THE "REQUIREMENT" OF PLEBISCITE† IN TERRITORIAL RAPPROCHEMENT††

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Plebiscites have been employed and proposed in many territorial settlements as a means for a just solution to the territory concerned. They have been advanced due to their alleged legality in international law and to their alleged democratic character. Plebiscites have also been viewed as a necessary corollary to the right of self-determination. Nevertheless, although many national liberation movements articulate their political demands in terms of the right of self-determination, they are not in favor of plebiscites. This is primarily due to theoretical problems related to ideals of democracy and the right of self-determination, and practical problems such as: delimitation of the area concerned; composition of voters in the context of demographic change; problems of organization, supervision, and oversight accountability; and a resulting increase in tension between the parties concerned. Plebiscites have also sparked incidents of violence. This article will attempt to analyze the requirement of plebiscites in territorial rapprochement in light of the factors above.

I. ARE PLEBISCITES REQUIRED UNDER CUSTOMARY INTERNATIONAL LAW?

Historically, customary law has been one of the primary sources of international law.[1] Customary law was the predominant source of international law for centuries. Although treaty laws have preempted customary laws in certain fields, customary laws are still important in these fields since treaty law may fail to cover all aspects of the law or all the

† A plebiscite is a vote of the people that expresses their choice for or against a proposed law or enactment, which, if adopted, will work a change in the constitution that is beyond the powers of the regular legislative body. BLACK'S LAW DICTIONARY 1038 (5th ed. 1979).

†† Rapprochement is the establishment or state of cordial relations. WEBSTER'S NEW COLLEGIATE DICTIONARY 957 (1976).

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW sec. 102 (1986) [hereinafter RESTATEMENT]. Article 38 of the International Court of Justice provides that "a rule of international law is one that has been accepted as such by the international community of states. . .in the form of customary law. . . ." *Id.*

states. Treaty laws cannot preempt those rules of customary international law which are *jus cogens*.[2]

Customary international law results from a general and consistent legal practice adhered to by states out of a sense of legal obligation.[3] In order to qualify as customary international law, state practices must be consistent and unmotivated by political considerations or expediency.[4] Charles De Vischer, former President of the International Court of Justice, has written that governments attach importance to the distinction between customs by which they hold themselves bound, and practices which are dictated by considerations of expediency devoid of definite legal meaning.[5]

First, we must analyze whether the state practices pertaining to plebiscites are consistent, and then, whether they are conducted with a sense of legal obligation. A perusal of recent and historical plebiscites will help determine whether they have become customary international law.

A. Plebiscites from the French Revolution to World War I

Following the French Revolution, the French Constituent Assembly renounced the undertaking of any war for the purpose of conquest and declared that France would never employ its forces against the liberty of any people.[6] The Assembly stated that the French Republic "wishes no other dominion than the gratitude of the nations, no other possession than the heart of nations."[7] The French decision to ascertain the will of the people as a prerequisite for any annexation was perceived by the French as a high moral principle rather than a legal obligation. According to Brownlie, in order to qualify as a customary law, there must be a sense of legal obligation as opposed to a sense of courtesy, fairness, or morality.[8]

In the annexation of Avignon and Venaissin, the first territorial rapprochement in which the principle of plebiscite was applied, the French Constituent Assembly acted in good faith.[9] The historical title and France's strategic interests were cited as the reasons for the annexation

2. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, arts. 53, 64.
3. RESTATEMENT, *supra* note 1, sec. 102.
4. 7 ENCYCLOPEDIA OF PUBLIC INT'L L. 62 (1981) [hereinafter ENCYCLOPEDIA].
5. DE VISCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 156-57 (rev. ed. 1966).
6. J. MATTERN, THE EMPLOYMENT OF THE PLEBISCITE IN THE DETERMINATION OF SOVEREIGNTY 54 n.3 (John Hopkins Univ. Studies XII No. 3 1920).
7. E. WITTMAN, RIGHT OF NATIONAL SELF-DETERMINATION 41 (1919).
8. I. BROWNLIE, PRINICIPLE OF PUBLIC INTERNATIONAL LAW 7 (1966).
9. J. MATTERN, *supra* note 6, at 55-58.

by the partisans for union. The Assembly voted in favor of annexation, even after repeated adverse decisions by vote of the people due to doubts about the authenticity of the conducted plebiscite. After a favorable report by three mediators who had been sent to the territory, the Assembly was satisfied that the people of Avignon freely had expressed their wishes for union with France.[10] In the annexation of Savoy and Nice, the plebiscite was followed only after the occupation of those territories by the French.[11] In other words, in these territories plebiscites were used to "legitimize" a *fait accompli.*

In German and Belgian territories, the French secured the vote through the political clubs and societies that they established and supported. The authenticity and bona fide character of the plebiscite was damaged by the widespread manipulation of the electoral process, which ranged from friendly advice to military pressure against the people to be annexed. In these cases, a plebiscite was used to bring the predetermined territorial annexation into harmony with the claim of consensual annexation. As one author noted, the institution of the plebiscite as a method of expression of the popular will was killed between its conception and birth.[12]

Confidence in the "requirement" of a plebiscite deteriorated further when the French refused to employ it as a means for the cessation of a French territory. As far as French territory was concerned, the principle of inviolability of territory superseded the principle of plebiscite. In France, the prevalent view at the time was that international law was based on interest and justice. Therefore, there were no annexations or separations without approval by the population of the territory, or the interest of the Republic making the change inevitable.[13] In short, annexation was lawful if it promoted the interest of the nation even when it was against the wishes of the people. Later, after the Franco-Prussian War, France solicited the support of Europe against the cession of Alsace-Lorraine on the ground of territorial inviolability, not on the wishes of the inhabitants.[14] Thus, it can be concluded that the Republic's interest and the exigencies of practical politics, and not the will of the people, were the main factors in the territorial rapprochement.

Most of the French annexations were undone by the Congress of Vienna (1815) which did not recognize plebiscites as a means for territorial rapprochement. The main reason for the plebiscite's nonrecognition

10. *Id.* at 58.
11. *Id.* at 66.
12. *Id.* at 79.
13. E. WITTMAN, *supra* note 7, at 53.
14. J. MATTERN, *supra* note 6, at 53, n.73.

was that, outside France, popular sovereignty was not yet established in Europe; moreover, governments viewed plebiscites as a means of territorial aggrandizement. Thus, the requirement of plebiscite was not recognized by a large portion of the international community.

Plebiscites were also held in the unification process of Italy. According to Sara Wambaugh, plebiscites were used, not because they were perceived to be required by law, but because there was no other way to establish title against the opposition of various European courts, which could point to the treaties and the principles of legitimacy in support of the deposed petty sovereign and against the union.[15] In short, plebiscites were used for the purpose of political expediency.

During the Italian unification process, Napoleon opposed the use of plebiscites in international relations.[16] When Savoy and Nice were offered as a bribe, however, Napoleon consented to annexation by Sardinia based on a plebiscite.[17] Switzerland protested the cession of Savoy and Nice from Italy to France on the ground that it had rights in Savoy by virtue of a treaty.[18]

In contrast, the settlement of the Romania question had a different result. Article 24 of the Peace Treaty of March 30, 1856 convoked two parliaments to ascertain the wishes of the people of Moldavia and Valachia, both now part of Romania, about the future organization of their principalities. The plebiscite was supported by Austria and Turkey because they felt that they could influence the vote. Thus, Turkey and Austria, with the help of England, violated the electoral process, thereby thwarting the principalities' desire for fusion. Due to the manipulation of the electoral process, those elections were cancelled, and new elections were held in which the people expressed their wish for the fusion of both principalities. Turkey, however, publicly disregarded the people's decision and opposed the fusion. Later, the fusion was diluted and a temporary solution was found in the form of "Principate-Unite".[19]

Similarly, in 1864, during the discussion of the cession of Northern Schleswig, France's proposal of a plebiscite was opposed by Austria and Russia. As a result, the conference disbanded without arriving at a decision. A plebiscite in Northern Schleswig was revived and incorporated as Article V in the Peace Treaty of Prague. Nevertheless, Bismark announced later that Article V was incorporated in the Peace Treaty only because of pressure from France.[20] Surprisingly, Austria, who formerly

15. S. WAMBAUGH, I THE DOCTRINE OF NATIONAL DETERMINISM XXXII (1919).
16. J. MATTERN, *supra* note 6, at 97.
17. *Id.* at 98.
18. *Id.* at 100.
19. *Id.* at 105.
20. *Id.* at 109.

opposed the rule of plebiscite, supported Article V; which required a plebiscite. Nonetheless, the Treaty of October 11, 1878, later annulled the plebiscite provision.[21] These events illustrate that the Peace Treaty did not codify or reflect existing law, but merely stated a rule which was subject to annulment at the whims of the state.

A plebiscite was used effectively in the dissolution of the Union of Norway and Sweden. In the transfer of St. Bartholomew, which was ceded to Sweden in consideration of a trade favor for the amount of 400,000 francs, both parties agreed to secure the approval of the people.[22] The peoples' sanction alone, however, did not secure the transfer; the peoples' sanction, coupled with 400,000 francs, effected the transfer.[23]

In the United States, according to one constitutional authority, there is "no principle of public law, or general precept from [our own] practice that requires the consent of the population of an annexed territory to be obtained. In none of the instances, except that of Texas, has the United States deemed this consent necessary."[24] In the purchase of the Danish West Indies by the United States, at the insistence of Denmark, the United States gave an unofficial consent to hold a plebiscite, which resulted in favor of annexation.

Chile annexed Tacna and Arica on the alleged ground that Peru did not have the means to pay an indemnity.[25] It was stipulated in the Treaty of Ancon that, after ten years, a plebiscite would be held to ascertain the wishes of the people and that whichever country was favored should pay the loser ten million dollars. As one observer aptly stated, in this context, plebiscite was "no more than a circumlocution, an invention to disguise the sale."[26] Nonetheless, due to the "Chileanization" of the territory, and the violence surrounding the plebiscite, the question of Tacna and Arica was eventually resolved through negotiation.

The position of plebiscite during the period between the French Revolution and World War I can be best summarized in the words of former Prime Minister and Secretary of State for Foreign Affairs, the Marquis of Salisbury. In respect to the cession of Helgoland by England, he stated that "plebiscite was not among the traditions of this country."[27]

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21. *Id.*
22. *Id.* at 115.
23. *Id.* at 116.
24. *Id.* at 186 (quoting WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 347 (1810)).
25. W.J. DENNIS, TACNA AND ARICA: AN ACCOUNT OF THE CHILE-PERU BOUNDARY DISPUTE AND THE ARBITRATIONS BY THE UNITED STATES 149 (1931).
26. *Id.* at 187.
27. J. MATTERN, *supra* note 6, at 188.

B. *Plebiscites After World War I*

On January 22, 1917, President Woodrow Wilson said in his message to the Senate ". . .that no right anywhere exists to hand peoples from sovereignty to sovereignty as if they were property."[28] Similar pronouncements were made by other Allied leaders.[29] Germans, in their reply to the first peace treaty, also acknowledged this principle. As a result of the emergence of the right to self-determination, plebiscite became an important tool in territorial rapprochement. Some territories were ceded without a plebiscite due to the indisputable non-German character of the transferred inhabitants. In the territories of mixed nationalities, plebiscites were held in some territories to ascertain the wishes of the people prior to transfer. Nonetheless, some territories of mixed nationalities were transferred without a plebiscite.

Plebiscites were held in the Saar Territory,[30] Eupen and Malmedy,[31] East Prussia,[32]Schleswig,[33] Upper Silesia, and in the southern part of Klagenfurt.[34] Upper Silesia, according to the draft treaty, was to be ceded to Poland without a plebiscite. Germany objected to this on the grounds that Upper Silesia was not inhabited by an indisputably Polish population and, moreover, because Germany had a need for Silesian coal. Later, the revised draft provided for a plebiscite. Although the majority of the people decided in favor of fusing with Germany, it was partitioned between Poland and Germany following a revolt.

The theory behind the outright cession was that those territories were inhabited by an indisputably non-German population; therefore, a plebiscite was not necessary to obtain their consent. Contrary to this policy, territories that had mixed nationalities or that were inhabited by a

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28. *Id.* at 176.

29. *Id.* at 177.

30. A plebiscite was held under the supervision of the League of Nations, in the Union with Germany. *See* S. WAMBAUGH, THE SAAR PLEBISCITE 304 (1940).

31. Plebiscites were conducted in these territories, which were already under the administration of Belgium, where it was proposed they be transferred to them. There were various factors that raised doubts about the legitimacy of the "plebiscite." First, the voters were not given a choice, but rather were asked to express only their disapproval. Second, the plebiscite was not conducted under the natural powers, but under Belgium, to which it was proposed to be transferred. Therefore, the fairness of the election was in doubt. Third, the ballot was not secret, but a public writing. *See* Dugdale, *Eupen & Malmedy: The League Responsibility*, 16 NEW EUROPE 201 (1920).

32. The vote in East Prussia was decided in favor of Germany. J. MATTERN, *supra* note 6, at 142.

33. The plebiscite was conducted in two different zones corresponding to the national composition of the inhabitants: Danes and Germans. *Id.* at 138.

34. The plebiscite resulted in favor of Austria, which made the plebiscite in the north redundant, and caused whole areas to become under the control of Austria. It is interesting to note that although sixty to seventy percent of voters in the southern part were Slavs by race, they voted in favor of Austria. Bryce, *The Klagenfurt Plebiscite*, 60 GEOGRAPHIC J. 112, 122 (1922).

predominantly German population were ceded without a plebiscite. For instance, neutral and Prussian Moresnet,[35] which had a predominantly German population, was ceded to Belgium in partial compensation for the destruction of Belgian forests "in spite of German protest not to 'barter' human beings from one sovereignty to another merely for the sake of wood and zinc ore."[36] West Prussia, which had 744,000 Germans and 580,000 Poles, was ceded to Poland on historical grounds without a plebiscite.[37] The Province of Posen, which had a large German population, and enclaves living outside the district inhabited by Germans, was ceded to Poland without a plebiscite on the grounds that the existence of German enclaves were due largely to "Prussianization".[38] Although the Allied Powers acknowledged that the population of the city of Danzig had long been predominantly German, it was ceded to Poland on historic and economic grounds.[39] The city and district of Memel, which had 68,000 Germans and 54,000 Lithuanians, was ceded to Lithuania to provide it an outlet to the sea.[40] Southern Tyrol was ceded to Italy for strategic considerations.[41] These instances illustrate that plebiscites were not held consistently, and that they were often influenced by historic, economic, and strategic considerations.

In certain instances, the affected party did not recognize the plebiscite. Austria did not recognize the plebiscite held in a small part of Burgenland, which was to be incorporated into Austria by the Trianan Peace Treaty. The results of the plebiscite instead indicated that the people wanted to join with Hungary.[42]

In certain cases, plebiscites were attempted by the League of Nations, but were unable to be carried out. The League of Nations proposed plebiscites in Teschen, Spisy, and Orva that did not take place due to the ethnic animosity between the Czechs and the Poles and the violence and intimidation that surrounded it. Later, the territorial question was solved by interstate negotiations.[43] Another attempted plebiscite did not take place because the interested parties (Lithuanians and Poles) refused to neutralize the zone.[44]

Other proposed plebiscites were also not carried out. Article 64 of

35. J. MATTERN, *supra* note 6, at 133-34.
36. *Id.* at 133.
37. *Id.* at 142.
38. *Id.*
39. *Id.* at 144.
40. *Id.* at 145.
41. J. BARROS, THE AALAND ISLANDS QUESTION 311-12 (1969).
42. ENCYCLOPEDIA, *supra* note 4, at 435.
43. L.T. FARLEY, PLEBISCITE AND SOVEREIGNTY: THE CRISIS OF POLITICAL ILLEGITIMACY 34, 136 (1986).
44. *Id.* at 136.

the Peace Treaty of Sevres, which provides for a plebiscite in Kurdistan, was not carried out by the subsequent Lausanne Peace Treaty of 1923.[45] According to the December 1921 treaty between Great Britain and the Irish Free State, the boundary between the two countries would be determined according to the wishes of the people. So far, the wishes of the inhabitants have not been ascertained.[46] The demand for a plebiscite by Sweden in Aaland Island was also not met. The question was decided later by a commission of inquiry in Finland's favor. Finally, Turkey requested a plebiscite to settle the boundary dispute with Iraq involving oil fields, but settled later on a treaty basis.[47]

Authorization powers were also not uniform in their approach to plebiscites. After the incorporation of Austria, Hitler conducted a plebiscite in the whole Reich, including Austria, and the reintegration was approved.[48] In contrast, with respect to annexation of Baltic republics with the USSR, no plebiscites ever took place, either before or after the annexation.[49]

The first plebiscite proposed by the United Nations was with respect to Kashmir. Initially, both interested parties, namely India and Pakistan, agreed to hold a referendum in Kashmir and accept the UN resolutions.[50] Later, India attempted to divest itself of its legal obligation and tried to transform it into a moral obligation. In his speech to Parliament, Prime Minister Pandit Jawaharlal Nehru stated that the proposed plebiscite "has nothing to do with law."[51] Nonetheless, he said that India did not want any people in the Indian territory against their will; he declared, "we openly said to them [the people of Jammu and Kashmir] and to the world, that we will give them a chance to decide and we will stand by that decision in this matter. Therefore, we must honor the pledge."[52] Nevertheless, contrary to the UN obligation and its self-imposed moral obligation, India still refused to hold a referendum in Kashmir.[53] Pakistan, in its statement regarding India's refusal to hold a plebiscite, said that in cases where there is a Hindu majority, India favors consulting the wishes of the people, but not when Muslims constitute the majority.[54]

It is not clear whether India understood the pledge it undertook in

45. ENCYCLOPEDIA, *supra* note 4, at 435.
46. *Id.*
47. *Id.* at 436.
48. *Id.*
49. *Id.*
50. 1947-48 U.N.Y.B. 388, 482, U.N. Sales No. 1949.1.13; 1948-49 U.N.Y.B. 280, U.N. Sales No. 1950.1.11.
51. Diwan, *Kashmir and the Indian Union*, 12 INT'L & COMP. L.Q. 347 (1953).
52. *Id.*
53. 1950 U.N.Y.B. 306, U.N. Sales No. 1951.1.24.
54. *Id.* India also rejected the Swedish proposal to submit the issue to the world court, while Pakistan agreed to it. *Id.*

1948 to hold a plebiscite as a legal obligation. In 1952, however, it clearly viewed the referendum, not as a legal one, but as a moral one.

Most of the plebiscites held by the UN were in the context of decolonization rather than in the context of territorial rapprochement. In Rwanda, the UN held a referendum to decide the future of the institution of Muami, but not one to decide the relationship between Rwanda and Burundi.[55] This was decided in a conference attended by the UN Commission and by delegates from both countries. Plebiscites held in the British Cameroons had the following results: the northern part joined Nigeria and the southern part joined the Cameroons.[56] In 1969, Indonesia employed a new type of "plebiscite," and, in spite of the UN Secretary General's reservation, annexed West Iran.

In 1971, South Africa proposed holding a plebiscite in Namibia before the International Court of Justice (ICJ) under the pretext of "adducing considerable evidence on the factual issue." The court rejected the plebiscite proposal and said that the plebiscite was a political one and had no relevance to the question pertaining to the validity of the mandate.[57] In 1979, the Organization of African Unity's (OAU) proposal to hold a plebiscite for Western Sahara was rejected by Polisario.[58] However, Polisario later agreed to the proposed referendum, only after acceptance of the condition that the vote be restricted to the native Western Saharan people.[59] The plebiscite, however, has not yet been held.

This brief outline of the history of plebiscites illustrates that they are employed primarily for reasons of political expediency, and not due to perceived legal obligations. Therefore, it is difficult to discern the role of plebiscites as a part of customary international law. As E.W. Hall said, it is a misapprehension to regard the right of alienation as "subject to the tacit or express consent of the population inhabiting the territory intended to be transferred."[60] Further, as Oppenheim said, "it is doubtful whether the Law of Nations will ever make it a condition of every cession, that it must be ratified by a plebiscite."[61]

II. Is the Requirement of Plebiscites a Part of Conventional Law (Treaty Law)?

Treaties are another source of international law. Nevertheless, only

55. 1961 U.N.Y.B. 486, U.N. Sales No. 62.I.1; 1962 U.N.Y.B. 456, U.N. Sales No. 63.I.1.
56. 1962 U.N.Y.B. 452, U.N. Sales No. 63.I.1.
57. Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa), 1971 I.C.J. 57-58, 122 (Advisory Opinion of June 21).
58. M. Pommerance, Self-Determination in Law & Practice 101 (1982).
59. 1981 U.N.Y.B. 1193, 1196, U.N. Sales No. E.84.I.1.
60. J. Mattern, *supra* note 6, at 171.
61. Lauterracht, 1 Oppenheim's International Law 551-52 (8th ed. 1955).

lawmaking treaties are considered a source of international law. An example of this is the Charter of the United Nations, in which the international community stipulates new general international conduct or declares their understanding.[62] When all the members of the international community are parties, these treaties become international law.[63] In the absence of a treaty pertaining to the requirement of the plebiscite in which all the members of the international community are partners, it cannot be said that the requirement of a plebiscite is conventional law.

The most prominent treaty in the area of plebiscites was the Treaty of Versailles. Since the plebiscite was not an existing legal requirement at that time, the Treaty of Versailles did not bind the non-parties;[64] it only bound the states that were parties to it. Even this limited value of peace treaties is vulnerable to challenges based on the concept of unequal treaties.

When a treaty favors one party and does not create reciprocal and equivalent rights and duties, it is viewed as an unequal treaty. Often, an unequal treaty is the result of a weak state's submission under pressure from a strong state.[65] Since peace treaties were made favoring the Allied Powers at the expense of the Central Powers, those treaties were unequal treaties and can be considered invalid due to a conflict with the peremptory norm of general international law, namely equality. Moreover, since the defeated states were coerced to consent to such treaties by the victors, these unequal treaties can also be considered invalid due to coercion.

III. IS THE REQUIREMENT OF PLEBISCITES A PART OF "GENERAL PRINCIPLES RECOGNIZED BY CIVILIZED NATIONS"?

According to a statute of the International Court of Justice, "the general principles are also considered to be a source of international law."[66] The intention of the statute is to authorize the court to apply the general principles of municipal jurisprudence. The purpose of the inclusion of the general principles as a source of international law is to give due weight to the legal experience and practice of mankind generally.[67] An important attribute of a general principle is that "it must be shared by a fair number of civilised nations."[68] Therefore, the determination of whether the requirement of a plebiscite is one of the "general principles

62. BRIERLY, THE LAW OF NATIONS 58 (6th ed. 1967).
63. LAUTERRACHT, *supra* note 61, at 27-28.
64. When a treaty reflects or codifies the existing law, non-parties to the treaty will be bound to it. *See* L. HENKIN, INTERNATIONAL LAW CASES AND MATERIALS 70 (2d ed. 1987).
65. ENCYCLOPEDIA, *supra* note 4, at 514.
66. International Court of Justice art. 38.
67. LAUTERRACHT, *supra* note 61, at 31.
68. G. SCHWARZENBERGER, MANUAL OF INTERNATIONAL LAW 27 (6th ed. 1976).

of law recognized by civilized nations" warrants a study of the domestic jurisprudence of various states.

In the United States, the following sovereign powers have been identified in annexing new territory: the power to admit new states into the union; the power to declare and carry on war; the power to make treaties; and the power as a sovereign to acquire territory by discovery and occupation or by other proper methods recognized by international usage.[69]

The consent of the inhabitants of annexed territories was not obtained by the United States except in the annexation of Texas. According to Kent, although the consent of the inhabitants may be a sound policy, the power of alienation resides exclusively within the treaty-making power.[70]

According to the Constitution of the USSR, the provisions that deal with the admission of new republics to the Union,[71] and the determination and change of the boundaries within the Union,[72] do not mandate the consent of the inhabitants. Even the provision that confers upon the Union the right to secede does not dictate that the right can be exercised only with the consent of inhabitants.[73]

According to the Australian[74] and Indian[75] Constitutions, the inhabitants' consent is not necessary for the admission or establishment of a new state. For the alteration of the boundaries and names of existing states within India, the recommendation of the president is required, not the consent of the inhabitants.[76] Although the president is required to ascertain the views of the legislature (not the people) of the state concerned, it should be noted that such views do not have any mandatory effect. An amendment to the constitution, not the wishes of the people, is required for the cession of territory in favor of a foreign state.[77]

In Australia, the consent of the state's parliament, as well as the electorate's approval, is necessary to alter the limits of a state.[78] With the exception of Australia, none of the above-mentioned constitutions require a plebiscite for annexation, cession, or alteration.

69. J. MATTERN, *supra* note 6, at 185.
70. *Id.* at 187.
71. KONST. SSSR art. 73(1) (U.S.S.R.).
72. KONST. SSSR art. 73(2) (U.S.S.R.).
73. KONST. SSSR art. 72 (U.S.S.R.).
74. AUSTL. CONST. art. 121.
75. INDIA CONST. art. 2.
76. INDIA CONST. art. 3.
77. *Id.*
78. AUSTL. CONST. art. 123.

In the South West Africa case, Judge Tanaka, in his dissenting opinion, referred to the "general principles" as a basis for human rights.[79] Therefore, if a corollary can be established between the requirement of a plebiscite and human rights, namely the right to self-determination, then it can be concluded that the principle of the plebiscite has subtly attained the character of a legal norm. The latter part of this article, however, will argue that the requirement of the plebiscite is not a necessary corollary to the right of self-determination, thus, that it is not a "general principle recognized by civilized nations."

IV. THEORETICAL ASPECTS OF PLEBISCITES

A. *Do Plebiscites in the Context of Territorial Rapprochement Embody the Ideals of Democracy?*

The plebiscite is hailed by many as the most democratic interpretation of the concept of self-determination.[80] In order to appraise the plebiscite's democratic nature in the context of territorial rapprochement, the notion of democracy should be clarified.

The essence of democracy based on universal suffrage is that today's political minority may become tomorrow's political majority due to the dynamic nature of politics. In internal democracy, today's loser may become tomorrow's victor through the medium of periodic elections. In the context of territorial rapprochement, however, since a plebiscite is held to decide the future of a territory only once, there is no possibility for the minority to become the majority; there is no future democratic discourse to address the grievances of the minority regarding such a territorial settlement. In other words, through a plebiscite, fifty-one percent of the voters can force forty-nine percent to a permanent objectionable allegiance. In the words of Bonfils, in instances like this, "plebiscite means subjection, subordination of minority to a majority."[81] Therefore, except in almost unanimous decisions, a plebiscite will not do justice to the minority. Nevertheless, unlike plebiscites held in decolonization contexts, a unanimous verdict is rare in plebiscites held for territorial rapprochement. For instance, in French Somaliland, ninety-eight percent of the people voted in favor of independence.[82] In South Cameroon, more than one-third of the population objected to union with Cameroon.[83] In

79. South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 296 (Judgment of July 18).

80. W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 12 (1977).

81. LAUTERRACHT, *supra* note 61, at 161.

82. ENCYCLOPEDIA, *supra* note 4, at 436.

83. 1961 U.N.Y.B. 472, U.N. Sales No. 62.I.1.

North Cameroon, more than one-half of the population voted against the union with Nigeria.[84] Unanimous plebiscites result in decolonization contexts because the contest is between a colonized people and a distant colonial power, as opposed to a contest between two factions living in the same territory.

Moreover, in internal democracy, a political minority can exercise influence in the democratic process through compromises and coalitions with various other factions. Since territorial settlement is very ethnically oriented — that is, a plebiscite is typically a contest between two ethnic factions — there is no possibility for the ethnic minority to make an alliance with the ethnic majority and exercise power in the plebiscite process. In the Saar plebiscite, there was a contest between the French and Germans; in the Tacna-Arica plebiscite, there was a contest between Peruvians and Chileans; and in the proposed Teschen plebiscite, there was a contest between Czechs and Poles. In these circumstances, alliances between French and Germans, Peruvians and Chileans, or Czechs and Poles could not be expected.

Since plebiscites are held only once, they deprive future generations of democratic rights and confer extraordinary rights on the present population in that the latter decides for the former. Furthermore, when the present population elects members to the legislature or to the executive branch, citizens do not abandon their rights to reverse their decision if they are dissatisfied with the performance of the elected representative. In the plebiscite, there is no opportunity to reverse the decision.[85]

With respect to a plebiscite in the territorial context, informed civic participation, one of the main features of democracy, is often lacking due to extremist and chauvinistic feelings which are aroused by the population during the plebiscite. Unlike internal democracy, which is marked by a better-informed manifestation of opinion, in a plebiscite, the chances are good that the worst-informed opinion will prevail.

In addition, democracy is a process in which deliberations, mediations, and compromises are made; a plebiscite, however, involves absolute and quick decisions. Therefore, a plebiscite cannot be concluded to be democratic, even though it feigns an illusion of democracy.

B. Is the Requirement of Plebiscites a Necessary Corollary to the Right of Self-Determination?

Although the origin of the concept of self-determination is said to be traceable back into antiquity, the concept is acknowledged to have

84. *Id.*
85. Petrie, *The Plebiscite — Its Use and Abuse*, 272 Q. REV. 107 (1939).

gained prominence with the American Declaration of Independence.[86] The Declaration proclaims that "all Men . . . are endowed by their Creator with certain Inalienable rights, that among these are Life, Liberty and the Pursuit of Happiness . . . that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . ."[87] Similarly, in the French Revolution it was declared that "the exercise of natural rights has no limitation save those which assure to the other members of society the enjoyment of those same rights [and that] [t]hese limitations cannot be determined except by law."[88]

Later, the concept of self-determination became the core of nineteenth century nationalism and played an important role in the unification process of Germany and Italy.[89] The concept of self-determination was raised again by subjugated nationalities of Central Europe during World War I. The Allied Powers recognized self-determination as one of their war aims. President Woodrow Wilson, the champion of self-determination during this era, declared that "[p]eoples are not to be handed about from one sovereignty to another by international conference or an understanding between rivals and antagonists, national aspiration must be respected. Peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril."[90] Prime Minister Lloyd George of Great Britain asserted that the general principle of national self-determination is "as applicable in their cases of German colonies as in those of occupied European territories."[91] Although the right of self-determination was diluted by the mandate system at the Paris Peace Conference, many states emerged as a result of the dismemberment of the empires of Austria-Hungary and Russia after World War I.

The concept of self-determination also was advanced during the Bolshevik Revolution. Lenin supported the national liberation movements and said that there was a democratic content in the nationalism of every oppressed nation.[92] The Marxists, however, did not view the right to self-determination as an end in itself, nor did they view it to be an absolute right. The Marxists perceive the right of self-determination, not as an aim, but as a means to socialist democracy.

86. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
87. *Id.*
88. LAUTERRACHT, *supra* note 61, at 54.
89. D. RONEN, THE QUEST FOR SELF-DETERMINATION 3 (1979).
90. R. BAKER & W. DODD, I THE PUBLIC PAPERS OF WOODROW WILSON 180 (1927).
91. W. OFUATEY-KODJOE, *supra* note 80, at 75.
92. A. COBBAN, NATIONAL SELF-DETERMINATION 97 (1944).

The political concept of self-determination was transformed by the United Nations into a legal principle during the decolonization era. General Assembly Resolutions 1514[93] and 2625,[94] and the covenants on civil and political rights,[95] and economic and cultural rights,[96] have elevated the political principle of self-determination to a legal right. As a result, more than fifty new states were born after World War II.

In contemporary plural societies, the right of self-determination has become the rallying point for various ethnic groups.[97] For instance, the Tamils in Sri Lanka, the Flemish in Belgium, the French in Canada, the Irish in Ireland, the Eritreans in Ethiopia, and the Miskitos in Nicaragua articulate their political demands in terms of the right of self-determination.

1. The Theoretical Bases to the Right of Self-Determination

There are three theoretical bases to the concept of self-determination: national determinism, plebiscite, and national equality.[98] The national determinism theory is based on nineteenth century German nationalism, which promotes the idea of one nation, one state. This theory states that every nation must constitute a state. The plebiscite theory, which was originated during the French Revolution, stressed that government should be based on the consent of the governed. In the external context, it means territory can only be ceded with the consent of the inhabitants of the territory in question. The national equality theory was originated by the Bolsheviks. The national equality theory proclaims that nations are sovereign and equal: when a nation is suppressed, it can evoke the right of self-determination to restore its government. The Soviet Union and the Third World advocated the national equality theory during the decolonization era.

2. Application of the Theoretical Bases of the Right of Self-Determination

Although the plebiscite was used as a means for the realization of the right to self-determination in the various annexations with France, plebiscites have been used as a ratification of *fait accompli*; they were used to mask the character of conquest in these annexations. The fact

93. G.A. Res. 1514, 8 U.N. GAOR (947th plen. mtg.) at 188 (1960).
94. G.A. Res. 2625, 13 U.N. GAOR (183d plen. mtg.) at 337, U.N. Doc. A/8082 (1970).
95. International Covenant on Civil and Political Rights art. I, 11 U.N. GAOR Annex 1 at 168 (1966).
96. International Covenant on Economic, Social and Cultural Rights art. I, 11 U.N. GAOR Annex at 165 (1966).
97. D. RONEN, *supra* note 89, at 43, 47.
98. W. OFUATEY-KODJOE, *supra* note 80, at 11-12.

that most plebiscites were conducted while the areas were still under French occupation raised doubts about the authenticity of the plebiscite. Furthermore, France refused to employ a plebiscite in the context of the cession of French territory. As far as French soil was concerned, the doctrine of territorial unavailability superseded the requirements of a plebiscite. Thus, during the French revolution, plebiscites were used not because the plebiscite theory was considered to be the proper base for the right to self-determination, but rather for sheer political expediency.

Although plebiscites were held during the unification process of Germany and Italy, the decisive force for the unification was nineteenth century nationalism. German philosophers advanced the notion of one nation, one state. This view holds that each nation had the right to deem itself an independent state, and that only nationally homogeneous states were legitimate. The most prominent thesis in the German and Italian unification process was the national determinism theory.

During the interwar period, it was not clear which theory was promoted as a theoretical base for the right to self-determination. Although it was proclaimed that peoples and provinces were not to be bartered from sovereignty to sovereignty as if they were mere chattels and pawns in a game, plebiscites were employed selectively, not universally. In the cession of Eupen and Malmedy, neutral Moresnet, the province of Posen, West Prussia, and the free city of Danzig, the consent of the inhabitants was not obtained.

Even where plebiscites were held, they were not considered to be the only factor in the determination of the frontier lines. For instance, although the Allied Powers agreed to hold a plebiscite in Schleswig, they said that the frontier lines should be drawn "according to a line based on the result of the votes, and proposed by the international commission and taking into account the particular geographical and economic considerations of the localities in question."[99]

The Allied Powers also claimed that their war aims included "the reorganization of Europe, guaranteed by a stable regime and based at once on respect of nationalities. . .the liberation of the Italians, as also of the Slavs, Romanians and Czecho-Slovaks from foreign domination, the setting free of the populations subject to the blood tyranny of the Turks. . ."[100] These goals showed that the Allied Powers considered that all nations are equal, and that oppression of one nation by another nation

99. A. COBBAN, *supra* note 92, at 27.
100. W. OFUATEY-KODJOE, *supra* note 80, at 76.

was contrary to international standards. In other words, the Allied Powers saw the principle of self-determination in terms of the national equality theory.

During this period, the Allied Powers also favored the national determinism theory. President Woodrow Wilson, in his speech to Congress on February 11, 1918, said that national aspirations must be respected. At the peace conference, the U.S. delegation very much opposed the idea of holding plebiscites and suggested that demarcation of territorial lines should be based on nationalities.[101] In the context of the plebiscite in Shcleswig, the Italian delegation said that "the Italian delegates, while entirely associating themselves with the conclusion arrived at by the Committee, feel that they must take this opportunity of making reservations of a general kind relative to the scope of the principles of the plebiscite regarded as the sole method of solving territorial problems."[102] As a result, plebiscites were not held in broader areas where the inhabitants were members of the nationality of the state to which it was supposed to be annexed, but this policy was not adopted faithfully. Many territories, in which the inhabitants were predominantly German, were ceded to Allied Powers without consulting the wishes of the population due to political, economic, and alleged historical reasons.

Nationalist movements during this period based their claim to right of self-determination on the basis of the national determination thesis. Therefore, during the interwar period, the right to self-determination was interpreted in terms of all three theoretical bases.

After World War II, the territorial disputes in Eastern Europe reactivated the concept of self-determination. In keeping with President Wilson's Fourteen Points, President Roosevelt and Prime Minister Churchill declared in August 1941 that "they desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned."[103] During this period, President Roosevelt interpreted the concept of self-determination in terms of the plebiscite theory. In a memorandum he wrote after signing the Atlantic Charter, he stated that the self-determination of boundaries and forms of governments by the plebiscite was the most substantial contribution made by the Versailles Treaty. This method can be extended in the case of certain populations and areas that have conducted century-old feuds. As an example, the people of Croatia should not be forced into a government with the Serbs

101. *Id.* at 81.
102. *Id.* at 219.
103. W. OFUATEY-KODJOE, *supra* note 80, at 98.

or with the Italians, or with the Hungarians, or compulsory independence by themselves, without an expression of their own views."[104]

In 1942, President Roosevelt, believing that colonialism threatened international peace and security more than the territorial dispute in Eastern Europe, extended the principle of self-determination to colonial countries. Although, President Roosevelt's conviction was not shared by other Allied Powers such as England and France, Russia and China fully endorsed President Roosevelt's notion and insisted that the colonial countries be granted independence. In this context, the concept of self-determination was viewed as national liberation.

In short, the concept of self-determination was interpreted in terms of the national equality theory. The fact that the terms "nation", "the colonies", "mandated territories", and "dependant countries" were used interchangeably at the San Francisco Conference[105]also indicates that the main reason for holding plebiscites was to prevent alien subjugation. Oppression of one nation by another was considered contrary to the notion of equality of nations and a threat to international peace in view of the colonial rebellion.

The San Francisco Committee rejected Belgium's proposal to extend the principle of self-determination to "national groups which do not identify themselves with the population of state."[106] Furthermore, several General Assembly Resolutions indicate that the United Nations theoretically rejected the national determinism theory and accommodated the national equality theory and the plebiscite theory. General Assembly resolution 2625[107] ties the concept of territorial integrity to the requirement that the state must be possessed of a government representing the whole people and belonging to the territory without distinction as to race, creed, and color. General Assembly Resolution 1514[108] condemns "the subjection of people to alien subjugation, domination and exploitation." Finally, General Assembly Resolution 637[109] recommends determining the ". . .wishes of the peoples concerned, the wishes of the people being ascertained through plebiscites *or other recognized democratic means.*"

On the question of Namibia, the International Court of Justice rejected South Africa's proposal to hold a plebiscite in Namibia to ascertain the wishes of the people and emphasized the legal implications of the mandate system. This mandate system was based on a theory that "there

104. *Id.*
105. *Id.* at 107-08.
106. *Id.*
107. G.A. Res. 2625, *supra* note 94.
108. G.A. Res. 1514, *supra* note 93.
109. G.A. Res. 637, 4 U.N. GAOR (403d plen. mtg.) at 113 (1952) (emphasis added).

are certain territories which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world."[110] South Africa's proposal was rejected because General Assembly Resolution 2145[111] and Security Council Resolution 276[112] reaffirmed General Assembly Resolution 1514. Resolution 1514 declared that the subjection of peoples to alien subjugation ". . .is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation, and recognizes their right to self-determination."[113]

The International Court of Justice favored the national equality theory over the plebiscite theory in the context of decolonization. Also, in the context of secession, the international community has interpreted the concept of self-determination in terms of the national equality theory rather than the plebiscite theory. In the Aaland case, the commission of inquiry held that when there is a manifest and continued abuse of sovereign power to the detriment of a section of the population, oppressed people, as a last resort, may secede from that state.[114] Therefore, the decisive factor in separation is not the wishes of the people (plebiscite theory), but the subjugation of one nation by another nation (national equality theory). Under this analysis, it can be said without reservation that the requirement of the plebiscite is not a necessary corollary to the right of self-determination.

3. Theoretical Bases of the Right of Self-Determination in the Settlement of Territorial Disputes

In the settlement of territorial claims, the interpretation of the concept of self-determination in terms of the plebiscite theory[115] poses a major problem when the demography of the territory concerned is changed by colonization or migration. In this circumstance, the ascertainment of the legitimate "self" entitled to the right of self-determination is a difficult one. The question arises whether only the "indigenous" population, or the settlers also, may participate in the plebiscite. If the latter can also participate, the question is whether it should be limited to long-term settlers only, or if recent settlers can participate also.[116]

In the disputes pertaining to the Falkland Islands, Gibraltar, and

110. LEAGUE OF NATIONS COVENANT art. 22.
111. G.A. Res. 2145, 11 U.N. GAOR (454th plen. mtg.) at 118 (1966).
112. U.N. SCOR (1529th mtg.) at 1, U.N. Doc. S/INF/25 (1970).
113. G.A. Res. 1514, *supra* note 93.
114. J. BARROS, *supra* note 41, at 316.
115. "When a territory is transferred from one sovereignty of one state to that of another, the consent of the inhabitants of the territory thus affected is required to make the transfer valid." S. WAMBAUGH, PLEBISCITE SINCE THE WORLD WAR 28 (1933).
116. M. POMMERANCE, *supra* note 58 at 2, 4.

Belize; Argentina, Spain and Guatemala respectfully refused to respect the wishes of the people in those territories on the basis of the legitimacy of the population. Argentina maintained that the indigenous population was evicted by the colonial administration and replaced by a population of British Origin.[117] With respect to Gibraltar, Spain argued on the basis of Article 73 of the United Nations Charter, which addresses the importance of the population's interests in the nonself-governing territories. Spain argued, also, on the basis of Resolution 1514, which refers to the indigenous inhabitants who have their roots in the territory. Spain stated that it would "distort the intent of the authors. . . by arguing that a few settlers established in a territory from which the original inhabitants had been first expelled could one day take over the territory."[118]

Additionally, the demand of French settlers in Algeria to participate in Algeria was rejected by the General Assembly as repugnant to the theory of self-determination.[119]

In opposition to the proposed referendum in the Eastern Province of Sri Lanka, which determined whether the Eastern Province wished to remain with the Northern Province of Sri Lanka, the Tamils argue that the demography changed due to the state-sponsored colonization of the Eastern Province. Therefore, the referendum will not be able to ascertain the wishes of the legitimate "self" of the Eastern Province. In addition, during World War II, various groups, including the Polish government in exile and the Free French, had similar concerns that the self-determination provision in the Atlantic Charter might be interpreted in a manner that would sanction and make permanent the wartime deportations and forceable transfers of the population effected by the Nazis.[120]

The instances mentioned above illustrate that indiscriminate application of the plebiscite theory in territorial disputes will pervert the meaning of the right to self-determination when the demography of the territory in question is changed. If the plebiscite theory is applied blindly, a state can annex territory inhabited by members of another nationality, remove large numbers of them by open or veiled pressure, or merely by their distaste for living under the rule of an alien government, introduce in their place its own nationals and then claim the territory on the basis of self-determination."[121]

The question before us is whether the rule of the plebiscite or some

117. 1964-65 U.N. GAOR Annex 8 at 441 [hereinafter GAOR Annex].
118. 1968 U.N. GAOR (1799th mtg.) at 9-10.
119. G.A. Res. 1573, 8 U.N. GAOR (956th plen. mtg.) at 129 (1960).
120. M. POMMERANCE, *supra* note 58, at 78.
121. A. COBBAN, *supra* note 92, at 26.

other principle should be applied in the exercise of the right of self-determination by the legitimate selves when the demography of the territory concerned has changed. In Alsace-Lorraine (1919), the right of the earlier community was preferred over the right of the existing inhabitants. The Allied Powers felt that "conducting a plebiscite in this case would be 'insultingly illegitimate.' "[122]

With respect to the future of the Falklands,[123] the United Kingdom argued that "it was the Islanders to determine what their ultimate constitutional status should be," and stated that "according to the United Nations Charter and the Declaration on the Granting of Independence to colonial countries and peoples those wishes should be paramount."[124] Argentina's position was that the Malvinas were part of Argentina and wanted "the restoration of its territorial integrity through the restitution to it of the Malvinas."[125] Uruguay stated that Resolution 1514 established quite clearly in paragraph 6, that in certain circumstances — "those deriving from acts of territorial usurpation" against the country — the applicable principle is territorial integrity.[126] The United Nations Subcommittee III evaded the issue stating that Resolution 1514 was applicable to the Falkland people, but that special factors pertaining to the Malvinas should also be borne in mind.

Spain claimed Gibraltar, which was administered by the United Kingdom, on the basis of the 1973 Treaty of Utrecht. The treaty stipulated that Gibraltar should automatically revert to Spain before any change in its status could take place.[127] The United Kingdom advanced the same argument as in the Falkland dispute, and held a referendum in which the people of Gibraltar voted overwhelmingly in favor of maintaining the ties with the British. The United Nation General Assembly, however, passed a resolution to the effect that the issue of Gibraltar should be resolved without the participation of the inhabitants.[128] The International Court of Justice implicitly endorsed the General Assembly resolution in the Western Sahara Advisory opinion.[129]

In the case of Ifni, in view of the circumstances of the nomadic population, the United Nations recognized Morocco's historical claim of Ifni and called for the retrocession of Ifni to Morocco. The retrocession took

122. M. Pommerance, *supra* note 58, at 2.
123. United Kingdom annexed Falkland in 1833. The population consists of almost entirely British settlers.
124. *Id.* at 440.
125. *Id.* at 442.
126. GAOR Annex, *supra* note 117, at 439.
127. *See* Schwed, *Territorial Claims as a Limitation to the Right to Self Determination in the Content of Falkland Island Dispute*, 61 FORDHAM INT'L L.J. 461 (1982-83).
128. G.A. Res. 2353, 11 U.N. GAOR (164th plen. mtg.) at 293 (1967).
129. Western Sahara, 1975 I.C.J. 33 (Advisory Opinion of Oct. 16).

place on June 30, 1969.[130] Nevertheless, in the case of Belize, due to Guatemala's weak historical claim over Belize, the wishes of the population superseded Guatemala's claim of territorial integrity.[131] In this case, since Guatemala's claim had not been established, the population of Belize was considered to be the indigenous population entitled to the right of self-determination.

The International Court of Justice dealt with the right of self-determination in the context of demographic change in the Western Sahara case, stating that a certain population did not constitute "people" entitled to self-determination.[132] The court determined that "the right to self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized."[133] General Assembly Resolution 976 implicitly confers such discretionary powers on the General Assembly in the realization of the right of self-determination. This was illustrated by the General Assembly's treatment of Ifni and Western Sahara. Although the General Assembly dealt with both issues simultaneously, they treated them differently. Through Resolution 2229, the General Assembly requested Spain to transfer Ifni to Morocco, "bearing in mind the aspiration of the people," and "invited Spain to hold a referendum with a view to enabling the indigenous population of the territory to exercise freely its right to self-determination."[134]

The above mentioned instances illustrate that when the demographic map of the territory concerned is changed, and when there is a valid historical claim to that territory by another state, the principle of territorial integrity superseded the wishes of the present inhabitants of the territory concerned.

The opposition of the Liberation Tigers of Tamil Elam (LTTE) to the proposed referendum is but another opposition that followed the same line. Although the "right to homeland" has not been explicitly recognized in international law, it can be deduced from satisfactory guarantees which include the right of preemption on every occasion where offers to purchase lands are made by outsiders; from the General Assembly resolution on the right to return; and from the United Nations prohibition against the introduction of foreign elements in the territory concerned. The guarantees were promulgated by the Commission of Inquiry for Aalander in the Aaland Island Case, which was later upheld by the

130. Maguire, *Decolonization of Belize*, 22 VA. J. OF INT'L LAW 271 (1982).
131. *Id.*
132. Western Sahara, *supra* note 129, at 33.
133. *Id.* at 36.
134. Schwed, *supra* note 127, at 464.

Council of the League and various conventions.[135]

In light of demographic change in the Eastern province due to state-sponsored colonization, the Tamil's opposition to the referendum in the Eastern province seems to be rational and logical.

4. Plebiscites in the Face of National Liberation Movements

Polisario rejected the Organization of African Unity's (OAU) call to hold a referendum in Western Sahara on the ground that the Saharan people had already achieved self-determination through that body.[136] In Polisario's rejection, it implied that the right to self-determination can only be exercised once. The right to self-determination manifested in the internal context by periodic elections, and in the external context, by the relationship of the right to self-determination to a representative government,[137] representing the whole people belonging to the territory, without distinction as to race, creed, and color, suggests that the right to self-determination is a continuing right.

Polisario could have based its objections on the ground that the national liberation movement, rather than referendum, are the authentic manifestations of the peoples' will in the liberation struggle. As Justice Ammon stated in the Western Sahara case, "nothing could show more clearly the will of emancipation than the struggle undertaken in common with the risks and immense sacrifice it entails. That struggle is more decisive than a referendum, being absolute sincere and authentic. . . ."[138] He concluded that the "need to pay regard to the freely expressed will of peoples" can be disposed of when a certain population does not constitute "people," and also in the context of a "legitimate struggle for liberation from foreign domination."[139]

The United Nations has also recognized that the liberation movements are authentic representatives of the legitimate aspirations[140] of the people in the struggle for liberation, and has conferred upon them observer status at the United Nations.

Nevertheless, the legitimacy of the liberation movements is challenged due to violence inherent in those struggles. But, as Bedjaoui[141]

135. *See generally*: Geneva Convention IV; 1963 European Convention on Human Rights; 1969 American Convention on Human Rights; Universal Declaration on Human Rights; and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

136. M. POMMERANCE, *supra* note 58, at 101.

137. General Assembly Resolution 2625 ties the concept of territorial integrity with the representative government.

138. Western Sahara, *supra* note 129, at 100.

139. *Id.* at 99-100.

140. H. GROS ESPIELL, THE RIGHT OF SELF-DETERMINATION STUDY 15-16 (1977).

141. M. BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION 57-58 (1961).

said in the context of the Algerian liberation struggle, liberation movements are able to carry arms because of the support of the people; it is not because of their arms that they enjoy the public support. Furthermore, in the Sri Lankan context, the emergence of the Liberation Tigers of Tamil Elam, preceded by their heroic struggle, is a more authentic manifestation of the will of the Tamil people than the proposed referendum.

V. PRACTICAL PROBLEMS WITH PLEBISCITES

A. Composition of Voters

Since most plebiscites are conducted on the basis of universal suffrage, the composition of voters plays an important part in the outcome. Even when universal suffrage is employed, the outcome of the plebiscite can be influenced by manipulation of the criteria of voter qualifications. Voter qualifications are set in order to achieve desired results. In examples of plebiscites held, we can detect differences in the qualifications of voters. This is due to the politics of the plebiscite. For example, in Upper Silesia, voters had to have completed their twentieth year on the first of January of the year in which the plebiscite took place. In East Prussia, the voters had to be twenty years of age on the effective date of the treaty.[142] Setting the date for habitual residence also varies due to political considerations.

The Allied Powers wanted to give Upper Silesia to the Germans; thus, lenient voter qualifications were promulgated. These qualifications enabled 350,000 Germans who had emigrated from that territory to return; their votes tipped the scale in favor of Germany. In order to achieve desired results, governments sometime abandon one-man-one-vote and limit the suffrage to only one nationality or to some selected representative. For instance, in the Cyprus plebiscite, which was arranged by the Greek Orthodox Church in 1950, ninety-five percent of the Greek population expressed their wish to be united with Greece.[143]

Governments also alter the demographic map of the territory in question through colonization or expulsion of indigenous people. In 1871, approximately one-half million Frenchmen were moved out of Alsace-Lorraine so that 300,000 Germans could be settled in the same region.

Similarly, during an interim period, before the proposed plebiscite in Tacna-Arica, Chile indulged in "Chileanization"[144] of the territory.

142. Hinks, *The Plebiscite in East Prussia and in Slesvig*, 14 NEW EUROPE 224 (1920).
143. 1954 U.N.Y.B. 94, U.N. Sales No. 1955.I.25.
144. The Chileanization was conducted through "the expulsion of Peruvian Priests, the

Therefore, Peru argued that since a plebiscite arranged under conditions existing in 1883 would be invalid in 1922, the year the plebiscite was to be held, the question of Tacna-Arica should be settled through arbitration based on historical grounds. The U.S. arbitration, however, only partially sustained Peru's charge of Chileanization and failed to invalidate the provision pertaining to the plebiscite. The arbitration held that charges of Chileanization were very serious but the charges were not sustained by credible and specific evidence. The arbitration also stated that article three of the Treaty, which subjected the territory to Chile's authority during the interim period, gave Chile the right to subsidize the colonization.[145] It is not clear, in light of this statement, whether proof of Chileanization would have clearly invalidated the plebiscite provision. Nevertheless, in the absence of article three, proof of Chileanization would have probably undermined the plebiscite.

The most important factor in the German victory in the Allenstein plebiscite was the German colonization. Initially, the Germans established small colonies in the midst of the Polish population; later, they developed them as towns and villages and made them predominantly German.[146] The Germans opposed the cession of Posen to Poland, claiming that the inhabitants of Posen were not indisputably Polish and that there were certain parts inhabited predominantly by Germans. The Allied Powers rejected the German opposition on the ground that the German presence was due to "Prussianization."[147] Because of the French fear of German colonization, a five or seven year residency requirement was proposed for participants in the Saar plebiscite.[148]

Indian population expulsion was also an issue in the Kashmir settlement. Sir Owen Disian, the United Nations representative for India and Pakistan, suggested that the settlement be negotiated by the parties and not settled by an impartial arbitrator. Pakistan responded that "such a course would enable India to continue to systematically alter the composition of the population of the state by expelling Muslims and settling non-Muslims in their place."[149]

During the plebiscite in South Cameroon, substantial argument took

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suppression of Peruvian newspapers, the denial to Peruvians of the right to assembly and display of the Peruvian flag, the boycott of Peruvian labors, the conscription of Peruvian young men in the Chilean Army, the banishment of Peruvian citizens and a general persecution of Peruvians through mob violence either tolerated or encouraged by Chilean authorities". *See* Villaran, *Chile's Policy of Aggression and Intimidation*, 24 CURRENT HISTORY 699 (1926).

145. W.J. DENNIS, *supra* note 25, at 313.

146. Griffith, *The German Victory in the Allenstein Plebiscite*, 16 NEW EUROPE 82 (1920).

147. J. MATTERN, *supra* note 6, at 141-42.

148. S. WAMBAUGH, *supra* note 30, at 61 n.65.

149. *The India-Pakistan Question*, 1951 U.N.Y.B. 341, U.N. Sales No. 1952.1.30.

place regarding the eligibility of the potential participants in the plebiscite. The United Kingdom delegation wanted to give the right to vote to both the French and Nigerian Cameroonians. The United Nations General Assembly, however, limited the vote to persons who were born in Southern Cameroon and persons who had one parent born there. In Northern Cameroon, the General Assembly decided that all residents of North Cameroon who were at least twenty-one years of age were qualified to vote in the plebiscite.[150]

In the context of the Falkland Islands, Gibraltar, and Belize, the countries of Argentina, Spain, and Guatemala respectively claimed that the population of those countries did not constitute "people" who were entitled to the right of self-determination, and declined to ascertain the wishes of those populations. Argentina and Spain were able to secure overwhelming support for their claim. However, in the context of Belize, its position was not sanctioned by the United Nations due to Guatemala's weak historical claim.

In 1975, following the International Court decision on Western Sahara, Morocco announced a march of unarmed civilians into Western Sahara. The purpose of the march was to change Morocco's demography because of fears that Western Sahara would oppose the union with Morocco in a referendum.[151] Polisario charged that Morocco had begun to colonize areas under its occupation by replacing Saharan people with unemployed Moroccans. It claimed the aim of Morocco was to thwart any action the United Nations might take to secure for the Saharan people the right of self-determination.[152] Later, the Implementation Committee of the Organization of African Unity (OAU) decided that only those Saharan listed in the 1974 census who were at least eighteen years of age were eligible to participate in the proposed plebiscite.[153]

These events clearly illustrate that, so far, the international community has failed to formulate rules regarding the eligibility of participants allowed to vote in a plebiscite where there is a demographic change in the territory. Various rules may be formulated. It is not known whether distinctions should be made between voluntary settlers and persons subject to a state-imposed scheme of colonization may be made. Also, it can not be determined whether a "critical date" could be selected or whether all the settlers and colonists should be excluded from the plebiscite, however ancient their origin may be.[154]

150. 1961 U.N.Y.B. 364, U.N. Sales No. 62.I.1.

151. 2 ENCYCLOPEDIA OF PUBLIC INT'L L. 292 (1981).

152. *Questions Relating to the Declaration on the Granting of Independence and to the International Trustee System*, 1978 U.N.Y.B. 862, U.N. Sales No. E.80.I.1.

153. *Trusteeship and Decolonization*, 1981 U.N.Y.B. 1196, U.N. Sales No. E.84.I.1.

154. G.A. Res. 637, *supra* note 109, at 4.

In the proposed referendum in the Eastern province of Sri Lanka, since colonization was accelerated soon after independence, some argue that "critical date" (cut-off date) should be 1947,[155] the year in which Sri Lanka gained independence. Some even argue that the critical date should be 1921. What about the refugees who have fled the island due to the ethnic conflict; are they entitled to participate? Since the refugees have not abandoned their home permanently, justice dictates that their wishes be ascertained also, but how can they express their wishes? It is not rational to expect the refugees to return to the island to vote before there is a lasting peace. In this context, it is interesting to note Turkey's argument in the proposed plebiscite in Cyprus in 1954. Turkey argued that more than 300,000 Turks, who emigrated for various reasons and who now lived in various parts of the world, should also have their vote counted.

B. Delimitation of the Area

Delimitation of the territory will result in a change in the composition of the voters, which will also influence the outcome of a plebiscite.[156] Proper territorial basis is difficult to find absent the danger of a political gerrymander.

Adolf Hitler was very skillful in conducting a plebiscite. After the annexation of Austria, he held a plebiscite in the whole Reich, including the newly-incorporated territory, to gain an approval that served to legitimize his annexation.[157] Dividing the British Cameroons into two units enabled the Northern part to merge with Nigeria. In Southern Cameroon, 233,571 people voted in favor of joining the Republic of Cameroon, and 97,741 voted in favor of Nigeria. In Northern Cameroon, 149,296 people voted affirmatively for joining Nigeria, and 97,659 voted to join the Republic of Cameroon.[158] The above figures indicate that if British Cameroon was taken as a unit, the entire country would have gone to the Republic of Cameroon.

Furthermore, if a plebiscite is conducted in Ireland regarding Northern Ireland, the result will be different than if a plebiscite is conducted in Northern Ireland alone. So far, there is no consensus in the international community in identifying the factors that should be taken into account in delimiting the area. Regarding the proposed referendum in the Eastern Province of Sri Lanka, the question arises whether the

155. Ponnambalam, *The India-Sri Lankan Peace Accord: The Tamils' Point of View*, 26 LOGOS 40 (1987).
156. G.A. Res. 637, *supra* note 109, at 29-31.
157. Petrie, *supra* note 85, at 116.
158. 1961 U.N.Y.B. 472, U.N. Sales No. 52.I.1.

Eastern Province, which is a sub-unit of the Tamil homeland, should be viewed as a separate unit for the purpose of the plebiscite. If that sub-unit can be viewed as a separate unit, why can not districts such as Amparai, which has predominantly Muslim inhabitants, be viewed as a separate unit, and, why should not the wishes of inhabitants of those districts be ascertained separately? Should not the Northern and Eastern Provinces, which are recognized by the India-Sri Lanka accord as the homeland of the Tamils, constitute a unit for the proposed plebiscites?[159]

In the delimitation of the plebiscite area, the doctrine of territorial inviolability plays a significant role. According to Johannes Mattern, the doctrine of territorial inviolability was born in 1344 in France during the proposed cession of Guyenne to England. According to the French, French soil could never be ceded without the consent of the entire nation. In the Treaty of 1359, not only the representatives of the territory to be ceded to England, but also the representatives of the whole nation were called upon to decide.[160] After the Franco-Prussian War, France solicited the support of neutral European countries against the cession of Alsace-Lorraine to the Germans on the principle of territorial inviolability.[161]

The theoretical foundation for this doctrine was based on Rousseau's theory of social contract; that is, every change of state territory, whether annexed or separated, is a change of the social contract. Therefore, the consent of all the interested people should be obtained. The French argued that, like the formation of a partnership, the acceptance of a new member to a club, or the dissolution of a society in which the consent of all the interested parties is obtained, the consent of the whole realm should be obtained in the cession of a French territory.[162]

When Greece proposed a plebiscite in Cypress in 1954, Turkey argued that because Cypress, which lies almost completely within the Turkish territorial waters, was a continuation of the Anatolian Peninsula with which it had very close geographic, historic, economic, and ethnic link. Thus, Turkey believed the wishes of the twenty-four million Turks on the mainland should also be ascertained.

In contrast, India replied to criticism against it for its armed action in Goa by stating that "there could be no question of self-determination

159. *See generally India-Sri Lankan Accord: Agreement to Establish Peace and Normalcy to Sri Lanka*, 26 INTERNATIONAL LEGAL MATERIALS 1175 (1987).

160. J. MATTERN, *supra* note 6, at 46-47.

161. *Id.* at 47, 53.

162. E. WITTMAN, *supra* note 7, at 76. In the annexation of territories, France did not adhere to this doctrine. As theoretical justification, the French said that these territories were not formed with the country from which it annexed on a free will basis, but rather under will tyrant.

by an Indian against his own country as there was no need for him to determine that he was an Indian."[163]

With respect to the proposed referendum in the Eastern Province of Sri Lanka, a similar argument can be advanced that there could be no question of self-determination by a Tamil in the Eastern Province against his own nation, because it need not be determined that he was a member of the Tamil nation. The Tamils maintain that the Eastern province is a part of the Tamil homeland whose integrity cannot be questioned through referendum or through negotiations.[164]

C. *Polarization of Rival Factions and the Violence Surrounding Plebiscites*

When a plebiscite is employed to settle a territorial dispute, interested parties often arouse their members' emotions through intense, hateful propaganda in order to gain maximum participation of their respective groups in the plebiscite process. The constituencies' passions are inflamed in the process. The campaigns are not limited to nonviolent tactics; they also include a reign of terror. The resulting animosity prevents the different factions from living peacefully, even after the plebiscite. Since the voters are the main players in a plebiscite, all interested parties normally engage in intimidation of the members of the rival factions in an attempt to frustrate their participation in the plebiscite. Sometimes, expulsion of the opposition from the territory concerned is also carried out.

As mentioned earlier, in Tacna-Arica, the Chileanization was not confined to nonviolent means, but also included every kind of irregular and violent means:[165] for example, banishment of Peruvian citizens and a general persecution of Peruvians through mob violence, which was either tolerated or encouraged by Chilean authorities. Moreover, the arrival of Peruvian exiles also contributed to the political confusion and chaos. A fair plebiscite was believed to be impossible because of riots in Tacna City; outrages against Peruvians; intimidation and maltreatment of Peruvians by two government-sponsored organizations, namely the Society of the Sons of Tacna and Arica and the Society of Tacna-Arica; expulsion of Peruvians from the plebiscite territory; and failure of the

163. M.A. DHUIRI, THE CONCEPT OF SELF-DETERMINATION IN THE UNITED NATIONS 217 (1965).

164. LIBERATION TIGERS OF TAMIL ELAM'S, THE NATION BETRAYED 5 (1988).

165. M. Deitrick, *Description of the Reign of Terror in the Disputed Provinces*, 24 CURRENT HISTORY 704 (1926).

courts to administer impartial justice.[166] Therefore, the proposed plebiscite in Tacna-Arica was abandoned as a means of settling the territorial dispute between Peru and Chile. As one author noted, "if evidence was needed of the futility of trying to award territory in accordance with the results of a plebiscite, the long and vain efforts of the two parties to fix the basis of such a plebiscite seem to give it."[167]

In the Allenstein plebiscite, the plebiscite area was a field of intense racial struggle in the days before the plebiscite.[168] In the countryside, which was predominantly Polish, German bands informed Polish sympathizers of their actions and threatened them with violence if they voted for inclusion within Poland. The plebiscitary police, which consisted of Germans, took no action when the Polish sympathizers were abused.[169] In Teschen, Spisy, and Orva, intense ethnic animosity between Poles and Czechs led to a breakdown of authority and eventually forced the cancellation of the proposed plebiscite.[170]

With respect to determining the relationship between Rwanda and Burundi, the different ethnic inhabitants of the two territories and the mutual distrust and hostility that existed between them would have discouraged the United Nations from holding a referendum.[171]

The proposed referendum in the Eastern Province of Sri Lanka encourages both the Sinhalese government and the Tamils to engage respectively in expulsion and decolonization through violent means.

D. Supervision of Plebiscites

Those who are responsible for the operation of a plebiscite can influence its outcome by setting rules in relation to the registration of voters, campaigning, symbols, location of polling stations, and by setting the timing of the plebiscite. Most importantly, the supervisory authority has an opportunity to rig the ballot. Therefore, the supervising authority should not have any interest in the outcome of the plebiscite in order to ensure the plebiscite's fairness.

During France's annexation of French territories, French generals, who occupied the plebiscitary areas, exerted their influence and pressure

166. M. Deitrick, *American Official Account of the Anti-Peruvian Campaign*, 24 CURRENT HISTORY 708 (1926).

167. L. JONES, 13 TRANSACTIONS OF THE GROTIUS SOCIETY 168 (1928).

168. Griffith, *The German Victory in the Allenstein Plebiscite*, 16 NEW EUROPE 82 (1920).

169. *Id.* at 84.

170. L.T. FARLEY, *supra* note 43, at 73, 136.

171. 1962 U.N.Y.B. 456, U.N. Sales No. 63.I.1. During the August, 1961 riots, hundreds were killed and thousands became refugees.

in various ways and obtained the desired results.[172] Most of the plebiscites under the Versailles Treaty were conducted under the Allied troops' supervision, not under the national troops in the disputed area. Plebiscites held in Eupen and Malmedy under the supervision of Belgium, to which it was to be annexed, drew similar criticism from many quarters.[173]

South Africa has also come under scrutiny for its supervision and proposals for plebiscites According to the "plebiscite" conducted by South Africa in South West Africa, the majority opted for union with South Africa. South Africa candidly said that the wish of the native population was ascertained in a "different way."[174] In 1971, the International Court of Justice[175] rejected South Africa's proposal to hold a plebiscite in Namibia due to South African participation on the procedural side.

In 1967,[176] sixty percent of the voters were in favor of maintaining colonial rule according to a "plebiscite" conducted by France in French Somaliland. Later, in a United Nation sponsored plebiscite in 1977, approximately ninety-nine percent of the people voted for independence.[177] The connection between the verdict in the plebiscite and the supervisory authority is clearly illustrated in the French Somaliland plebiscites.

Due to Polisario's doubt about Morocco's impartiality when accepting the proposed plebiscite in the Western Sahara, Polisario required that the Moroccan forces and administration be withdrawn and that a provincial administration be set up by the United Nations, with the presence of OAU and UN peacekeeping forces.[178]

In the proposed referendum in the Eastern Province of Sri Lanka,

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172. E. WITTMAN, *supra* note 7, at 45.

173. Dugdale, *supra* note 31.

174. In 1946, South Africa stated that it had consulted the wishes of the inhabitants of South West Africa regarding their future status. It said that the European population had unanimously expressed its wish to be included in the union through their medium of South West African Legislature Assembly. Furthermore, South Africa stated that the wishes of the natives had also been ascertained in an equally democratic, but rather different form, with due regard to their differing tribal organizations and customs. The result of the consultation was reported to be:

200,850	in favor of annexation
33,520	opposed to annexation
56,790	could not be consulted

However, the General Assembly rejected this "plebiscite" on the grounds that the inhabitants of South West Africa have not yet secured the political autonomy or realized the political development, which would enable them to express an opinion on such an important question such as the incorporation of their territory. 1946 U.N.Y.B. 208, U.N. Sales No. 1947.1.18.

175. Legal Consequences for the Status of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 179 (opinion of June 21).

176. 1967 U.N.Y.B. 664, U.N. Sales No. E.68.I.1.

177. 1977 U.N.Y.B. 870, U.N. Sales No. E.79.I.1.

178. 1981 U.N.Y.B. 1173, U.N. Sales No. E.84.I.1.

the Sri Lankan government proclaimed its opposition to the merger of the Northern and Eastern Provinces and declared that it would campaign against such a merger. The Indian government's role has been transformed from mediator to a party in the conflict, as illustrated by the exchange of letters in the India-Sri Lanka Accord and armed conflict with the Tamils. If a plebiscite is held under these governments, partisan politics will rob it of authenticity and legitimacy.

Moreover, the presence of Indian armed forces is not conducive to a fair plebiscite. Switzerland protested the annexation of Savoy and Nice with France in 1860 by stating that the "occupation by foreign agents would be an unfair coercion of the free expression of the wishes of the population. . . ." This view was echoed in a United Nations Resolution which declared that "in order that the people of Namibia should be enabled freely to determined their own future, it is imperative that all South African armed forces be completely withdrawn so that free elections under the supervision of the United Nations may be held. . . ."[179]

VI. CONCLUSION

Due to practical problems such as the composition of voters, delimitation of the area concerned, supervision of the plebiscite, polarization and violence between the rival factions, and theoretical problems in relation to the ideals of democracy and the right of self-determination, the employment of a plebiscite in the context of demographic change is neither the wise, nor the right decision. The lack of support for the requirement of the plebiscite in international law reaffirms this view.

179. G.A. Res. 32/9, 16 U.N. GAOR (57th plen. mtg.) at 488, U.N. Doc. A/32/2.7 and Add. 1-3 (1977).