hugh Thirlway, 'Reflections on *Lex Ferenda*' (2001) 32 Netherlands Yearbook of International Law 3-26.

Goals:

1. United Africa (Federal/Confederate)
   - accelerating progress towards continental unity and integration for sustained growth, trade, exchanges of goods, services, free movement of people and capital through establishing a United Africa and fast-tracking economic integration through the/of the CFTA[1056]

2. World class infrastructure criss-crosses Africa

   - improving connectivity through newer and bolder initiatives to link the continent by rail, road, sea and air; and developing regional and continental power pools, as well as ICT

3. Decolonisation

   - All remnants of colonialism will have ended and all African territories under occupation fully liberated. We shall take measures to expeditiously end the unlawful occupation of the Chagos Archipelago, the Comorian Island of Mayotte and affirming the right to self-determination of the people of Western Sahara.[1057]

Aspiration 2 also speaks of 'self-determination' rather than the 'right to self-determination of peoples'. However, this time reference is made to 'self-determination of African people'. This addition suggests there is another nuance to make when assessing the interpretation of self-determination of peoples within the AU. In fact, two contexts are presented here in which self-determination operates. First, under the goal of a united Africa, and second, within the context of decolonisation. The first goal is aligned with the previously stated interpretation of self-determination as an engine for integration in a quest for prosperity and development. The second goal, however, refers to territories and speaks of liberation. Within that bullet point, the term 'right to self-determination' is used. This suggests that within the AU framework distinction needs to be made between self-determination as a Pan-African concept and the international right to self-determination. When mentioned simply as self-determination, it means Pan-Africanism; when mentioned as the right to self-determination, it means the international legal norm as included in the ICCPR and ICESCR. At the same time, AU material suggests that self-determination and the right to self-determination are not completely distinct.

[1056] '/' added by author.
[1057] AU, 'Our Aspirations for the Africa We Want' (*African Union*).

In its Strategic Plan 2009 – 2012, the AU distinguishes between different operative levels from the viewpoint of the supranational organisation. Three levels are being highlighted explicitly, while a fourth level is implied:

> Africa seeks to promote existing and agreed-upon shared values across the Continent at individual, national, regional and continental levels. At the individual level, the values include those inherent in universal and inalienable human rights; basic freedoms; identity and opportunity; tolerance; participation in governance and development processes; reciprocal solidarity in times of need and sharing; dignity and respect; justice; sense of fairness; equality of persons; respect for the elderly; integrity; community cohesion and inclusive societies; and control of one's destiny. At national and regional levels, the values include: sovereignty; self-determination and independence; adherence to the rule of law; democracy and representation of the will of the people; care for the vulnerable; economic and social justice; public order, equality, fairness; solidarity of States; and sustainability of the environment.[1058]

First, there is a reference to the individual level, which appears to be viewed as essentially consisting of individual human rights. However, community and society are also mentioned within that category, thus including a caveat for collective rights as well. This interpretation is supported by the African human rights framework more broadly. Unlike in the European context, human rights within the framework of the African Charter expressly include collective rights alongside individual ones and have done so from the beginning. In fact, the Charter itself refers in its title to "human and peoples' rights", thus putting individual and collective human rights on an equal footing. It also includes several provisions applicable to communities or peoples rather than only individuals.[1059] Consequently, the 'individual level' includes both, individual and collective human rights that can be enforced *vis-à-vis* the other levels mentioned in the Strategic Plan.

Second and third are the national and regional levels, which are mentioned alongside each other in the same sentence. Remarkably, no distinction is being made with regards to sovereignty, self-determination and independence on a national and regional level. Instead, all these "values" seem to apply to each level respectively. This raises questions as to the meaning given to each of these values. Independence equal to statehood is commonly something reserved for the

[1058] Strategic Plan 2009 – 2012 (Assembly/AU/3 (XIII)) para. 96.
[1059] Arts. 20 and subsequent.

national level, at least from the viewpoint of international law and relations. The same applies to full sovereignty and self-determination if one observes these from the perspective of questions of statehood.

The fact that no distinction or further clarification of these values ensues can mean two things. One, that no distinction was intended and regions as well as nation states are entitled to full sovereignty, self-determination and independence. This would include the option of regions aspiring to achieve statehood. Two, and alternatively, the same values apply to the national and regional level, but they mean something different than what is usually understood: namely, sovereignty, self-determination and independence have nothing to do with statehood, but they are concepts carrying certain guarantees. These guarantees are the ability to make and implement decisions, freedom from outside interference and respect for the decisions and actions pursued.

It is notable in this regard, that despite being mentioned next to sovereignty and independence, reference is not being made to the right to self-determination of peoples in the Strategic Plan, but instead only to 'self-determination'. In light of the previous analysis, this further suggests that the distinction between self-determination and the right to self-determination is an intentional one. This would also mean, in turn, that if self-determination was intentionally chosen over the right to self-determination, that the classical interpretations of the concepts of sovereignty, self-determination and independence as usually made in relation to the right to self-determination, do not apply without qualifications.

Given the continued and understandable hesitance of states to make full independence and sovereignty as classically reserved for states applicable to notions of self-determination – including the established right to self-determination of peoples – makes option one seem very unlikely. The better arguments, thus, support the alternative interpretation, which requires a qualification of the concepts of 'sovereignty', 'self-determination' and 'independence', as they are already established in the context of the international right to self-determination of peoples.

The fourth level, not explicitly mentioned in the Strategic Plan, is the supranational level. It may seem obvious but should be mentioned for the sake of completeness and because the AU's Strategic Plan does not mention it explicitly. The Plan was elaborated by and for an organisation operating on a supranational level, and that same supranational organisation set out the values applicable to the individual, national and regional levels, without, however, explicitly stating that the supranational level is bound by the same values. Considering that paragraph 96 speaks of "existing and agreed-upon shared values across the Continent" and that "Africa seeks to

promote" these, the most obvious conclusion is that the supranational organisation sees its own role in the promotion of these values in a bid for further integration, which would furthermore be in line with its purpose (Art. 3 Constitutive Act).

Nevertheless, supranationalism is not only pursued by promoting individual, national and regional values without proposing a new set of particular supranational values as the EU did. Despite not labelling the references to democratic principles, human rights, the rule of law and good governance as 'African values', they are enshrined as the principles the AU is based on in Art. 4 AU Constitutive Act.

Further support for the theory of an emerging principle of self-determination of peoples within the AU context can also be found in many of the AU's Assembly's and Executive Council's declarations, which are consistent in their use of the right to self-determination of peoples in international legal cases such as Palestine or the decolonisation of Mauritius, without referring to 'self-determination of peoples' in that context.[1060]

Concluding, there are obvious similarities to the findings this case study found regarding the EU: both supranational organisations uphold shared values on which the respective organisation is founded. The notion of shared values is recognised as important for the future longevity of the organisation in both cases. Furthermore, the content of these shared values overlaps, e.g. respect for human rights, democracy and equality are emphasised by both organisations.

Distinct to the EU, the AU, however, explicitly recognised and set out the right to self-determination of peoples in Art. 20 African Charter, which binds all AU Member States. The AU also distinguishes between shared values on an individual, regional and national level, while listing different values for each. In comparison, EU shared values apply to all levels without further distinction. Only the AU explicitly upholds "self-determination and independence" as shared value. In that regard, the AU recognises two interpretations of self-determination, one Pan-African, one stemming from international law.

[1060] See, for example, Declaration on the Situation in Palestine and the Middle East, Assembly/AU/Decl. 1(XXXV) 1, 2 (para. 3), 5 (para. 16); Decision on Decolonisation of Mauritius, Assembly/AU/Dec.788(XXXIII) 1 paras. 5c, 5e; but also Resolution on the Impact of Sanctions and Unilateral Coercive Measures on African Union Member States, Assembly/AU/Res. 1(XXXV) 2, para 1 and Resolution on the Impact of Sanction and Unilateral Coercive Measures, Assembly/AU/Res.1(XXXIII) para 1, which reference the right to self-determination in the context of unilateral coercive measures in order to reach the subordination of another state resulting in the relinquishing of its sovereign rights.

Against the historical and political background of many African states, self-determination first and foremost is a means to achieve independence, not only because statehood is the ultimate goal, but because statehood is viewed as the embodiment of freedom from outside interference, oppression and exploitation. Thus, it is no coincidence that self-determination and independence are mentioned in the same sentence. Interpreted together with the goals and aspirations of the AU and the common commitment of African States to the supranational organisation, this concept of self-determination points towards a new interpretation of self-determination that is developing in the African context.

Having discussed the political dimension, the next section will consider the legal approach to self-determination of peoples within African jurisprudence.

5.4.2 African legal approaches to the right to self-determination of peoples

The AU aims for supranational, sub-continental integration to result in a "United Africa", in the form of a federation or confederation of States.[1061] Thus, on a continental level, either through a potential exercise of African peoples' right to self-determination, or conversely, through the sovereign acts of the AU's Member States, the AU is intended to result in one of the forms of independent statehood. While this only concerns the continental level, this section, however, will analyse African legal approaches to the right to self-determination of peoples from both, the continental perspective of the AU - mainly through jurisprudence of the ACtHPR and the ACHPR - as well as the regional and national perspectives of AU Member States.

While the AU itself is not a party to the African Charter, 54 of its 55 Member States have ratified the Charter, 34 of which have subordinated themselves to the ACtHPR jurisdiction pursuant to Arts. 3 and 4 Optional Protocol,[1062] whose judgments are legally binding upon the parties. Furthermore, the ACtHPR is one of the AU's legal organs, beside the Commission on International Law (AUCIL), Extraordinary African Chambers (EAC), African Commission on Human and Peoples' Rights (ACHPR), AU Advisory Board on Corruption (AUABC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Not all

[1061] See Aspiration 2, Goal 8 of Agenda 2063.
[1062] ACtHPR 'African Court on Human and Peoples' Rights' (*African Court on Human and Peoples' Rights*, 17 June 2023).

these judicial bodies have engaged with questions concerning the right to self-determination of peoples,[1063] therefore this section will focus on those which have, ACHPR and ACtHPR.

In assessing the legal approach of and within a supranational organisation, one needs to differentiate between the stance and jurisprudence of the supranational organisation and those on the national plane, as these do not always overlap.[1064] Hence, this study distinguishes between the African approach to self-determination of peoples through the AU's judicial organs and the approach shown by selected AU Member States within their own national jurisdiction and as communicated on the political stage. Consequently, this section will first look at the legal parameters regarding self-determination as set out by the AU judicial organs, before assessing some of the Member States' individual positions.

The ACtHPR

The ACtHPR's position is anchored in Art. 18 of the AU Constitutive Act, while further provisions concerning its composition and functioning can be found in the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Union Court on Human and Peoples' Rights (hereinafter 'the ACtHPR Protocol').

One important case in which the ACtHPR issued a decision regarding questions involving the right to self-determination was *Ogiek* (2017). In the case, which concerned the indigenous right to self-determination, the Court denied an interpretation of the indigenous right to self-determination amounting to a right to independence.[1065] At the same time, the Court held that the indigenous peoples' rights to territory, culture, to freely dispose of their wealth and resources as well as their right to development are linked to the right to self-determination.[1066] However, it is important to note that in this case not the right to self-determination as such was in question, as it is enshrined in Art. 20 African Charter, but Arts. 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter.

The ACtHPR also dealt with an application concerning the Western Sahara (2022). That application was framed around the alleged failure of certain African states to respect the

[1063] This is because the African Charter establishes the ACHPR as the monitoring body overseeing its implementation, while the ACtHPR has a complementary function in relation to the ACHPR according to the Protocol establishing the Court, the Rules of Court and the Rules of Procedures of the ACHPR.
[1064] See, for example, section 4.1 about the struggle for legal supremacy between the German Constitutional Court and the ECJ.
[1065] *African Commission of Human and Peoples' Rights v Republic of Kenya* [2017] ACtHPR Application No. 006/2012 para. 199.
[1066] ibid, para. 199; more generally paras. 195-201.

Western Sahara's territorial integrity, state sovereignty and the right to self-determination of the Sahrawi people by readmitting Morocco as a Member of the AU without imposing conditions requiring Morocco to end its "unlawful occupation".[1067] While the ACtHPR reaffirmed the Sahrawi's right to self-determination throughout the judgment, even stating that they "have been deprived of their right to self-determination as a result of the continued occupation of part of its territory by Morocco",[1068] it disagreed that the African states in question violated their obligations arising from Art. 20 African Charter.[1069] It argued that "ultimately, the admission of Morocco is essentially the decision of the Assembly, which has a distinct legal personality, and not of its individual Member States".[1070]

The ACHPR

Most of the legal engagement with the right to self-determination of peoples of Art. 20 took place in the jurisprudence of the ACHPR with regards to human and peoples' rights as provided in the African Charter. The ACHPR's approach to the right to self-determination of peoples in its jurisprudence can be distinguished in two main questions the case law indicates: 1. who the right holder is (i.e. who is a people), and 2. what the right comprises (i.e. what is self-determination).

Already on first reading the way the right to self-determination of peoples is enshrined in Art. 20 African Charter, shows distinct characteristics in comparison to joint Art. 1 ICCPR and ICESCR.[1071] First, Art. 20 African Charter uniquely upholds a right of all peoples to exist, before acknowledging that they hold a right to self-determination.[1072]

While the existence of a people is a logical requirement to enjoy any rights, it is a consideration that the two human rights Covenants do not show in their joint Art. 1.[1073] Second, the African Charter emphasises the "unquestionable" and "inalienable" nature of the right to self-

[1067] *Bernard Anbataayela Mornah v Respondent States* [2022] ACtHPR Application No. 028/2018 paras. 8-16.
[1068] ibid para. 300.
[1069] ibid paras. 314, 322.
[1070] ibid para. 319.
[1071] For the full provision see sub-section 5.4.1.
[1072] See also (n1067) para. 295.
[1073] What exactly the right to existence as enshrined in Art. 20 ACHPR amounts to, remains controversial, as the Commission did not engage with this right, despite having mentioned it in its case law, see Resolution on the Western Sahara, ACHPR/Res. 45, 11 May 2000 and Resolution on the Situation Between Sudan and South Sudan, ACHPR/Res/219, 2 May 2012. For the different scholarly approaches to Art. 20's right to existence see further Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP 2020) 499-500.

determination of peoples. Jointly, Art. 1 of both human rights Covenants simply state that all peoples have the right to self-determination, without adding these two characteristics.

The rest of the first paragraphs of both provisions are similar in so far as they protect the free determination of peoples' political, social and economic development. Notably, Art. 20 African Charter, unlike Art. 1 Covenant, does not mention cultural self-determination. This omission can be explained as Art. 22 African upholds peoples' right to economic, social and cultural development. Thus, the cultural aspect is enshrined in a separate article.

Another considerable difference is the separation of the peoples' right to freely dispose of their natural wealth and resources in the African Charter (Article 21) rather than it being included in Art. 20 as the right to self-determination as such. It will be recalled that joint Art. 1 of the Covenants includes the right to freely dispose of natural resources in connection with self-determination of peoples. As will be shown below, ACHPR jurisprudence interprets this distribution of aspects conventionally linked to the right to self-determination in general international law to the effect that in the African human rights system, the collective rights enshrined in Arts. 20 and following are interlinked, rather than distinct stand-alone provisions.

Case law on Art. 20: content of the right (what is self-determination)?

On the question of what self-determination encompasses, the ACHPR seems to take a wide stance. For example, besides finding that territorial occupation can amount to a violation of Art. 20's right to self-determination of peoples,[1074] it also acknowledged that acts of terrorism may potentially constitute a violation of the right to self-determination of peoples of Art. 20 in so far as it poses a threat to a state's existence.[1075]

In so far as it concerns the right to 'pursue social and economic development' as provided for in Art. 20(1), links between the right to self-determination of peoples and Arts. 21 and 24 have been confirmed in the ACHPR's jurisprudence,[1076] thus showing the interrelation between these provisions. In light of this interrelation, the right to freely dispose of wealth and natural

[1074] ACHPR, *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication 227/99, 29 May 2003 paras 67 and 77.
[1075] Republic of Kenya, Combined 8th–11th Periodic Report on the African Charter on Human & Peoples' Rights, November 2014, paras 276, 277.
[1076] Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR/Res. 224, 2 May 2012.

resources cannot be viewed in complete isolation from the right to self-determination of peoples, despite the rights being enshrined in separate provisions in the African Charter.

It is notable, that all the above findings were made concerning questions of internal self-determination, rather than external self-determination. Indeed, the ACHPR, as other international human rights treaty bodies, is cautious in dealing with issues of external self-determination under Art. 20 African Charter. Any issues relating to questions of external self-determination are for the most part limited to the historical context in which Art. 20 African Charter was drafted, namely issues surrounding the completion of Africa's decolonisation.[1077] This position is reinforced by the then OAU Member States' consensus to give priority to the principle of *uti possidetis* over other competing claims to external self-determination. In fact, the utmost respect for the territorial integrity and sovereignty of now AU Member States' as well as states party to the African Charter has been reinforced in ACHPR jurisprudence concerning claims to external self-determination.[1078] As a result, any exercise of external self-determination, if at all, can only unfold within the borders of a state's territory as protected by *uti possidetis*.[1079] However, even within those parameters, secessionist claims have so far been rejected in ACHPR jurisprudence, with one notable exception. In its Resolution on the situation of the North of the Republic Mali, the ACHPR rejected the unilateral declaration of independence of Azawad with a view to Art. 20.[1080]

Yet, in *Congrès du peuple katangais v Democratic Republic of the Congo* (1995) the ACHPR left a caveat for secessionist claims as a remedy against certain human rights violations "to the point that the territorial integrity of [the State] should be called to question".[1081] Regarding the secession of South Sudan from Sudan (2011), the ACHPR supported the exercise of the external right to self-determination by the peoples of South Sudan.[1082] However, the crucial difference to other contentious cases involving claims to external self-determination is, that the successful

[1077] Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola*, 5 November 2013.
[1078] Communication 75/92, *Congrès du Peuple Katangais v Democratic Republic of the Congo*, 22 March 1995, para 5.
[1079] Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para 41; See also *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the African Commission on Human and Peoples' Rights, at its 41st Ordinary Session held in May 2007 in Accra, Ghana 2007 para 24: "The self-determination of the populations should therefore be exercised within the national inviolable borders of a State, by taking due account of the sovereignty of the Nation State.".
[1080] Resolution on the Situation of the North of the Republic Mali, ACHPR/Res.217 (2 May 2012).
[1081] *Congrès du peuple katangais v Democratic Republic of the Congo* (n1078); see further Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 244–245.
[1082] Statement of the Chairperson of the African Commission on Human and Peoples' Rights, Madam Reine Alapini-Gansou, on the occasion of Southern Sudan referendum of 9 January 2011.

secession of South Sudan from Sudan unfolded based on an agreement between the two entities, and the referendum which paved the way for South Sudan's secession was considered "fair" and legal by Sudan itself within the parameters of the "constitutional" right to self-determination "exercised by the people of South Sudan".[1083]

Nevertheless, generally, the ACHPR favours the prevention of secessionist claims through "the promotion and protection of minority rights and inter-ethnic tolerance".[1084] As options in which self-determination could be exercised, the ACHPR recognises "independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity".[1085] Thus, the ACHPR goes beyond the three traditional outcomes envisaged in UN resolution 1541 Principle VI (see above).

As indicated above, the majority of ACHPR jurisprudence focusses on questions of internal self-determination, which does not affect state borders. In that regard, the ACHPR considered relevant issues relating to questions of *inter alia* participation and consent,[1086] equal opportunities of peoples,[1087] and elections.[1088]

Looking at how versatile the jurisprudence on the content of Art. 20's right to self-determination of peoples is a differentiated approach to the right is discernible. While being cognisant of the colonial context in which the external dimension of the right is relevant within the ambit of Art. 20, just as within the UN human rights system, in African human rights law, the internal dimension of the right to self-determination of peoples has been emphasised. In that context, treaty bodies like the ACHPR have carved out different aspects of the right, which surpass the notion of a right to independent statehood. Rather, the nature of the right to self-determination as a fundamental collective human right which is essential for the enjoyment of other collective human rights extended towards peoples, such as the right to development, to enjoy one's culture, access to resources or the right to a satisfactory environment favourable for a people's development was emphasised.

[1083] The 4th and 5th Periodic Reports of the Republic of the Sudan in Accordance with Article 62 of the African Charter on Human and Peoples Rights for the Period 2008 – 2012 paras. 7, 9.
[1084] Guidelines (n1079).
[1085] (n1078) para 4.
[1086] Guidelines for National Periodic Reports; (n1065); Advisory Opinion (n1079) para 26.
[1087] Guidelines for National Periodic Reports*;* Guidelines (n1079) no III. para 4.
[1088] (n1157); Decision on Unconstitutional Changes of Government in Africa CM/2166 (LXXII), Assembly of the Heads of State and Government/4th Ordinary Session of the AEC, AHG/Dec.150 (XXXVI) (12 July 2000).

In this framework, the ACHPR emphasises the significance of the right to self-determination as a legal prerequisite for the enjoyment of all other collective rights.[1089] The African human rights system strongly asserts the current trend international human rights law is now experiencing as far as the recognition of self-determination of peoples as quintessential legal standard for other collective rights is concerned.[1090] Narrow constructions of independent statehood or secession, while remaining relevant, do not adequately reflect the fundamental position of the right to self-determination within human rights law, neither within the African human rights system nor within the international human rights system more widely. In fact, the African approach to the right to self-determination does not need to justify the right's reason for existence in post-colonial international law, as African human rights jurisprudence has already tightly embedded it in the system of the African Charter including other collective rights.

Case law on Art. 20: right holder (what constitutes a people)?

The question of who constitutes a people within the scope of the right to self-determination, is as difficult in the context of the African Charter, as it is in the context of other international legal instruments as referenced priorly. Stefan Salomon interprets ACHPR jurisprudence on Art. 20 African Charter as establishing "some vague 'objective' standards of what constitutes a people", that, however, is subject to variations depending on which right is in question.[1091] Thus, a people in the context of Art. 20 varies from a people in the context of Art. 22, according to Salomon.[1092]

While it is true that the content of the collective human rights provisions of the African Charter differ, due to the interrelation between them, as indicated above, the systematically consistent interpretation would be that the "people" referred to in Arts. 19, 20, 21, 22, 23, and 24 are subject to the same theoretical parameters. In light of the interrelation among these rights it would be difficult to reason why the same people that can have a right to self-determination for

[1089] See similarly Salomon (n959) 238: "Self-determination should less be understood as a substantive right in its own sense, but as a procedural right that enables the claiming of other rights. Self-determination thus ought to be viewed as an enabling right." However, this study distances itself from reducing the right to self-determination to a procedural right without substantive normative value.
[1090] Especially in the realm of indigenous peoples' rights, see 'Derecho a la libre Determinación de los Pueblos Indígenas y Tribales', report by the IACHR from 28 December 2021, Chapter 2, particularly para. 78.
[1091] (n959) 229.
[1092] ibid 228: "(…) the term 'people' in the context of the African Charter does not exist in abstracto, but only through the specific rights that are at question."

the scope of Art. 20, cannot automatically enjoy a right to development under Art. 22 and vice versa.

It is conceivable that one could argue that one does not want to open the door to external self-determination claims for a people who can claim a right under any of the other above-mentioned articles encompassing collective rights. However, both the ACHPR's and the ACtHPR's jurisprudence does not substantiate such concerns, as both bodies clearly encourage avenues of internal self-determination, while limiting the applicability of external self-determination to post-colonial contexts. In fact, there are indications of a larger trend in international jurisprudence on the right to self-determination of peoples, which aligns with the African interpretation of the right and its right holders as indicated above.[1093]

Analysing the ACHPR's findings on Art. 20 and the question, who constitutes a people, one can divide the case law in three different categories. First, ACHPR jurisprudence dealing with indigenous peoples, such as in *Endorois*, *Gunme* or *Ogiek*. Second, ACHPR jurisprudence concerned with citizens as a people, as happened in *Dawda Jawara*. Third, ACHPR jurisprudence regarding other minorities in general, often along the line of ethnic divisions, which in turn often overlap with the first category concerning indigenous peoples. This is because minorities and indigenous peoples in Africa, instead of seeking external self-determination, have discovered that the more efficient way to bolster their claims is internal self-determination, which moreover does not challenge human rights treaties and international law as do claims to external self-determination.[1094]

In *Endorois* (2010), the Commission developed its interpretation on the meaning and content of 'peoples' as the entity the right to self-determination revolves around. It established a number of "objective features that a collective of individuals should manifest to be considered as 'peoples'": "a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights."[1095] Such an approach of framing an identity around a shared

[1093] See also Joshua Castellino, 'International Law and Self-Determination: Peoples, Indigenous Peoples and Minorities' in Christian Walter, Antje Ungern-Sternberg, Kavus Abushov *Self-Determination and Secession in International Law* (OUP 2014) 37, 38.
[1094] ibid; see also Dinah Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2017) AJIL 62, 63.
[1095] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya Endorois* [2010] Communication 276/03 (2 February 2010) para. 151.

experience of suffering aligns with the basic idea of Pan-Africanism as reactive ideology in response to foreign subjugation.

Particularly interesting from the viewpoint of supranational organisations on the right to self-determination of peoples, is the element of a common economic life or other bonds, a characteristic which peoples within such an organisation undoubtedly share. In the case of the EU, this economic bond extended so far as to result in a monetary union, the arguably most evident sign of economic interrelation among peoples and states. Beyond that, the notion of ideological affinities could indicate the embracing of shared values as falling within the ambit of that term. Thus, certain elements of this ACHPR approach to defining peoplehood for the scope of the right to self-determination of peoples – at least as far as Art. 20 African Charter is concerned – are transferrable to the situation of other supranational organisations. This is furthermore bolstered by the use of the plural form in the ACHPR's decision: "identities and affinities", instead of 'identity' and 'affinity'.

One year before its decision in *Endorois*, the ACHPR held in *Gunme* (2009), that self-identification "as a people with a separate and distinct identity" is crucial for the determination of whether a people within the ambit of the right to self-determination exists.[1096] As such, the identity of a people cannot be denied by external observers, but only recognised.[1097] It is striking that the ACHPR's approach to defining a people here, albeit as a step to determining the existence of an indigenous people, relies on similar conditions as the UN approach for the determination of the existence of a minority, emphasising "a common history" and "linguistic tradition", just as the HRC did in General Comment No. 23 of 1994.[1098]

That this is not an accident is evidenced by the ACHPR's finding in *Sudan Human Rights Organisation*, a case from the same year as *Gunme* (2009). Here, the ACHPR noted that "in some cases groups of "a people" might be a majority or a minority in a particular State".[1099] In the same communication, the Commission also clarified that the "right of a people" can be asserted "against both external and internal abuse", rather than only applying to "external aggression, oppression or colonization".[1100] Hence, the ACHPR expressly embraced the

[1096]ACHPR, *Kevin Mgwanga Gunme et al v Cameroon* [2009] Communication 266/03 (27 May 2009) para. 179.
[1097] ibid: "Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it.".
[1098] HRC, General Comment No. 23: The rights of minorities CCPR/C/21/Rev. 1/Add.5 para. 5.1; see also Stefan Salomon n(989) 228.
[1099] ACHPR, *Sudan Human Rights Organisation, Centre On Housing Rights And Evictions v Sudan* [2009] Communication No. 279/03, 296/05 (27 May 2009) para 220.
[1100] ibid para. 222.

possibility of peoples constituting minorities within states, as opposed to approaches where minorities are excluded from any notion of peoplehood.[1101]

Nevertheless, the ACHPR also followed the opposite approach in its jurisprudence. In *Dawda Jawara* (2000) the Commission readily accepted that the Gambian people, namely all those individuals holding Gambian citizenship, constitute a people for the purposes of Art. 20, without further legal assessment.[1102]

In 2013, the ACHPR added an important nuance to its self-determination jurisprudence given its generous approach which potentially includes minorities under the term 'peoples'. In *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013), the Commission denied a violation of the Cabinda's right to freely dispose over their wealth and natural resources given that the respondent's claim that resources were "effectively managed for the benefit of all peoples of Angola" was not challenged in the case.[1103] Thus, the Commission considers the violation of one people's collective right in relation to other peoples' rights within the same jurisdiction (here national unit). In different words, one people's right cannot be exercised to the detriment of another people, if that encroaches on the rights of other peoples under the African Charter.

In light of this jurisprudence, one could conclude that the lines between indigenous peoples and minorities in particular are blurred. The ACHPR's Working Group on Indigenous Populations/Communities (WGIP)[1104] acknowledged overlaps between the two concepts in its 2005 report and referenced the works of Asbjørn Eide and Erika Irene Daes when it considered the usefulness of a clear-cut distinction between indigenous peoples and minorities.[1105] In acknowledging this, however, the WGIP recognises that the nature of the rights pertaining to indigenous peoples and minorities are different and distinguishable. While indigenous peoples' rights are formulated as collective rights enjoyed by a community, minority rights are often framed around individual rights.[1106] The most evident difference, however, can be seen in

[1101] Within UN decolonisation, for example, all inhabitants of Non-Self-Governing and Trust Territories were considered a people, see Arts. 73 and 76 UN Charter; see also generally Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (2008) *International and Comparative Law Quarterly* 537-572.
[1102] ACHPR, *Sir Dawda Jawara v Gambia* (Communication No. 147/95, 149/96) [2000] 17 (11 May 2000) para. 73.
[1103] *Decisions of the African Commission on Human and Peoples' Rights*, 2010-2014, (Human Rights Digest, Open Society Justice Initiative) 23.
[1104] Following ACHPR/Res. 455 (LXVI) 2020, the WGIP is called the 'Working Group on Indigenous Populations/Communities and Minorities in Africa', however, the report cited here was published under its old name.
[1105] WGIP, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (ACHPR & IWGIA 2005) 95.
[1106] ibid 96.

indigenous peoples' special relation to their land and natural resources.[1107] Rights to territory and access do not form part of minority rights as set out in the two human rights Covenants, nor in the Minority Rights Declaration, but they are significant in UNDRIP and ILO Convention 169.

As this section has shown, the legal approach for the assessment of what peoples are for the scope of the African Charter's right to self-determination of peoples, is generous. ACHPR jurisprudence recognised indigenous peoples, citizens as a people, as well as minorities as a people enjoying the collective rights of Arts. 19, 20, 21, 22, 23 and 24 African Charter, including the right to self-determination. While one might view this generosity as inevitably leading to further fragmentation and weakening of African states, which are largely tormented by internal conflicts, one needs to consider how the interpretation of the content of Art. 20's right to self-determination evolved in this respect, as shown in the previous section. Especially with regards to minorities and indigenous peoples, the African human rights jurisprudence has predominantly engaged with internal aspects of the right to self-determination, which has also been favoured in cases by indigenous peoples and minorities, while being hesitant to engage with external self-determination claims. In fact, the ACHPR has expressed that it expects all groups involved in self-determination conflicts to seek a resolution through internal rather than external self-determination.

In light of this evolution, the recognition of Africa's multifarious peoples and as a consequence the collective rights they hold, represents an opportunity to reconcile their interests in a peaceful way that does not necessarily challenge state borders, and therefore is not likely to weaken, but rather to strengthen the position of African states.[1108] In acknowledging this, one has to recognise, however, that this also puts the responsibility on states to enable all peoples within their territories to enjoy their respective rights to peacefully coexist. Inevitably, such a development would put an end to any ideas of nationalist nationhood, where one people (aka nation) prevails over all others.

5.4.3 AU Member States' positions towards the right to self-determination of peoples

The steadfast legal approaches to the right to self-determination in African human rights law are one side of the story, but as the case study on the EU has shown, that custom as recognised

[1107] ibid 97.
[1108] Shelton (n1094) 69.

by the ICJ Statute is also relevant in understanding legal frameworks. This might give insight into the state of custom regarding the right to self-determination in an African context as one of the sources of international law recognised for instance in Art. 38 ICJ Statute.

It is generally accepted that the existence of customary norms is based on the interplay of two elements: state practice and *opinio juris*.[1109] Regarding the identification of state practice, this section follows the approach laid down in the International Law Commission's (ILC) 'Draft Conclusions on Identification of Customary International Law'. According to the report, both states and international organisations are able to produce practice relevant for the emergence of customary law.[1110] Furthermore, any conduct, "whether in the exercise of … executive, legislative, judicial or other functions" can constitute state practice.[1111] More specifically, "conduct in connection to treaties", to which reports under the African Charter count.[1112] Important is that the practice is general and consistent.[1113] Arguably more difficult to ascertain is the existence of *opinio juris* concerning a certain state practice. The ILC proposes that *opinio juris* describes the "sense of legal right or obligation" underlying a certain practice.[1114] Thus, state practice accompanied by *opinio juris* "is to be distinguished from mere usage or habit".[1115] The report acknowledges that evidence of *opinio juris* can take a variety of forms, including official publications, government legal opinions, decisions of national courts and treaty provisions.[1116] Finally, it should be specified that since this study is limited to assessing custom concerning the right to self-determination of peoples within the AU, it is looking at particular customary international law, rather than general customary international law.[1117]

Chagos Islands case statements

The most recent international law case addressing the question of the customary law status of the right to self-determination of peoples in the context of decolonisation is *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (hereinafter

[1109] ILC, 'Draft Conclusions on Identification of Customary International Law' (2018) 2 (Part 2) Yearbook of the International Law Commission, Conclusion 2.
[1110] ibid Conclusion 4 (2).
[1111] ibid Conclusion 5.
[1112] ibid Conclusion 6 (2).
[1113] ibid Conclusion 8 (1).
[1114] ibid Conclusion 9 (1).
[1115] ibid Conclusion 9 (2).
[1116] ibid Conclusion 10 (2).
[1117] ibid Conclusion 16.

Chagos case).[1118] In order to determine whether the process of decolonisation regarding Mauritius was lawfully completed in accordance with international law, when it was granted independence in 1968, the Court had to identify the applicable norms of international law at the time.[1119] Consequently, the question arose as to whether or not the right to self-determination in the context of decolonisation was a customary norm in the relevant time period from 1965 to 1968.[1120] The AU itself, representing its 55 Member States, submitted two written statements in the course of the proceedings, while Djibouti, Lesotho, Madagascar, Mauritius, Namibia, Niger, the Seychelles and South Africa each also submitted individual statements.

Lesotho's, Madagascar's and the Seychelles' submissions were limited to the Court's jurisdiction over the case and questions of admissibility and will therefore not be further considered here. The other AU Member States, however, did express their opinions regarding the right to self-determination between 1965 and 1968. Djibouti and Namibia, while not engaging with the question of its customary status explicitly, emphasised that self-determination of peoples was an established right by 1965.[1121] Madagascar endorses paragraph two of AU Assembly Resolution 1 (XXVIII), in which the AU expressed its opinion that the excision of the Chagos Archipelago prior to the independence of Mauritius was a violation of international law.[1122] Similarly, Mauritius submitted that based on practice and research, self-determination of peoples emerged as a right in customary international law by 1960.[1123] Even if one was to argue that it emerged "as a stabilised interpretation of Articles 55 and 56 of the U.N. Charter" this does not detract from it forming part of contemporary international law.[1124] South Africa also considers the right to self-determination to have crystallised by 1960, when it was declared in the 1960 UN Resolution 1514 (XV).[1125]

That the right to self-determination was part of customary international law was furthermore upheld by the AU in the course of the proceedings. The AU's submissions are a significant indicator of the African States' *opinio juris* on the matter, as the organisation not only represents the 55 African Member States, but it also bases its position on a series of resolutions that were issued since the times of the OAU concerning Mauritius' decolonisation. In an analogy to the ICJ's finding regarding UN resolutions as evidence of *opinio juris*, the issued AU Assembly

[1118] (n437) para. 95.
[1119] ibid para. 144.
[1120] ibid para. 142.
[1121] Written Submission of the Republic of Djibouti (1 March 2018) para. 32; Republic of Namibia regarding *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (1 March 2018) 3.
[1122] Written Statement of the Republic of Madagascar (28 February 2018) 1.
[1123] Written Statement of the Republic of Mauritius (1 March 2018) para. 6.29.
[1124] ibid para. 6.30.
[1125] Written Statement submitted by the Government of the Republic of South Africa, paras. 62, 63.

Resolutions may be considered indicative of African States' *opinio juris* on the customary right to self-determination of peoples.[1126]

While voting data regarding the Resolutions is not available – as is the case concerning UN Resolutions – Art. 7 AU Constitutional Act provides that AU Assembly decisions are taken by consensus or at least a two-third majority, thereby underscoring the representativeness of AU Assembly decisions.

This evaluation was confirmed by the ICJ in its Advisory Opinion on the matter. The Court concurred that not only did the right to self-determination of peoples form part of international customary law at the time period in question, but also that the right to territorial integrity of a Non-Self-Governing Territory was a customary norm at the time.[1127]

However, while the Chagos Islands statements do reveal the AU's and its Member States' opinion on the status of the customary right to self-determination of peoples, they reveal nothing about the right in a supranational context. Instead, the case and all related submissions only operate within the strict contours of the context of decolonisation, as emphasised throughout the proceedings. Nevertheless, the case, especially in light of Britain's continued refusal to follow the ICJ's ruling, is proof of how African states continue to struggle with colonial legacies even in the 21st century and more than 60 years after the start of UN decolonisation processes.

From a constitutional perspective[1128]

Based on the ILC's draft report legislation can be evidence of state practice.[1129] Constitutions, as products of legislation, fall within that category and are thus being considered here. A number of AU Member States provide for the right to self-determination of peoples in their constitutions, either explicitly, by mentioning it directly, or implicitly, by providing for democratic frameworks that they consider as fulfilment of their obligations under the right to self-determination of peoples.[1130] Since the subsequent section on state reports under Art. 20 African Charter will consider African states' views of their obligations following Art. 20, this

[1126] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 para. 70.
[1127] *Chagos* (n1118) paras. 155, 160.
[1128] All constitutions mentioned in this sub-section are compiled in the Table of Primary Sources at the end of this study.
[1129] (n 1111).
[1130] See further the following section concerning the state reports.

section focusses on those states that expressly mention the right to self-determination of peoples in their constitutions.

While the Republic of Burundi only makes a passing reference to the right in its preamble, Ethiopia is the only example of a state expressly enshrining the right to self-determination of peoples in its constitution, including the right to secede. In its preamble, Ethiopia also emphasises its "strong commitment" to the "full and free exercise" of the right to self-determination. Notably, the exercise of the right to self-determination is closely tied to a right to democratic government and economic and social development in the preamble, once again underscoring the linkage between these collective rights.[1131] However, Ethiopia goes even further than that. Art. 39 of its constitution provides:

> 1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self- determination, including the right to secession.
>
> (…)
>
> 3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.

With this stance on the right to self-determination, Ethiopia's constitution is unique. Although Art. 39 has not been tested in practice (even though the unfolding situation with Tigray may yet yield consequences), Art. 39(4) sets out the requirements and formalities in order to claim the right to self-determination, including the option of secession.

Algeria chose a different approach in its constitution. While "extend[ing] her solidarity to all the peoples struggling for political and economic liberation, for the right of self-determination and against all forms of racial discrimination" in Art. 32, it does not provide for the right vis-à-vis its own people. In fact, Art. 32 sounds more like it is directed externally, to other countries that have self-determination conflicts, to which Algeria seemingly does not count.[1132] Similarly,

[1131] "Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development".
[1132] Algeria also has a history of supporting self-determination movements since its own independence in 1956 see e.g. British International Studies Association, 'Algeria's Self-Determination and Third Wordlist Policy under President Houari Boumédiène' (*BISA*).

Guinea-Bissau and Cape Verde both pledge to "defend(s) the right of all peoples to self-determination and independence" in constitutional Arts. 18(2) and 10(3) respectively.

In Art. 18(2) Guinea-Bissau pledges to "participate in African States' efforts to materialize the principle of African unity on a regional continental basis", an indication that the quest for African unity for the purposes of Pan-Africanism in the eyes of Guinea-Bissau falls within the ambit of self-determination of peoples. Another comparable expression of solidarity and support for the international right to self-determination of peoples can be found in the constitution of Angola. Art. 12 emphasises Angola's respect for UN and OAU (now AU) provisions and law, including the "rights of peoples to self-determination and independence". These are particularly interesting examples, as they indicate that African States do consider the right relevant in a supranational context.

In comparison to these constitutional approaches to the right to self-determination of peoples, South Africa shows a rather unique caveat in its Art. 235 dealing with self-determination:

> The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

In a way similar to the Ethiopian constitution, South Africa too recognises the possibility of parts of its population claiming a right to self-determination, without however going as far as including the option of secession. In fact, Art. 235 does not include any suggestions that external forms of self-determination have been considered in the provision.

Although the Republics of Sudan and South Sudan both do not reference the right to self-determination of peoples in their constitutions expressly, as indicated earlier, South Sudan's secession from Sudan as mode of exercising the right to self-determination of peoples was considered in line with constitutional law.

Thus, in conclusion, the above-considered constitutional provisions of AU Member States concerning the right to self-determination of peoples show a drastically different approach to the right compared to EU Member States, who do not recognise the right in their constitutions. Some African Member States do include explicit references to the right to self-determination of peoples in their constitutions, albeit these references suggest different views on the right. While Ethiopia's constitution acknowledges its internal side, independence and secession as

manifestations of exercising the right to self-determination seem to have been of considerable concern to the state given the detailed regulation of these processes in its constitution. Guinea-Bissau views the Pan-African goal of African unity as falling within the ambit of the right to self-determination, a remark, that no other AU Member State has included in its consitution in that manner.

State reports

State reports under Art. 20 African Charter provide insight into how AU Member States interpret their obligations under the right to self-determination of peoples. An evaluation of their reports under the provision reveals six main themes in the context of Art. 20. The first is the link between Art. 20 and democratic guarantees. Indeed, the majority of African states reported their compliance with Art. 20 obligations by referring to their constitutions providing for and regulating elections, ensuring participation in deciding the political form of the state and involvement of communities in decision-making processes.[1133] The second theme concerns a distinction between political and economic independence under Art. 20, as evidenced in the reports.[1134]

Similarly, considerations about social and economic development were reported as measures under Art. 20,[1135] with Nigeria standing out as it considered relevant protecting livelihoods of indigenous groups against companies, forced displacement and attacks under Art. 20.[1136]

Unsurprisingly, considering their colonial history, a large number of states reported their road to independence and their support for other countries under foreign domination under Art. 20, thereby emphasising their interpretation of the right to self-determination of peoples in its colonial context and as meaning a right to independence.[1137] From that understanding of the right as a right to independence, other reports making general references to foreign influences must be distinguished, as they show two fine nuances of interpreting the right to self-

[1133] For example, Periodic Report of Burkina Faso to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights October 1998 – December 2002 (July 2003) 68, 69; The 11th, 12th and 13th Periodic Reports of the Republic of Rwanda on the Implementation Status of the African Charter on Human and Peoples' Rights paras. 153, 154).

[1134] E.g. Periodic Report of Egypt to the African Charter on Human and Peoples' Rights for 2017, 20, 21.

[1135] Republic of Kenya, Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights, para. 152.

[1136] Nigeria's 6th Periodic Country Report 2015-2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria, 100, 101.

[1137] E.g. Periodic Report of the Sahrawi Arab Democratic Republic to the African Commission on Human and Peoples' Rights Containing all the Outstanding Reports in Accordance with Article 62 f the Charter (October 2011) para. 44.

determination: as right to independence in the colonial setting on one hand and as a right to freedom from any illegal interference, even beyond the colonial setting, on the other.[1138]
The last theme that can be identified from evaluating the state reports is an emphasis on internal self-determination as opposed to secessionist aspirations under Art. 20. In that regard, not merely democratic governance is referenced, but also freedom of expression, amongst others.[1139] Overall, states do view the right to self-determination in a similarly multi-faceted way as the ACHPR in its jurisdiction. While the ACHPR has certainly been progressive in its approach to interpreting Art. 20, this seems to be a development congruent with Member States' positions, regardless of whether their views were influenced by ACHPR jurisprudence or the other way round.

5.4.4 AU challenges and crises in selected Member States, including contentious cases in Africa involving self-determination claims

Very few cases involving self-determination claims and interests go through the legal processes of national courts and tribunals. Since self-determination is politically charged and often instrumentalised in politics, many cases involving the right, while highly relevant in the political realm, formally do not appear in case files. The lack of search results in case data banks, however, should not lead one to assume there are no other self-determination cases simply because they do not show up in the case files of courts. Especially in international law, as explained in the introduction, contextualising legal issues in their socio-political environment is crucial to understand the wider picture.

The Horn of Africa is home to a number of African countries that either have been or are embroiled in self-determination conflicts.[1140] While the independence war between Ethiopia and Eritrea is settled, tensions within Ethiopia continue. Ongoing tensions also remain between Somaliland and Somalia as a result of their colonial history. In the past, there were two colonies with the name Somaliland, one British and one Italian. British Somaliland achieved independence in 1960, during the course of decolonisation. Only four days after becoming

[1138] E.g. Republic of Djibouti, Combined Initial and Periodic Report under the African Charter on Human and Peoples' Rights (1993-2013) paras. 275, 276; Republic of Zimbabwe, 11th, 12th, 13th, 14th, and 15th Combined Report under the ACHPR para. 19.6.
[1139] Single Report comprising the 4th, 5th and 6thPeriodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention, paras. 565-567.
[1140] See also Redie Bereketeab (ed), *The Horn of Africa: Intra-State and Inter-State Conflicts and Security* (Pluto Press 2013).

independent, Somaliland decided to merge with the former Italian colony of Somaliland, thereby forming the Republic of Somalia. This union was, however, not considered fruitful by the former British colony of Somaliland, which declared its independence again in 1991.[1141]

Somaliland's eventual *de facto* secession from the Republic of Somalia resulted in the existence of two entities, the Republic of Somalia, on the territory of formerly Italian Somaliland, and Somaliland, on the territory of formerly British Somaliland. To date no state has recognised Somaliland's statehood. As a result, Somaliland remains in political abeyance not unlike the Frozen Conflicts in the former Soviet region from the perspective of international relations, regardless of whether one supports constitutive or declarative recognition theories, as it is universally shunned by the international community of states.

Since its secession in 1991, Somaliland has continued to try to achieve international recognition, but the AU's policy is to deny any diplomatic recognition of the entity in favour of what is considered Somalia's right to territorial integrity and state sovereignty. At the same time, Somalia itself does not attempt to rule over Somaliland, leading to a politically complex situation the latter is finding itself in. Geographically located on the African continent, but within the AU not recognised as African state, Somaliland is excluded from the development, infrastructure and peace and security plans and missions of the AU.

The secession of South Sudan from Sudan stands in sharp contrast and will be briefly considered here. South Sudan gained independence through a referendum in 2011. Unlike Somaliland, South Sudan was not a colonial construct, nor was it at any point in time an independent state, but it was a part of Sudan as administered by Britain. Similar to Somaliland's claims, South Sudan too argued that different colonial rule entitled them to exercise their right to self-determination within the UN decolonisation framework. Yet the outcome in both cases could not be more distinct: Sudan recognised and agreed (in a treaty titled *The Comprehensive Peace Agreement*) to South Sudan's independence following a referendum that was considered legal by both parties. Thus, South Sudan's statehood was achieved through agreement. Such an agreement was not reached between Somaliland and Somalia, with Somalia politically considering Somaliland "a Northwestern Region of Somalia".[1142] Furthermore, it could be

[1141] Though this was due to the descent into anarchy of the rest of Somalia, exacerbated by the failure of UN and Western interventions to maintain peace.
[1142] 'UN Security Council, UK Continue to Encourage Somalia Claims Over Somaliland' (*Somtribune*, 28 March 2018).

argued that Somaliland already consumed its colonial right to self-determination,[1143] when it first, albeit briefly, achieved independence in the course of British decolonisation, before having merged with Italian Somaliland to form the Republic of Somalia.[1144] What then remains for Somaliland to reach its aim of independence via the avenue of self-determination, are the options of external self-determination through agreement with the Republic of Somalia (as happened in South Sudan), unilateral secession (which lacking any international recognition casts doubts as to whether this can be considered to ultimately have been successful since 1991) or autonomy while geographically and politically remaining attached to Somalia. As long as Somaliland's international status remains as it currently is, the benefits from participating in the AU will be denied to it.

A slightly different example to be considered here is Biafra. Its history was somewhat similar to South Sudan, with the difference that Biafra did not have a separate colonial administration like South Sudan. Biafra seceded from Nigeria in 1967 and existed as partially recognised independent state until 1970, when it was retaken by Nigeria's military after two and a half years of civil war. At the root of the secession was a failure of post-colonial Nigeria to include the Igbo as envisioned by the Aburi Accords. This led to widespread marginalisation and violence culminating in an attempted secession which was met with a brutal military response.[1145]

The textbook example for failed decolonisation that resulted in ongoing conflict is the Western Sahara. The people living in the disputed territory of the Western Sahara inherited the source of their conflict with Morocco following Spain's withdrawal of colonial rule over the territory in 1974. Morocco blocked the referendum conceded to the peoples of the Western Sahara by the UN (later reaffirmed by the ICJ) based in its alleged historical ties to the territory.[1146] Since then, armed conflicts, military occupation and numerous ceasefire agreements were made between Morocco and the Front Polisario, the party acting as the representative of the Sahrawi people.[1147] As the Sahrawi people have not yet been able to hold their referendum within the

[1143] The idea that the applicability of the right to self-determination ends once foreign domination has been terminated, is for example reflected in India's reservation to common Art. 1 ICCPR/ICESCR. Responses to India's reservation and state practice in general do, however, cast doubt as to the resonance of such doctrine.
[1144] Redie Bereketeab, *Self-Determination and Secession: African Challenges* (Routledge 2014) 4.
[1145] See further John J. Stremlau, *The International Politics of the Nigeria Civil War, 1967-1970* (Princeton University Press 1977).
[1146] See (n70).
[1147] For a timeline of events in this case see Carlos Ruìz Miguel, Moisés Ponce de León Iglesias and Yolanda Blanco Souto, *The Western Sahara: Selected Primary Legal Sources; 15 Basic Statements on the Conflict* (Andavira 2018) 17-24.

parameters of their right to self-determination, as confirmed by the UN,[1148] the OAU and AU[1149] as well as the EU,[1150] the Western Sahara conflict remains unsettled. While Morocco left the then OAU in 1984 over disputes concerning the treatment of the Western Sahara territory, it rejoined the organisation in 2017. Strongly lobbying against the prospect of an independent Western Sahara,[1151] it is likely that this unsolved conflict will be and remain another challenge for the unity and conflict resolution ability of and within the AU.

Similarly, the secessions of what was then known as 'Rhodesia' and Katanga are examples for mishandling the process of decolonisation. Rhodesia is a case of secession on the African continent led by white settlers, who felt threatened by the fast pace of decolonisation in the 1960s, leading to a unilateral declaration of independence of the Southern part of Rhodesia in 1965. A war with the Rhodesia ensued until new elections took place under supervision in 1980, leading to the establishment of today's Zimbabwe. Thus, Rhodesia, albeit a case of decolonisation having sparked conflict, falls into a different category than Somalia, Biafra, the Western Sahara or South Sudan, as the secession was not based on native ethnic conflicts or interests, but on colonial settlers' interests.

Similarly, in the case of Katanga, in the south of the Congo, white settlers had an interest in Katanga's secession to maintain their position and it is common opinion that the former colonial powers did not only have an interest, but at least financially supported the conflict.[1152] At the same time, indigenous tribes had their own interests in gaining the upper hand in the conflict and were instrumentalised and supported from outside.[1153] The unrest in the region continues today, albeit to a lesser scale than in the 60s.[1154] Above that, new tensions were sparked between

[1148] See for example UNGA Res 2229A (XXI) (20/12/1966) A/RES/2229 73 and UNGA Res 72/95 (15/12/2017) A/RES/72/95 as well as UNSC Res 2351 (28/04/2017) S/RES/2351.
[1149] E.g. CM/Res. 272 (XIX) (1972) and Assembly/AU/Decl. 3 (XXI) (2013).
[1150] For example, European Parliament Resolution of 25 November 2010 on the Situation in Western Sahara (2012/C99/E/16); European Parliament resolution on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, April 18, 2012 OJ C 258 E (7-IX-2013) 8-36; European Parliament Resolution on the 22nd Session of the United Nations Human Rights Council, February 7, 2013 OJ C 24 (22-I-2016) 89-97; European Parliament Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter, December 17, 2015 OJ C 399 (24-XI-2017)151-175.
[1151] For example, Morocco blocked a PSC Resolution concerning the Western Sahara in 2021, see 'Morocco refused an AU Peace and Security Council declaration about Sahara' (*iMArabic* 22 March 2021).
[1152] Collin Gonze, 'Katanga Secession: The New Colonialism' (1962) 9(1) *Africa Today* 4-6, 12, 16.
[1153] ibid.
[1154] International Crisis Group, 'Katanga: Tensions in the DRC's Mineral Heartland' (Africa Report N°239, 3 August 2016); see also 'DRC: Conflict in Katanga' (*reliefweb* 7 July 2006).

the DRC and neighbouring Rwanda, who are accusing each other of supporting rebel groups in the other's territory.[1155]

However, even beyond these cases, where self-determination conflicts were inherited from the countries' colonial past, African states face security threats directed to challenge their sovereignty from within without basing claims on any right to self-determination. Examples for this are Nigeria, Somalia, Mali, all countries which face internal conflicts with terrorist groups such as Boko Haram, Al Islah, Wahhabi and others, who aim at overthrowing existing regimes to establish their own. The AU has repeatedly upheld the importance of the right to self-determination in the context of forced regime changes and with particular regard to threats posed by terrorism, AU Member States have agreed on the 16th AU Assembly Summit on Terrorism and Unconstitutional Regime Change to finally put into effect the African Standby Force (ASF).[1156]

These cases of inner conflicts as well highlight the importance of the role the right to self-determination of peoples can play, when it is upheld as a protection against forced regime changes, unconstitutional changes of government or even military occupation. These cases underscore not only the importance but rather the potential of the right to self-determination of peoples to be considered as more than a purely disruptive, fragmenting force, but also a safeguard. Such an approach to the right to self-determination of peoples has already emerged in AU declarations and ACHPR cases. For example, in its Resolution on Nigeria of 3 November 1994, the ACHPR called upon the Nigerian military to "respect the right of free participation in government and the right to self-determination and hand over the government to duly elected representatives of the people without unnecessary delay" after the coup occurred.[1157] Similarly, the ACHPR determined the military coup in Gambia in *Dawda Jawara* a breach of the Gambian peoples' right to self-determination under Art. 20 African Charter.[1158]

[1155] Eliane Fatchina, 'DRC-Rwanda Conflicts: What are the Two Countries Accusing Each Other of?' (*Afro Impact,* 31 May 2022); and more recently Center for Preventive Action, 'Conflict in the Democratic Republic of Congo' (*Council on Foreign Relations*, 7 June 2023).
[1156] Elvis Teke, 'AU Summit on Terrorism and Unconstitutional Regime Change: African Response to the Situation' (*rtv News,* 28 May 2022); David Ochieng Mbewa, 'AU states to activate African Standby Force to strengthen war on terrorism' (*CGTN Africa,* 30 May 2022); Accra Declaration on Unconstitutional Changes of Government in Africa of 17 March 2022.
[1157] Resolution on Nigeria, ACHPR/Res.11, 3 November 1994.
[1158] *Dawda Jawara* (n1102) para 73.

Territorial disputes before the ICJ between African states underscore the potential for conflict and struggle to delimit and maintain territorial boundaries based on colonial legacies.[1159] They are further evidence to the limits of creating peace through strict boundaries.

It is widely acknowledged in literature and by the AU itself that conflicts within and among African states are a significant hindrance to economic and social development.[1160] For instance, AU Assembly Declaration *Decision on the Report on the Activities of the Peace and Security Council (PSC) and the State of Peace and Security in Africa* (Assembly/AU/Dec. 815(XXXV)) offers a contemporary report and evidence of African States' struggle with internal and border conflicts.[1161]

The essential question arising in view of these cases is what role the right to self-determination of peoples can and should play. The point this study has been emphasising repeatedly is that international law cannot afford to consider the context in which the right to self-determination applies today to be the same way as did prior to decolonisation. With at least two continents having committed to the idea of supranationalism to secure economic development, peace and security of peoples, supranationalism may be the new nuance that has to be taken into account in self-determination theories.

Particularly in light of the African continent and the internal and self-determination conflicts its states and peoples are confronted with, classical views on the exercise of the right to self-determination of peoples offer two solutions: Either the principle of *uti possidetis* continues to be upheld to the detriment of self-determination claims and secessionist movements that are at the root of many internal conflicts African states struggle with, or the geographic map of Africa is redrawn based on the success of these self-determination and secessionist movements. The former sheds doubt on the survival of the post-colonial African state, if its internal conflicts are left to fester and not addressed adequately, the latter represents a bold mission with uncertain outcome, risking the goals peoples in Africa want to achieve, namely development, peace and security, all of which require a certain degree of stability as a precondition.[1162]

[1159] For example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6; *Frontier Dispute (Burkina Faso/Mali)* [1994] ICJ Rep 554; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2002] ICJ Rep 303.
[1160] Folusho Adewumi Oladipo, 'Pan-Africanist Ideas, Issues and Challenges' (2019) 4(5) International Journal of Engineering, Applied Sciences and Technology 121, 122; (n983) 201, 202.
[1161] See also the PSC's periodic reports on the topic.
[1162] Similarly, Redie Bereketeab, 'Self-Determination and Secession: A 21st Century Challenge to the Post-Colonial State in Africa' (2012) The Nordic Africa Institute Policy Notes 2012/5 4.

Supranational integration could be considered a solution because the majority of African States have made an intentional decision to follow that path, which is significant. Further, supranational integration may also be considered as the creation of supranational bodies and institutions allowing for greater political leeway.[1163] The creation of autonomous regions combined with equal access to the fruits of supranational integration, may go a long way in satisfying the underlying issues that are the roots of many internal conflicts in African states.

Limiting the right to self-determination of peoples to traditional applications, will not contribute to the solution of these issues.[1164] However, rather than proposing such a development as ailment to African issues, this study bases this finding on the observation that African states seem to have recognised and started to pursue this option already, as evidenced by the increased regional integration and AU integration projects, as well as stances on the role of self-determination and the right to self-determination of peoples as analysed above. In that respect it is crucial to remember that Pan-Africanism and consequently the idea of supranational integration was the response of African states to the arbitrary geographic division of their territories following decolonisation and its consequences.

At the Cairo Summit 1964 of the OAU the irredentist claims of Morocco to Western Sahara and Somalia to Somaliland led to insistence within the OAU on adoption of the *uti possidetis* doctrine, as claiming land beyond a states' borders as defined in the course of decolonisation was viewed a significant risk to maintaining peace, thus impededing development. As a result, a conscious choice in favour of the European-inspired nation-state concept was made. In such a framework the right to self-determination becomes a threat, if viewed through the lens of nationalism on which claims to independent statehood are to be based.

By contrast, national self-determination does not apply to Pan-Africanism, but within this framework, other aspects of self-determination move to the foreground and must be found to avoid cyclic and disruptive national self-determination claims impeding peace and development. Since African states chose to base their supranational policies at third level Pan-Africanism embodied by the AU, this Pan-Africanism has shaped the interpretation of the right

[1163] See previous chapter.
[1164] "Nonetheless, most empirical evidence shows that, at least initially, conflicts and wars continue even after secession. The question then becomes: if secession cannot resolve conflicts and wars, is it a goal worth pursuing? The opposite outcome, maintaining territorial integrity, has also proven to be problematic in sustaining peace, stability and development. The recent increase in secessionist movements is itself testimony to this problem. The predicament is rather an expression of the limits of self-determination (Burke 2010: 57).", (n1162).

to self-determination of peoples in the African context and given it meaning beyond UN decolonisation or early 20th century nation-state building.[1165]

The 1979 division of South Africa into homelands based on self-determination throws yet another light on another nuance case law offers. The establishment of homelands was viewed by many as an artifical nation-state building attempt to ensure white supremacy in South Africa.[1166] The consistent resistence against this apartheid regime from many parties, including the Pan-Africanist Congress in South Afirca are another indicator for the irreconcilanilty of Pan-Africanism and the idea of territorial, national self-determination.

Overall, African peoples and states chose in their recent history to follow other avenues within the right to self-determination than just ethnic nationalism, even though the latter remains relevant at least within the realm of internal self-determination and with a view to indigenous and minority rights jurisprudence.

5.5 The difficulties surrounding finding a Pan-African identity for the determination of peoplehood and the relevance of integration for the role of self-determination in supranational Africa

The central significance of determining 'peoples' for the application of the right to self-determination of peoples has been shown throughout the study. If one applies the right to self-determination of peoples to a supranational context, this question remains relevant, if just for the simple reason to avoid an inflationary application of that right. Beyond that, the question of identity is relevant for the relation between self-determination of peoples and supranationalism to determine the interpretation needed of self-determination and to carve out its rationale. Analysis of ACHPR jurisprudence on the question of peoplehood yielded three findings: First, the ACHPR recognises indigenous peoples as peoples for the scope of the right to self-determination of peoples. Second, citizens of a state as a whole constitute a people for the same scope. Third, minorities too are conceded access to the right to self-determination of peoples, however often resulting in a terminological overlap with indigenous peoples constituting a minority in a state.

[1165] This was not a smooth process as evidenced by Morocco's difficult relationship with the AU, see Enu Afolayan, 'Morocco and the AU: A Game of Thrones?' (*Africa Middle East* 24 August 2016).
[1166] E.g. Roger Southall, *South Africa's Transkei: The Political Economy of an "Independent" Bantustan* (Heinemann 1982) 4-19.

The question of peoplehood on a supranational scale has not yet been determined. At the AU level, Pan-African values have been formulated as the leading norms for the continent's supranational integration. In many ways, these Pan-African values, are in synergy with the European values analysed in Chapter 4. The concept of Pan-African values was introduced under the term "Shared Values" by the AU Commission in 2011, within its second Strategic Plan 2009-2012. The Commission presented these values as the means to address African development challenges that hinder supranational integration.[1167] In fact, Shared Values form the third pillar on which the AU rests according to the Plan. The other three pillars are peace and security, development, integration and cooperation and institution and capacity building.[1168] Different to the EU, the AU adopted a nuanced approach, which considers different values on different levels:

> At the individual level, the values include those inherent in universal and inalienable human rights; basic freedoms; identity and opportunity; tolerance; participation in governance and development processes; reciprocal solidarity in times of need and sharing; dignity and respect; justice; sense of fairness; equality of persons; respect for the elderly; integrity; community cohesion and inclusive societies; and control of one's destiny. At national and regional levels, the values include: sovereignty; self-determination and independence; adherence to the rule of law; democracy and representation of the will of the people; care for the vulnerable; economic and social justice; public order, equality, fairness; solidarity of States; and sustainability of the environment.[1169]

This list of values is not exhaustive, as the Strategic Plan also refers to good governance, democracy, respect for human rights, response to humanitarian situations, intra-African solidarity, gender equality, respect for African culture and protection of African cultural heritage.[1170]

The Strategic Plan that sets out these values creates the impression that the values are development goals for African states, intended to carry normative weight, as well as formulate individual values and rights such as participation in government, human rights and basic freedoms. Similar to European values, these shared African values are supposed to form the core around which the Pan-African community is to be built. However, European values have

[1167] (n1058) paras. 88-98.
[1168] ibid para. 4.
[1169] ibid para. 96.
[1170] ibid para. 95.

received sharper contours in comparison and are more clearly directed towards society, while the shared values of the AU appear to still be policy goals rather than societal norms of the present. Thus, while in the AU too the tendency to build a supranational community around shared values is recognisable, it appears to be at a different stage of evolution. As such, these shared values are not yet helpful in determining the contours of peoplehood on the Pan-African level, except with a view to the future. This indication of future development of the notion of peoplehood with particular importance for Pan-Africanism, is however underscored by ACHPR jurisprudence in *Endorois*:

> 149. (…) the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of "peoples." It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three "generations" of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights. In that regard, the African Commission notes its own observation that the term "indigenous" is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission. In the context of the African Charter, the Working Group notes that the notion of "peoples" is closely related to collective rights.

This finding indicates how peoplehood in the context of self-determination may take shape in the coming years if supranational integration within the Pan-African organisation continues to progress. The determination of a peoples in the context of self-determination claims cannot be reduced to challenges to territorial integrity of a state but needs to be seen in connection with collective rights that flow from the self-determination guarantee more generally. A people on the supranational, Pan-African plane will be able to assert its rights to development, equality, non-discrimination, etc. vis-à-vis the supranational institutions, should they take governance-like forms, as happened in the EU. Such an interpretation of self-determination, heavily influenced by the more political, Pan-African understanding of self-determination of peoples as presented above, is also supported in a footnote to the same decision:

> The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image.[1171]

Forming a parallel to EU citizenship, one of the AU's flagship projects under Agenda 2063 is the introduction of an AU passport facilitating free movement for holders between AU Member States. While plans to introduce the passport were first mooted in 2016, the rollout has been postponed repeatedly.[1172] In 2022, 33 AU Member States signed the protocol set to finally introduced the passport, with 4 States who already ratified it. Security concerns were among the main reasons for hesitance among Member States in supporting the project.[1173]

Like EU citizenship, the AU passport will not be issued instead but alongside national passports enabling free movement between AU Member States' territories. Thus, African States have embraced the idea of supranational identity, even though reasons for supporting the AU passport project may be of an economic and pragmatic nature in the first place.[1174] This should not come as a surprise given the Pan-African nature of the AU, a project that AU Member States decided to support when they established the organisation and joined in it. As explored earlier in this thesis, Pan-Africanism is based on the idea of a unifying identity, namely being African, without however denying or challenging sub-continental identities.[1175] In that sense, ACHPR jurisprudence and AU value policies align with Pan-Africanism when both institutions recognise the various layers of the notion of peoplehood, both generally and under the right to self-determination of peoples.

[1171] ibid fn 49.
[1172] African News Agency, 'AU Heads of State to launch African Union Passport during Kigali Summit'(*Mail & Guardian Africa,* 15 July 2016).
[1173] See NEPAD, *Second Continental Report on the Implementation of Agenda 2063* (African Union 2022) 57.
[1174] ibid: "Free movement of people is a pillar to accelerate growth and increase intra-African trade.".
[1175] See also Issa G. Shivji, 'Pan-Africanism or Imperialism? Unity and Struggle towards a New Democratic Africa' (2006) 10(1) African Sociological Review 208-220.

5.6 Conclusion

In viewing the African continent from the historic perspective of the attempts to establish supranational forms of governance, two things become clear: First, there have been numerous such attempts to establish forms of supranational governance with varying degrees of success, all of which were focussed on the ending of oppression – the classical *raison d'être* for self-determination. These attempts have resulted in various organisations, at times with overlapping goals and institutional frameworks, at times in sharp contrast to one another. Second, these models of supranational governance by and large aimed at establishing independent super-states through supranationalism. Thus, supranational associations on the African continent seem to be perceived as somewhat inevitably resulting in an independent state and hence supranationalism as form of governance appears to be another form of establishing statehood, only on a larger scale. Considering how Pan-Africanism influenced and continues to influence African supranational projects, this link between supranationalism and statehood is intelligible. This is underscored by the decision of the Assembly of Heads of State and Government to move towards a union government under the provisional label 'United States of Africa'.

In Africa more than in other parts of the world, supranationalism seems crucial when assessing the continued legacy of colonialism that forms part of the contemporary reality of post-colonial states. The rise of regional supranational organisations and the establishment of first the OAU and then the AU are examples of this reality. However, while in Europe the EU developed strongly towards supranational governance, African states seem to view supranationalism in more pragmatic terms as economically beneficial for their joint development, while showing considerable resistance towards abandoning notions of national sovereignty that are perceived traditional even though they are in reality colonial legacies.

Continuing the contrast with the EU example, EU Member States voluntarily transfer governing competence to the EU in many sectors, which results in the supranational organisation to step alongside the national state and in some respects even above it, if one considers the supremacy of EU law, for example. Such a model is not reconcilable with traditional Westphalian notions of sovereignty and it demonstrates the changes since the middle of the past century. At the same time, traditional notions of sovereignty continue to exist and pose challenges to these new models of sovereignty, as can be seen in the resurfacing of nationalist tendencies in EU states such as Hungary and Poland. The very recent Brexit is an example of how conflicting notions of sovereignty might clash and lead to a state withdrawing from a supranational organisation.

As in Europe, in Africa too traditional notions of national sovereignty are met with more and more challenges. The proliferation of supranational governance models had an impact on the relationship between citizens and their state, as well as on how peoples view themselves in relation to the state. For example, the use of AU passports which underscores the forging of a Pan-African, supranational identity in Africa complements national citizenship, comparable to EU citizenship which led to many EU citizens identifying as both, national citizens of their state as well as supranational citizens of the EU. As such, Pan-Africanism offers a solution to the issue of defining what or who can be considered 'African', by supplementing national or regional identities, without seeking to replace them.

Despite the challenges arising from the tension between national and supranational sovereignty models, post-colonial states still seem to develop towards supranational models of sovereignty. On the African continent, one of the reasons for that development seems to be rooted in the pragmatic realisation of many African states, that supranational models offer opportunities to overcome many of the challenges they are currently facing and have been facing as a result of decolonisation.

In Africa, decolonisation was achieved through adherence to arbitrary state boundaries configured under colonial regimes. This produced artificial nation states based on the European model, which did not exist in that form pre-colonisation of Africa. The adoption of the principle of *uti possidetis* protected these new boundaries. Unfortunately, the new African states were not established in consideration of their histories, traditions, cultures, ethnicities, or any other factors, but purely following the boundaries set by the former colonial powers when they delineated their colonial territories from each other to avoid conflict. As a result of this arbitrary process of statehood creation in Africa, many African states struggle with self-determination conflicts, ethnic rivalries and internal conflicts.

Despite emphasis on the principle of *uti possidetis,* many African states face a real threat of a part of their population – and the use of the term population instead of territory is intentional here – wishing to secede. This usually happens in the form of claims to the right to self-determination of peoples, which has a particular content and application in the context of decolonisation. While a solution has seemingly been reached between South Sudan and Sudan, the long-term effect of this process is yet to be seen. Furthermore, it is not certain that this secession will put an end to other secessionist claims from other groups within Sudan. In fact, according to research from other scholars these groups feel motivated by the successful secession of South Sudan. Neither is it certain that South Sudan itself will be free from further

secessionist claims based on the right to self-determination of peoples. The example of South Sudan is symbolic for other African States, as Somalia, the Western Sahara and Nigeria, besides many others, who all struggle with similar internal conflicts as a result of the artificial creation of nation states. These struggles continue to fuel conflicts, which are a considerable factor in stalling peace and stability in many African countries and are thus a significant issue that must be addressed in any plan for development in Africa.

As a result of the long-term exploitation of resources, territory and people in formerly colonised African states oriented solely to increase the former colonisers' own maximal gain, these states struggled to establish functioning, self-sustaining economic and political infrastructure, which could generate meaningful growth and development. Additionally, uneven distribution of economically valuable resources in many African States, adds to already existing territorial disputes as mentioned earlier.[1176] This makes them highly dependent on good relations among each other, to foster exchange and access to resources.

Cooperating in a supranational project such as the AU, could strengthen and stabilise the often volatile and highly complex relations among African states, especially when they bring neighbouring states into direct dialogue. Above that, it crucially facilitates resource sharing and is thus likely to improve the economic development in African states. This has proven successful in the case of the EU, whose Member States were historically embroiled in recurring conflicts with each other. As questionable as the ability of supranationalism to bring peace to Europe seemed initially in light of its history, decades of peace prove its success. Even in the light of recent tragic events in the Ukraine, this success remains. The current war in Europe is not a failure of supranationalism, but it does highlight among other things the dangers of an instrumentalisation of self-determination claims in the interest of hegemonic heads of governments.

Pursuing supranationalism seems an opportunity to assert a veritable African position. This is because the AU is precisely not an EU-copy. Instead, the idea of supranationalism is inherent in Pan-Africanist ideologies and thus offers an opportunity for African states to strengthen their identities and positions on the world scene, without falling victim to yet another external imposition since colonialism.

[1176] Antonio Savoia and Kunal Sen, 'The Political Economy of the Resource Curse: A Development Perspective' (2021) 13 Annual Review of Resource Economics 206-209; see also United Nations Economic Commission for Africa, 'Transboundary Natural Resource Disputes in Africa: Policies, Institutions and Management Experiences' (Economic Commission for Africa 2018).

As the example of EU citizenship and the AU passport show, supranational identities can peacefully supplement national and regional identities. Crucially, the fact that supranationalism considers and embraces the notion of multi-layered identities, reflects its touch with reality. The idea of a singular, national identity seems less and less tenable in the current face of reality, where both, erstwhile colonialism and globalisation played a crucial role in shifting minority-majority relations in states.

6 Concluding remarks

This study's aim was to provide the bases for answering the question

What is the role of and how does self-determination of peoples operate as a legal norm in the context of supranational governance and what potential does it hold?

The research question was approached by looking at two supranational organisations, the EU and the AU, and their approach to self-determination of peoples as a legal and political concept. The case studies revealed that they differ significantly: the EU is an organisation in the context of which the terms supranationalism and supranational governance emerged in modern literature (acknowledging the general eurocentrism of academic writing on the topic), being the older institution of the two. As a result, the EU can look back on more than 60 years of development, which allowed it to operate today in the way it does. The AU – at 40 years if one includes its predecessor – on the other hand, has arguably yet to undergo processes that transform it into a more supranational organisation, considering that it refers to the EU as guiding model. Yet, despite the EU's longer history and its system that espouses supranational governance more decisively than the AU, self-determination of peoples does not appear to have played a similarly fundamental role in its legal and political system, at least not to the extent that it is being addressed explicitly in the Treaties.

While chapter 4 established how crucial the concept of collective self-determination is in the EU despite this silence, self-determination of peoples is not a concept addressed from within the EU itself except as a reaction to certain conflicts, largely external to its borders.[1177] By contrast, within the political and legal framework of the AU, self-determination of peoples developed to assume two distinct functions. On one side, it is a political concept fundamental for the continuing supranational integration within the AU and it is placed at the centre of the AU's policies. On the other side, the right to self-determination of peoples anchored in Art. 20 African Charter must be understood as a related, yet independent second track on which the concept of self-determination operates within the AU.

In both the EU and AU, supranationalism seeks to map a path towards prosperous development. The EU ensured the longest period of peace between its Member States in centuries, an aim particularly inspired the devastating consequences of the two World Wars. In the case of the AU, supranationalism is driven by the aim of emancipation from the legacies of colonialism, foreign oppression and exploitation. On this basis, this study proposes a theory of self-

[1177] Sub-section 4.2.1.

determination as supranationalism to enable people to achieve their desires, indications for which are discernible in the two organisations at the centre of this study. At the same time, it becomes clear from this study that the degree of development of an alternative notion of self-determination through supranationalism is at different stages in the EU and the AU.

Specifically, in the context of the AU, the pursuit of supranational integration and using self-determination as the political and legal vehicle to further this process was a conscious choice that also evidences the merits of such a theory. However, even in the context of the EU, where the concept of collective self-determination is addressed with far more hesitation largely due to the desire of states to protect their own spheres of sovereignty and not to lend any potential legitimisation of potential secessionist movements by referencing the right to self-determination of peoples this study evidenced that developments are discernible that point towards the consideration of applying self-determination of people to wider contexts. These are reflected tentatively in scholarship and politics, by drawing on the possibility of a democratic right to self-determination, but also in the process of European supranational integration, which challenges traditional notions of governance and peoplehood and thus the framework/context in which self-determination may be relevant.

Within both regional frameworks the ascent of supranationalism in the second half of the 20th century up until now correlates with a new, supranational understanding of the concept of sovereignty. African states appear inclined to use these changed and continuously changing notions of sovereignty as an opportunity to move beyond colonial legacies, which continue to affect the reality of post-colonial states in Africa. European states, however, appear to continue to view self-determination of peoples through the traditional international legal lens, largely considering it of direct relevance in other countries than themselves.

From the instances of the conflicts over self-determination considered in this thesis it becomes visible, that self-determination resulting in a bid to secede is claimed to reach certain goals. One significant aspiration is full political and economic development accompanied by the preservation of minority interests, including their ability to practice their culture and participate in decision-making processes concerning their political and economic future. Independent statehood is traditionally viewed as the safe road to access these goals. However, it is incontestable that independent statehood on its own is no guarantee that these goals may be fulfilled. If one accepts the assumption that national self-determination is but the vehicle to achieve the aforementioned goals, the solution to self-determination conflicts seems suspiciously obvious. Supranational rather than national approaches, alongside a certain degree

of decentralisation and legal protections, to prevent a country's majority from disregarding or overwhelming ethnic minorities, could be a means to secure minorities' interests.

The persistence of national self-determination in particular, as a natural corollary to notions of traditional, national sovereignty needs critical reassessment in light of the development of sovereignty notions towards supranational or shared models of sovereignty. History shows national narratives – whether concerning sovereignty or self-determination – are prone to misuse by political leaders of established states; while Hitler's plan to reunite 'German territories' is the classical historical example, the invasion of Ukraine was also framed around the narrative of protecting fellow kinship beyond the borders of the state who regards a neighbouring state's minority its own constituent majority.

Self-determination seeks to underline national sovereignty, which by its very nature disrupts any reconciliation of interests among different ethnic groups in mixed complex contemporary societies. Instead, it seeks to establish stability by cementing the predominance of one ethnic group deemed to constitute a 'nation' above others. Under this pretence, the self-determination claims could become merely cyclical as raised earlier by way of example of the South Sudan secession. Including supranationalism in the self-determination equation could break this cycle.

The heightened interest in supranationalism since the second half of the past century has significantly changed notions of sovereignty. The once uncontested Westphalian model of national sovereignty is being increasingly supplemented and substituted by models of shared or supranational sovereignty. This new sovereignty model affects the relationship between peoples and their states, as well as citizens and states of nationality. Thus, post-colonial states find themselves in a very different position from their colonial and pre-colonial predecessors.

Nationalism accompanied by traditional notions of sovereignty did little for the economic development and prosperity of many post-colonial states – rather, in many cases, colonial legacies divided entities and communities across national boundaries creating tense rivalries and frequent conflict. These have hindered cooperation and mutual development. By contrast the emergence of supranational entities as advocated by Pan-Africanists and Pan-Arab movements all along, can be viewed as an obvious antidote to narrow and often recently constructed nationalist narratives that underpin the quest for separate statehood.

Trends towards greater supranational integration and governance in various world regions may lend further support to the theory of self-determination proposed in this study. In fact, as chapter 2 observed, alternative views and suggestions that collective development may be better

accommodated beyond notions of national statehood already emerged in history long before organisations like the EU and the AU were established. Crucially, both Marx and Lenin did not view federalism a viable alternative, but instead they considered the overcoming of the state essential for joint prosperous development.[1178] However, even between the two World Wars, so-called Europeanists seriously considered alternative methods of European integration besides through the now traditional Member-State model.[1179]

Thus, in summary, there are strong grounds that suggest a reconsideration of the classical prism of independent, national statehood, through which self-determination of peoples is commonly viewed. Taking into consideration the steady historic developments towards formal supranationalism – first through loose alliances and trading agreements, later through more institutionalised structures, such as the AU's and EU's precursors, including regional developments – it appears astonishing that international legal scholars only recently and tentatively started to include notions of shared sovereignty and entities beyond the traditional state in the discourse on self-determination of peoples.

Given the unchartered territory of applying self-determination notions to supranational governance contexts, this thesis offers an entry point into a wider field of research. Its contribution consists in the comprehensive – albeit not exhaustive – reappraisal of historic, political and legal sources that lend support to reconsidering collective self-determination against the background of supranational governance contexts, while also formulating a theory that hopefully inspires researchers from various fields that have an interest in the concept of self-determination of peoples to take the findings of this study into account in exploring new and relevant facets of this contested concept.

[1178] Lenin (n103) 36-38.
[1179] (n579) 7.

Table of Cases

Council v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) [2016] ECJ C-104/16 P

European Commission v Republic of Poland [2019] ECJ C-619/18

Flaminio Costa v ENEL [1964] ECJ C 6-64

Front Polisario v Council [2015] CJEU T-512/12

Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECJ C-208/09

Janko Rottmann v. Freistaat Bayern [2010] ECJ C-135/08

Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2014] ECJ C-36/02

Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECJ C-184/99

German Constitutional Court

Judgment of the Second Senate of 5 May 2020 [2020] BVerfG 2 BvR 859/15

Solange I [1974] BVerfGE 37, 271

Solange II [1986] 2 BvR 197/83

Zustimmungsgesetz zum Vertrag von Lissabon [2009] BVerfG 2 BvE 2/08

International Court of Justice

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion) [2010] ICJ Rep 403

- Response Submitted by Finland to Questions of Judge Koroma and Judge Cancado Trindade (December 2009)
- Separate Opinion of Judge Yusuf
- Written Statement of the Kingdom of the Netherlands (17/04/2009)

Armed Activities on the Territory of the Congo (New Application 2002) Democratic Republic of the Congo v Rwanda [2006] ICJ Rep 6

East Timor (Portugal v. Australia) [1995] ICJ Rep 90

Frontier Dispute (Burkina Faso/Mali) [1994] ICJ Rep 554

Frontier Dispute (Burkina Faso/Niger) [2013] ICJ Rep 44

- 'Separate Opinion of Judge Yusuf'

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) [2002] ICJ Rep 303

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 [2019] ICJ Rep 95

- Separate Opinion Judge Robinson
- Written Statement of the Republic of Madagascar (28 February 2018)
- Written Submission of the Republic of Djibouti (1 March 2018)
- Written Statement of the Republic of Mauritius (1 March 2018)
- Republic of Namibia regarding Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (1 March 2018)
- Written Statement submitted by the Government of the Republic of South Africa

Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep 226

Reparation for Injuries Suffered in the Service of the United Nations [1949] Advisory Opinion ICJ Rep 174

Territorial Dispute (Libyan Arab Jamahiriya/Chad) [1994] ICJ Rep 6

Western Sahara [1975] ICJ Rep 12

<u>League of Nations</u>

The Åland Islands Case

Report of the Commission of Jurists, League of Nations Official Journal (October 1920)

Report of the Commission of Rapporteurs, League of Nations Council Doc. B7 21/68/106 (1921)

<u>Supreme Court of Canada</u>

Nevsun Resources Ltd v Araya [2020] SCC 5 1 SCR 166

Reference Re Secession of Quebec [1998] SCC 2 SCR 217

United Nations Human Rights Committee

Chief Ominayak and the Lubicon Lake Band v. Canada (Communication no. 167/1984) CCPR/C//38/D/167/1984 (1990)

Gillot v France (Communication No. 932/2000) CCPR/C/75/D/932/2000 (2002)

Ivan Kitok v Sweden (Communication no. 197/1985) CCPR/C/33/D/197/1985 (1988)

Apirana Mahuika et al v. New Zealand (Communication no. 547/1993) CCPR/C/55/D/547/1993 (2000)

Table of Legislation

Act concerning the Conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on which the European Union is founded, Protocol No 2 - on the Åland Islands, Official Journal C 241, 29/08/1994 P. 0352

Act on Greenland Self-Government (Act no. 473 of 12 June 2009)

The Home Rule Act of the Faroe Islands

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code Document 02013R0952-20190515

Table of other Primary Sources

The Constitution of the People's Democratic Republic of Algeria (2016)

Constitution of the Republic of Burundi 2005, as amended to 2018

Constitution of the Federal Democratic Republic of Ethiopia (21 August 1995)

Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 19. Dezember 2022 (BGBl. I S. 2478) geändert worden ist

Constitution of the Republic of Guinea-Bissau 1984, as amended to 1996

The Constitution of the Republic of South Africa, 1996

South Sudan's Constitution of 2011 with Amendments through 2013

Sudan's Constitution of 2019

Verfassung des Freistaates Bayern in der Fassung der Bekanntmachung vom 15. Dezember 1998 (GVBl. S. 991, 992) BayRS 100-1-I

Table of Treaties and Conventions

Consolidated Version of the Treaty on European Union (adopted 13 December 2007, entered into force 1 December 2009) OJ C115/13

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

AU Documents

Decisions

Decision on Decolonisation of Mauritius, Assembly/AU/Dec.788(XXXIII)

Decision on the First Progress Report of the Chairperson of the Commission on the Situation in Western Sahara – Doc. EX.CL/788(XXIII) No. 3

Decision on the Report on the Activities of the Peace and Security Council (PSC) and the State of Peace and Security in Africa (Assembly/AU/Dec. 815(XXXV)

Decision AHG/Dec 160 (xxxvii) of the Summit of Lusaka, July 2001

Decision on Unconstitutional Changes of Government in Africa CM/2166 (LXXII), Assembly of the Heads of State and Government/4th Ordinary Session of the AEC, AHG/Dec.150 (XXXVI) (12 July 2000)

Declarations

Accra Declaration on Unconstitutional Changes of Government in Africa of 17 March 2022

Declaration on the Situation in Palestine and the Middle East, Assembly/AU/Decl. 1(XXXV)

Solemn Declaration on the 50th Anniversary of the OAU/AUAssembly/AU/Decl. 3 (XXI) (2013)

Resolutions

Resolution on Special Measures to be Adopted on Decolonization and the Struggle against Apartheid and Racial Discrimination, CM/Res. 272 (XIX) (1972)

Resolution on Nigeria, ACHPR/Res.11, 3 November 1994

Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR/Res. 224, 2 May 2012

Resolution on the Impact of Sanctions and Unilateral Coercive Measures on African Union Member States, Assembly/AU/Res. 1(XXXV)

Resolution on the Renewal of the Mandate, Appointment of the Chairperson, Reconstitution and Expansion of Mandate of the Working Group on Indigenous Populations/Communities in Africa, ACHPR/Res. 455 (LXVI) 2020

Resolution on the Situation of the North of the Republic Mali, ACHPR/Res.217 (2 May 2012)

Resolution on the Western Sahara, ACHPR/Res. 45, 11 May 2000

Resolution on the Situation Between Sudan and South Sudan, ACHPR/Res/219, 2 May 2012

State Reports

Periodic Report of Burkina Faso to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights October 1998 – December 2002 (July 2003)

Single Report comprising the 4th, 5th and 6thPeriodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and 1st Reports relating to the Maputo Protocol and the Kampala Convention

Republic of Djibouti, Combined Initial and Periodic Report under the African Charter on Human and Peoples' Rights (1993-2013)

Periodic Report of Egypt to the African Charter on Human and Peoples' Rights for 2017

Republic of Kenya, Combined 8th–11th Periodic Report on the African Charter on Human & Peoples' Rights, November 2014

Republic of Kenya, Combined Report of the 12th and 13th Periodic Reports on the African Charter on Human and Peoples' Rights

Nigeria's 6th Periodic Country Report 2015-2016 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria

Periodic Report of the Sahrawi Arab Democratic Republic to the African Commission on Human and Peoples' Rights Containing all the Outstanding Reports in Accordance with Article 62 f the Charter (October 2011)

4th and 5th Periodic Reports of the Republic of the Sudan in Accordance with Article 62 of the African Charter on Human and Peoples Rights for the Period 2008 – 2012

Other

Draft Criteria for Accreditation of Non-African States (Document EX CL 161 VI_E) Part III

Guidelines for National Periodic Reports

Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights

Statement of the Chairperson of the African Commission on Human and Peoples' Rights, Madam Reine Alapini-Gansou, on the occasion of Southern Sudan referendum of 9 January 2011

Strategic Plan 2009 – 2012 (Assembly/AU/3 (XIII))

EU Documents

Resolutions

CoR, 'Resolution of the Committee of the Regions on 'The outcome of the 2000 Intergovernmental Conference and the discussion on the future of the European Union'' (2001) Official Journal of the European Communities C 253/08

European Parliament Resolution of 23 October 2013 on the European Neighbourhood Policy: Towards a Strengthening of the Partnership: Position of the European Parliament on the 2012 Reports (2013/2621(RSP)

Resolution on the Impact of Sanction and Unilateral Coercive Measures, Assembly/AU/Res.1(XXXIII)

European Parliament Resolution of 5 February 2009 on Kosovo and the Role of the EU, B6-0063/2009

European Parliament Resolution of 25 November 2010 on the Situation in Western Sahara (2012/C99/E/16)

European Parliament resolution on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, April 18, 2012 OJ C 258 E (7-IX-2013) 8-36

European Parliament Resolution on the 22nd Session of the United Nations Human Rights Council, February 7, 2013 OJ C 24 (22-I-2016) 89-97

European Parliament Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter, December 17, 2015 OJ C 399 (24-XI-2017)151-175

Other

Copenhagen Criteria established by the European Council in 1993

CLARE, 'Recommendation 34 (1997) on the Draft European Charter of Regional Self-Government' (Recommendation 1349(1997))

Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo

European Parliament Recommendation of 15 November 2017 to the Council, the Commission and the EEAS on the Eastern Partnership, in the run-up to the November 2017 Summit (2017/2130(INI)) at https://www.europarl.europa.eu/doceo/document/TA-8-2017-0440_EN.html

UN Documents

UN General Assembly Resolutions

UNGA Res 1514 (XV) (14/12/1960) A/RES/1514

UNGA Res 1541 (XV) (15/12/1960) A/RES/1541

UNGA Res 2200A (XXI) (16/12/1966) A/RES/2200A

UNGA Res 2229A (XXI) (20/12/1966) A/RES/2229

UNGA Res 2625 (XXV) (24/10/1970) A/Res/2625

UNGA Res 47/135 (18/12/1992) A/RES/47/135

UNGA Res 61/295 (02/10/2007) A/RES/61/295

UNGA Res 72/95 (15/12/2017) A/RES/72/95

UN Human Rights Committee

HRC, 'Free, Prior and Informed Consent: A Human Rights-Based Approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples' (2018) A/HRC/39/62

HRC, General Comment No. 12: 'Article 1 (Right to Self-Determination)' CCPR_GEC_6626_E (1)

HRC, General Comment No. 23: 'The Rights of Minorities' (1994) CCPR/C/21/Rev. 1/Add.5

HRC, General Comment No. 25: 'The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)' (1996) CCPR/C/21/Rev.1/Add.7

San Francisco Conference 1945

UNCIO III, 622 Doc. 2 G/29

UNCIO VI, 300 Doc. 374 I/1/17

UNCIO VI, Doc. 1006, I/6

UNCIO VI, 12 Doc. 1006/I/6

UNCIO VI, 366 Doc. 817/I/1/31

UNCIO VI, 296 Doc. 343 I/1/16

UNCIO VI, 455 Doc. 944 I/1/34 (1)

UNCIO VI, 704 Doc. 723 I/1/A/19

UN Security Council Resolutions

UNSC Res 2351 (28/04/2017) S/RES/2351

Other

Aaland Islands - League of Nations Council - Reports and Proposal Regarding the Rapporteurs Commission Responsible for Studying the Question - Correspondence between the Landsting of Aaland and the Council (UN Archives Geneva)

Department of Public Information United Nations, Yearbook of the United Nations 1946-47 (Lake Success, New York 1947)

Repertory of Practice of the UN, Art. 1(2) Supplement No. 10 (2000–2009), Volume 1 (legal.un.org)

UN Doc 1950 Annexes A/C.3/L.96 17

Bibliography

All weblinks were last accessed on 12th June 2023 (hyperlinks were inserted where possible and helpful for the convenience of the reader)

Aceska A and Mitroi A-R, 'Designating Heritage as European: Between the European Union's Heritage Initiatives and the Nation-State' (2021) 27 International Journal of Cultural Policy 881

ACtHPR 'African Court on Human and Peoples' Rights' (*African Court on Human and Peoples' Rights*, 17 June 2023)

Adeniyi O and others, 'African Union and the Challenges of Development' (2016) 5 Journal of African Studies 67

Adetula V and others, 'The Legacy of Pan-Africanism in African Integration Today' (*The Nordic Africa Institute*, September 2020)

Adi H, *Pan-Africanism: A History* (Bloomsbury 2018)

Afolayan E, 'Morocco and the Au: A Game of Thrones?' (*Africa Middle East*, 24 August 2016)

AFP and Staff T, 'Algeria Denounces African Union Granting Israel Observer Status' (*The Times of Israel*, 26 July 2021)

African News Agency, 'Au Heads of State to Launch African Union Passport during Kigali Summit' (*Mail & Guardian Africa*, 15 July 2016)

Ahmetaj M, 'Serbia Should Stop Comparing Catalonia to Kosovo' (*EU Observer*, 10 October 2017)

Akın Y, 'The Ottoman Empire: The Mandate That Never Was' (2019) 124 The American Historical Review 1694

Akintug H, *The EU Referendums on Åland: An Overview of the EU Debates in the Åland Parliament during Autumn 1994* (The Åland Islands Peace Institute 2020)

Akol Nyok Akol Dok Bat and Thayer BA, 'Takeover Trap: Why Imperialist China Is Invading Africa' (*The National Interest*, 31 July 2019)

Al Mayadeen Net, 'African Union Suspends Decision to Grant Observer Status to "Israel"' (*Al Mayadeen*, 6 February 2022)

Albert E, 'China in Africa' (*Council on Foreign Relations*, 12 July 2017)

Alfredsson G, 'The Right to Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed), *Modern law of self-determination* (Martinus Nijhoff 1993)

Alston P and Goodman R, *International Human Rights* (OUP 2013)

Alternative für Deutschland, *Programm Für Deutschland: Das Grundsatzprogramm Der Alternative Für Deutschland* (2016)

Amann DM and others, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113 American Journal of International Law 784

Amao O, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge 2019)

Ambrosius L, 'Democracy, Peace and World Order' in John Milton Cooper (ed), *Reconsidering Woodrow Wilson: Progressivism, internationalism, war, and peace* (Woodrow Wilson Center Press 2008)

Anderson G, 'A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?' (2016) 49 Vanderbilt Journal of Transnational Law 1183

——, 'Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?' (2016) 34 Arizona Journal of International and Comparative Law 1

Andreev SA, 'The EU "Crisis of Legitimacy" Revisited: Concepts, Causes, and Possible Consequences for the European Politics and Citizens' (2007) 7 Political Perspectives

Aniche ET, 'From Pan-Africanism to African Regionalism: A Chronicle' (2020) 79 African Studies 70

Araratyan A, 'Self-Determination in Nagorno-Karabakh' (*The Guardian*, 4 October 2020)

ASEAN, 'ASEAN Member States' (*ASEAN.org*)

——, 'ASEAN Plus Three' (*ASEAN.org*)

AU, 'About the African Union' (*African Union*, 10 February 2022)

——, 'Agenda 2063: The Africa We Want' (*African Union*)

——, 'The AU Commission' (*African Union*)

——, 'Diaspora & Civil Society Engagement' (*African Union*)

——, 'Member States' (*African Union*)

——, 'OAU/AU Treaties, Conventions, Protocols & Charters' (*African Union*)

——, 'Our Aspirations for the Africa We Want' (*African Union*)

——, 'The Pan-African Parliament' (*African Union*)

——, 'The Diaspora Division' (*African Union*)

African Union Commission, 'African Union Handbook 2022' (African Union 2022)

Avedian V, ‘State Identity, Continuity, and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide’ (2012) 23 European Journal of International Law 797

Babarinde O, ‘The EU as a Model for the African Union: The Limits of Imitation’ (2007) 7 Jean Monnet/Robert Schuman Paper Series

Balcha E, ‘The African Developmental Conundrum: The Paradox of Nepad vs. Developmental State Policy’ (*Addis Standard*, 27 March 2013)

Bang H, Jensen MD and Nedergaard P, ‘“We the People” versus “We the Heads of States”: The Debate on the Democratic Deficit of the European Union’ (2015) 36 Policy Studies 196

Barakat NE, ‘Making “Tribes” in the Late Ottoman Empire’ (2021) 53 International Journal of Middle East Studies 482

Barden G and Murphy T, *Law and Justice in Community* (OUP 2010)

Barigazzi J and Vela JH, ‘EU’s Unanimity Rules Are Here for Now, despite Chatter’ (*Politico*, 20 September 2022)

Barnard C and Peers S, *European Union Law* (3rd edn, OUP 2020)

Barnett C, ‘Culture, Policy, and Subsidiarity in the European Union: From Symbolic Identity to the Governmentalisation of Culture’ (2001) 20 Political Geography 405

Barnett MN and Solingen E, ‘Designed to Fail or Failure of Design? The Origins and Legacy of the Arab League’ in Amitav Acharya and Alastair I Johnston (eds), *Crafting cooperation: Regional international institutions in comparative perspective* (CUP 2007)

Barnett MN, ‘Sovereignty, Nationalism, and Regional Order in the Arab States System’ (1995) 49 International Organization 479

Bartels L, ‘Jurisdiction and Applicable Law in the WTO’ (2014) University of Cambridge Legal Studies Research Paper Series, Paper No. 59/2014

Barten U, *Minorities, Minority Rights and Internal Self-Determination* (Springer 2015)

Baylis J, Owens P and Smith S (eds), *The Globalization of World Politics: An Introduction to International Relations* (OUP 2022)

Bebel A, *Aus Meinem Leben: Zweiter Teil* (JHW Dietz Nachf GmbH 1911)

Becker Lorca A, ‘Eurocentrism in the History of International Law’ in Bardo Fassbender and others (eds), *The Oxford Handbook of the History of International Law* (OUP 2012)

Beetz JP, ‘From Practice to Principle and Back: Applying a New Realist Method to the European Union’s Democratic Deficit’ (2018) 66 Political Studies 339

Begg I, 'The European Union and Regional Economic Integration: Creating Collective Public Goods – Past, Present and Future' (*EPRS | European Parliamentary Research Service*, March 2021)

Bellamy R, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019)

Benedict AO, 'Pan-Africanism and the Challenges of Development in the 21st Century' (2010) 4 Africana 191

Benedikter T, *100 Years of Åland's Autonomy* (Lit Verlag 2021)

Bengoetxea J, 'The EU as (More than) an International Organization' in Jan Klabbers and Asa Wallendahl (eds), *Research handbook on the law of international organizations* (Edward Elgar Publishing Limited 2011)

Benziger F, 'A Closer Look At Recent Self-Determination Issues in Eastern Europe' (*IntLawGrrls*, 25 September 2022)

Bereketeab R, *The Horn of Africa: Intra-State and Inter-State Conflicts and Security* (Pluto Press 2013)

——, *Self-Determination and Secession: African Challenges* (Routledge 2014)

Besson S, 'Sovereignty in Conflict' (2004) 8 European Integration Online Papers

Bi S, 'Cooperation between China and ASEAN under the Building of Asean Economic Community' (2021) 10 Journal of Contemporary East Asia Studies 83

Bicchieri C, Muldoon R and Sontuoso A, 'Social Norms' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University 2018)

Bieling H-J, 'Intergouvernementalismus' in Hans-Jürgen Bieling and Marika Lerch (eds), *Theorien der europäischen Integration* (3rd edn, Springer 2012)

Bird A, 'Third State Responsibility for Human Rights Violations' (2010) 21 European Journal of International Law 883

Bishku M, 'In Search of Advantages: Israel's Observer Status in the African Union' (*The Conversation*, 15 August 2021)

Blair A, *The European Union since 1945* (2nd edn, Routledge 2011)

Blanton R, Mason TD and Athow B, 'Colonial Style and Post-Colonial Ethnic Conflict in Africa' (2001) 38 Journal of Peace Research 473

Blazquez A, 'Identifying the EU's Weaknesses in Foreign and Defence Policy: The Struggle to Become a More Effective Global Actor' (*Europeum Monitor*, 19 October 2020)

Blauberger M and others, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 Journal of European Public Policy 1422

Bloor K, 'Regionalism and the European Union' (*E-International Relations*, 21 May 2022)

Blumi I, 'Race, Gender, and Difference: Ottoman Empire' (Suad Joseph ed, *Encyclopedia of Women & Islamic Cultures*, 1 January 2009)

Boeckh K, 'Crumbling of Empires and Emerging States: Czechoslovakia and Yugoslavia as (Multi)National Countries' in Ute Daniel and others (eds), *1914-1918 Online: International Encyclopedia of the First World War* (Freie Universität Berlin 2017)

Boese VA and Wilson MC, 'Contestation and Participation: Concepts, Measurement, and Inference' (2022) 26 International Area Studies Review 89

Bond M, *Hitler's Cosmopolitan Bastard: Count Richard Coudenhove-Kalergi and His Vision of Europe* (McGill-Queen's University Press 2021)

Borgen CJ, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (*ASIL Insights*, 29 February 2008)

Borz G, Brandenburg H and Mendez C, 'EU Cohesion Policy Helps Build a European Identity' (*European Policies Research Centre*, 5 July 2022)

Bossuyt M, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987)

Bouwhuis S, 'The International Law Commission's Definition of International Organizations' (2012) 9 International Organizations Law Review 451

Börzel TA and Risse T, 'Introduction: Framework of the Handbook and Conceptual Clarifications' in Tanja A Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative regionalism* (OUP 2016)

Börzel TA, *States and Regions in the European Union: Institutional Adaptation in Germany and Spain* (CUP 2001)

Bravo R and Hayden J, 'EU Defends Spain's Right to Use "proportionate" Force' (*Bloomberg*, 4 October 2017)

British International Studies Association, 'Algeria's Self-Determination and Third Wordlist Policy under President Houari Boumédiène' (*BISA*)

Brown GW, McLean I and McMillan A, *The Concise Oxford Dictionary of Politics and International Relations* (OUP 2018)

Bruter M, 'Legitimacy, Euroscepticism & Identity in the European Union – Problems of Measurement, Modelling & Paradoxical Patterns of Influence' (2008) 4 Journal of Contemporary European Research 273

Bruter M and others, *The Conference on the Future of Europe: Putting Local and Regional Authorities at the Heart of European Democratic Renewal* (European Union 2021)

Buchheit LC, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978)

Buras P and Terka P, 'Poland under Duda: A Divided Country, Dividing Europe' (*European Council on Foreign Relations*, 14 July 2020)

Buscaneanu S, *Regime Dynamics in EU's Eastern Neighbourhood: Eu Democracy Promotion, International Influences, ... and Domestic Contexts* (Palgrave Macmillan 2016)

Bush B, *Imperialism and Postcolonialism* (Pearson 2006)

Caiani M and Weisskircher M, 'Anti-Nationalist Europeans and pro-European Nativists on the Streets: Visions of Europe from the Left to the Far Right' (2021) 21 Social Movement Studies 216

Cambou D, 'The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective' (2019) 23 The International Journal of Human Rights 34

Cameron D, Johnson R and Goldfarb ZA, 'Why Greece and Germany Just Don't Get along, in 15 Charts' (*The Washington Post*, 3 July 2015)

Cameron F, 'The European Union as a Model for Regional Integration' (*Council on Foreign Relations*, 24 September 2010)

Campbell G, 'Herman Van Rompuy Says Brexit "Has Changed EU View of Scotland"' (*BBC News*, 15 September 2019)

Cantle T, *Community Cohesion: A New Framework for Race and Diversity* (Palgrave Macmillan 2008)

Capotorti F, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1

Cassese A, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995)

Castellino J, 'International Law and Self-Determination: Peoples, Indigenous Peoples and Minorities' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and secession in international law* (OUP 2014)

Center for Preventive Action, 'Conflict in the Democratic Republic of Congo' (*Council on Foreign Relations*, 7 June 2023)

Chase-Dunn C, 'Twenty-First Century Deglobalization and the Struggle for Global Justice in the World Revolution of 20xx' in Hosseini SA Hamed and others (eds), *The Routledge Handbook of Transformative Global Studies* (Routledge, Taylor & Francis Group 2020)

Chernichenko SV and Kotliar VS, ‘Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends’ in Julie Dahlitz (ed), *Secession and international law: Conflict avoidance - regional appraisals* (TMC Asser Press 2003)

Chopin T, ‘Europe and the Identity Challenge: Who Are “We”?’ (2018) 466 European Issues

Christiano T, ‘Self-Determination and the Human Right to Democracy’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015)

Christopher AJ, ‘Decolonisation without Independence’ (2002) 56 GeoJournal 213

Cicero MT in Günther Laser (ed), *De Re Publica* (Reclam 2014)

Claes M and Reestman J-H, ‘The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case’ (2015) 16 German Law Journal 917

Claes M, ‘How Common Are the Values of the European Union’ (2019) 15 Croatian Yearbook of European Law and Policy VII

Close P and Ohki-Close E, *Supranationalism in the New World Order: Global Processes Reviewed* (Macmillan 1999)

Cobo M, Study of the Problem of Discrimination Against Indigenous Populations, E/CN.4/Sub.2/1982/2/Add.6 Chapter V

Coleman A, *Resolving Claims to Self-Determination* (Routledge 2013)

Comaroff J and Comaroff J, *Theory from the South: Or, How Euro-America Is Evolving towards Africa* (Taylor & Francis 2012)

Conference on the Future of Europe, ‘Conference on the Future of Europe: Report on the Final Outcome’ (9 May 2022)

Connor W, ‘Ethno-Nationalism’ in Myron Weiner, Samuel P Huntington and Gabriel A Almond (eds), *Understanding political development* (Waveland Press 1994)

Conze E, *Die Große Illusion: Versailles 1919 Und Die Neuordnung Der Welt* (Siedler 2018)

Cooper F, ‘Decolonization and Citizenship: Africa between Empires and a World of Nations’ in Els Bogaerts and Remco Raben (eds), *Beyond Empire and Nation: The decolonization of African and Asian societies, 1930s-1960s* (Paperback 2012)

Coppieters Foundation, ‘UN Expert on Self-Determination Warns EU’ (*Coppieters*, 2 February 2018)

CoR, ‘Opinion of the Committee of the Regions of 15 September 1999 on the Implementation of EU Law by the Regions and Local Authorities’ (European Union 1999)

——, ‘Opinion: Local and Regional Authorities in the Permanent Dialogue with Citizens’ (140th Plenary Session, 12-14 October 2020) CIVEX-VII/001

Cornell D and others, ‘Ich Werde Sein’ (*Luxemburg: Gesellschaftsanalyse und Linke Praxis*, March 2018)

Coudenhove-Kalergi R, *Pan-Europa* (Pan-Europa Verlag 1923)

Council of Ministers, ‘European Ministers of Culture Meeting within the Council on Guidelines for Community Cultural Action’ (1992) Official Journal of the European Communities C 336

Craig P, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010)

Crawford J, *The Right to Self-Determination in International Law: Its Developments and Future* (OUP 2001)

——, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006)

Culcasi K, ‘Cartographies of Supranationalism: Creating and Silencing Territories in the “Arab Homeland”’ (2011) 30 Political Geography 417

Curry G, ‘Woodrow Wilson, Jan Smuts, and the Versailles Settlement’ (1961) 66 The American Historical Review 968

Daes E-IA, ‘An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations’ (2008) 21 Cambridge Review of International Affairs 7

Danso K, ‘The African Economic Community: Problems and Prospects’ (1995) 42 The Politics of Economic Integration in Africa 31

Daugirdas K, ‘International Organizations and the Creation of Customary International Law’ (2020) 31 European Journal of International Law 201

Davidson H, ‘Hong Kong Crisis: At Least 360 Arrested as China Protests Grow’ (*The Guardian*, 27 May 2020)

Dawson M and de Witte F, ‘Constitutional Balance in the EU after the Euro-Crisis’ (2013) 76 The Modern Law Review 817

de Brabandere E, ‘The Impact of Supranationalism on State Sovereignty from the Perspective of the Legitimacy of International Organisations’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013)

Julia De Clerck-Sachsse and Piotr Maciej Kaczyński, *The European Parliament: More Powerful, Less Legitimate? An Outlook for the 7th Term* (Centre for European Policy Studies, Working Document No 314/May 2009)

de Jesús Butler I, ‘The European Union and International Human Rights Law’ (OHCHR, Europe Regional Office)

De Zayas A, '4 Questions on Catalonia' (*Alfred de Zayas*, 11 November 2017)

Del Mar K, 'The Myth of Remedial Secession' in Duncan French (ed), *Statehood and self-determination reconciling tradition and modernity in international law* (CUP 2015)

Delanty G, 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1 Citizenship Studies 285

——, 'Models of European Identity: Reconciling Universalism and Particularism' (2002) 3 Perspectives on European Politics and Society 345

Delzell CF, 'Altiero Spinelli and the Origins of the European Federalist Movement in Italy' (1993) 16 History of European Ideas 767

Demertzis M, 'Why Do European Countries Join the EU?' (*Bruegel*, 2 December 2022)

den DSF van, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices* (Intersentia 2013)

Dersso SA, 'The AU's Extraordinary Summit Decisions on Africa-ICC Relationship' (*EJIL*, 28 October 2013)

Deutsch KW and Foltz WJ, *Nation Building in Comparative Contexts* (Aldine Transaction 1996)

Diden A, 'Israel's Observer Status: Algeria Puts Pressure on AU' (*Le Journal de l'Afrique*, 5 August 2021)

DiEM25, 'Ein Manifesto Zur Demokratisierung Europas' (*DiEM25*)

The Diplomatic Service of the European Union, 'Statement on the Events in Catalonia' (*EEAS*, 2 October 2017)

Directorate-General for Communication (European Commission), 'Public Opinion in the European Union' (*Publications Office of the EU*, 2021)

Dono M, Alzate M and Sabucedo J-M, 'Predicting Collective Action in a Secessionist Context: Different Motives for Two Opposed Stances' (2021) 12 Frontiers in Psychology

Dowling S, 'Snuffing out EU Hopes: Tiny Aland Islands Threaten to Reject Lisbon Treaty' (*Der Spiegel*, 13 March 2008)

EAC, 'Political Federation' (*eac.int*)

——, 'Partner States' (*eac.int*)

Easton A, 'Poland Stokes Fears of Leaving EU in "Polexit"' (*BBC News*, 9 October 2021)

Echternkamp J, 'Europa unter Nationalsozialistischer Besatzung' (*Bundeszentrale für Politische Bildung*, 30 April 2015)

ECOWAS, ‘Vision 2020’ (*ecowas.int*)

——, ‘Member States’ (*ecowas.int*)

EFA, ‘2019 Manifesto European Elections’ (*EFA*)

Eggermont F, ‘In the Name of Democracy: The External Representation of the Regions in the Council’ in Carlo Panara and Alexander de Becker (eds), *The Role of the Regions in EU Governance* (Springer 2010)

el-Dakhakhni F, ‘AU Grants Palestine Observer Status’ (*Egypt Independent*, 27 May 2013)

The Electoral Commission, ‘Results and Turnout at the EU Referendum’ (*electoralcommission.org*)

Endelman J, ‘In the Shadow of Empire: States in an Ottoman System’ (2018) 42 Social Science History 811

Engels F, ‘Letter to A. Bebel’, *Karl Marx and Friedrich Engels: Selected Works in Three Volumes*, vol 3 (Progress Publishers 1973)

Escudero Espinosa JF, *Self-Determination and Humanitarian Secession in International Law of a Globalized World: Kosovo v. Crimea* (Springer 2017)

EU, ‘EU Membership, How to Join, Candidates’ (*European Union*)

European Central Bank, ‘The Monnet Method: Its Relevance for Europe Then and Now’ (*Mario Draghi, President of the ECB, Award of the Gold Medal of the Fondation Jean Monnet pour l’Europe, Lausanne, 4 May 2017*)

European Commission, ‘European Governance – A White Paper’ [2001] Official Journal of the European Communities C 287

——, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committeee of the Regions: An EU Strategy on Standardisation - Setting Global Standards in Support of a Resilient, Green and Digital EU Single Market’ (2 February 2022) COM/2022/31

——, ‘Ius Soli’ (*Migration and Home Affairs/European Commission*)

——, ‘New Cohesion Policy’ (*European Commission*)

——, *Public Opinion in the European Union – First Results* (European Union 2021)

European Parliament, ‘The Committee of the Regions’ (*Fact Sheets on the European Union | European Parliament*, 2023)

——, ‘The Enlargement of the Union’ (*Fact Sheets on the European Union | European Parliament*, 2023)

——, ‘The European Elections in 1979’ (*EU Citizens’ Corner | European Parliament Liaison Office in the United Kingdom*)

——, *The Historical Development of European Integration* (Fact Sheets on the European Union | European Parliament 2018)

——, ‘Intergovernmental Decision-Making Procedures’ (*Fact Sheets on the European Union | European Parliament*, 2023)

——, ‘The Principle of Subsidiarity’ (*Fact Sheets on the European Union | European Parliament*, 2023)

——, ‘The Protection of Article 2 TEU Values in the EU’ (*Fact Sheets on the European Union | European Parliament*, 2023)

——, Report on the 2021 Commission Report on Kosovo’ (17 June 2021, A9-0179/2022)

——, ‘Supranational Decision-Making Procedures’ (*Fact Sheets on the European Union | European Parliament*, 2023)

——, ‘The 1995 Enlargement of the European Union: The Accession of Finland and Sweden’ (*Think Tank | European Parliament*)

——, Press Release of 29 March 2012, ‘MEPs Welcome Progress of Serbia, Kosovo and Montenegro towards Joining the EU’

European Parliamentary Research Service, ‘In Focus – the European Parliament Has More Power’ (*European Sources Online*, 17 March 2014)

——, *The 1995 Enlargement of the European Union: The Accession of Finland and Sweden* (Study by the European Union History Series, Historical Archives Unit November 2015).

Ewing C, ‘“With a Minimum of Bitterness”: Decolonization, the Right to Self-Determination, and the Arab-Asian Group’ (2022) 17 Journal of Global History 254

Fabbrini S, ‘Intergovernmentalism and Its Limits’ (2013) 46 Comparative Political Studies 1003

Fabricius P, ‘The Pan-African Parliament Finally Elects a President’ (*ISS Africa*, 1 July 2022)

Fagbayibo B, ‘A Supranational African Union? Gazing into the Crystal Ball’ (2008) 41 De Jure 493

——, ‘Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview’ (2013) 16 Potchefstroom Electronic Law Journal 32

——, *Transcending Member States: Political and Legal Dynamics of Building Contintental Supranationalism in Africa* (Springer 2022)

Fastenrath U, ‘Ch. XI Declaration Regarding Non-Self-Governing Territories, Article 73’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary,* vol II (3rd edn, OUP 2012)

Fatchina E, ‘DRC-Rwanda Conflicts: What Are the Two Countries Accusing Each Others Of?’ (*Afro impact*, 31 May 2022)

Fink A, ‘Under What Conditions May Social Contracts Arise? Evidence from the Hanseatic League’ (2010) 22 Constitutional Political Economy 173

Finkel C, *Osman’s Dream: The History of the Ottoman Empire, 1300-1923* (Basic Books 2005)

Fisch J and Mage A, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (CUP 2016)

Fisch J, ‘Adolf Hitler Und Das Selbstbestimmungsrecht Der Völker’ (2010) 290 Historische Zeitschrift 93

Fligstein N, Polyakova A and Sandholtz W, ‘European Integration, Nationalism and European Identity’ (2012) 50 JCMS: Journal of Common Market Studies 106

Fondazione De Gasperi, ‘Homepage - Fondazione De Gasperi’ (*Fondazione De Gasperi - Il pensiero, gli ideali morali e politici di Alcide De Gasperi*)

Foret F and Calligaro O, *European Values: Challenges and Opportunities for EU Governance* (Routledge 2018)

Foster JB, ‘Marx and Internationalism’ (2000) 52 Monthly Review 11

Fountain J, ‘A Christian Europe(an): The Forgotten Vision of Robert Schuman’ (2011) 36 Encounters Mission Journal

Gasimov Z, ‘Zum Phänomen Der Russifizierungen: Einige Überlegungen’ in Zaur Gasimov (ed), *Kampf um wort und schrift: Russifizierung in Osteuropa im 19.-20. Jahrhundert* (Vandenhoeck & Ruprecht 2012)

Gerber H, ‘Law in the Ottoman Empire’ in Anver M Emon and Rumee Ahmed (eds), *The Oxford Handbook of Islamic law* (OUP 2015)

Gherghina S and O’Malley DJ, ‘Self-Determination during the Brexit Campaign: Comparing Leave and Remain Messages’ (2019) 19 Fédéralisme Régionalisme

Gillingham JR, ‘The Monnet Method and the Obsolescence of the EU’ in Francesco Giavazzi and others (eds), *The Liberal Heart of Europe: Essays in memory of Alberto Giovannini* (Palgrave Macmillan 2021)

Glencross A, ‘Altiero Spinelli and the Idea of the US Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy’ (2009) 47 Journal of Common Market Studies 287

Goldberg D, 'Traces of Pan-Africanism and African Nationalism in Africa Today' (2017) 64 Theoria: A Journal of Social and Political Theory

Gonze C, 'Katanga Secession: The New Colonialism' (1962) 9 Africa Today 4

Grabbe H and Lehne S, 'Defending EU Values in Poland and Hungary' (*Carnegie Europe*, 4 September 2017)

Grieshaber K, 'US Museum Condemns Use of Its Art by German Far-Right Party' (*AP NEWS*, 30 April 2019)

Grin G, 'Shaping Europe: The Path to European Integration according to Jean Monnet' (Jean Monnet Foundation for Europe, Debates and Documents Collection, Issue 7, Lausanne, March 2017).

Guilhaudis J-F, *Le Droit Des Peuples à Disposer d'eux-Mêmes* (Presses Universitaires de Grenoble 1976)

Gutheil M and Liger Q, 'Right-Wing Extremism in the EU' (Policy Department for Citizens' Rights and Constitutional Affairs, European Union 2022)

Hack K, 'Decolonization and Violence in Southeast Asia: Crises of Identity and Authority' in Els Bogaerts and R Raben (eds), *Beyond Empire and Nation: The decolonization of African and Asian societies, 1930s-1960s* (Paperback 2012)

Halman L and others, 'Atlas on European Values: Change and Continuity in Turbulent Times' (Open Press TiU, Tilburg University 2022)

Handy P-S and Djilo F, 'The African Union's Peace and Security Dilemma' (*ISS Africa*, 26 July 2021)

Hasan KS, 'The Doctrine of Self-Determination' [1962] Pakistan Horizon 186

Hayrapetyan A, 'Federalism, Functionalism and the EU: The Visions of Mitrany, Monnet and Spinelli' (*E-International Relations*, 21 September 2020)

Heater DB, *National Self-Determination: Woodrow Wilson and His Legacy* (St Martin's Press 1994)

Hedgecoe G, 'Catalan Independence Talks Are Back - and the Stakes Are High for PM Sánchez' (*Politico*, 14 September 2021)

Helfer LR, 'Understanding Change in International Organizations: Globalization and Innovation in the Ilo' (2006) 59 Vanderbilt Law Review 649

Henley J and others, 'Beyond Catalonia: Pro-Independence Movements in Europe' (*The Guardian*, 27 October 2017)

Henrad K, 'An EU Perspective on New versus Traditional Minorities: On Semi-Inclusive Socio-Economic Integration and Expanding Visions of European Culture and Identity' (2010) 17 Columbia Journal of European Law 57

Henry J, 'The Theory of the State: The Position of Marx and Engels' (2008) 37 Forum for Social Economics 13

Herod CC, *The Nation in the History of Marxian Thought. the Concept of Nations with History and Nations without History* (Springer 1976)

Higgins R, 'Self-Determination and Secession' in Julie Dahlitz (ed), *Secession and international law: Conflict avoidance - regional appraisals* (Asser Press 2003)

Higgott R, 'Global Challenges to European, Western, Liberal Values' (*LSE Ideas Ratiu Forum*, 25 August 2021)

Hilpold P, 'The Right to Self-Determination: Approaching an Elusive Concept through a Historic Iconography' (2006) 11 Austrian Review of International and European Law 23

——, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 Chinese Journal of International Law 47

——, 'Secession in International Law: Does The Kosovo Opinion Require a Re-Assessment of This Concept?' in Peter Hilpold (ed), *Kosovo and international law: The ICJ advisory opinion of 22 July 2010* (Nijhoff 2012)

Himmer M and Rod Z, 'Chinese Debt Trap Diplomacy: Reality or Myth?' [2023] Journal of the Indian Ocean Region 1

Hobsbawm EJ, *Nations and Nationalism since 1780: Programme, Myth, Reality* (2nd edn, CUP 2012)

Hofbauer JA, *Sovereignty in the Exercise of the Right to Self-Determination* (Brill 2016)

Hofmann C, 'Rosa Luxemburg Zur Russischen Revolution' (*JACOBIN Magazin*, 8 January 2022)

Holton RJ, *Globalization and the Nation State* (Bloomsbury Publishing 2011)

Hooghe L and Marks G, *Multi-Level Governance and European Integration* (Rowman & Littlefield Publishers 2001)

Housden M, 'National Minorities as Peacebuilders? How Three Baltic Germans Responded to the First World War' (2018) 43 Peace & Change 5

IACHR, 'Derecho a la libre Determinación de los Pueblos Indígenas y Tribales' (28 December 2021)

International American Conference 'The congress of 1826, at Panama, and subsequent movements toward a conference of American nations' (Washington Government Printing Office 1890)

International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (Report of December 2001)

International Crisis Group, ‘Katanga: Tensions in the DRC’s Mineral Heartland’ (Africa Report N°239, 3 August 2016)

ILC, ‘Draft Conclusions on Identification of Customary International Law’ (2018) 2 (Part 2) Yearbook of the International Law Commission

——, Report on the Work of Its Seventieth Session (ILC Draft Conclusions), UN Doc. A/73/10 (2018)

International Work Group for Indigenous Affairs, *Indigenous Peoples’ Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination* (2019)

Itzkowitz N, *Ottoman Empire and Islamic Tradition* (University of Chicago Press 1972)

James CLR, *A History of Pan-African Revolt* (PM Press 2012)

James W, ‘Barroso Ruffles Scottish Feathers over EU Membership’ (*Reuters*, 16 February 2014)

Jaspers E, ‘Values’ (*Oxford Bibliographies*, 2016)

Jawad HA, ‘Pan-Islamism and Pan-Arabism: Solution or Obstacle to Political Reconstruction in the Middle East?’ in Haifaa A. Jawad (ed), *The Middle East in the New World Order* (Palgrave 1997)

Jellissen SM and Gottheil FM, ‘Marx and Engels: In Praise of Globalization’ (2009) 28 Contributions to Political Economy 35

Jeong S, ‘Globalization’ in Marcello Musto (ed), *Marx Revival: Key concepts and new critical interpretations* (CUP 2020)

Jetschke A and Murray P, ‘Diffusing Regional Integration: The EU and Southeast Asia’ (2012) 35 West European Politics 174

Joenniemi P, ‘The Åland Islands: Neither Local nor Fully Sovereign’ (2014) 49 Cooperation and Conflict 80

Kartsonaki A, ‘Debating the Right to Secede: Normative Theories of Secession’ in Ryan D Griffiths, Aleksandar Pavković and Peter Radan (eds), *The Routledge Handbook of Self-determination and secession* (Routledge 2023)

Katsikas S, ‘Millets in Nation-States: The Case of Greek and Bulgarian Muslims, 1912–1923’ (2009) 37 Nationalities Papers 177

Kayaoglu T, ‘Westphalian Eurocentrism in International Relations Theory’ (2010) 12 International Studies Review 193

Keating M, ‘European Integration and the Nationalities Question’ (2004) 31 Politics & Society 367

——, ‘Europe, the State and the Nation’ in John McGarry and Michael Keating (eds), *European integration and the Nationalities Question* (Routledge 2006)

Kelsen H, *The Law of the United Nations* (Stevens & Sons Limited 1950)

Kettell S and Kerr P, *The Brexit Religion and the Holy Grail of the NHS* (CUP 2021)

Khadiagala GM, ‘Pan-Africanism and Regional Integration’ in Nicholas Cheeseman, David McBeath Anderson and Andrea Scheibler (eds), *Routledge Handbook of African Politics* (Routledge 2013)

Kisiangani E, ‘AU and Pan-Africanism: Beyond Rhetoric’ (*Institute for Security Studies* 24 May 2013)

Klabbers J, ‘Contending Approaches to International Organizations: Between Functionalism and Constitutionalism’ in Asa Wallendahl and Jan Klabbers (eds), *Research Handbook on the law of International Organizations table of contents* (Edward Elgar Publishing 2011)

Knop K, *Diversity and Self-Determination in International Law* (CUP 2009)

Kochanek J, ‘Jan Smuts: Metaphysics and the League of Nations’ (2012) 39 History of European Ideas 267

Kode D, *The Complexity of Democracy-Building in Conflict Affected States: The Role of ECOWAS and the African Union in Cote d’Ivoire* (International Institute for Democracy and Electoral Assistance 2016)

Kokaj A and Sinani B, ‘The Multi-Level Governance of the European Union: The Role of the Local Government’ (2023) 13 Juridical Tribune 32

Korb A, ‘Homogenizing Southeastern Europe, 1912–99: Ethnic Cleansing in the Balkans Revisited’ (2016) 18 Journal of Genocide Research 377

Kornprobst M, *Irredentism in European Politics: Argumentation, Compromise and Norms* (CUP 2008)

Koskenniemi M, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 International and Comparative Law Quarterly 241

Kostakopoulou D, ‘Had Coudenhove-Kalergi’s Pan-Europa Foreseen the United Kingdom’s Nationalist Hour (Brexit)?’ (2020) 5 European Papers 691

Krasner SD, ‘Recognition: Organized Hypocrisy Once Again’ (2013) 5 International Theory 170

Kryukov MV, ‘Self-determination from Marx to Mao’ (1996) 19 Ethnic and Racial Studies 352

Kubicek P, ‘Illiberal Nationalism and the Backlash against Liberal Cosmopolitanism in Post-Communist Europe’ (2022) 28 Nationalism and Ethnic Politics 332

Kudarauskas M, 'A Federal Europe: One More Try?' (*Harvard International Review*, 13 December 2021)

Lacroix J, 'Does Europe Need Common Values?' (2009) 8 European Journal of Political Theory 141

Lansing R, *The Peace Negotiations, a Personal Narrative* (Constable 1921)

Larsen SR, *The Constitutional Theory of the Federation and the European Union* (OUP 2021)

Lefkowitz D, *Philosophy and International Law: A Critical Introduction* (CUP 2020)

Lehning PB, 'European Citizenship: Towards a European Identity?' (2001) 20 Law and Philosophy 239

Leng LY, 'Economic Aspects of Supranationalism: The Case of ASEAN' (1983) 2(1) Political Geography Quarterly 21

Lenin VI, 'Theses on the National Question' in Robert Daglish (ed), *Lenin: Collected Works*, vol 19 (Progress Publishers 2011)

——, 'Disruption of Unity Under Cover of Outcries for Unity' in Julius Katzer (ed), *Lenin: Collected Works*, vol 20 (Progress Publishers 2011)

——, 'The Right of Nations to Self-Determination' in Julius Katzer (ed), *Lenin: Collected Works*, vol 20 (Progress Publishers 2011)

——, 'The Socialist Revolution and the Right of Nations to Self-Determination: Theses' in George Hanna (ed), *Lenin: Collected Works*, vol 22 (Progress Publishers 2011)

——, 'The State and Revolution: The Marxist Theory of the State and the Tasks of the Proletariat in the Revolution' in Stepan Apresyan and Jim Riordan (eds), *Lenin: Collected Works*, vol 25 (Progress Publishers 2011)

——, 'Letter to the Workers and Peasants of the Ukraine: Apropos of the Victories Over Denikin' in George Hanna (ed), *Lenin: Collected Works*, vol 30 (Progress Publishers 2012)

Lennon M, 'Stateless Nations in the EU: The Case for an Equal Partnership', *Self-determination in a context of shared sovereignty: How to devise a European approach?* (Coppieters Foundation 2020)

Leshoele M, 'AFCFTA and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?' [2020] Journal of Contemporary African Studies 1

Levrat N, 'The Right to National Self-Determination within the EU: A Legal Investigation' (EU Borders Working Paper 08, September 2017)

——, 'Two Steps Away from Independence…Towards EU Membership', *Self-determination in a context of shared sovereignty: How to devise a European approach?* (Coppieters Foundation 2020)

Lindseth PL, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010)

——, *The Oxford Handbook of International Organizations* (OUP 2016)

Lodge J, 'The Tindemans Report and European Union' 1 New Zealand International Review 32

Lovatt H and Mundy J, 'Free to Choose: A New Plan for Peace in Western Sahara' (*European Council on Foreign Relations*, 26 May 2021)

Lynch A, 'Woodrow Wilson and the Principle of "National Self-Determination": A Reconsideration' (2002) 28 Review of International Studies 419

Ma A, 'EU Commissioner Says Spain Could Be on the Cusp of a "very Disturbing" Civil War' (*Business Insider*, 6 October 2017)

Makubaza D, 'PAP Elections: Africa the Biggest Winner' (*The Herald*, 2 July 2022)

Manila E, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (OUP 2007)

Mapuva J, 'Prospects of Amalgamating the SADC and SACU' (*Ideas for Peace*, 19 February 2015)

Marko J, 'What Is Wrong with the Concept of Multinational Federalism? Some Thoughts about the Interrelationship between the Concepts of (Multi-)Nationalism, Federalism, Power Sharing and Conflict Resolution' (2020) 19 Ethnopolitics 416

Marx K and Engels F, 'Manifesto of the Communist Party', *Karl Marx and Friedrich Engels: Selected Works in Three Volumes*, vol 1 (Progress Publishers 1973)

——, *Manifest Der Kommunistischen Partei* (Sálvio Marcelo Soares ed, Meta Libri 2008)

Massetti E, 'Let Down by Europe? Secessionist Regionalist Parties and the EU's Reactions vis-à-vis Attempts to Achieve 'Independence in Europe'' in Coppieters Foundation (ed), *Self-Determination in a Context of Shared Sovereignty: How to devise a European Approach?* (Coppieters Foundation 2020)

Mbewa DO, 'AU states to activate African Standby Force to strengthen war on terrorism' (*CGTN Africa*, 30 May 2022)

McCorquodale R, 'Group Rights' in Daniel Moeckli and others (eds), *International human rights law* (4th edn, OUP 2022)

McLaren LM, 'Opposition to European Integration and Fear of Loss of National Identity: Debunking a Basic Assumption Regarding Hostility to the Integration Project' (2004) 43 European Journal of Political Research 895

Meester DH, 'The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession' (2011) 48 Canadian Yearbook of international Law 215

Meighan C, 'Poll Shows Backing for a Second Independence Referendum across the UK' (*The National*, 7 December 2021)

Miguel CR, Iglesias MP de L and Souto YB, *The Western Sahara: Selected Primary Legal Sources: 15 Basic Statements on the Conflict* (Andavira 2018)

Mitrany D, *The Functional Theory of Politics* (St Martin's Press 1975)

Monten J, 'Thucydides and Modern Realism' (2006) 50 International Studies Quarterly 3

Moravcsik A, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 Journal of Common Market Studies 603

Murray R, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP 2020)

——, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004)

Murswiek D, 'The Issue of a Right to Secession – Reconsidered' in Christian Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff 1993)

Musgrave TD, *Self-Determination and National Minorities* (OUP 2000)

Müller J-W, 'Beyond Militant Democracy?' (2012) 73 New Left Review 39

Nan, 'AU Executive Council Debates Africa's Relationship with ICC' (*The Eagle Online*, 11 October 2013)

Nantulya P, 'The African Union Wavers between Reform and More of the Same' (*Africa Center for Strategic Studies*, 19 April 2019)

——, 'Burundi, the Forgotten Crisis, Still Burns' (*Africa Center for Strategic Studies*, 24 September 2019)

Nelson CE, 'Fears of Revolution and International Cooperation: The Concert of Europe and the Transformation of European Politics' (2023) 32 Security Studies 338

NEPAD, *Second Continental Report on the Implementation of Agenda 2063* (African Union 2022)

Neuberger B, 'National Self-Determination: A Theoretical Discussion' (2001) 29 Nationalities Papers 391

Nicolaïdis K, 'European Demoicracy and Its Crisis' (2012) 51 JCMS: Journal of Common Market Studies 351

Nicolosi SF and Mustert L, 'The European Committee of the Regions as a Watchdog of the Principle of Subsidiarity' (2020) 27 Maastricht Journal of European and Comparative Law 284

Niestroy I, ‘Sustainable Development Goals at the Subnational Level: Roles and Good Practices for Subnational Governments’ (Sharing Tools in Planning for Sustainable Development, May 2014)

Nzewi O, ‘Influence and Legitimacy in African Regional Parliamentary Assemblies: The Case of the Pan-African Parliament’s Search for Legislative Powers’ (2013) 49 Journal of Asian and African Studies 488

Oeter S, ‘Self-Determination’ in Bruno Simma and others (eds), *The Charter of the UN: A Commentary*, vol I (3rd edn, OUP 2012)

Ogunnoiki AO, ‘Federalism as a Political Ideology and System of Government: The Theoretical Perspectives’ (2017) 3 International Journal of Advanced Academic Research 52

Oladipo FA, ‘Pan Africanist Ideas, Issues and Challenges’ (2019) 04 International Journal of Engineering Applied Sciences and Technology 114

Olewe D, ‘Pan-African Parliament: Punches, Kicks and Death Threats’ (*BBC News*, 12 June 2021)

OSCE, ‘The European Union’ (osce.org/partnerships/european-union)

Ostrowski MS, ‘Europeanism: A Historical View’ (2021) 32 Contemporary European History 287

O’Leary E and Schnurr L, ‘Catalan Standoff Touches Separatist Hearts beyond Spain’ (*Reuters*, 5 October 2017)

Paluzie E, ‘The Catalan Conflict: A Human Rights Issue in the EU’ in Coppieters Foundation (ed), *Self-determination in a context of shared sovereignty: How to devise a European approach?* (Coppieters Foundation 2020)

Panara C and de Becker A, ‘The “Regional Blindness" of Both the EU and the Member States’ in Alexander de Becker (ed), *The Role of the Regions in the European Union* (Springer 2010)

Panke D, Stapel S and Starkmann A, *Comparing Regional Organizations: Global Dynamics and Regional Particularities* (Bristol University Press 2020)

Papadogiannis N, ‘Is There Such Thing as a “European Identity”?’ (*The Conversation*, 21 May 2019)

Parlett K, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011)

Pavel CE, ‘The European Union and Diminished State Sovereignty’ (2022) 25 Critical Review of International Social and Political Philosophy 596

Pease K-KS, *International Organizations: Perspectives on Global Governance* (Routledge 2018)

Peirone F, ‘The Rule of Law in the EU: Between Union and Unity’ (2019) 15 Croatian Yearbook of European Law and Policy 57

Perju V, ‘Supranational States in the Postnational Constellation’ (2019) 17 International Journal of Constitutional Law 1068

Petersmann E-U, ‘Why Treaty Interpretation and Adjudication Require “Constitutional Mind-Sets”’ (2016) 19 Journal of International Economic Law 389

Polzin M, ‘Constitutional Identity as a Constructed Reality and a Restless Soul’ (2017) 18 German Law Journal 1595

Pomerance M, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Nijhoff 1982)

Press and Information Team of the Delegation to the UN in New York, ‘UNGA 77 – Fourth Committee: EU Explanation of Position on Western Sahara Resolution’ (*EEAS*, 14 October 2022)

Press and information team of the EU Office/EU Special Representative in Kosovo, ‘The European Union and Kosovo’ (*EEAS*, 20 October 2021)

Quane H, ‘The United Nations and the Evolving Right to Self-Determination’ (1998) 47 International and Comparative Law Quarterly 537

Rabaka R, *Routledge Handbook of Pan-Africanism* (Routledge 2022)

Raič D, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002)

Rapport M, *Nineteenth-Century Europe* (Palgrave Macmillan 2005)

Ratner SR, ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90 American Journal of International Law 590

Reiken R and Bellamy A, ‘The Responsibility to Protect in International Law’ (2010) 2(3) Global Responsibility to Protect 267

Dietrich Rauschning, ‘Ch.XII International Trusteeship System, Article 75’ in Bruno Simma and others (eds), *The Charter of the United Nations. A Commentary,* vol II (3rd edn, OUP 2012) 1855

Reh C, ‘The Lisbon-Treaty: De-Constitutionalizing the European Union?’ (2009) 47 Journal of Common Market Studies 625

Reinisch A, *Essential of EU Law* (CUP 2012)

Reporters T, ‘Europe Must Become “Federation of States”, Barroso Says’ (*The Telegraph*, 11 September 2012)

Reus-Smit C, *The Politics of International Law* (CUP 2009)

Riegert B, 'The 4 Persistent Problems Dogging the EU' (*Deutsche Welle*, 14 September 2021)

Risse T and Acharya A, 'Regionalism Beyond EU-Centrism' in Tanja A Börzel (ed), *The Oxford Handbook of Comparative regionalism* (OUP 2016)

Rittberger B and Schimmelfennig F, 'Explaining the Constitutionalization of the European Union' (2006) 13 Journal of European Public Policy 1148

Rodríguez-Santiago E, 'The Evolution of Self-Determination of Peoples in International Law' in Fernando R Tesón (ed), *The Theory of Self-Determination* (CUP 2017)

Rosenfeld M, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25 European Journal of International Law 177

Rousseau J-J, *Du Contrat Social, Ou, Principes Du Droit Politique* (1762)

Royuela V and López-Bazo E, 'Understanding the Process of Creation of European Identity – the Role of Cohesion Policy' (2020) 46 Investigaciones Regionales - Journal of Regional Research 51

RTE, 'President Wilson Forces Resignation of His Secretary of State (18 February 1920)' (*Ireland's National Public Service Media | Meáin Náisiúnta Seirbhíse Poiblí na hÉireann*)

Ryazanskaya S (ed), 'Marx to Engels, November 2 1867', *Karl Marx and Friedrich Engels: Selected Correspondence* (Progress Publishers 1955)

Sabel CF and Gerstenberg O, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 European Law Journal 511

SACU, 'History of SACU' (*Southern African Customs Union*)

——, 'Vision and Mission' (*Southern African Customs Union*)

SADC, 'SADC Institutions' (*sadc.int*)

——, 'Member States' (*sadc.int*)

——, 'SADC Objectives' (*sadc.int*)

Saeed S, 'Brussels Says Catalan Referendum Was "Not Legal"' (*Politico*, 2 October 2017)

Sahara Press Service, 'AU Executive Council Rejects Moroccan Attempt to Pass Two Projects through Saharawi Occupied Territories towards West Africa' (*Spsrasd.info*, 5 February 2021)

Saklani JS, 'Marxist Perspective on Nationalism and the Nationality Question' (2009) 70 The Indian Journal of Political Science 719

Salomon S, ‘Self-Determination in the Case Law of the African Commission: Lessons for Europe’ (2017) 50 Verfassung und Recht in Übersee 217

Sambanis N, Germann M and Schädel A, ‘SDM: A New Data Set on Self-Determination Movements with an Application to the Reputational Theory of Conflict’ (2017) 62 Journal of Conflict Resolution 656

Sanderson D, ‘Scottish “people” Have Right to Self-Determination like the Kosovans, SNP Claims’ (*The Telegraph*, 27 September 2022)

Sandkühler T, ‘Europa Und Der Nationalsozialismus: Ideologie, Währungspolitik, Massengewalt’ (2012) 9 Zeithistorische Forschungen/Studies in Contemporary History 428

Sanjaume-Calvet M, Elias JM and Balaguer IS, *Movements for Self-Determination in Europe: An Analytical Cartography* (Coppieters Foundation 2022)

Sarooshi D, *International Organizations and Their Exercise of Sovereign Powers* (OUP 2007)

Satyendra N, ‘Nations & Nationalism’ (*Tamilnation.org*, 10 May 2004)

Savoia A and Sen K, ‘The Political Economy of the Resource Curse: A Development Perspective’ (2021) 13 Annual Review of Resource Economics 203

Scarfi JP, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (OUP 2017)

Schakel AH, ‘Multi-Level Governance in a “Europe with the Regions”’ (2020) 22 The British Journal of Politics and International Relations 767

Scharf MP, ‘Earned Sovereignty: Juridical Underpinnings’ (2003) 31 Denver Journal of International Law and Policy 373

Scheffer DJ, ‘A New Roadblock for Scottish Independence’ (*Council on Foreign Relations*, 9 December 2022)

Scheinin M and Åhren M, ‘Relationship to Human Rights, and Related International Instruments’ in Marc Weller and Jessie Hohmann (eds), *The UN declaration on the rights of indigenous peoples: A commentary* (OUP 2017)

Schorkopf F, ‘Value Constitutionalism in the European Union’ (2020) 21 German Law Journal 956

Schöpflin G, ‘National Identity in the Soviet Union and East Central Europe’ (1991) 14 Ethnic and Racial Studies 3

Secretariat General of the CoR, *EU Annual Report on the State of Regions and Cities* (European Union 2022)

Shahabuddin M, ‘Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar’ (2019) 9 Asian Journal of International Law 334

Shelton D, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 American Journal of International Law 60

Shivji IG, 'Pan-Africanism or Imperialism? Unity and Struggle towards a New Democratic Africa' (2006) 10 African Sociological Review 208

Sidbury J, *Becoming African in America: Race and Nation in the Early Black Atlantic, 1760-1830* (OUP 2007)

Sikharulidze A, 'Opinion: An Alternative View of Georgia's European Identity and Past History' (*commonspace.eu*, 3 September 2021)

Siroky D and Abbasov N, 'Secession and Secessionist Movements' [2021] Political Science Oxford Bibliographies

Smis S, *A Western Approach to the International Law of Self-Determination Theory and Practice* (Vrije Universiteit Brussel 2001)

Smith AD, *Nationalism: Theory, Ideology, History* (2nd edn, Polity Press 2010)

Smith MG, 'The Hegemony of Content: Russian Language as the Language of State Assimilation in the USSR, 1917-1953' in Zaur Gasimov (ed), *Kampf um wort und schrift: Russifizierung in Osteuropa im 19.-20. Jahrhundert* (Vandenhoeck & Ruprecht 2012)

Smuts JC, *The League of Nations: A Practical Suggestion* (Hodder and Stoughton 1918)

Sommerer T and others, 'Decision-Making in International Organizations: Institutional Design and Performance' (2021) 17 The Review of International Organizations 815

Southall R, *South Africa's Transkei: The Political Economy of an 'Independent' Bantustan* (Monthly Review Press 1983)

Spiliopoulou Åkermark S, Heinikoski S and Kleemola-Juntunen P, *Demilitarisation and International Law in Context: The Åland Islands* (Routledge, Taylor & Francis Group 2018)

Steger DP, 'The WTO in Public International Law: Jurisdiction, Interpretation and Accommodation' (Institute of International Trade Law and Development, University of São Paulo, in collaboration with the WTO Appellate Body 2005)

Sterio M, 'On the Right to External Self-Determination: "Selfistans," Secession and the Great Powers' Rule' (2010) 19 Minnesota Journal of International Law 137

——, 'Do Kurds Have the Right to Self-Determination and/or Secession?' (*Opinio Juris*, 28 September 2017)

——, 'Self-Determination and Secession under International Law: The Cases of Kurdistan and Catalonia' (*ASIL*, 5 January 2018)

Stremlau JJ, *The International Politics of the Nigerian Civil War, 1967-1970* (Princeton University Press 1977)

Summers J, 'The Right of Self-Determination and Nationalism in International Law' (2005) 12 International Journal on Minority and Group Rights 325

——, 'The Internal and External Aspects of Self-Determination Reconsidered' in Duncan French (ed), *Statehood and self-determination reconciling tradition and modernity in international law* (CUP 2013)

Szpilman CWA and Saaler S, *Pan-Asianism: A Documentary History*, vol 1 (Rowman & Littlefield 2011)

——, 'Pan-Asianism as an Ideal of Asian Identity and Solidarity, 1850–Present' (2011) 9 The Asia-Pacific Journal 1

Tatham M, 'Going Solo: Direct Regional Representation in the European Union' (2008) 18 Regional & Federal Studies 493

Taylor PM, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR RIGHTS* (CUP 2020)

Teke E, 'AU Summit on Terrorism and Unconstitutional Regime Change: African Response to the Situation' (*rtv News*, 28 May 2022)

Tekiner U, 'The "European (Union) Identity": An Overview' (*E-International Relations*, 16 April 2020)

Telegraph Reporters, 'Europe Must Become "Federation of States", Barroso Says' (*The Telegraph*, 11 September 2012)

Teshome RG, 'The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?' (2022) 22 Human Rights Law Review 1

The Chancellery of the Prime Minister, 'White Paper on the Reform of the Judiciary' (7 March 2018)

The Greens/EFA in the European Parliament, 'Respect for Self-Determination Key to Resolving Nagorno-Karabakh Conflict' Press Release of 7 October 2020

Thiemeyer G, 'Supranationalität Als Novum in der Geschichte der Internationalen Politik der Fünfziger Jahre' (1998) 4 The Journal of European Integration History 5

Thirlway H, 'Reflections on Lex Ferenda' (2001) 32 Netherlands Yearbook of International Law 3

Thornberry P, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern law of self-determination* (Martinus Nijhoff 1993)

Throntveit T, ‘The Fable of the Fourteen Points: Woodrow Wilson and National Self-Determination’ (2011) 35 Diplomatic History 445

Tindemans L, ‘Report by Leo Tindemans, Prime Minister of Belgium, to the European Council’ (29 December 1975) Bulletin of the European Communities, Supplement 1/76

Tizzano A, ‘The Tindemans Report’ (1976) 2 Italian Yearbook of International Law 130

Tomuschat C, ‘Self-Determination in a Postcolonial World’ in Christian Tomuschat (ed), *Modern law of self-determination* (Martinus Nijhoff 1993)

Turner O, ‘“Finishing the Job”: The UN Special Committee on Decolonization and the Politics of Self-Governance’ (2013) 34 Third World Quarterly 1193

Tilindyte L, *Regional Participation in EU Decision-Making: Role in the Legislature and Subsidiarity Monitoring* (EPRS | European Parliamentary Research Service 2016)

United Nations Economic Commission for Africa, ‘Transboundary Natural Resource Disputes in Africa: Policies, Institutions and Management Experiences’ (Economic Commission for Africa 2018)

Unit for Political Studies, ‘Israeli Observer Status at the African Union: What Do They Gain?’ (*Arab Center for Research and Policy Studies*, 8 August 2021)

UN OHCHR, ‘Indigenous Peoples and the United Nations Human Rights System: Fact Sheet No. 9/Rev.2’ (United Nations New York and Geneva 2013)

Van den Driest S, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices* (Intersentia 2013)

Valcárcel RL, ‘A Coup against Spanish Democracy Is a Coup against Europe’ (*The Globe and Mail*, 30 September 2017)

Verhaegen S and Hooghe M, ‘Does More Knowledge about the European Union Lead to a Stronger European Identity? A Comparative Analysis among Adolescents in 21 European Member States’ (2015) 28 Innovation: The European Journal of Social Science Research 127

Vidmar J, ‘Remedial Secession in International Law: Theory and (Lack of) Practice’ (2010) 6 St Antony’s International Review 37

Viljoen F, *International Human Rights Law in Africa* (2nd edn, OUP 2012)

Volt Europa, ‘The 5+1 Challenges’ (*Volt Europa*)

von Bogdandy A and Venzke I, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2012) 23 European Journal of International Law 7

von Bogdandy A, ‘Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area’ (2014) 12 International Journal of Constitutional Law 980

Vucheva E, 'EU Fudges Kosovo Independence Recognition' (*EU Observer*, 18 February 2008)

wa Muiu M, 'The Contemporary Relevance of Pan-Africanism in the 21st Century' in Reiland Rabaka (ed), *Routldege Handbook of Pan-Africanism* (Routledge 2020)

Walsh J, 'Braced for Spanish Civil War 2.0' (*The New European*, 5 October 2017)

Wang F-L and Elliot EA, 'China in Africa: Presence, Perceptions and Prospects' (2014) 23 Journal of Contemporary China 1012

Weiner M, 'Peoples and States in a New Ethnic Order?' (1992) 13 Third World Quarterly 317

Weitz E, 'Self-Determination: A German Enlightenment Idea Became the Slogan of National Liberation and a Human Right' (2015) 120 American Historical Review 462

Weller M, 'Self-Determination of Indigenous Peoples' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018)

Wendt A, *Social Theory of International Politics* (University Press 1999)

WGIP, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (ACHPR & IWGIA 2005)

Whelan A, 'Self-Determination and Decolonisation: Foundations for the Future' (1992) 2 Royal Irish Academy 25

White J, 'Europeanizing Ideologies' (2020) 27 Journal of European Public Policy 1287

Wickersham GW, 'The Peace Treaty – It's Meaning to America: America's "Place in the Sun" Due to Her Efforts to Secure a Just Peace' in Lloyd Wilson Bevan and Hugo Christian Martin Wendel (eds), *Harper's Pictorial Library of the World War: The great results of the war*, vol XII (Project Gutenberg 2013)

Wiedmeier P, 'The Idea behind Coudenhove-Kalergi's Pan-European Union' (1993) 16 History of European Ideas 827

Wilkinson MA, 'Political Constitutionalism and the European Union' (2013) 76 The Modern Law Review 191

Wittich S, 'Diplomatic Protection' (*Oxford Bibliographies Online*, 12 April 2019)

Wolfrum R, 'Purposes and Principles, Article 1' in Bruno Simma and others (eds), *The charter of the United Nations: A commentary*, vol I (OUP 2012)

——, 'Preamble' in ibid

Woode-Smith N, 'Africa's Obsession with Sovereignty Endangers Human Rights' (*Rational Standard*, 26 January 2017)

Yotova D, ‘New Forms of Collective Identity in Europe’ (2017) 3 Journal of Liberty and International Affairs 55

Zaharia V and Pozneacova V, ‘Supranationalism vs. Intergovernmentalism in the Actual Organization of Eu’ (2020) 6 Logos Universality Mentality Education Novelty: Political Sciences & European Studies 47

Zapryanova GM and Surzhko-Harned L, ‘The Effect of Supranational Identity on Cultural Values in Europe’ (2015) 8 European Political Science Review 547

Ziegler KS, ‘The Relationship between EU Law and International Law’ in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (CUP 2016)

Ülker E, ‘Contextualising “Turkification”: Nation-Building in the Late Ottoman Empire, 1908-18’ (2005) 11 Nations and Nationalism 613

‘10 of Africa’s Longest-Serving Dictators’ (*African Leadership Magazine*, 27 April 2014)

‘About Minorities and Human Rights’ (*OHCHR*)

‘Africa Trade Development Center’ (*africatdc.com/whadn/*)

‘African Union’ (au.int)

‘African Union Postpones Debate on Israel’s Observer Status’ (*Al Jazeera*, 7 February 2022)

Decisions of the African Commission on Human and Peoples' Rights, 2010-2014, (Human Rights Digest, Open Society Justice Initiative)

‘Decision of the Council of the League of Nations on the Aaland Islands including Sweden's Protest’, Minutes of the 14th Meeting of the Council (24 June 1921) League of Nations Official Journal l September 1921

‘Der Nationalsozialismus und der Europäische Gedanke’ (*CVCE – Luxembourg Centre for Contemporary and Digital History*, 8 July 2016) ‘Deutsches Steuergebiet’ (*Zoll online*)

‘DRC: Conflict in Katanga - Democratic Republic of the Congo’ (*ReliefWeb*, 7 July 2006)

‘Eastern Sudan Conference Demands Right to Self-Determination’ (*Dabanga Radio TV Online*, 30 September 2020)

‘“Empathy” for Independent Scotland Joining the EU Says Tusk’ (*BBC News*, 2 February 2020)

‘Establishing the Urban Agenda for the EU: Pact of Amsterdam’ (*futurium.ec.europa.eu*, 30 May 2016)

‘Ethiopia Supports Self-Determination and Independence of Western Sahara within Resolution 1514’ (*Sahara Press Service*, 25 October 2020)

‘EU & Europa’ (*afd.de*, 28 August 2021)

‘Fondazione De Gasperi’ (fondazionedegasperi.org)

‘Guatemala’s Sayaxché Recognizes Right to Self-Determination of People of Artsakh’ (*armenpress.am*, 24 October 2020)

‘International Court of Justice’ (icj-cij.org)

‘Internationella Avtal Och Dokument Rörande Åland’ (*Ålands Kulturstiftelse*)

‘Internet Archive: Digital Library of Free & Borrowable Books, Movies, Music & Wayback Machine’ (*Internet Archive: Digital Library of Free & Borrowable Books, Movies, Music & Wayback Machine*)

‘Iraq Refuses Talks with Kurds about Referendum Results’ (*Al Jazeera*, 26 September 2017)

‘Israel Granted Official Observer Status at the African Union’ (*Al Jazeera*, 23 July 2021)

‘Jean Monnet - His Thoughts’ (*Jean Monnet House*)

‘La Charte des Nations Unies’ (*United Nations*)

‘Marine Le Pen Rebrands Front National in Push for Support’ (*The Guardian*, 1 June 2018)

‘Marx - Engels: Gesammelte Werke’ (*Mew - Marx und Engels - Gesammelte Werke - Komintern (SH)*)

‘Morocco Refused an AU Peace and Security Council Declaration about Sahara’ (*IMArabic*, 22 March 2021)

‘Non-Self-Governing Territories | The United Nations and Decolonization’ (*United Nations*)

‘Pakistan PM: Talks with India Only If Kashmir “siege” Is Lifted’ (*Al Jazeera*, 28 October 2020)

‘Pan-African Parliament Brawl Condemned’ (*eNCA*, 1 June 2021)

‘Poland May Have to Leave EU, Supreme Court Warns’ (*BBC News*, 17 December 2019)

‘President Woodrow Wilson’s Message to Congress (Address of the President, Jan 8, 1918)’ (*National Archives and Records Administration*)

‘Press Release No. 031/2018’ (African Union Directorate of Information and Communication)

‘Scottish Independence: Scots EU Independence Plan “Now Untenable”’ (*BBC News*, 13 December 2013)

‘Serbia Accuses World of Double Standards over Catalonia and Kosovo’ (*Reuters*, 3 October 2017)

‘Should Unanimity in the EU Council Be Abolished?’ (*Debating Europe*, 8 November 2022)

‘Stateless Refugees and Migrants’ (*European Network on Statelessness*)

‘The 15th Extraordinary Session of the Executive Council of the African Union’ (*Segun Badmus’ Perspectives*)

‘The African Dictators’ (*Africa Facts*)

‘The Åland Islands Solution: A Precedent for Successful International Disputes Settlement - Remarks by Patricia O’Brien’ (*legal.un.org*, 2012)

‘Trusteeship Council’ (*United Nations*)

UK in a Changing Europe (ukandeu.ac.uk)

‘United Nations Treaty Collection’ (UNTC)

‘UN Security Council, UK Continue to Encourage Somalia Claims over Somaliland’ (*SomTribune*, 28 March 2018)

‘WHADN’ (*Africa Trade Development Center (ATDC)*), 15 February 2023

‘What Is the Pacific Alliance? – Alianza Del Pacífico.’ (*Alianza del Pacifico*) 2023

‘World Reacts as Catalonia Calls for Independence’ (*Al Jazeera*, 28 October 2017)

‘World Report 2015: Rights Trends in World Report 2015: Burundi’ (*Human Rights Watch*)