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INDIANA UNIVERSITY
BLOOMINGTON, INDIANA, UNITED STATES

O'MEARA LECTURE
7 SEPTEMBER 2022

The Hon. Michael Kirby AC CMG

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Abstract

“Self-determination” takes its meaning from its context; likewise the word “people”. This O’Meara Lecture concerns self-determination of peoples referred to in UN Charter and other public law. Although controversial, the idea has a long history with many resonances with the United States of America which the author describes. It is relevant to the Ukrainian conflict, as recognised by President Putin; although not favourably. International law has not developed clear principles or institutions to give the concept effect. The Lecture describes the work of an expert group of UNESCO (1985-91), which he chaired, attempting to define who constitute a “people” and how their self-determination might be achieved. Is it relevant to the present conflict in Ukraine? Does it apply to Indigenous peoples living in modern states? Is it a potential solution or part of the problem with “people” discontented with their governance?

THE UKRAINE INCURSION OF FEBRUARY 2022

In February 2022, just before the Russian Federation invaded Ukraine, President Vladimir Putin made a speech seeking to justify the reasons for this incursion. Under the UN *Charter*, an attack by a member country of the United Nations is forbidden. There are only two exceptions recognised by international law. The first is pursuant to a resolution of the Security Council

* Based on address given in Australia 2022.

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under Ch VII of the UN *Charter*. Absent in that case, the second was pursuant to the right of self-defence. Russia claimed the latter, instancing the encroachment to Russian territory by adjacent territories. It claimed that Ukraine was threatening its territory by pursuing an application to join the North Atlantic Treaty Organisation (NATO).¹

No attempt was made by Russia to secure support or approval for its invasion from the Security Council of the United Nations under provisions of the United Nations *Charter*. According to President Putin, the incursion was not a ‘war’ but a ‘special operation’.

The resort by Russia to force of arms, in February 2022 and the immediate invasion deep into the heartland of the Ukrainian nation, was a new development in Europe. An immediate meeting of the UN General Assembly was convened. This was not subject to a ‘veto’ by Russia.

In the view of Russia, expressed by President Putin, the foreshadowed application by Ukraine for NATO membership and the earlier intrusions by the Ukrainian military and political leadership against the rights of the Russian-speaking people in borderland territories, all represented an impermissible danger to the Russian Federation and its people. This could not be tolerated by their government. President Putin therefore claimed that Russia was “liberating” Ukraine from “Nazis and drug addicts” in the Ukrainian Government.

¹ Stuart Kaye, “The Russian Invasion of Ukraine in International Law” (2022) 96 ALJ 293 at 294-5

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

In a televised address on 21 February 2022, to the Russian nation on the eve of the invasion, President Putin invoked the early history of the USSR. He elaborated an explanation for the creation of Ukraine as a separate nation state. He described debates in Russia of the early 1920s by reference to the rights of *peoples to self-determination*:

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

USSR in 1991, this mistake became absolutely obvious. We are going to show you what real decommunization means for Ukraine. In the mid 1980's ... the national questions and unfulfilled aspirations of the people of the Union became primarily the growing appetite of local elites. The leadership of the CPSU [resulted in] verbiage about restoring the Leninist principle of national *self-determination*... The resulting collapse of historical Russia under the name of the USSR is on their conscience.”²

In short, Ukraine was described by President Putin as a long-time undeserving beneficiary of an undeserved “dowry” from the Russian Empire and then from the Soviet era. Ukraine’s government had indulged in “outright robbery of the citizens [of Russia]...”³

“*People* who consider themselves Russians and would like to preserve their identity, language [and] culture, were made clear that they are strangers in Ukraine. Russians are expelled from schools, from all public spheres, [even] ordinary shops... There are “reprisals against the Ukrainian Orthodox Church of the Moscow Patriarchate”.

President Putin also claimed that, after Russia’s seizure of Crimea in 2014, the inhabitants of the peninsula had “made their free choice – namely to be together with Russia”. Moreover, he added “We have direct evidence” that

² Message from the President of the Russian Federation February 20, 2022, 22:35 (Vladimir Putin, <http://en.kremlin.ru/events/president/transcripts/67828>).

³ President Vladimir Putin, broadcast 21 February 2022, *loc cit*.

“aggressive actions [by Ukraine] are carried out “with the support of foreign intelligence services.”⁴

President Putin reported his “fear” of the presence of “weapons of mass destruction” in Ukraine and also of the “danger to Russia of NATO’s potential military operations”. “Ukraine’s entry into NATO [would be] a direct threat to Russia’s security”. He complained about the “very reserved” response he had received to a question he had posed to President Clinton of the United States in the 1990s on “How would America feel about admitting Russia into NATO?” He complained about the United States’ withdrawal from the *Intermediate Range Nuclear Forces Treaty* and other nuclear weapons limitations agreements. He demanded fidelity to the Minsk package of measures (2014-5) which had been designed to settle the situation in Donbas, envisaging adjustments to the border between Russia and Ukraine. He demanded “immediate cessation of hostilities” on the part of Ukraine, targeted at Russia. Finally, on the eve of invasion, he expressed his confidence in the support of the *citizens of Russia* and “all the patriotic forces of the country” for the course that he was proposing. All too quickly that course became evident following the Russian military’s incursion into Ukraine on 21 February 2022.⁵

What is the right to self-determination? Who are a “people” to enjoy such a right? How does the demand for fulfilment of that right respond when it would

⁴ Ibid *loc cit.*

⁵ Justin Glyn, “The Russian view on Ukraine: and International Law Perspective”, *Eureka Street*, Vol. 32, No.1 (8 March 2022)

occasion change to bordering territory, reflected by the creation of a nation states enjoying national sovereignty and recognition, as such, amongst the international community? How does international law today offer any guidance, or solution, for the peaceful resolution of clashes between nations when one is relying on self-determination of peoples and another is relying on its historical right to national sovereignty? And is resisting resort to arms and the unilateral attempt to alter national borders to reflect the alleged wishes of a “people” claiming self-determination and independence from its present rulers enforceable and if so where?

HISTORICAL ORIGINS OF SELF-DETERMINATION

One of the first explicit references to the concept of self-determination of peoples appeared in an important instrument justifying the severance of links between peoples formerly bound in allegiance to a common nation state. This was in the United States *Declaration of Independence*.⁶ That *Declaration* was, adopted on 4 July 1776. It was authored by a committee of five American colonists led by Thomas Jefferson in the then British colonial settlements in North America. They claimed political independence from Great Britain. Drawing upon the philosophical writings of John Locke, that *Declaration* asserted:

⁶ *American Declaration of Independence*: See Carl Becker, *The Declaration of Independence* (1922) Vintage 1958. Cf. K.L. Hall and Ors (editors) *The Oxford Companion to the Supreme Court of the United States*, New York, 1992, OUP, 222-223.

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

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

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

Exceptions soon emerged to the notion of “self-determination”. The United States of America asserted itself of governmental power over the former Spanish colonies in Guam, Puerto Rico, the Philippine Islands and Cuba. The will of those people to be governed by the United States was not, at that time, consulted by the Government of the United States. However, as that country moved to enter the Great War in Europe (1914-1918), President Woodrow Wilson revived the original American commitment to the self-determination of peoples expressed in the *Declaration of Independence*. Specifically, Wilson did so in the *Fourteen Points* that were expressed on 4 July 1918, as a basis for achieving peace and diplomacy to bring about an end to the brutality of the Great War.⁷

According to Wilson’s statement, new colonial policies that he proposed were to be based on the “interest of the populations concerned”:⁸

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

⁷ W. Wilson, “The Fourteen Points”. Published as Appendix VI in Sir Frederick Pollock, *The League of Nations*, Stevens, London, 1920 at 236. See Point 1 (p 237).

⁸ *Ibid*, Point 5 (238).

In the aftermath of the War, the *Fourteen Points* were invoked in connection with many borderland disputes involving Russia,⁹ Belgium,¹⁰ France and Alsace-Lorraine;¹¹ Italia Irredenta;¹² Austria-Hungary;¹³ Rumania; Serbia and Montenegro;¹⁴ Turkey and the Dardanelles.¹⁵ It was declared that each of these territories, with unresolved disputes with its neighbours, should resolve them by reference to the same principles. Likewise, the same principles should be applied to newly freed Poland “which should include the territories inhabited by undisputedly Polish populations and whose political and economic independence and territorial integrity should be guaranteed by an international covenant.”¹⁶

When it came to enforcing the rights of peoples, Wilson resorted to poetic language, expressing his faith in a League of Nations that he proposed to the warring nations. The *Covenant* of the League of Nations was adopted by the victorious Allies in 1920. However, US ratification failed to gain the approval of the US Senate. Effectively, this spelt an end to Wilson’s grand ideas because they had lost their principal disciple and advocate. The League of Nations without the United States of America was, quickly shown to be powerless to uphold the *Fourteen Points* or the *League Covenant*.

The Second World War concluded with the unconditional surrender of the Axis powers in 1945. The vanquished states faced an earlier declaration of

⁹ Ibid, Point 6 (“Russia”)... “The treatment accorded Russia by her sister nations in the months to come will be the acid test of their good will, of their comprehension of her needs as distinguished from their own interests, and of their intelligent and unselfish sympathy.

¹⁰ Ibid, Point 7 (238-239).

¹¹ Ibid, Point 8 (239).

¹² Ibid, Point 9 (239).

¹³ Ibid, Point 10 (239).

¹⁴ Ibid, Point 11 (240).

¹⁵ Id, Point 12 (239-240).

¹⁶ Id, Point 13 (240).

the Allied war aims, expressed by President F.D. Roosevelt (US) and Prime Minister W.S. Churchill (UK) in the *Atlantic Charter*.¹⁷ This was agreed aboard *USS Augusta* on 9 August 1941, in Placentia Bay, Newfoundland. It was made public on 14 August 1941. It contained a number of principal clauses, three of which are presently relevant:

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

Churchill was hesitant about some of these principles because of the feared implications (ultimately realised) for the survival of the British Empire. However, Churchill had no option but to sign the *Atlantic Charter*. In turn, the *Atlantic Charter* influenced the language and assertion of key provisions of the UN *Charter* of 1945.¹⁸

The opening clauses of the UN *Charter* reflected the *Atlantic Charter*. The introductory words, which likewise reflected the writings of John Locke, made clear (as did the *US Constitution* earlier and the UN *Charter* later) that the foundational principle of the document was to be the will of the people affected. The opening words of the *US Constitution* state:¹⁹

¹⁷ Joint declaration (*Atlantic Charter*) announced by President Franklin D. Roosevelt and Prime Minister Winston Churchill, Washington, 24 August 1941. See J.P. Lash, *Roosevelt and Churchill 1939-41*) W.W. Norton and Co, New York, 2006, 400.

¹⁸ June 26, 1945; 59 Stat.1131, TS993; 3 Bevans 1153, entered into force October 24, 1945.

¹⁹ US Constitution, Article II, Section 2. See K. Hall above n.6, 955 at 958.

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

The *Charter* of the United Nations asserts similar notions in language largely identical:²⁰

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

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

In Article 1 of the *Charter*, expressing the “Purposes” of the United Nations, the following was included:

²⁰ UN *Charter*, Articles 1 and 2.

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

All members of the United Nations agreed, in the terms of the *Charter*, to: “settle their international disputes by peaceful means They are required to commit themselves to:

“Refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²¹

Specifically, nothing in the *Charter* was to be interpreted as authorizing the United Nations “to intervene in matters which are essentially within the jurisdiction of any state.”²²

So what is the meaning and ambit of “self-determination”? What are the several rights of “peoples”, the rights of “members”, and the rights of the state parties to the *Charter*? How can the rights and obligations that include “respect for human rights and fundamental freedoms of all”, as addressed to individual human beings, be reconciled with the “right of self-determination of peoples”? What is to happen if a “right” of self-determination, invoked; under the *Charter*, could endanger the “principle of the sovereign equality” of all members, where that is contested by a member state within whose

²¹ UN *Charter*, Article 2.4.

²² UN *Charter*, Article 2.7.

borders “peoples” are found, who are entitled to self-determination? In the event of a dispute over the “right to self-determination”, which organs and procedures of the United Nations or of member states shall have the power of decision and enforcement? None of these questions is answered with specificity in the UN *Charter*. Nor are they answered explicitly in any subordinate instruments made under the *Charter*.

The *Universal Declaration of Human Rights* (UDHR) was formulated later by a committee chaired by Eleanor Roosevelt, widow of the late US President.²³ The UDHR was adopted by the Third Session of the General Assembly at a meeting held in Paris on 8 December 1948. The acceptance of the UDHR without a single opposing vote, and almost unanimously, was pronounced adopted by the President of the General Assembly (Dr H.V. Evatt, Australia).

The UDHR was not, as such, a treaty that could bind UN member states, to act in accord with, and observe, the stated rights and liberties. However, soon after the UDHR was proclaimed, the UN General Assembly adopted and opened for ratification, a number of international treaties. These included the *International Covenant on Civil and Political Rights*,²⁴ and the *International Covenant on Economic, Social and Cultural Rights*.²⁵ In the first article common to each of these treaties, exceptionally, there is included an article, expressed in identical terms, referring to the right of peoples to self-determination:

²³ Adopted 10 December 1948; GA Res 217A (111); UN res A810 at 71 (1948). See K. Hall, above n 11.

²⁴ ICCPR, adopted 16 December 1966, entered into force 23 March 1978, GA Res 2200 A(XXI) undoc/6316 (1966); 999 UNTS 171, Martin and Ors, 29..

²⁵ ICESCR in *United Nations, Human Rights: A Compilation of International Instruments* (Vol.1, First Part, 7); 993 UNTS No. 14531 (1976).

Article 1:

- (1) All *people* have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development;

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

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

UNESCO’s EXPERT GROUP

In 1980, I was appointed to be a member of the Australian National Commission for UNESCO. This is a statutory body created by the Australian Parliament. In 1983, I participated in the Australian delegation to the General Conference of UNESCO held in Paris late that year. The leader of that delegation was the Hon. Gough Whitlam, past Prime Minister of Australia. The conference occurred just before the United States and the United Kingdom (and later Singapore) withdrew from UNESCO and suspended payment of their contributions as member states. Specifically, at the General Conference, the United States delegation moved for the deletion of references to UNESCO's programmatic items referring to peoples' rights.²⁶ The US delegation cited concern that the "rights of peoples" would become a cover to condone the anti-libertarian activities of governments and states, contrary to the human rights of individuals but condoned by the UN because done in the name of poorly defend peoples' rights.

In the result of this division of opinion, an expert group was established by UNESCO to elucidate the notion of "peoples' rights" and specifically the peoples' right of self-determination. The chair of the first meeting of the expert group was Judge Kéba M'baye of Senegal, a judge (later President) of the International Court of Justice. I was appointed a member of the expert group. The second meeting of the group elected me to be chairman. The third meeting, which was held in Budapest, Hungary, elected me to be the rapporteur, with responsibility to draft the group's report to UNESCO on this issue.²⁷

²⁶UNESCO, Australian delegation report, noted in M.D. Kirby, "UNESCO and Courage", 4 November 1996.

²⁷ The UNESCO Secretariat officer was Janusz Symonides, born 1920, died Poland 2020. Director UNESCO Division of Human Rights, Democracy, Peace and Tolerance 1989-2000.

The report of the meeting identified its mandate, including the “examination of provisions relating to the right of peoples in existing universal international instruments, regional instruments and national constitutions. It also included an analysis of the provisions of earlier UNESCO instruments relating to the “preservation, safe-guarding and development of cultures and cultural identities”. The reference to “culture” was a reminder of the primary relevant ambit of UNESCO under its constitution.

In these deliberations a recommendation that had been adopted by the expert group addressed the content of the word “peoples” and the content of the “right of self-determination”. The group provided a “description (but not a definition)” of a “people” for this purpose. It concluded that a “people” in this context comprised:²⁸

“1. A group of individual human beings who enjoy some or all of the following common features:

- (a) A common historical tradition;
- (b) Racial or ethnic identities;
- (c) Cultural homogeneity;
- (d) Linguistic unity;
- (e) Religious or ideological affinity;
- (f) Territorial connections;
- (g) Common economic life;

²⁸ UNESCO, Expert Group on Rights of Peoples to Self-Determination, Report 1991.

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

The foregoing description has proved influential. It has been included in subsequent analyses of this concept.²⁹ Against the background of this “description” and an explanation of the work of the UNESCO expert group, it stated a number of additional conclusions:

1. The concept of peoples’ rights is now established by universally recognised international law. Its existence cannot now validly be controverted;

²⁹The UN Special Rapporteur Martinez Cobo in a study on discrimination against Indigenous populations and also by UN Independent Expert on the Promotion of Democratic and Equitable International Order, Alfred de Zayas later relied on the “Kirby definition” in the report to the UN General Assembly (A/69/272) undocs.2014.08.07 – See https://www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/906-Peoples%27_Rights_and_Self_Determination_-_UNESCO_Mtg_of_Experts.pdf.

2. Some peoples' rights are universally accepted. These include the peoples' rights to existence, the peoples' right of self-determination and other rights;
3. There is however a continuing and legitimate debate about the precise content of still other rights claimed to be peoples' rights.
4. The concept is a dynamic one which is in the process of elucidation and clarification;
5. UNESCO is an appropriate forum for such elucidation and clarification, particularly because of the direct relevance of peoples' rights to cultural identity, educational practices and other established areas of UNESCO's competence."

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

1. "Internal self-determination, especially democratic forms of government";
2. The implications of peoples' rights to a safe global environment for such issues as the so-called Greenhouse Effect (sic) and global warming;
3. The responses to disasters of transnational significance, such as had occurred at Chernobyl; and
4. The implications of peoples' rights to peace.³⁰

³⁰ 545-89 (Conf 602/7).

Like a State, “a people” can only act through human agency. The rules governing the representation of State in international law are well known. But those relating to the representation of peoples are “poorly documented”.³¹ There was at this time a body, the Unrepresented Nations and Peoples Organisation (UNPO). It was an international civil society organisation. It included representatives of some “peoples” who then (unknown to themselves) were on the brink of achieving “self-determination”.

The UNESCO expert group examined the foundations (philosophical, political and legal) that underpinned the recognition and protection of the “rights of peoples to self-determination”. This led to an exploration of several considerations already apparent, including “cultural identity”; the concept of “peoples in conditions of extreme poverty”; research on self-determination of Indigenous peoples; exploration of the relationship between peoples’ rights and human rights; and how the former could learn lessons from evolution of the latter.³² Some concern was expressed about the potential dangers of weakening the universality of human rights, particularly the global character and indivisibility of human rights. Under the UN *Charter*, the UDHR and developing international law, an obligation had begun to emerge requiring States to “practise tolerance and live together in peace with one another as good neighbours”. Did such a principle (named in Australia as “multi-culturalism”) apply worldwide? And did “self-determination of peoples” endanger this concept by which self-determination was expressed not by adoption of separate statehood; but by adjustment to living within the one

³¹ Ibid, 7.

³² J. Crawford, *The Rights of Peoples*, 1988.

state, including by the adoption of federal arrangements or the recognition of special protected rights of minorities within a larger entity.

The rights of peoples was controversial in February 1990 when the report of the UNESCO experts was released. The recent death in Russia of Mikhail Gorbachev reminds us of those tumultuous times. That year also witnessed dramatic developments within and around the perimeter of the USSR. The achievement or restoration of national independence of many States on the breakup of the USSR quickly overtook the intellectual ruminations of the UNESCO experts and their call for further examination of the foregoing issues.

The developments of the modern borders of Ukraine followed, in part, historical predecessors, linguistic majorities and, in one case, a personal decision of a political leader with power to impose its implementation. Nikita Khrushchev was, at this time, the leader of the USSR. He and his family had moved from Russia to Ukraine where he grew up and he first became an official of the CPSU. Allegedly, in order to celebrate the 300th anniversary of a Ukrainian saint, Khrushchev decided that Crimea, despite earlier historical, ethnic and cultural links to Russia, should be assigned to Ukraine in an adjustment to the internal borders of the then USSR.³³ No referendum or plebiscite was held in the Russian or Ukrainian SSRs or elsewhere in the USSR, to endorse or accept this “gift”. President Putin, in the pre-invasion speech, to which reference has been made declared his bewilderment about what Khrushchev must have been thinking when he made such a gesture to

³³ V. Putin, Broadcast address to the Russian people on 22 February 2022. See above n.7.

Ukraine. At the time, it may have been considered a relatively insubstantial gesture, in the context of the practical, political and legal political unity of the USSR.

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

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

CONCLUSIONS: A CONCEPT UNDER DEVELOPMENT

In the international crisis concerning the territorial integrity of Ukraine, there have been few references to the peoples' right of self-determination in either side of the conflict. Consideration of this concept by the UNESCO expert group, has been overlooked or ignored. UNESCO is a specialized agency of the United Nations not basically political. Its purpose was to "advance peace, sustainable development and human rights by facilitating collaboration and dialogue among nations".³⁴

Since 1945, large numbers of claims of self-determination have been advanced. Some only have been resolved peacefully and satisfactorily. Examples well known to Australian people include:

- * The self-determination of the First Nations People of Australia itself, within a context of the Australian national polity. Undoubtedly, they come within the literal ambit of the nation of a "people". But is this the context of the United Nations? Or is that notion a formula to cause conflict alien to the purposes of the United Nations?;
- * The struggles for self-determination that Indonesia has faced, including in East Timor and potentially Papua;
- * The claim against Papua New Guinea itself by the people of Bougainville;
- * The claim for self-determination by the separatist forces in north Malaysia and in the southern province of Thailand;
- * The claims to independence and self-determination by several minority ethnic groups in Myanmar (Burma);

³⁴ UNESCO Constitution, 1945.

- * The claims to self-determination of the Rohingya people against Myanmar and Bangladesh;
- * The claims to self-determination in the Indian Sub-continent that occasioned the creation of Pakistan, its border conflicts with India over Kashmir, and the development by both states of nuclear weapons;
- * Conflicts in Afghanistan, including between Afghani peoples and Hazaras;
- * The many often still unrequited claims for self-determination in Arab and adjacent lands, including by the Kurds, unrequited since 1918 and by minority groups in Iraq, Syria, the Palestinian people, and minorities in Iran and Iraq;
- * The Armenian minority in Turkey;
- * The Chechen, Georgian and Russian-speaking minorities in Russia;³⁵
- * The current claims of people seeking self-determination from France in Corsica;
- * In the United Kingdom, the claims of Scottish independence, the 'Troubles' in Northern Ireland and also demands for measures of autonomy for the people in Wales. There are many more claims of this kind in former colonial lands; the demands of Quebec and Native American people for self-determination and so forth; and
- * In recent days it has even been suggested that the United States of America can now be seen, not as a united democratic single country but as parts of its territory made up of "white" conservative peoples and parts that are made up of a multicultural mixed ethnicity who do not share the will to remain together as a united polity. Self-

³⁵ Ukraine Donbas Russian speaking region.

determination applies in terms to all peoples. But does not apply to the United States itself?.

The main point of this O'Meara Lecture has been to draw attention to the root causes of many examples of hostilities in Ukraine that may be found in the demand that people living in our world, including in the Ukraine borderlands who speak a non-national language; share the non-national history; and who identify with the non-national religion, culture and national pride, should, in defined circumstances, enjoy a right to become (or to be restored to) the Russian nation. So much may be explained by reference to the right of self-determination of the peoples. Clearly the resolution of such a claim, particularly on the part of a P5 member of the Security Council of the United Nations with the world's largest nuclear arsenal must depend not on military conquest by force of arms. It must be resolved, if there is time, by a peaceful, authenticated and principled solution based in international law.

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

Ensuring that the contemporary weapons of mass destruction (particularly nuclear weapons) are quickly brought under the effective control of law, necessitates prompt action on the part of our species to dismantle the nuclear, chemical and other stockpiles without delay. It requires resort to principles and peaceful means of resolving such disputes. Given the self-evident risks, a response should not lie beyond the capacity and action of global human society. In searching for the solutions, an ingredient will probably involve consideration of the people's right of self-determination that is evident in many of the dangerous flashpoints of conflict in the world today.