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## **The Right to Self-Determination and Security: A New U.N. Mechanism**

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In the last two decades the international community found itself ill equipped to counter intrastate conflict. From 1989-2004 fifty-three out of fifty-seven conflicts in fifty-one locations were intrastate conflicts, with almost half resulting from self-determination movements.<sup>1</sup> Due to the nature of intrastate warfare and international norms based upon the state system of territorial sovereignty, states are finding it increasingly difficult to effectively engage in intrastate warfare. Asymmetrical warfare is becoming the norm as nations engage in violence to illicit international attention, with violent repression and human rights violations a result.<sup>2</sup> At the moment, there is no international law that guides external actor response to self-determination movements beyond the scope of decolonization, and the international community's adherence to legal positivism prevents any deviation from international law or norms.<sup>3</sup> At its core, the conflict is between citizens, based on identity, making claims for autonomy against their state, or multiple states when identities are transnational, and a state's right to security through territorial sovereignty.

This article proposes an institutional and procedural change in the form of a tribunal mechanism for the realization of two rights: the right to security and the right to self-determination. Through a case-by-case basis it acts as a mitigator to help facilitate rights claims, adjust international codes of war, and establish clear

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<sup>1</sup> Harbom and Wallensteen 2005; Walter 2005, 105.

<sup>2</sup> Y. N. Kly 2001; Kaufmann 2001. Asymmetrical warfare is defined as warfare in which one actor holds a relatively excessive amount of military, political, and economic power than the other actor. This causes the conflict to be in favor of the state, which holds vastly more power than a nation. The nation must use non-traditional means to compete with the state's power, employing tactics often labeled as "terrorism" by the state. For more information and a clear definition of asymmetrical warfare, please consult: Cordesman, Anthony H., and Burke, Arleigh A. 2001. *The Lasting Challenge: A Strategy for Counterterrorism and Asymmetric Warfare*. Center for Strategic and International Studies. Available from <[http://www.csis.org/media/csis/pubs/homelandspeech113001\[1\].pdf](http://www.csis.org/media/csis/pubs/homelandspeech113001[1].pdf)>. Accessed 26 November 2006. For additional sites containing links to reports and speeches pertaining to asymmetrical warfare, refer to: The RMA Debate. 2006. *Asymmetric Warfare*. Project on Defense Alternatives. Available from <<http://www.comw.org/rma/fulltext/asymmetric.html>>. Accessed 26 November 2006.

<sup>3</sup> Buchanan, 2004, 9, 339. Legal positivism refers to the concept that law is separate and not dependent upon morality or ethics. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. Essentially, the law is interpreted and implemented as it is written, not as it should be (Rochester, 2006:43).

criteria for legitimate self-determination movements.<sup>4</sup> Briefly mentioned in this paper is the conflict between the right to self-determination and the right of security and obstacles in international law that prevents an effective resolution, how the international community is attempting, but failing, to address intrastate conflict, and proposed solutions. While intrastate warfare takes on many contexts, the focus here is on self-determination movements. The case is made for a tribunal-based mechanism by addressing common concerns of a state-based international system. Issues of legitimacy, motivations of states and nations to participate, the role existing institutions play in the larger context of the tribunal, variations of the tribunal's rulings, definition setting, and conflict resolution are all addressed and used to justify the merits of the tribunal mechanism. Only a new mechanism that can serve as a direct access channel based upon a legal foundation will disputes that fundamentally revolve around the conflict between the right to self-determination and the right to security be resolved, thus diminishing intrastate warfare.

## **The Issue of State Security and Group Self-determination**

International law is a direct result of the Treaty of Westphalia in 1648, and as a result state sovereignty is considered supreme. Deriving from the unquestioned supremacy of the state-system, there is a lack of international institutions that can clarify or create international norms. This trend is starting to reverse itself as absolute sovereignty is increasingly viewed as unacceptable while it is more acceptable for states to relinquish to international laws in the interest of human rights.<sup>5</sup> Framing intrastate conflict in terms of universal rights is the means in which the UN justified previous international interventions, and serves to solidify the need for a mechanism for arbitration and mitigation. This is because the international community is committed to upholding human rights, especially those deemed to be universal. However, "this is a normative challenge to the United Nations: the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to

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<sup>4</sup> If self-determination is defined solely as the right to succeed, then it should be invoked as a last resort. It is better to find alternate means to self-determination, such as self-government within a state, saving secession only for continued violations (Buchanan, 2004: 331). Self-determination is not limited to decolonization or creation of a state, but includes the ability of an ethnicity to fully participate in the political process of their parent state (Frankovits, 2001). Self-determination can also take the form of territorial, cultural, or local autonomy through self-administration (Komlossy, 2001). Legitimate self-determination movements should only occur for nations that have a history of violence target towards their individual members, on multiple occasions, and with multiple rights violations. Even for the most egregious violations of human rights, a full secessionist movement is a last resort (Buchanan, 2004: 331).

<sup>5</sup> Joyner 2001, 248, 249, 252.

intervene.”<sup>6</sup> The shift towards human rights as a basis for international law and norms is a relatively new phenomenon. The recent UN report by the High-level Panel on Threats, Challenges, and Change entitled, *A more secure world: our shared responsibility* raised the problem of intrastate warfare, but with few decisive conclusions.<sup>7</sup> The Panel’s findings largely support a strict adherence to the state-system, but left open the possibility of international intervention when a state violates its citizens’ human rights. The High-level Panel maintained that when a state grossly violates human rights, or is a failed state, it is a danger not only to its own citizens, but the international community, thus sanctioning intervention. With the publication of this report, the UN continued to indicate its desire to uphold human rights however veiled in the language of state interest and collective security.<sup>8</sup> Both self-determination and security are essential for granting and protecting human rights, which is a cornerstone for the United Nations.<sup>9</sup> The international community sees both self-determination and state security as sacred, but these are in conflict.<sup>10</sup> Unlike the concept of security as a universal right, self-determination required rulings by pre-existing international bodies for its universality to be solidified. The Human Rights Committee found self-determination to be applicable to all people, explicitly stating that this will apply to those not under foreign occupation.<sup>11</sup> Additionally, the International Court of Justice and Inter-American Commission on Human rights of the Organization of American States both ruled that self-determination universally applicable.<sup>12</sup> A nation guarantees security of its individual members by claiming and realizing the right to self-determination. With the UN committed to upholding human rights, it is essential that the UN give the same credence to self-determination as it already gives to state sovereignty. Human rights are both an end and a means to an end – the realization of the right to self-determination or sovereignty will grant more complete human rights and act as a means to ultimately achieve a more peaceful environment, i.e. security.<sup>13</sup> The state uses the international community to press for its claim to security, and in the cases of genocide where individuals are threatened because of membership in a group, the international community is also the only venue left.

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<sup>6</sup> High-level Panel on Threats, Challenges, and Change 2004. Referred to simply as High-level Panel in this paper.

<sup>7</sup> The High-level Panel on Threats, Challenges, and Change, hence forth referred to as the High-level Panel.

<sup>8</sup> High-level Panel 2004.

<sup>9</sup> Y. N. Kly 2001.

<sup>10</sup> Horowitz 1997, 437.

<sup>11</sup> Y. N. Kly 2001.

<sup>12</sup> Parker 2001.

<sup>13</sup> Hampson 2001.

# **Inherent Obstacles to Resolving Conflict Between State Security and Group Self-determination:**

## **Previous UN Actions**

The cases of Rwanda, Somalia, Yugoslavia (Bosnia and Kosovo included), and currently Sudan clearly indicates that ethnic groups who no longer have an interest in coexisting within current state boundaries will resort to bloody warfare that is or near genocide. These types of conflicts will persist and genocides will become a norm so long as international law creates a biased contradiction between the right of self-determination and security.<sup>14</sup> This bias towards the sanctity of state sovereignty generates international institutions, codes of war, and norms that are in favor of maintaining the status quo.

General attempts to define self-determination and guidelines for when it is applicable are problematic and subject to constant change. Prominent examples of these attempts are: the UN Charter, Declaration of Principles International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Helsinki Final Act of the Conference on Security and Cooperation in Europe, Declaration of Granting of Independence, Resolution 1960/1541, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, ILO Convention (No. 169/1989), UN World Conference on Human Rights, and the International Criminal Court.<sup>15</sup> Each of these instances addressed self-determination in some form or other, but none created a solid definition and when self-determination is legitimate, going as far as contradicting previous statements.

The rhetoric of UN member states from 1984 to 2003 is a living testament to a failure to define self-determination and to determine when that right is applicable. Starting in 1984, a committee on General Comment 12 from the Covenant on Civil and Political Rights stated that ‘all peoples have the right of self-determination... they freely “determine their political status and freely pursue their economic, social and cultural development.”<sup>16</sup> Furthermore, the right to self-determination is an inalienable right in which historical precedence shows that “the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.”<sup>17</sup> However, in 2001 member states told the Third Committee

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<sup>14</sup> Trambo 2001.

<sup>15</sup> Daes 2001.

<sup>16</sup> Office of the High Commissioner For Human Rights 1984.

<sup>17</sup> Office of the High Commissioner For Human Rights 1984.

(Humanitarian, Social and Cultural) that self-determination does not entail independence, but could be exercised in other ways.<sup>18</sup> Then in 2002 self-determination movements were thought to create more problems than solutions and that any form of self-determination should not move beyond self-administration or self-governance.<sup>19</sup> The Fourth Committee (Special Political and Decolonization) in 2003 identified a clear right to self-determination and the right to an independent state for non-self-governing territories, specifically those that were former colonies.<sup>20</sup> From a twenty-year span, and even within a three-year span, self-determination, in terms of a definition, implication, and implementation, continuously changed indicating that this is an issue the international community is ill prepared to deal with.

The High-level Panel report highlights the bias towards the state and international status quo. It is indisputable that state collapse leads to insecurity on a local and international level, which this report continually addresses. This report encourages the UN to prop up weak states in the interest of international security since “there is a clear international obligation to assist States in developing their capacity to perform their sovereign functions effectively and responsibly... the United Nations is to provide support to weak States — especially, but not limited to, those recovering from war — in the management of their natural resources to avoid future conflicts.”

<sup>21</sup> A claim for self-determination is a form of “state collapse” and jeopardizes the status quo. Strict adherence to supporting states easily translates into supporting a weak state against a nation- group to avoid a collapsed state, even if it is no longer a viable state.

The phrase “the management of their natural resources to avoid future conflict” implies that the international community can redistribute resources amongst nation groups, thus intervening on their behalf, but this act is limited since the use of terrorism, even for self- determination movements, is condemned for not adhering to state-centered international law. In addressing the inability for an internationally accepted definition of terrorism, the report stated that “...the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians... Attacks that specifically target innocent civilians and non -combatants must be condemned clearly and unequivocally by all.”<sup>22</sup> The report’s language does not make the distinction between the means or the ends of a goal. If terrorism, defined by the state, is used in a self-determination movement, then the movement

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<sup>18</sup> Fifty-sixth General Assembly, Third Committee 2001.

<sup>19</sup> Fifty-seventh General Assembly, Third Committee 2002.

<sup>20</sup> Fifty-eighth General Assembly, Fourth Committee 2003.

<sup>21</sup> High-level Panel 2004, para. 96, 261.

<sup>22</sup> High-level Panel 2004, para. 160, 161.

itself is to be condemned. The converse is true in that the state, unable to identify or specifically target armed insurgents, will be condemned and lose legitimacy if it engages in a “total war” mindset and acts to fully repress an internal violent movement.

Combining the rejection of terrorist tactics and preventing the collapse of the state, the ability for self-determination movements to gain legitimacy is further limited when “any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security.”<sup>23</sup> Foreseeably, any action on the part of a nation to put forth its claim through non-institutional means is illegitimate. Intrastate conflict cannot seriously be addressed if an action that lessens life chances is a threat to international security. The message is clear: disturbing the status quo of state sovereignty and boundaries is to be done only in the most extreme circumstance, making it difficult for self-determination movements to appeal to the international community.

To ensure sovereignty based security and due to the General Assembly losing the initiative, legitimacy, and ability to solve conflict, the High-level Panel views the Security Council as the pre-eminent and legitimate means to respond to intrastate conflict, which it can adequately do.<sup>24</sup> This blatant adherence to the status quo is unfortunate since it is through the General Assembly that nations have the hope of greatest access, as seen through the process of decolonization when the Trusteeship Council operated within the General Assembly to aid nations in gaining autonomy.<sup>25</sup>

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<sup>23</sup> High-level Panel 2004, 12.

<sup>24</sup> High-level Panel 2004, 53.

<sup>25</sup> Mohamed 2005.

While supporting the status quo, the High-level Panel still made a significant, if well-concealed, deviation from current norms that simultaneously left the door open for international intervention. States are obligated to ensure both security and citizens' welfare. When a state fails to ensure its citizens' welfare, the international community assumes those responsibilities. Paragraph 29 establishes that intervention is legitimate.

Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. But history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbors. And in those circumstances, the principles of collective security mean that some portion of those responsibilities should be taken up by the international community, acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be.<sup>26</sup>

This leaves open the possibility that the UN can interfere in self-determination movements so long as the state is denying a nation their intrinsic rights. With international security being linked to both human rights and state security, the High-level Panel established that human rights are, at minimum, on the same level as that of state sovereignty. A recent example in which the sanctity of state sovereignty was violated in the interest of human rights was the break up of Yugoslavia. This was spearheaded by European and American recognition and done outside the bounds of international norms when the centralized state is resisting secession.<sup>27</sup>

## **Previous Proposals**

The lack of a mechanism and the general question of how the international community should address self-determination movements is a contemporary issue for both the international community and academia. Obviously, the High-level Panel focused on intrastate warfare and the issue of human rights. The First International Conference on the Right to Self-Determination of the United Nations dealt specifically with the role that self-determination plays in human rights, the international community, and in what capacity the United Nations should address the violent conflicts resulting from self-determination movements. This conference,

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<sup>26</sup> High-level Panel 2004, para. 29.

<sup>27</sup> Horowitz 1997, 431.

whose papers and proceedings were collected in the book, *In Pursuit of the Right to Self-Determination: Collected Papers & Proceedings of the First International Conference on the Right to Self-Determination of the United Nations*, recognized that there is no current means to adequately define, address, and resolve issues of self-determination.<sup>28</sup> One of the overarching realizations is that self-determination claims must be adjudicated from the standpoint of international law, morality, and human rights, rather than the geopolitical standpoint that reinforces the status quo of the state-system.<sup>29</sup> In fact, there is no clear conception of what the goal of international law is or should be, making it near impossible for the international community to adequately address intrastate warfare, especially self-determination movements.<sup>30</sup> The Conference on Self-determination recognized that the current political climate would not allow for the rapid implementation of proposed changes. However, as intrastate conflict continues to be the norm and not adequately addressed, states and the international community will come under increasing pressure to address self-determination movements.<sup>31</sup> Two speakers at this conference, Y. N. Kly and Andre Frankovits, established that any solution should be framed in the context of an international crisis requiring an international solution.

Andre Frankovits provided a possible solution by suggesting a new “Commission on Self-determination” that will establish a means to determine if the claim to self-determination is legitimate, and if so, it will be referred to the Security Council. The proposed commission will create an expert group on self-determination that will outline the feasibility of granting the right to self-determination, its impact, and what the Commission and Security Council should do. In conjunction with this commission there will be an office of the High Commissioner for Self-determination, with an individual High Commissioner having power over the commission. This person is to resolve any disputes within the Commission, and to ensure that the findings of the Commission on Self-determination are disseminated to other UN bodies.<sup>32</sup>

Majid Traboo, another speaker at The First International Conference on the Right to Self-Determination of the United Nations, desires a Charter reform for a creation of a second chamber to the UN comparable to the General Assembly but will instead represent national minorities. This second chamber can serve as a forum for nations and a means for their grievances to be properly addressed. Traboo finds that the definition and perception of the nation-state on an international level is an obstacle

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<sup>28</sup> Y. N. Kly and D. Kly 2001.

<sup>29</sup> Faulk 2001.

<sup>30</sup> Buchanan 2004, 76.

<sup>31</sup> Faulk 2001.

<sup>32</sup> Frankovits 2001.



to adequately addressing intrastate conflict. As a by-product of his proposed second UN chamber, this chamber will phase out the traditional definition of a nation-state and create a new concept that more accurately reflects the internal tensions within states.<sup>33</sup>

Beyond the above-mentioned Conference, Saira Mohamed proposed reinstating the Trusteeship Council, which can possibly adjust to the new nature of peacekeeping and intrastate war.<sup>34</sup> Mohamed believes that the Security Council has monopolized power and overextended its responsibility. By shifting governance to the Trusteeship, it balances the Security Council, makes it easier to maintain peace, and carryout peace-building. This would require a revision of the UN Charter, an act Mohamed views as a necessity if the UN wishes to function beyond the parameters of state-to-state conflict.<sup>35</sup>

Allen Buchanan examined international law as a means of aiding or limiting the right to self-determination. He believes that legal positivism and state sovereignty are the methods which international law currently relies upon, causing multiple problems in addressing non-state threats. Buchanan shifts away from the state system of international justice to one in which international law is geared toward self-determination through Kantian-based human rights claims; that is, every person is entitled to equal respect and concern. As an extension, legitimacy of an internationally acceptable act is based upon human rights with an emphasis on preserving justice, rather than the more arbitrary norm of preserving international peace. Additionally, secession is only legitimate if there are grave violations of human rights, thereby the international community should mandate the secession. His method to ensure adherence to justice comes from the international community monitoring and regulating states. In no part does he suggest a mechanism for how to apply this, but rather a new institution and system.<sup>36</sup>

Buchanan believes that reforming the UN Charter and rules of intervention, while possible, is not feasible given the current political climate and concept of state sovereignty. A more efficient and plausible reform, according to Buchanan, is to bypass the UN in general and create a new coalition of rights conscious states. This coalition could resemble something like the European Union, but have the power of intervention, probably reinforced with a Security Council nod of approval. At first it should only intervene at a regional level, but can expand its scope. Doing so serves

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<sup>33</sup> Trambo 2001.

<sup>34</sup> Mohamed 2005.

<sup>35</sup> Mohamed 2005.

<sup>36</sup> Buchanan 2004.

as a superior type of international model to enforce human rights or as motivation for a UN reform. This coalition would violate current international law, but it will act in the spirit of the law, particularly by upholding human rights.<sup>37</sup> Furthermore, state consent (according to Buchanan) is not needed for intervention since states do not truly represent their citizens and legitimacy derives from justice and protection of human rights. He does concede that state consent is still a necessity due to limited resources, but this norm will change in the near future.<sup>38</sup>

## **The Tribunal Based Mechanism and Motivations**

Proposed here is the establishment of a ‘tribunal mechanism’ that has three tasks: 1) determines the legitimacy of self-determination claims, 2) determines whether or not a movement/group should be granted some form of autonomy, and if not 3) the degree that the state military apparatus is sanctioned to use whatever means possible to ensure the security of its citizens and the sanctity of its sovereignty – all done on a case-by-case basis. In order to ensure that the international community becomes actively involved, recognizes, and adheres to the tribunal’s findings, the ruling will then be passed to the UN General Assembly for approval and implementation, an integral part to the tribunal mechanism. This way, the international community is forced to become proactive in either (1) insuring any form of autonomy for the nation and that the parent state complies; or (2) help end unsanctioned violence by clearly stating that the “nation’s” movement is illegitimate and the state receives the necessary international support. In other words, this method creates a channel in which intrastate conflict and asymmetrical warfare can be properly addressed without the Westphalian state system’s restraints. Since the creation of the tribunal hinges upon state support, the following sections are mostly phrased in order to ‘convince’ states of the benefits of the tribunal mechanism. As such, most of the focus is on the possibility that a nation can form a new state due to it being the prominent affront to state sovereignty and the issue states are most concerned about.

### ***General justifications for the tribunal***

The international community is inefficient in countering internal conflict since its response is catered to a single instance and is often not replicated.<sup>39</sup> The need to constantly expend political capital to fully address and correct intrastate conflict empowers states to ignore the conflict altogether. This is especially harmful to the parties involved in the dispute since international variables are the determinant for intervention, especially in regards to military alliances. Those linked to a powerful

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<sup>37</sup> Buchanan 2004. 449-54, 462

<sup>38</sup> Buchanan 2004, 307, 313, 449-54, 462.

<sup>39</sup> Frankovits 2001.

state through a military alliance has a disproportionate chance of realizing their right to security, especially compared to a nation.<sup>40</sup> With the tribunal, all states and nations essentially have an equal chance of having their conflict internationally addressed. The initiative lies with the nation and state; those that are directly impacted by the conflict.

When a self-determination movement occurs, violence is often the result, but resulting only as a last resort. Guaranteeing that other options are available empowers the group experiencing relative deprivation. Majeski tested to see if social actors or states with asymmetric power are more likely to cooperate using multiple game theory models.<sup>41</sup> As a generalization, agents with asymmetric power, particularly the ability to choose who they interact with, promote cooperation.<sup>42</sup> This is a key point since a mechanism within the UN will in effect give a nation a variation of the asymmetric power of choosing who and when to interact. Since “cooperative worlds evolve particularly when agents have the ability to selectively interact with other agents in their world” this empowerment aptly serves to promote cooperation.<sup>43</sup>

A case-by-case ruling also has the added benefit of creating much needed definitions. There is no standing definition of what constitutes terrorism or a movement towards self-determination. The vague distinctions between rebellion, civil war, terrorism, and insurrection, all of which use asymmetric warfare and are forms of intrastate conflict, create a blurred legal definition for each, ultimately undermining the ability for an adequate international response. The UN report blatantly states that there is no consensus and one must be formed on a case-by-case basis.<sup>44</sup> This is exactly what the tribunal does, presenting a unique opportunity for the creation of clear definitions of terrorism and self-determination, all of which will aid in countering intrastate conflict.

It is possible to establish criteria for determining the right to self-determination through establishing who has the right to make the claim, how to make the claim, or how to implement autonomy; definitions that are in a continued state of flux.<sup>45</sup> With exclusive detailing of moral and human rights, legitimacy, justice, and the existence of states, even application of laws and definitions becomes possible, translating into

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<sup>40</sup> Mullenbach 2005.

<sup>41</sup> In this instance asymmetric power is used to indicate widespread use of access channels.

<sup>42</sup> Need citation from Majeski

<sup>43</sup> Majeski 2004.

<sup>44</sup> High-level Panel 2004.

<sup>45</sup> Please see the above section titled, “Inherent Obstacles to Resolving Conflict Between State Security and Group Self-determination: Previous UN Actions” for examples.

international justice. Through like-case similarities and clear definitions pertaining to self-determination movements, justice can be repeatedly and consistently applied. In order to do so, the UN must surpass the scope of a state, requiring an improvement in mediation and clear criteria for the use of force, two goals set forth by Kofi Annan.<sup>46</sup>

### ***Ruling in favor of a nation***

Before addressing motivations specific to nations or states, the types of rulings must be addressed. The tribunal must first rule if the nation has a legitimate claim for self-determination before the tribunal can determine the degree of sovereignty/autonomy to grant the nation. A legitimate claim for self-determination is only possible by a legitimate nation. The tribunal determines if the nation is a legitimate group based upon, but not limited to, a group with a clear history existing as a nation, common characteristics and ideology amongst the individuals of that group, and existing as a nation persecuted by the state. Without determining if the nation is legitimate, there is no basis for a claim to self-determination. If the nation is deemed to be a legitimate nation group, the tribunal rules if the nation has a legitimate claim for self-determination based upon deliberations between the nation and the state.

The next step is to determine what form of sovereignty/autonomy entails. This paper does not address every type of ruling possible, but lists the types of rulings that could be the frequent outcome. As stated earlier, secession is not the only option available for a ruling in favor of the nation.<sup>47</sup> The tribunal's ruling, or the vote by the General Assembly, can also establish how to implement the recommended solution through actions similar to staged or bundled sovereignty.<sup>48</sup> The reason for staged autonomy is to limit the likelihood of the new state becoming a failed state raked with renewed violence.<sup>49</sup> The General Assembly is in a position to aid in staged autonomy through determining a case-by-case timeline and events that must occur before the continuance to the next step.<sup>50</sup> In terms of a ruling in favor of self-

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<sup>46</sup> High-level Panel 2004, see paragraphs nine and ten in the "Note by the Secretary-General."

<sup>47</sup> Buchanan 2004, 7.

<sup>48</sup> Hampson, 2001, Buchanan 2004, 435. Staged autonomy is when a state is created using benchmarks to slowly separate the new state from its parent state, helping to ensure a smooth transition into a new political system. Staged autonomy is broken down into steps and could take years to complete. Bundled sovereignty is when several aspects of autonomy are combined to grant the nation limited or complete sovereignty.

<sup>49</sup> Interestingly, the tribunal can also serve as a means to reverse balkanization. Due to economies of scale, overt balkanization is not desirable and can actually serve to diminish power of all parties involved. With the tribunal situated to create an outline for staged autonomy, it can also create a staged reintegration when a state and nation that Balkanized realized that doing so generated negative consequences. The threat of a loss of economies of scale is also one manner that gives check to rampant claims for self-determination when it is obvious that a nation does not have the resources or means to be economically feasible.

<sup>50</sup> Please refer to section below titled "Involvement of the General Assembly."

government within the existing state, staged autonomy gives the nation and state time to adjust and create the political structure and culture necessary for it to succeed.

### ***Nation specific motivations***

The motivation for nations to use and support the tribunal is rather simple. No other current mechanism is in a comparable position to grant a nation international recognition for their fight for self-determination. International recognition is imperative for a successful state or regime. If the tribunal makes this ruling, it will help put an end to the fighting since the state must comply and allow for the formation of a new nation-state. One causality of self-determination movements degrading into warfare is that the nation group believes that all non-violent access channels to a decision making body, whether on the state or international level, are closed to them; a form of relative deprivation if all other groups within a nation's parent state enjoy these channels.<sup>51</sup> The tribunal serves as an open access channel that can potentially reduce the level of violence by nation groups and the violent response by states.

### ***Ruling in favor of a state***

The tribunal is not hostile to the state since it is in a position to determine better case rulings. Claims for self-determination by "nations" with a long history of grievances have a better chance of a ruling in its favor, but those without do not. Since the tribunal can give several types of rulings, it is possible for a ruling to completely undermine any form of legitimacy for a nation. The tribunal's ruling also undermines the legitimacy of the rebellion since international recognition is no longer a possibility and the movement's violence can be categorized as terrorism. The tribunal has but one overarching ruling in favor of the state: the state's right to security is paramount to any claim that a nation, whether real or imagined, might have. State specific motivations More explanation is needed for states' motivations for the creation and use of the tribunal mechanism. International intervention is often perceived as a violation of state sovereignty, an intrusion into domestic affairs, and serves only to encourage a breakdown of state boundaries.<sup>52</sup> Governments must see any mechanism as a means to end conflict, not as a threat to sovereignty that will cause further conflict.<sup>53</sup> The domino effect of secessionist movements within states is greatly feared, aiding to the resistance to them. However, Russia's centralized government allowed the break up of many groups into new states and

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<sup>51</sup> Ignatieff 2004, Chapter 4.

<sup>52</sup> Frankovits 2001.

<sup>53</sup> Daes 2001.

resisted in Chechnya.<sup>54</sup> The acquiescence lead to peace and fairly normalized relations between Russia and the new states while the latter is an on going armed conflict, a distinction worth noting. One way to assist in ending conflict is international recognition, which brings about international assistance in maintaining territorial integrity and assistance in internal affairs.<sup>55</sup> Having international assistance in rebuilding or propping up a state's infrastructure or regime allows the state to continue to function as a viable entity.

Even if the tribunal rules in favor of the nation, this can still help ensure a state's security through the Geneva Convention. Any ruling by the tribunal must carry the caveat that both parties sign the Geneva Convention. By doing so, the problem of signatories in Article Two of the Geneva Convention is resolved.<sup>56</sup> Once signed, use of asymmetrical warfare becomes a violation of the Convention and illegitimate for the newfound nation-state and its parent state to use at a future date. Therefore, the parent state will still be able to function in a way that insures the greatest possibility of security for its citizens since the opposing party can no longer effectively use indiscriminate violence inherent with asymmetrical warfare. If the nation persists in the use of asymmetric warfare, or fails to contain the radical elements that desire its continuation, then the nation risks a major loss of international legitimacy, which in turn legitimizes a state's right to unequivocally ensure its security.

The state should work to end conflict since the very existence of conflict often results in violence or the breakdown of political systems and order, which is not only dangerous to a regime, but also hampers economic development.<sup>57</sup> In a sense, fighting an insurgency, or waging one, erodes legitimacy, especially the state's. Under the context of upholding human rights as the strongest form of legitimacy, a state is in a catch twenty-two since if it fights a self-determination movement it violates the right to it, and if it allows violent secessionist acts, it violates the right to security.

Even so, one party might refuse to participate in the tribunal, especially on the part of the state. Since the international community is inherently biased towards maintaining the status quo by means of maintaining current state sovereignty, the state is already in a favorable position. Appearing before a tribunal is risky for the

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<sup>54</sup> Horowitz 1997, 429.

<sup>55</sup> Buchanan 2004, 265.

<sup>56</sup> Article Two stipulates that the Geneva Convention applies to "...two or more of the High Contracting Parties." As such, only states are held accountable and it's designed for interstate conflict, not intrastate conflict. Having a nation, now a state, sign the Geneva Convention, conflicts are now intrastate and restrained by the Geneva Convention as written (The Fourth Geneva Convention, 1949).

<sup>57</sup> Buchanan 2004, 265.

state since they have more to lose than the nation. A nation has much to gain, if only for the fundamental reason that they can present their case to an international audience, possibly gaining support for their movement. The state should still voluntarily participate in the tribunal, if only to prevent being shamed and risk being labeled a rouge state. The tribunal acts as a forum that can be monopolized by the nation if the state refuses to attend. With the state participating, both parties' positions are made public and taken into account. This is a perfect opportunity for a state to put forth its arguments, especially if its legitimacy is in question due to possible human rights violations.

## **Involving the General Assembly**

In order to ensure that the international community becomes actively involved, recognizes, and adheres to the tribunal's findings, the ruling will be passed to the United Nations General Assembly. Court decisions, like those from the ICJ, are not recognized as international law or interpretations of it. As such, they are guidelines that can be ignored by states.<sup>58</sup> Involving the General Assembly phrases the validation or rejection of the tribunal's ruling in the form of a resolution. This will force the international community to become proactive in ensuring the successful creation of a nation's autonomy and state compliance, or the international community must help end unsanctioned violence by allowing a state to ignore restrictive articles in the Geneva Convention. The simple act of voting forces a resolution by the international community, helping to end a conflict that otherwise might have gone unresolved for several more years. The vote also serves to grant legitimacy to the tribunal. Francis B. Sayre, former U.S. Representative to the Trusteeship Council, states, "it must be recognized that in the shaping of political organizations such as the United Nations and in the determination of their powers, the votes of member states are often of even greater significance than the determinations of judicial tribunals."<sup>59</sup> The tribunal can act in a manner not conducive to the reality of the General Assembly, but it still needs the General Assembly to make the rulings a reality.

Part of the success of the decolonization process can be attributed to the ongoing debates within the General Assembly, dictating constant scrutiny and media attention.<sup>60</sup> Having open debate within the General Assembly keeps proceedings transparent and forces justification for the General Assembly's votes and the tribunal's rulings. Transparency and the needed justification also helps the ruling remain limited to that single case, preventing a possible abuse of power or

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<sup>58</sup> Joyner 2001, 248.

<sup>59</sup> Mohamed 2005, 832.

<sup>60</sup> Frankovits 2001.

accidentally legitimizing human rights abuses. This method aids both the state and nation by creating a public access channel in which intrastate conflict and asymmetrical warfare can be properly addressed without the normal state system's restraints.

The catch to the voting in the General Assembly lies in what happens with a negative vote for the tribunal's ruling. A negative vote shows the international community's viewpoint of the conflict and still causes the implementation of either the formation of a nation's autonomy or lax military restrictions upon a state. The simple act of voting forces the international community to take a public stance on a conflict that otherwise might have gone unresolved for several more years. This improves both the efficiency of the UN in resolving conflicts as well as limiting the violence after the UN reaches a decision due to active international involvement. Granted the violence will continue, but the scope and duration of the violence will be limited.

The tribunal gains legitimacy by means of a commitment to justice through protecting human rights. The ruling by the General Assembly makes use of a democratic institution, which confers additional legitimacy to the tribunal. If states can consent to its creation and ruling, and nations do the same, then the tribunal gains political power and legitimacy. When the General Assembly votes on the ruling of the tribunal, then the General Assembly is consenting to the tribunal's right to exist, and as a result the states are too.<sup>61</sup> In this instance, there is also a symbiotic relationship between the two. As the tribunal gains legitimacy through association with a democratic institution, the General Assembly does the same through association with a mechanism committed to justice. When institutions lack resources for democratic authorization, they have minimal legitimacy and minimal justice.<sup>62</sup> This is the problem with UN councils in that they are not democratic, contain disproportionate powers, and cause continual change in resolutions and definitions, all adding to a loss of legitimacy for the UN and its ability to implement justice. The tribunal forces institutions to address conflicts and a vote in General Assembly adds greater amount of democracy when dealing with intrastate conflict.

Being heavily invested in the success of a nation's autonomy, the General Assembly would extensively monitor the progress of the nation. To efficiently monitor progress, the UN would have to dispatch observers to the region and possibly peacekeeping troops to ease the transaction to autonomy. Based upon Fortna's study, the presence of peacekeepers, especially observers, will aid in diminishing the conflict

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<sup>61</sup> From content found in Buchanan 2004, 292.

<sup>62</sup> Buchanan 2004, 259.



and help to prevent a reoccurrence.<sup>63</sup> Additionally, the General Assembly will effectively act as a supra-observer, thus drastically increasing the likelihood of a successful and peaceful transaction.

### ***Bypassing the Security Council***

With little chance of either the state or sub-state involved in the conflict immediately ending hostilities, the UN must provide peacekeeping/making troops to the region of conflict. Use of observers, peacekeepers, or UN reform is generally an issue reserved for the Security Council, but for intrastate conflict, this is the entirely wrong path to take. It is acceptable to deviate from the norms by bypassing the Security Council's authorization for armed intervention, and it should not rely on the US to act as the sole enforcer or obstacle. If a major reform is needed for a "rule-based regime" to succeed, the Security Council must be bypassed.<sup>64</sup> There is also the question whether the Security Council tacitly overstepped its legal limits through post-conflict peacebuilding in the form of state building and governance that goes beyond its responsibilities outlined in Chapters VI and VII of the UN Charter. It is ill suited to deal with failed states due to problems with legitimacy, the divisive political nature of the council, and lack of accountability.<sup>65</sup> This being the case, the Security Council's position of power after the suspension of the Trusteeship Council is one based on precedent and tradition, not absolute international law.

Excluding the Security Council, especially on issues of international security, is counter to international norms and threatens the legitimacy of the proposed tribunal. It is important to note that involvement of some form of peacemaking or peacekeepers is contingent upon both a signed truce and the agreement of the state. This is not feasible for intrastate conflict since it occurs in a single state whose security and sovereignty is threatened, leading it to reject international intervention. The tribunal or General Assembly can recommend that course of action, but unless the state (original or newly created) accedes to peacekeeping/making forces, then Security Council involvement is a mute point. If the nation (state) or the state approaches the Security Council, then mechanisms already in place for the past half-century comes into play.

With the Security Council ill suited for a comparable role of the tribunal/General Assembly combination, it is arguable that the other types of councils might succeed where the Security Council failed. Historically, this is not the case. Current international law does not offer guidelines or analogous precedents for self-

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<sup>63</sup> Fortna 2004.

<sup>64</sup> Buchanan 2004, 431-32, 440.

<sup>65</sup> Mohamed 2005.

determination movements beyond the scope of decolonization.<sup>66</sup> Tracing the history of decolonization in the UN shows that the General Assembly was more open to listening to self-determination movements. Councils and trusteeships were not since they were mostly comprised of self-interested states that opposed decolonization that directly threatened the stable east-west balance of power.<sup>67</sup> Therefore, bringing in the General Assembly is the best method to ensure international participation, a close attempt at consensus, and aid in the tribunal's legitimacy, all with the aim of limiting intrastate conflict.

## **Conclusion**

Current conflicts revolve around intrastate warfare and the international community is unprepared to deal specifically with conflict between a state's right to security and a nation's right to self-determination. This conflict is specifically addressed through *A more secure world: our shared responsibility, the First International Conference on Self-Determination*, and other publications. It is clear that the UN and academia are concerned with intrastate warfare and desire a means to adjust the current institutions in order for a solution to be feasible. However, all previous proposals contain egregious flaws that promote no feasible way to mitigate conflict between states and nations.

Admittedly, this paper does not address the actual creation and implementation of the tribunal mechanism. Such an explanation and level of detail is well beyond this paper's scope given that a tribunal mechanism requires its own bureaucracy and support structure from the UN. Some questions to address on this issue is when this proposal should be implemented, how the judges on the tribunal are picked, if the judges should be experts on a case-by-case basis or permanent judges, the terms of office, the actual layout of the court proceedings, and the bureaucratic niceties of moving the ruling to the General Assembly for a vote. Additionally, the Security Council was largely glossed over, but any institutional reform or addition to the UN requires input and support from the Security Council, unanimous from the five permanent members, for any change to occur. Therefore, the interests of the Security Council and its five permanent members must be accounted for, perhaps by allowing the Council to decide whom the judges are. However, these are issues for a later date.

This paper justifies a possible mechanism that could serve to mitigate the inherent conflict between states claiming their right to security and nations claiming their right to self-determination. In no way is the proposal for a tribunal perfect in the

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<sup>66</sup> Buchanan 2004, 339.

<sup>67</sup> Frankovits 2001.

absolute, but it has the ability and flexibility to fully address self-determination movements. Like all international organizations, it will not immediately solve the problem that it purports to eliminate. It will take several years before results are seen. Patience extends to recognizing that intervention beyond humanitarian should be justifiable, including preventive intervention as well as intervention to stop a state from preventing a nation from succeeding.<sup>68</sup>

The proposed tribunal will not only mediate conflicts between nations and states by determining legitimacy of a nation's claim to self-determination or a state's claim to security. The tribunal can then establish to what extent a nation's self-determination can take, or to what extent a state can exercise their right to security. The very existence of the tribunal acts as an access channel that can remove relative deprivation by allowing nations and states to publicly present their case, creating another viable option before a nation or state resorts to violence. It is also in a position to establish and maintain definitions of self-determination and terrorism. Naturally, the tribunal alone would lack legitimacy and a means of enforcement, hence the link between the tribunal and the General Assembly. Doing so forces some form of democratization onto the ruling, adds transparency, and compels the international community to become proactive in reaching a solution to a conflict. There exist no international norms for intrastate conflict, mandating manipulation of current norms to fit the needs of individual states. The tribunal is a mechanism that attempts to create norms and adequately addresses problems with previous proposals. As such, it is a viable option that must be seriously considered in the near future.

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<sup>68</sup> Buchanan 2004.

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