CHAPTER NINE
PRACTICE IN PEOPLES’ RIGHTS

Outline

The last four chapters examined the legitimising effect of nationalism and liberalism on the drafting of international instruments and the decisions of courts and tribunals. This final chapter will extend this to international legal obligations. The theme throughout this work is that the law of self-determination is defined by the relationship, and indeed the tension between the doctrines of nationalism, liberalism and international law. In this “law”, self-determination is appealed to as an alternative source of legitimacy to international law and this can be for two reasons: either to support legal principles and obligations or to challenge them. The various aspects and categories of the law of self-determination can take one or both of these roles. This means to some extent that the law of self-determination is a contradiction in terms.

If self-determination is largely a doctrine about the legitimacy of legal rules, it raises the question of the extent to which a law of self-determination is actually concerned with creating legal obligations. Is self-determination, at the end of the day, basically a critique of international law or does it actually establish principles and rules of its own? Is it about legal status or political legitimacy or are the two inseparably interconnected? This chapter will examine the content of the right in relation to five categories to which it may or may not apply: 1) colonial peoples; 2) the peoples of states; 3) minorities, indigenous peoples and groups within states; 4) peoples under foreign domination or alien subjugation; and 5) populations under international territorial administration.

1. Colonial Peoples

By all accounts the self-determination of the peoples of trust, non-self-governing and mandate territories appears to be the doctrine’s most successful legal application. There seems to be a general consensus that
colonial self-determination is now part of international law. This view is perhaps best summed up by the International Court of Justice in the Namibia Opinion (1971):

[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all ‘territories whose peoples have not yet attained a full measure of self-government’ (Art. 73). Thus it clearly embraced territories under a colonial régime... ...the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.

The Court has subsequently expanded on self-determination in this context as a right of peoples of non-self-governing territories to independence and as a right *erga omnes*.

Colonial self-determination was undoubtedly a challenge to the legitimacy of both colonial government and the concept of trusteeship in the Trust and Non-Self-Governing systems, and as such it has been very successful. States with non-self-governing territories have all accepted the applicability of the principle of self-determination. An indication of its success also is the fact that one colonial category, the trust territory no...