RESPONSIBILITY OF THE UNITED NATIONS FOR BREACH OF RULES OF SELF-DETERMINATION

A Case Study of Eritrea and the United Nations

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Dedicated to my sister Alamaz Alazar Araya who is a martyr of the Eritrean armed struggle for self-determination and independence.

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ABSTRACT

The thesis argues for holding the United Nations responsible for violation of rules of self-determination in the same manner it has been responsible for infringement of humanitarian norms. The position stems from the decision of the International Court of Justice that held the United Nations has duties corresponding to its rights. By the analogously application of the rules of state responsibility, the United Nations is responsible for breach of rules of self-determination in the de-colonization process of Eritrea. The responsibility of the organization emanates from an imposition of a lopsided resolution. The resolution gave more weight to political and strategic interests while setting aside 'genuine and free will' of the people of Eritrea. The United Nations is also responsible for omission of its duty when Ethiopia abrogated the federal scheme in violations of international law. The thesis concludes by saying the world organization has legal and moral duties to make reparation to the people of Eritrea.

RÉSUMÉ

La thèse soutient la responsabilité l'Organisation des Nations Unies (ONU) pour la violation de règles d'autodétermination de la même manière qu'elle l'a été dans le cas de la violation de normes humanitaires. L'opinion exposée s'appuie sur une décision de la Cour Internationale de Justice qui a déclaré que l'ONU a des obligations au même titre qu'elle a des droits. En appliquant par analogie les règles de la responsabilité étatique à l'organisation, on peut conclure à la responsabilité pour la violation de règles d'autodétermination pendant le procée décolonisation de l'Érythrée. La responsabilité de l'ONU découle du fait qu'elle a imposé une solution inadéquate parce que basée sur un plan fédéral accordant plus d'importance à des intérêts d'ordre politique et stratégique et écartant la « volonté libre et réelle » du peuple érythréen. On pourrait également conclure à la responsabilité de l'ONU pour son omission d'agir lorsque l'Éthiopie a annulée son plan fédéral qui était pourtant parrainé par l'organisation. La conclusion de la thèse est l'ONU a à l'égard du peuple érythréen une obligation morale et légale de réparation.

TABLE OF CONTENTS

INTRODUCTION

The current stage of development of international law warrants an argument to the effect that the United Nations is legally responsibile for acts in breach of international law. The line of reasoning is supported by doctrines and international practise pursued since the birth of the the United Nations. This has been evident in the field of international humaniterian norms. But, the logic still goes good in other releam of activity of the organization. Relevantly, the organization is legal responsibile for violation of international rules of self-determination. The thesis argues the United Nation is responsibile for breach of rules of self-determination for failing to properly de-colonize the former Italian colony-Eritrea.

The fundamental features that distinguish Eritrea from other colonies have been summarized into three. First, Eritrea was the only Italian colony never allowed independence or the exercise of self-determination. Eritreans managed to exercise the right of self-determination only after they had won the war. Second, the Eritrean armed struggle for independence is the longest armed struggle in Africa and very costly. It left hundreds of thousands causalities and a war torn country. It also caused the emigration of over half a million of the population. Finally, the Eritrea question was the only issue of international relationship on which the two superpowers colluded by taking turns supporting Ethiopia's claim over Eritrea.[1]

Though the long dreamed sovereignty has been achieved after the people of Eritrea presented to the international community a war won independence in 1993, the path to the creation of the nation was hard and unbearably costly. The unfortunate situation begs some

[1] Okbazgi Yohannes, Eritea -A Pawn in World Politics (Gainseville: University of Florida Press 1991) at 1.

serious and difficult questions. Could this tragic history have been avoided had the UN properly undertaken the task of determining the future of the colonial state of Eritrea? Should the unfortunate history of the people of Eritrea simple left to join the jargons of history or some body should be called ansewerable for it? Should the United Nation be held responsible for failure to properly determine the future of the colony?

The paper will try to present the responsibility of the United Nations for failiing to properly handle the process of the de-colonization of the Eritrea. It will try to show the improper act of the United Nations saw a seed of conficit that unfolded in the region of for the last thiry 40 years. It is going to argue that the UN failed to meet the obligation incumbent up on it by the rules of self-determination. It will explore the responsibility of the United Nations for denying the Eritrean people the right to self-determination. As an organ entrusted with mandate to promote international peace and the right of self-determination, the United Nations is accountable for failing to meet its duties, the paper will assert. Consequently, it will try to make the United Nations accountable for the consequences of its illict acts and call the organization make reparation.

For this end, the thesis will have three parts. The first part of the paper will try to explore the responsibility of the United Nations for breach of international obligation. The paper will deduct the responsibility of organization from its legal status in the international plane. It will argue that the fact that the United Nations has international legal personality makes it vulnerable to international responsibility for breach of rules of international law including rules of self-determination. It will proceed to show the responsibility of the United Nations by application of regime of state responsibility in analogy. Here, it will underscore that the United Nations will be accountable for breach of rules international law if two

elements are fulfilled a breach of international obligation and attribution of the act to the organization.

The second part of the paper will analyze the responsibility of the United Nation for breach of rules of self-determination in the de-colonization of the former Italian colony Eritrea. It will show the United Nation failed to meet the demand of the rules of self-determination in two regards. First, the section will present the imposition of federal arrangement on the people of Eritrea. Second, it will show a breach of rules of self-determination by the United Nation's for failing to act when the Ethiopian governments unilaterally and illegally annexed Eritrea in flagrant violation of the United Nations resolutions. To this end, the argument will be buttressed by relevant historic and political events leading to the adoption of Resolution 390 V (A) that propose federation of Eritrea with Ethiopia. The paper will reveal that political and strategic interests have overshadowed "genuine and free" consent of the people of Eritrea in the adoption of the Resolution 390 V (A). An attempt will be made to discuss the responsibility of the United Nations for violation of self-determination in reference to the contemporaneous international legal norms. Accordingly, references will be made to the treaty and customary laws of determination rules as they stood in the adoption period of resolution 390 V (A) i.e. 1950 as well the abrogation of the resolution and aftermath.

Eventually, the paper will raise the question of reparation that follows breach of rules of international law. It will submit that the United Nations is duty bound to make reparation for damages sustained because of breach of rules of self-determination. The paper will conclude by recommending ways of undoing past wrongs by the United Nations.

CHAPTER I

I. THE RESPONSIBILITY OF THE UNITED NATIONS FOR BREACH OF RULES OF SELF-DETERMINATION

The law of self –determination is the outcome of successive United Nations legal instruments though it has even evolving for long. The principle of self-determination is traced back as far as ancient Greece and Rome and began as an expression against "all forms of subjugation and bondage."[2] The core of the principle lay in the American and French Revolutions insistence that governments should be responsible to the people.[3] It has been evolving as corollary to the notion of nationalism. However, it is the United Nations laws that elevated the principle into an international legal standard. The adoption and coming into effect of the international human right covenants and regional human right instruments helped in clarifying and concretizing the concept of self-determination.

The principle of self determination is one of the " most commonly and passionately expressed notion of international relationship."[4] It occupies a major place in the post world war international law and practice.The principle of self-determination has been enunciated in a number of United Nations' conventions and resolutions. As articulated by Doehring "the sheer number of resolutions concerning the right of self-determination makes their enumeration impossible."[5] In the United Nations' de-colonization regime, the most invoked instruments have been the United Nations Charter; Resolutions 1514(XV) entitled

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[2] Bereket Habte Selassie, "Eritrea and the United Nations" in Eritrea and the United Nations and Other Essays (New Jersey: The Red Sea Press Inc., 1989) at 73. [**hereinafter in Eritrea and the United Nations**]

[3] Antonio Cassese, Self-determination of People: A Legal Reappraisal (Cambridge: Cambridge University Press, 1995).

[4] Gebre Hiwet Tesfgiorgis, "Self-determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea" (1987) 6, 1 Wisconsin International Law Journal 75,at 76.

[5] K. Doehring , " Self-determination", in B.Simma,ed., The Charter of the United Nations : A Commentary (Oxford: Oxford University Press, 1994) at 60.

Declaration on Granting Independence to Colonial Countries and Peoples;[6] and Resolution 2625, which is a Declaration on Principles of International law concerning Friendly Relationships and Cooperation among States in accordance with the Charter of the United Nations[7].

At present, it is commonly agreed that the principle of self–determination forms part of the international legal order. However, at the outset many authors disputed the legal nature of self –determination. It was considered as purely political concept devoid of legal characteristics. Edward A. Laing, however, argues there is "an apparent doctrinal consensus" that the right of self-determination is recognized by international law. [8] He adds " self – determination is a generally accepted as a ' principle' or as a 'right' recognized in customary international law, by parties to specific agreements, and as UN law binding all members by virtue of the fact that it represents conventional law, particularly custom or a hybrid of both."[9] Hector G. Espeill also strongly argues that self-determination is a right of the people under colonial and alien domination in addition to being a principle of international law. [10]The consensus gradually emerged since the adoption of the United Nations Charter though it was more consolidated with the advent of international human right instruments.

The principle of self-determination forms part of treaty and customary international law imposing a duty as well as regulating the activities of international players such as the

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[6] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec.14, 1960) **[herein refereed as Declaration on Granting Independence].**

[7] Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28 , UN Doc. A/8028 (1970), at 121. [Here in-after **Declaration on Friendly Relations and cooperation**].

[8] Edward Laing , " The Norm Of Self-determination 1941-1991"(1991-1992) 22 California Western International Law Journal 209, at 209.

[9] Ibid., at 230.

[10] Hector G. Espeill, Special Rapporteur, Implementation of United Nations Resolution Relating to the right of Peoples Under Colonial and Alien Domination to Self –Determination, Study for the Sub-committee on

United Nations. The incorporation of the principle by the United Nations in its charter, covenants and resolutions and their application had established norms "by which claimants of self determination,"[11] and performance of the supposed guarantors can be judged. A breach of the rules of self-determination will logically raise issue of international responsibility. In the draft laws on state responsibility, the International Commission of Jurists enumerated denial of the right to self-determination as one of the elements constituting International crimes of state.[12] Though the law is at the stage of draft, one can reasonably discern the cause and effect relationship between denial of the right of self-determination and associated rules of international responsibility.

In light of this development, it is sober to argue for international responsibility of the United Nations for breach of rules of self-determination. The paper will continue to construct responsibility of the United Nations for breach of self-determination in the disposition of the former colony of Italy, Eritrea. However, the analysis would have to primarily settle the issue if the United Nations could, at all, be accounted for its acts. As a result the paper try to first make a case for the responsibility of the United Nations for breach of rules of international law. Thus, the next section will explore the practical and legal justifications and elements for holding the United Nations responsible.

Prevention of Discrimination and Protection of Minorities of the Commission on Human rights, U.N.Doc /CN.4/Sub.2/405,June 20,1978.Vol.1, at 9.

[11] Gebre Hiwet Tesfgiorgis, supra note 4, at 77.

[12] See The International Law Commission Commentary on Article 19 of the Draft Law on state responsibility in Yearbook of International Law Commission, 1976,vol.II, Part 2, 95-122. See for discussion on crimes of states « Report of the International Law Commission on the Work of its Fifth Session » (UN DOC. A/53/10) in Yearbook of the International Law Commission 1998 available at http://www.un.org/law/ilc/reports/1998/98repfra.htm

1.1. UNITED NATIONS AND LEGAL RESPONSIBILITY

In the history of international organizations, the United Nations takes a prominent place. Since its inception, the organization has been involved and involving itself in various activities of human kind. Under the instituting instrument of the United Nations, the United Nations Charter, the mandates of the organization are manifold. Article 1 of the United Nations charter states " the purposes of the United Nations are to maintain international peace and security; to develop friendly relationship among nations; to achieve international cooperation in solving international problems of social, economic, cultural or humanitarian character; and to be a center for harmonizing the actions of nations in the attainment of common ends"[13]

The United Nations has performed various tasks and activities though the cold war prevented the origination from fulfilling the high expectation bestowed on it. However, with the demise of the cold war, the United Nations has once again become more active. The significant rise of the involvement of the organization in the last decade attests to its emancipation from the cold war rivalry politics. The United Nations has participated in many peacekeeping, peace making and peace enforcement efforts. Parallel to, increasing engagement of the United Nations, the question of the responsibility of the organization has increasingly become a big issue among international legal scholars.

The question of the responsibility of the United Nations is hotly debated among scholars. Some argue in for making the United Nations accountable for its illicit acts while others challenge the position because of functional necessity. The issue was more promptly discussed in relation to application of international humanitarian norms in UN peace

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[13] Charter of The United Nations Charter, June 26 1945, Can. T. S. No. 7. Article 1.[**hereinafter referred as the UN charter**].

operations and the duties arising because of that. The debate was loud in the aftermath of the United Nations' operations in Korea, Congo, Persian Gulf and Somalia.

The question of responsibility was talk about in relation to the application of international humanitarian laws to the United Nations operation. International responsibility was looked as a derivative of the application of the International humanitarian norms to the organization. One of the proponents for responsibility of the United Nations Richard D. Glick refutes the arguments by which the United Nations purported to avoid responsibility emanating out of the applications of humanitarian norms.[14] As summarized by the author, the reasons against non-application of rules of humanitarian law and rules of responsibility derived from it are manifold. First, an application of international humanitarian norms to the United Nations affects neutrality of the organization and compromises the effectiveness of the organization.[15] Second, the international humanitarian norms are not applicable to the organization, for the United Nations cannot be a party to an armed conflict and its soldiers are not combatants as envisaged in the laws of war.[16] The third reason calls for limited application of humanitarian norms, the argument runs the organization should be obliged only to those limited "principles" or "principles and spirit" of international humanitarian norms. Fourth, the organization tried to avoid responsibility by incorrectly applying regimes of civil war humanitarian norms in situation of international armed conflicts.[17] Finally, there was contention that troop-contributing nations are directly responsible for violation of

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[14] Richard D. Glick, "Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces (Fall 1995) 17 Michigan Journal of International Law Fall , 517 Mich. J. Int'l L. 53 at (68-105). The author in detail expounds the application of the rules of international humanitarian norms to the United Nations by refuting the counter arguments raised to avoid applying the norms to the United Nations.

[15] Ibid., at 70.

[16] Ibid., at 73.

[17] Ibid., at 78.

international humanitarian norms by their contingent forces. [18]

Similarly, a study done by a special committee of the American society of international law also held the laws of wars should not bind the United Nations.[19] The committee reasoned, "the organization is uniquely acting on behalf of the organized community of nations against an offender state."[20] Thus, "it is in a legally and morally superior position compared to the other party to the conflict."[21] Even the United Nations, itself, used to treat the subject as a political issue rather than a legal obligation.[22].

However many authors criticized the position. They contended laws of war and duties arising out of them should bind the organization. It has been asserted that the compliance with duties of humanitarian norms promotes rather than compromises United Nations humanitarian and military missions.[23] The reasoning is founded on the conviction that the laws governing the conduct of war arises from a fundamental humanitarian need to mitigate the suffering of humankind caught in armed conflicts. The argument holds that the rules are applicable in situations of "war" or other conflicts regardless of whether the armed conflicts are between states or involve other actors. [24]

In addition, international practice and doctrines have supported the argument to the effect that the organization is responsible for the acts of its combatants. In the regulation issued by the Secretary General for the United Nations forces, the organization has accepted

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[18] Ibid., at 81.
[19] Eagleton et al., " Should The Laws of War Apply To The United Nations Enforcement Action?" (1952) American Society of International law Proceedings 216, at 220.
[20] Ibid.
[21] Ibid.
[22] Glick, supra note 14, at 80.
[23], Ibid., at 53.
[24] Richard R. Baxter, " The Role of Law in Modern War, "(1953) American society of International Law Proceedings 90, at 95. See also Julianne Peck, " The U.N. And The Laws of War: How Can The World's Peacekeepers Be Held Accountable?" (Spring 1994) 21 Syracuse Journal of International Law and Commerce 283, at 303; Brian D.Tittemore, Belligerents in Blue Helmets: Applying International Humanitarian laws to United Nations peace operations"(Winter 1997) 33, 1 Stanford Journal of International Law 61, at 61-117.

the responsibility to ensure that its forces comply with "general international conventions applicable to the conduct of military personnel." [25] The issue was largely resolved by a directive of the United Nations Secretary General issued in August 12, 1999.[26]

The question of responsibility of the United Nations brings into the scene the very raison d'être for making the international organization accountable for its acts. It has been submitted, " the principal aim of the law of international responsibility is to prevent or minimize (by deterrence) breaches of obligation prescribed by law and to provide remedies for those subjects whose legal rights have been infringed due to such violations."[27] To Pierre Marie Dupuy, the function of responsibility appeared to be "not only to secure compensation but sanction or penalize responsible [organizations]."[28] Ewa Butkiewicz also suggested that ascertaining international order require making international organization answerable for their acts.[29] He concludes "...It is right and proper and in conformity with the aim of ensuring the security of international intercourse to include international organizations in the scope of [rules of international responsibility.]" [30]The argument continues, if a subject of international law accepts an obligation arising out of international law by participating in international intercourse, it should be submitted to international rules

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[25] See Regulations of the UN Emergency Force (UNEF) and the UN Forces in the Congo(UNOC) and in Cyprus(UNFYCY); See also Konrad Ginther , " International Organizations, Responsibility" in R. Bernhartdt. ed (1983) 5 Encyclopedia of Public International law 162.

[26] Secretary General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (New York: United Nations Publications: August 12, 1999) *reprinted in* 38 ILM 1656 (1999) [hereinafter Bulletin].See also Daphna Shraga, «CURRENT DEVELOPMENT: UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage» (2000) 94 The American Journal International Law 406.at 406-408

[27] Moshe Hirsch, The Responsibility of International Organizations Toward Third Parties: Some Basic Principles (Dordrecht: Martinus Nijhoff Publishers Inc., 1995).

[28] Pierre- Marie Duputy, "The International Law of State Responsibility: Revolution or Evolution"(1990) 11Michigan Journal of International Law 104, at 108.

[29] Ewa Butkiewicz, " The Premises of International Responsibility of Inter-governmental Organizations" (1981-82) 11 The Polish Yearbook of International Law 106, at 117.

[30]Ibid., at 122.

of responsibility.[31]

Thus, accounting the United Nations for its activities goes in line with the very rational of responsibility of international organization. It will ensure the organization carry out its duties in tune with international legal norms. Further, it contributes in making international relations more smooth, stable and predictable.

The other reason for subordination of the United Nation to the rules of international legal responsibility comes from the inherent international nature of the organization. At present, the subordination of international organizations to the applicable norms of international law is less disputed.[32]International organizations, which are established under international law, are deemed subjects of the law, and they are bound by it.[33] As any other international organization, the United Nations is bound to the rules of international law applicable in its specific sphere of activities though unlike states it explicitly or implicitly might not consent to the rule of international law in question. Ewa Butkiewicz notes,

> if member states endowed international organization with the authority to act in a specific field governed by norms of [international law] and did not provide for the application of another system of law in the exercise of that authority, the organization cannot be subject to another legal regulation than that fixed by the respective norms of international law.[34]

The fact that international treaty forms international organizations and entrust them with authority leads to the conviction that international law is the proper law governing

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[31] Ibid.

[32] H.G.Schemers, International Institutional Law (The Netherlands; Sijothoff and Noordohoff, 1980) at 781-782.

[33] Ibid. ; M. H. Arsanjani , "Claims Against International Organizations," (1981) 7 Yale Journal of World public order 131, at 132-144; Restatement (third) of the foreign relations of the United states (1987); Butkiewicz , supra note 29, at 118.

[34] Butkiewicz, supra note 29, at 118.

most of their activities.[35]

The logical follow up would then be subordination of the international organizations to the rules of international legal responsibility originating from international norms. Therefore, the inherent trait of the United Nations as a world organization automatically leads to subordination of its activities to the rules of international law including regime of international legal responsibility and duties emanating from them. Yet, this does not mean all activities of the organization are regulated by international laws. The regime of international responsibility does not regulate activities of the organization that fall under the realm of local laws.[36]

Parallel to theoretical justification, past practices in the field of law of responsibility show evidence in favour of accountability of the United Nations. It was asserted that making international organization answerable for their activities has been practiced in the international field since the creation of League of Nations.[37] However, it was more remarkable after the Second World War albeit there were not few judicial precedents.[38] It is instructive to observe the Secretary General accept the legal liability of the UN for damage caused through its personnel by concluding several agreements with the claimant states.[39]The organization paid compensation to parties injured by its forces in the Korean and Congo

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[35] Ibid., at 120.

[36] The United Nations may enter into headquarter agreement with host states or it might include contracts of with local partners. Such juridical acts of the organization are regulated by the appropriate rules of municipal law. And responsibility arising out of such domestic legal acts do not fall in the scope of international legal responsibility instead they are regulated by the relevant provisions of the proper law. See Ewa Butkiewicz, Ibid. at 119.

[37] C. F. Amersanghe, Principles of Institutional Law of International Organizations. (Cambridge: Cambridge University Press, 1996).

[38] Ibid., at 239.

[39] See an agreements entered by the United Nations Secretary General and Belgium, Agreement between Belgium and UN. February 20, 1965, RevBelge, Vol.1 (1965) at 559.

operations.[40]

Further recent developments with the United Nations testify the subordination of the organization to the legal regime of international responsibility. In a report of the Secretary General to the General Assembly on administrative and budgetary aspects of the financing of the United Nations Peacekeeping Operations, the principle of liability of the United Nations has been clearly stated. The report declares:

> The international responsibility of the United Nations for the activities of United Nations forces is an attribute of international legal personality and its capacity to bear international rights and obligations. It is a reflection of the principle of state responsibility –widely accepted to be applicable to international organizations- that damage caused in breach of an international obligation and which is attributable to the organization, entails the international responsibility of the organization and its liability in compensation.[41]

The report in detail addressed the scope of United Nations liability for activities of United Nations forces, procedure for handling of third party claims and limitation of liability. The report was prepared by the Secretary General pursuant to authority given by paragraph 16 of the General Assembly Resolution 50/ 235 of 7 June 1996.[42] The General Assembly mandated the Secretary General to develop a revised cost estimate for third party claims and adjustments following a thorough study by the legal counsel. Though Resolutions of the United Nations' General Assembly are not binding as such, they have important probative value in showing the present developments of the rules of international law.

In short, it is widely accepted that as a prominent international actor, the United Nations is legally accountable for breach of international norms. The high engagement of the

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[40] R. Simmonds discussed in detail the legal effects of the United Nations Operation in Congo. R. Simmonds. Legal Problems Arising from United Nations Military operations in Congo (Hague: Martinus Nijhoff,1968).

[41] Secretary General, Report Of The Secretary--General Administrative and Budgetary Aspects Of The Financing Of United Nations Peacekeeping Operations, General Assembly, 51st Sess., U.N. Doc.A/51/389(September 20,1996). Reprinted in 37 I.L.M.700 (1998).

[42] General Assembly, Resolution on Financing of the United Nations Protection Force, the United Nations confidence Restoration operation in Confidence Restoration Operation in Croatia, the United Nations

organization in both degree and frequency in the international forum demands rendering the organization accountable for its acts in breach of legal obligations.

As indicated in the Report of the Secretary General to the General Assembly, legal responsibility of the United Nations organization is grounded on two lines of reasoning. The first emanates from an application of the concept of state responsibility to the international organizations. The rules of state responsibility are deemed applicable in relation to the acts of the United Nations. The other one takes responsibility as a corollary to rights of the organization on the international plain. The discussion will continue to deal with each of these legal grounds for responsibility of the United Nations.

1.2. LEGAL PERSONALITY AS SOURCE OF RESPONSIBILITY

The main justification for the responsibility of the United Nations emanates from its legal status under international law. As subjects of international law, the organization has international legal capacity to enter into juridical relationships, enjoy rights and correspondingly bear legal responsibilities. Bowett considers international legal responsibility as one of the consequences of international legal personality.[43] Similarly, C.F. Amerasinghe also holds responsibility of international organizations could be inferred from international personality. The author concludes that international organizations can be objects of legal suit or claim.[44] The fact that the United Nations maintains command over an armed force utilizing it flag subject to the rules of war [including rules of legal responsibility] was described as a "striking attribute" of international legal personality.[45]

Preventive Deployment Force and the United Nations General Assembly, GA Res. 50/235. UNGAOR, 50th Sess., U.N. DOC.A/RES/50/235 (1996) Paragraph 16.

[43] See D.W. Bowett, The Law of International Institutions. 4th eds. (London: Stevens and Sons Limited 1982).

[44] Amerasinghe , supra note 37, at 239.

[45]Bowett, supra note 43, at 340.

For the United Nations to be held responsible, it must be shown that the organizations possess an international legal personality.[46] Hirsch wrote that the preliminary condition for responsibility of international organization is the existence of legal personality towards third parties. He submitted that rules regulating elements of responsibility only come into play once the organization is endowed with legal personality toward third parties.[47] Thus, at the outset determining the legal personality of the United Nations is vital in addressing the issue of legal responsibility of the United Nations.

Entities possess legal personality if they are capable of exercising rights and duties in a given legal system.[48] The legal personality of international organizations comes from the provision of the constituting instrument. Member states may expressly state international personality of their organization or it may be implied from the constitution of the organization, and from pursed practices. [49] Evidence of the legal personality of the United Nations can be gathered from various sources of international law. The United Nation Charter – the constituent instrument, judicial precedent, practice of states and publicity affirm the legal status of the organization and associated duties of responsibility.

In the discussions held prior to the adoption of the charter, some delegates proposed to include a provision expressly conferring the United Nations with international legal personality, other opted to let the General Assembly subsequently determine the

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[46]Julianne Peck, "The U.N. And The Laws of War: How Can the World's Peacekeepers Be Held Accountable?" (1994) 21 Syracuse Journal of International Law and Commerce 283, at 299.

[47]Hirsch, Supra note 27, at 10.

[48] Bin Cheng, " Introduction to Subjects of International Law" in M. Bedjaoui , ed. International Law: Achievements & Prospects (Paris: M. Nijhoff Publishers, 1991) at 23.

[49] Hans Kelsen has written "an international community possesses juridical personality in the field of international law if the treaty constituting the community confers upon its organs the competence to exercise certain functions in relation to the members and especially the power to enter into international agreements establishing duties, rights and competence of the community." He affirms the treaty constituting the organization need not expressly confer legal personality to the organization; it may be inferred, he added, from the substantive provision of the treaty. ." Hans Kelsen. The Law of the United Nations; A Critical Analysis Of Its Fundamental Problems (New York: The London Institute of World Affairs, 1951).

international legal status of the organization. Some delegates also proposed the inclusion of "juridical" rather than "international" personality. However, the committee finally adopted the wording of Article 104 of the United Nations charter.[50] It has been reported that the committee came up with the current wording of the provision as a "timid compromise" to avoid any implication that the United Nations is a "super state".[51] This raised concerns to some scholars as to whether the organization has legal personality only under municipal law of member states rather than international personality in the international arena.[52] The drafting committee considered question of international legal capacity as superfluous that can implicitly derived from the provisions of the whole charter.[53] Consequently, whether the charter envisaged 'legal capacity' to encompass legal responsibility was not clear at the outset.

Case law, however, enlightened the question of international personality and issue of responsibility of the United Nations. On the matter, the most notably cited case is the Reparation case.[54] In this case, the International Court of Justice was asked for an advisory opinion if the United Nations has the capacity to bring international claims against a responsible *de jure* or *de facto* government for reparation to injury sustained by its personnel. In its advisory opinion, the court discussed the right to make an international claim in relation to the legal personality of the organization. Moreover, the court explicitly affirmed the legal personality of the United Nations. The court declared the scope of legal personality entails legal right and duties under international plane.

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[50] Article 103 of the United Nation charter states, "the organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."
See UNCIO DOC.554, IV/2/28; 13UNCIO Documents, at 662-23; also quoted in Ibid at 32-33.
[51] Bowett, supra note 43, at 340-341.
[52] Ibid.
[53] See UNCIO DOC 933,IV/2/42(2), at 8 .See also Lousi B. Sohn, ed., Cases on United Nations law , 2nd ed.(Brooklyn : The Foundation Press, Inc. 1967) at 33.
[54] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion (1949) I.C.J. Reports at 174.

The International Court of Justice stated:

> The Organization [United Nations] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights, which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on international plane. It is at present a supreme type of organization, and it could not carry out the intention of its founders if it was devoid of international personality.... The court has come to the conclusion that it [the United Nations] is an international person...It is a subject of international law capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claim.[55]

The International Court of Justice deduced the legal personality of the organization from the legal obligation and privilege the organization owes member states under the provisions of the charter. The court reasoned the nature of subject of international law depends on the needs of the international community. It was underscored that the requirement of international community indispensably demands the United Nations to have an international legal personality if it is to achieve purposes and principles specified in the United Nation charter. In short, it has been maintained that international legal personality of the United Nations is required for reasons of functional necessity.[56]

By the same token, the scope of the international personality will also be the function of the purpose and objective of the organization. It will entail rights and as well as duties that are necessaries for the organization to live up to the expectations that have befall upon it. Consequently, it is tenable to argue that international legal personality of the United Nations embodies the duty to remain responsibile for acts in want of international legal obligations as commended by the requirement of international life. This is because that international legal responsibility contributes in ensuring the organization complies with the duties prescribed by international legal norms. Therefore, international legal personality of the United Nations as established in the Reparation case leads to the conviction that the United Nations is legally

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[55] Ibid., at 178-179.

responsible for its acts violating rules of international law.

Moreover, it is in tune with international norms to argue that the United Nations is subject to attendant duties and responsibilities, as it has rights to make claims. It has been stated that rights are not given without the corollary duties.[57] The United Nations is duty bound to legal responsibility, as it is entitled to enforce its right in the international legal order.[58] As international persons can demand rights from other actors because they have right under international law, so they are to be held responsible for other subjects because they have obligation at international law.[59]

However, it has been warned against the general derivation of responsibility from international personality of international organizations. Brownlie noted that regard must be given to the involved of specific set of rules.[60] The author stressed, "there is not evidence of a presumption in law that the United Nations bears either an exclusive or a primary responsibility for tortuous acts of such forces, and the law remains undeveloped."[61] Yet the writer argues that the time is ripe for making the United Nation responsible. Evidence coming from various directions including from the United Nation itself suggests a prima-facie responsibility of the organizations for acts contravening basic norms of international law.

In summary, the discussion has tried to explore the legal responsibility of the United Nations as it is derived from the international legal personality of the organization. The landmark case of Reparation established international personality of the United Nations, and the International Court of Justice declared international personality entails duty to bear

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[56] Ibid., at 178.
[57] Peck, supra note., 46 at 301.
[58] Ibid.
[59] Amerasinghe ,supra note 37, at 239.
[60] Ian Brownlie, Principle of Public International law, 5th ed. (Oxford : Oxford University Press, 1998).

responsibility in as much as it confers enjoyable rights to the organization. Various authors stressed international legal responsibility is drawn from legal personality. The fact that the United Nation has an established international legal personality leads to the conviction it has unavoidable legal responsibility for its acts. Therefore, it is in accordance with the existing rules of international law to underscore that international legal personality of the United Nations renders the United Nations responsible for its illicit actions.

The other legal basis for the responsibility of the United Nations stems from the application of the regime of state responsibility to international organizations. The next section will proceed to deal with laws of state responsibility as source of responsibility.

1.3. REGIME OF STATE RESPONSIBILITY AS A SOURCE FOR RESPONSIBILITY OF THE UNITED NATIONS

Various authors suggest that responsibility of international organizations also arises from an application of the rules of state responsibility. It is submitted that the rules of inter-state responsibility are "widely applicable, with some variation, by analogy to the responsibility of international organizations."[62] Once the legal personality of an international organization is established, the applicable rules of legal responsibility are *mutantis mutandis*, rules of state responsibility. Another author also argues that there is a presumption that regime of inter-state responsibility applies to international organization though certain modifications are necessary due to the inherent character of such institutions.[63]

Accordingly, the rules of inter-state responsibility are not automatically applicable to international organizations though it is accepted that they are by analogy held to regulate responsibility of international organizations. One is advised to carefully examine whether

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[61] Ibid., at 686.
[62] Hirsch, Supra note 27, at 11.

each rule is applicable to international organization in conformity with the unique characteristics of international organization *vis–a-vis* sovereign states.[64] On the other hand, one has to be aware that the examination should not be limited to ascertainment of the application of rules of state responsibility to international organizations. The exclusive traits of international organizations necessitates inquires into alternative legal regimes appropriate to govern the relationship of international organization and third parties.[65]

Yet, it is commonly argued that under the applicable rules of international responsibility two elements are required to establish responsibility of international organization. These are an act: an international wrongful act and attribution of the act to the international organization.[66] The paper will continue to discuss the elements required for establishing responsibility of international organization and specifically the United Nations.

1.3.1. ELEMENTS CONSTITUTING RESPONSIBILITY OF THE UNITED NATIONS

There is an international legal responsibility on the part of international organizations if their actions violate an international obligation and the breach is attributable to the international organization. Both elements are derived from rules of state responsibility. They are characterized as 'objective' and 'subjective' elements; objective being the breach of an

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[63] Eduardo Jimenez De Arechega, " International Responsibility" in M. Sorensen, ed., Manual Of Public International Law (New York: Saint Martins Printing Press, 1968) 531, at 595.

[64] Ibid.

[65] Hirsch, Supra note 39, at 11.

[66] General Assembly, «Titles and texts of the Draft Articles on State Responsibility of States for International Wrongful acts adopted by the Draft Committe on the Second Reading, Part one» (UN DOC. A/CN.4/L.602/Rev.1) in Year book of International Law 26 July 2001 available at http://www.un.org/law/ilc/sessions/53/english/602rev1e.pdf . Article 2 states :

There is an international wrongful act of a state when the conduct consists of an act or an omission

a.) is attributable to the state under international law ; and

b.) constitutes a breach of an international obligation of state.

See also Article 3 0f the ILC Draft Articles on state responsibility, 1980(vol. II Part 2) I.L.C Year Book 30 , and the commentary of the commission in 1973(Vol. .II) I.L.C. Year book 179 et seq.

international obligation while subjective, the organization as author of the act.[67]

In the context of state responsibility, there is less divergence as to elements constituting an international responsibility, though some require damage as an addition element. J.de Arechaga argued damage or injury should be an additional third element.[68] A number of authors, however, disagree with holding damage as a distinctive element. They widely affirm that damage inherently exists in any violation of international law. Ago stated that "every breach of an engagement vis-à-vis another state and impairment of a subjective right of that state in itself constitute a damage of material or moral nature to that state... International responsibility derives its raison d'être purely from the violation of a right of another state and every violation of a right is a damage."[69]

Hirsch convincingly concludes two elements are required to establish the responsibility of international organizations, that is, breach of an international obligation and attribution of the breach to the organization.[70] Accordingly, the United Nations is responsible if it breaches an international obligation and the wrongful act is attributable to the organization. For our purpose, the discussion will be limited to deal with breach of an international obligation. This is from the fact that in the context of Eritrea and United Nations attribution is not an issue as the act in question is obviously that of the United Nations. Therefore, in what follows the paper will explore breach of an international obligation as an element for establishing responsibility of the United Nations.

1.3.1.1. BREACH OF AN INTERNATIONAL OBLIGATION

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[67]Brian D. Smith, State Responsibility and The Marine Environment: The Rules of Decision (Oxford: Claredon Press 1998) at 6.; See also Ago, " Second Report On State Responsibility" (UN Doc.A/CN.4/233) In Year Book of International Law Commission 1970 (New York: UN. 1970) 177, at 187.

[68] De Arechaga , supra note 63, at 534.

As in other organizations, estabishing the breach of an international obligation is one of the constituent elements showing the responsibility of the United Nations. A precondition to this element is the application of international norms to the international organization.[71] For the United Nation to be charged with a breach of an international norm there has to be evidence showing that an applicable rule of international law is violated. It has been stated that international organizations are subjects of international law and consequently subservient to the norms of international legal order. And, practice of the United Nations in the area of military operations shows that the organization is subordinate to the rules of international law. Hirch elaborates that the applicable rules of international law to international organizations are derived from the traditional source of international law. Under article 38(1) of the statute of the International Court of Justice, international laws governing the activities of the United Nations have their bases on international convention, international custom and general principles of law.[72] Subsidiary, the law may also be derived from judicial decision and teachings of publicists.[73] It must be noted, however, that all sources equally create responsibility of international organization in the international plain. [74]

Further, responsibility of the United Nations may arise from a treaty concluded by the organization. This is more apparent in the peacekeeping operations. The United Nations has frequently agreed with various nations and subsequently delegated its power to fulfill its mandate of peacekeeping and enforcing operations. Besides, the organization often

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[69] Ago, "First Report on State Responsibility" ((UN DOC.A/CN.4/217 and Add. I) in Year book of International Law Commission 1969,Vol.2 (New York :UN 1969) 125, at 132.
[70] Hirsch, supra note 27, at 13.
[71] Ibid., at 17.
[72] United Nations, Statute of the International Court of Justice, Article 38(1).
[73]Ibid.
[74] The Draft Articles on State responsibility declare, " there is a breach of an international obligation by a state when an act of a state is not in conformity with what is required of it by that obligation regardless of its origins and character," , see "Titles and texts of the Draft Articles on State Responsibility of States for International Wrongful acts adopted by the Draft Committee on the Second Reading, Part one » supra note 66, Article 12.

concludes treaties in relation to the headquarter agreements with the host states. It has entered into a series of agreements with the government of the United States of America and Switzerland. When the United Nations enters a treaty, it will be bound by it. The principle of *pacta sunt servanda* applies to the parties, and the organization has a duty to perform the treaty in good faith.[75] Here, the qualification being the treaty remains void if it violates a rule of *jus cognes* in accordance with the law of treaty. [76] The organization remains duty bound to responsibility arising out of breach of the terms of international treaties concluded by the organization.

The other main source of responsibility of the United Nations comes from breach of customary rules of international law.[77] This conviction is an extension of the strong legal arguments urging the application of humanitarian laws to the United Nations military forces. As it has been discussed, many legal scholars stressed the applicability of the customary laws of war to the United Nations. It was underlined that customary rules of war originating from the four Geneva Conventions and Additional Protocols, and The Hague rules of war are applicable to the activities of the United Nations military personnel. Past practices of the organization show the legal responsibility of the organizations for the unlawful acts committed by its military personnel. Hirsch points out acquiescence of the United Nations to the application of the customary rules of war. To use his words, "during the Korean War the UN claimed no exemption from any rule of the laws of war and its commitment to comply with customary laws of war was reaffirmed in the agreements concluded by the UN with

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[75] Hirsch , supra note 27, at 18.
[76] Ibid.at 30.
[77] See e.g. Baxter , supra note 24, at 90 ; Tittemore, supra note 24, at 283 ; Peck, supra note 24, at 61 ; Schermers , supra note 30 , at 657.

third parties following the operation in Congo."[78] Thus, it is now widely accepted that the United Nations is obliged to the customary rules of international law.

It is to be noted that the responsibility of the United Nations should not be limited to the laws of war. As a principal international organization, the United Nations has to comply with all rules of international law governing the realm of its activities; lest, the very mission of the organization will be compromised. The organization is accountable for acts contravening other customary rules of international law such as rules of self-determination.

In summary, the discussion has tried to present the responsibility of the United Nations for breach of international law. As in other areas of international human rights law, the United Nations is responsible for violations of rules of self-determination. The responsibility of the organization is derived from its legal personality in the world community. The fact that the organ is endowed with international personality makes it the subject of rights and duties, including the duty to remain accountable for acts in breach of international law. The international responsibility of the United Nations for rules of self-determination is established by application of the regime of state responsibility in analogy. Accordingly, the organization is responsible for breach of rules of self-determination if it performed acts in breach of rules of self-determination. In the context of de-colonization of Eritrea, the paper argues the United Nations infringed the law of self-determination. The next chapter will present in detail the responsibility of the United Nations for breach of self-determination in case of Eritrea.

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[78] Hirsch, supra note 27, at 39. For the United Nations operation in Congo see generally, Simmonds , supra note 40.

CHAPTER II

2. THE RESPONSIBILITY OF THE UNITED NATIONS FOR BREACH OF RULES OF SELF-DETERMINATION

At the present, it is more agreed that the United Nation could be held responsible for its actions that fall short of legality. It has been submitted that the world organization is accountable for breach of a prevalent norm of international law. In the area of responsibility of the United Nations, self-determination is one of the areas of international human rights law where the United Nations may be held answerable. Similar to the way in which the United Nation is responsible for violations of rules of self-determination, it is accounted for infringement of rules of humanitarian norms. As an international agency mandated to ensure the de-colonization of people based on the right of the people to self-determination, the United Nations has a moral and legal responsibility for acts violating the rules of self-determination. It should stand accountable for breach of the provisions of its charter - the United Nation Charter, which is the 'Magna Carta' of the world community and United Nations declarations regarding self-determination.

In the context of Eritrea and the United Nations, the paper argues that the acts of the organs of the United Nations breached international obligations prescribed by the rules of self-determination. The organization failed to comply with the duty incumbent upon it by the law of self-determination in disposing the fate of Eritrea, the former colony of Italy. The thesis argues that the acts and omissions of the United Nations infringe one of the fundamental norms of international law, that is, right of self-determination of people. The organization acted against the rules of self-determination in two regards. First, it imposed a flawed federal arrangement that did not guarantee the rights of the people nor one wished

by the people. Secondly, it omitted the duty to protect the right of the people to self-determination when Ethiopia unilaterally abolished the federal arrangement.

It a common knowledge that a claim made on the ground of denial of a right has to satisfy the threshold question if the aggreived party is entitled to the right alleagedly encroached. Relevantly, a thesis on breach of rules of self-determinaiton and denial of the right of the Eritrean people to self-determination has to show the concerned people stand as benefriciaries of the right under the rules of self-determination. It will continue to show the people of Eritrea as a group entitled to reep the benefits of rules of self-determination before it subsequently presents the denail of the right by the United Nations. However, it will, at the outset, try to present a brief background on Eritrean and its inhabitants.

2.1. ERITREA AND ITS PEOPLE : A BRIEF BACKGROUND

Like most African nations, Eritrea is the creation of colonialism. The Italian colonial empire forged the presented day Eritrea by joining different historical units. The History of the country prior to the advent of the European colonizer is rather complex. The land existed as conglomerate of feudal entities, often in war and many times victims of various aggressors and neighbors.

The people of Eritrea are composed of nine ethnic groups. They are almost equally divided into Moslem and Christian religions with an exception of a few animists. The original inhabitants of the present day Eritrea were *Nilotic* people who subsequently mixed with the *Hamitic* tribes from North Africa. Around 1000- 400 BC Semitic tribes crossed the Red Sea

and settled in the Eritrea Highlands.[79] At the end of the 4th century BC, a strong kingdom based on Eritrean highlands and *Tigrai* (now province of Ethiopia) was established. At its height, the kingdom made raids as far as the present-day Sudan and Southern Arabian Peninsula.[80]

During the period, the Beja tribes inhabited the lowland regions of the Northwestern and Northern Eritrea. The relations of the tribes with the *Axumite* kingdom were mostly that of raid and counter raid. Similarly, the Southern coasts of present day Eritrea had little, if any contacts with the *Axumite* kingdom. [81]

With the advent of Islam, the Christian kingdom of *Axum* began to decline. The Arab conquest of the region in sixth and seventh century resulted in the Southward movement of the *Beja* tribes of Egypt and Northern Sudan. As a result, the *Beja* kinsmen inhabitants of the Northern highlands and Western lowland were pushed into the Eritrean plateau. The Arab raid of *Adulis* port of *Axum* and expansion of the Beja tribes cut off *Axumite* kingdom from rest of the world and resulted in collapse of the kingdom.[82]

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[79] Semere Haile, "Historical Background to the Eritrean and Ethiopian conflict " In Lionel Cliffe and Basil Davidson, eds., The long struggle of Eritrea for Independence and Constructive peace, (Nottingham: Russell Press Ltd., ©1988.) at 12.

[80]David Pool , " Ethiopia and Eritrea : The Pre-colonial Period ," , in Proceedings of the Permanents People's Tribunal Of the International League For The Rights and Liberation Of Peoples Session On Eritrea , (Rome : Research and Information Center on Eritrea 1982) at 37. The Permanent Peoples' Tribunal is by statute an organ of the International Foundation and started in June 1979.Its main area of research is in the field of the "law for the rights of peoples". It is an opinion tribunal and gives an advisory opinion on issue referred to it. See its website http://www.grisnet.it/filb/tribu%20eng.html. Upon the joint request of the Eritrean People's Liberation Front and Eritrean Liberation Front, the Permanent tribunal delivered an advisory opinion on the Eritrean case in October 3, 1980. After hearing the testimony of various scholars and examining the position of the parties involved, the permanent tribunal rendered its opinion on " the qualification of the Eritrean case as a case of de-colonization, and the right of the Eritrean people to self-determination; as well the violation of by Ethiopia of this right to self-determination, and on the illegality of the intervention of the Ethiopia's allies in this struggle against the Eritrean people."see Permanent Peoples Tribunal, «Advisory Opninion on Eritrea » in Proceedings of the Permanents People's Tribunal Of the International League For The Rights and Liberation Of Peoples Session On Eritrea , (Rome : Research and Information Center on Eritrea 1982) at 357.

[81] G..K.N. Trevaskis, Eritrea - A Colony in Transition : 1941-52(London : Oxford University press, 1960) at 6.

[82] Roy Pateman, Eritrea: Even the Stones are Burning (Trenton: The Red Sea Press, 1990) at 32.

After the fall of *Axum*, all parts of Eritrea except the highlands, which were paying tribute to Ethiopia for limited period, were either independent or paying tribute to non-Ethiopian empires. The *Beja* established several independent kingdoms. The five kingdoms – *Nagic, Baklin, Giarin, Bazen and Kata* had control over much of the present day Eritrea and Northern Sudan. The followed constant conflicts eroded the authority of the kingdoms.[83]

By the end of 15th century, the land was subject to four political divisions: the *Medri Barhi* plateau, the *Barka* lowlands and Northern highlands, *Massawa* and surrounding coastal areas; and the *Denkalia* lowlands. *Massawa* was occupied by the Turkish in 1557; *Barka* lowlands and Northern highlands were under the Fung kings of Sudan; The *Medri Bahri Pateau* was ruled by *Beja* clan called *Bahre Negash* (Lord of the Sea); while the *Denakalia* region was considered as property of the Imam of Adal.[84]

In the middle of the 19th century, all the regions except the *Medri Bahri* came under the control of the Egyptians. The *Medri Bahri* region was occupied by Yohannes of *Tigrai* in 1879 until the arrival of the Italians in the region. [85]

By 1889, the Italian colonial power had driven out the Egyptians and King Yohannes of *Tigrai* and brought the country under one colonial rule. In 1890, Italy declared Eritrea as its first colony and bestowed the name Eritrea, from Red or 'Erythrean' sea. The present frontier of the country resulted from the rivalry expanding ambitions between Italian and Ethiopian kings. King *Menelik* of Ethiopia signed the Treaties of *Uccialli* in 1889 and *Addis Abeba* in 1896 after he bitterly defeated the Italians in the Battle of *Adwa.* Accordingly, *Menelik* the founder of modern Ethiopia forfeited Ethiopia's claim to the area and agreed to

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[83] Ibid.
[84] Ibid.,at 33-34.
[85] Haile, supra note 79, at 15-16.

unilateral Italian claim of Eritrea. The Italian colonial government ruled Eritrea until it was finally defeated in the Second World War by the Allied forces.

In 1941, the British military administration took over Eritrea from the Italians and administered the country for the next ten years. After the allied forced failed to agree on the future of the former Italian colonies, the matter was referred to the United Nations for consideration. In 1950, the United Nations resolved to integrate the country as an autonomous federal unit under the crown of the Imperial government of Ethiopia. The federal act entered into effect in 1952 and remained in action for a few years until it was abrogated unilaterally by Ethiopia in a decree that constituted Eritrea as the fourteenth province of Ethiopia. The country remained under Ethiopia successive regimes before it was liberated by EPLF (Eritrean People Liberation Front) in 1991. Eritrea became an official member of the United Nations in 1993 when the people of Eritrea overwhelming voted for independence in an international observed plebiscite.

Having noted the historic background of the people, the next question is whether the people of Eritrea stand as beneficiaries of rules of self-determination. The work will continue to show the people of Eritrea fall under the category of beneficiaries of rules of self-determination.

2.2. THE PEOPLE OF ERITREA AS BENEFICIARIES OF SELF-DETERMINATION

The question whether Eritrean people constitute a nation or a people to exercise the right of self-determination has been one of the corner issues in the struggle for self-determination. For the outset, some groups, and in particular Ethiopians, argued that due to its composition of various ethnic groups the people of Eritrea did not form a nation or

people to make up the beneficiaries of self-determination. Yet, the position is not acceptable under the rules of self-determination. As will be shown after, the people of Eritrea fall under the category of the beneficiaries of self-determination as defined by the rules of self-determination.

The laws of self-determination have guaranteed the beneficiaries of self-determination with the right to determine freely their destiny without internal and external pressures. This has been highlighted in the United Nations resolutions in relation to colonial people, and other international and regional human rights instruments.

However, applying the concept of self–determination and determining the beneficiaries have been one of the highly disputed issues. One of the main deficiencies of the law of self-determination is that the texts do not provide a definition of what is meant by people or do not provide a formal elaboration as to who the beneficiary of the right of self-determination are. In particular, what constitutes 'people' to enjoy the right of self -determination remains unclear. This has made the question to depend on the practical function which self-determination aims to serve.[86] Often, this depends on the prevalent balance of power. However, it is commonly argued that United Nations' practice in the field of self-determination has shown two types of beneficiaries: colonial people and peoples subject to domination.[87]

It is widely accepted that colonial people are the primary beneficiaries of the right of self-determination. The charter of the United Nations and declaration of the organization

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[86] Reference re Secession of Quebec, (1998)161 D.L.R.(4th)385(S.C.C.)August 20,1998[herein after referred as Quebec secession reference],para 123. Alain Fenet , "The Eritrean People and the Principle of Self – determination" , in Proceedings of the Permanents People's Tribunal Of the International League for The Rights and Liberation of Peoples Session on Eritrea , (Rome : Research and Information Center on Eritrea 1982) at 284.

[87] Ibid., at 284.

have put colonial people as primary beneficiaries of self-determination. Resolution 1514(XV) of the United Nations is considered as strong expression of right of the colonized people to self-determination. Provisions of the United Nations Charter, and specially rules concerning non-self-governing territories, expressly indicate application of self-determination to colonial situations and colonial people as beneficiaries of the right to self-determination. Colonial people are entitled to the right of external self-determination because they have been denied meaningful access to their governments in order to pursue their political, economic, social and cultural development[88]

The International Court of Justice has also confirmed the status of colonial people as beneficiaries of the right of self-determination. In its advisory opinion on the Namibian case, The International Court of Justice underscored that "the development of the international law in regard to colonies made the principle of self-determination applicable to all of them."[89] The proposition was also reaffirmed in the Western Sahara case in Judge Dilliard's position, where he held that self-determination has emerged to be applicable for de-colonization of those colonies that are under the aegis of the United Nations.[90]

It has been acknowledged by the international community that de-colonization was an exercise of the right of self–determination thought at times it was rejected by colonial powers. But, with the coming of the Soviet Union as a global power and emancipation of colonized people, self-determination has been the main instrument of the United Nations de-colonization process. The United Nations has marked de-colonization as the principal

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[88] "Reference re Secession of Quebec" supra note 86, para. 138.

[89] On the Legal Consequence for States of The Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, [1970] I.C.J. Rep., 1971, at 16. **(hereinafter referred as Namibian case)**

[90] Western Sahara Case, Advisory opinion, [1975] I.C.J. Rep.,12, at 31-33 **[hereinafter cited as Western Sahara Case]**

application of self-determination.[91] In practice, de-colonization has entailed enjoining nations, in particular colonial powers from impeding the exercise of self-determination; conferring legal status on the liberation struggles of colonial peoples'; and providing material and political support to colonized people.[92]

The laws of self-determination and pursued practice remarks that colonized peoples are the principal beneficiaries of the right of self-determination. From the post-1945 United Nations' de-colonization practices, the following elements have developed as criterion in determining whether an entity constitutes a people exercise the right of self-determination. "The term "people" denoted a social entity possessing a clear identity and its own characteristics; it implies a relationship with a territory; and a people should not be confused with ethnic, religious or linguistic minorities."[93]The people entitled to the right of self-determination have been the inhabitants of former colonies without further regard for ethnicity, language, religious and other objective characterization of the people. Territory, not nationhood was the determining factor. In most colonies, a subjective feeling of nationhood was defined by struggle against colonialism.[94]

In the Eritrean situation the impact of colonization on the soci-economic and political life of the inhabitants is significant. Italian colonial domination and British military administration brought radical changes in the social conditions of the colony. Beyond forging various historic unites to form the current territorial boundaries of Eritrea, Italian colonization unquestionably favored the birth of national consciousness. This was manifested by the formation of new groups because of socio-economic transformation and

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[91] Gebre Hiwet Tesfagiorgis , supra note 4, at 92.
[92] Declaration on Friendly Relations and Cooperation, supra note 7, at 121-23.
[93] Aurelia Cristescu , The Right to Self-determination, Historical and Current development on The Basis of United Nations Instruments, Special Rapporteur of The Sub-commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/SUB.2/404/REV.1 United Nations Publications (1981) at 41.

the development of new ties of solidarity and new alliance as a result of political struggle against common enemy.[95] Despite the multinational character of the people, historic, economic and political factors forged a distinct Eritrea identity distinguishable *vis-a-vis* Ethiopians and other neighbours.

The characterization of the inhabitants of Eritrea as a people was also recognized by the international community in its attempt to decide their destiny. [96] In Fenet's words, "the resolution, which accepted the colonial boundaries as a historically constituted entity, recognized the Eritrean people have the right to self-government subject to respect for the international status of the Ethiopian Empire."[97]

Similarly, the International Commission of Jurists asserted,

> The United Nations General Assembly Resolution of 1950 proposing Eritrea should be treated as an autonomous unit with in an Ethiopian federation was clearly treating the population as a 'people' ... distinct from the people of Ethiopia, with a recognized territory of their own. They were not regarded as or treated as a mere ethnic, linguistic or religious minority.[98]

The commission further underlined that the people of Eritrea have "as much right to be considered as a 'people' as the most African countries" which were created by division of Africa by Europeans at the end of the 19th century.[99] In the treaty for scramble of Africa,

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[94] Hurst Hanuum, Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights (Philadelphia: University of Pennsylvania Press, 1990) at 36.

[95] See generally Richard Leonard, " European Colonization and the Socio – Economic Integration of Eritrea," in Proceedings of the Permanents People's Tribunal Of the International League For The Rights and Liberation of Peoples Session on Eritrea , (Rome : Research and Information Center on Eritrea 1982) at 55-101; "Advisory Proceedings of the Permanents People's Tribunal," supra note 80, at 370.

[96] Alian Fenet " The Right of Eritrean people to Self-determination" In Lionel Cliffe and Basil Davidson, eds., The Long Struggle of Eritrea for Independence and Constructive peace, (Nottingham: Russell Press Ltd. , © 1988) at 34.

[97] Alain Fenet , in Proceedings of the Permanents People's Tribunal , supra note 80 at 35. See Resolution 390 , Year book of the United Nations 1950, at 364-370.

[98] Ibid.

[99] International Commission of Jurists, "Eritrea's Claim to Self-determination," (June 1981) 26 Review of the International Commission of Jurist, at 13. Under the treaty for scramble of African Europeans subdivided the continent into various nations, which have not taken due regard to ethnic or national composition of the territories. The only state made up of a unit ethnic identity is Somalia though Somalians inhabit in Ethiopia and Djibouti, as well.

Europeans subdivided the continent into various nations, which have not necessarily reflected the ethnic or national groups. The only state made up of a unit ethnic identity is Somalia thought Somalis inhabit in Ethiopia and Djibouti as well.

As colonized people, the people of Eritrea should be entitled to the right of self-determination and by virtue of their right; they should be allowed to freely choose their political, economic, social and cultural development. In the de-colonizing process of colonized and non self-governing people, the accepted norm is choice of the people is primarily taken into account and it prevails over other short-term interests. However, history conspired against the people of Eritrea. The fate of the people was decided in a resolution that takes political and strategic interest of great powers setting aside the free choice of the people.

The paper turns now to show the United Nations resolution that the proposed federal arrangement with Ethiopia goes against the interest of the people of Eritrea, and thus violates rules of self-determination. The analysis will precede under two headings: imposition of federal arrangement as denial of self-determination and abolishing of the federation and indifference of the world organization.

2.3. IMPOSITION OF RESOLUTION 390 V (A) AND RULES OF SELF-DETERMINATION

As stated earlier, one of the grounds for holding the United Nations accountable for breach of rules of self-determination arguably emanates from the act of adoption of Resolution 390 V(A). In an attempt to dispose the former Italian colony Eritrea, the United Nations imposed a flawed federal scheme upon the people of Eritrea against the resistance

of the majority of the inhabitants. The author submits the act of the United Nations contradicted rules of self-determination. In what follows, the paper will try to show the pitfalls of Resolution 390 V (A) in reference to the rules of self-determination.

The passing of Resolution 390 V (A) did not fulfill the requirements of rules of self-determination for the fact that the Resolution was not based on the free and genuine consent of the people. The analysis will reveal that the resolution was not substantiated by free and genuine consent of the people.

But, before that it is imperative to discuss the status and content of rules of self-determination as it stood in the time of the adoption of the resolution 390 V (A). This is because under 'principle of intertemporal law' any action or situation has to be accessed in light of the rules contemporaneous with it.[100] Also, article 18 (1) of the draft Articles on state responsibility declares an act constitutes a breach of an obligation only if it is performed at the time where the obligation is in enforce.[101] Thus, responsibility of the United Nations in point has to be set in reference to contemporary rules of self-determination at the time of the enactment of Resolution 390 V (A). This makes an analysis of rules of self-determination in the specified period of 1950 necessary.

Discovering the status of rules of self-determination in the required period is significant for resolution of the issue at hand. Whether the rules of self-determination achieved the status of a positive rule of international law and gives rise to the responsibility of the United Nations will assist in dissolution of the issue. The paper will try first to analyze

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[100] Max Huber expressed the 'Principle of Intertemporal law' of International Law in a dictum in the Island Of Palmas Case. Award of April 1928, RIAA Vol.2, at 829 et seq.

[101] Draft Law of the International Law Commissions on State Responsibility, Article 18(1), Year Book of International law Commission, vol. II 1980(Part 1),UN.DOC.A/31/370/(1976), at 38-42; Wolfram Karl, " The Time Factor in the Law of State Responsibility" in M.Spenedi and B. Simma (eds.), in United Nations Codification on State Responsibility (New York : Oceana , 1987) at 106-108; see also James Crawford , Special Rapporteure, " Second Report on State Responsibility," (UN DOC.AC/CN. 4 / 498) available at

if the principle of self-determination made up the fabric of customary international law in the period at issue.

2.3.1. INTERNATIONAL CUSTOMARY LAW AND RULES OF SELF-DETERMINATION

Doctrines are at variance on the question if the principle of self-determination was a customary rule of international law at the time of the adoption of Resolution 390 V (A). A few authors argued the principle of self-determination had the status of customary rule of international in the specified period. Margasevic wrote the United Nations Charter brought self-determination into a new positive principle of international law the respect and furtherance of which is a legal obligation of member states. He asserted that the obligation was imposed by the convention [United Nations Charter][102] Quincy Wright agreed with the position when he stated that United Nations members ratifying the charter undertook legal obligation in respect to self-determination of peoples with in their territory.[103]

In the same tone, Manfred Laches argued the United Nations Charter gave expression and confirmed the element of international law that derived its legal force from general principle of international law. According to his view, the United Nations Charter did not bring up new rule of international law; member states merely "confirmed and laid down in writing the principle of self-determination which had long been growing and maturing in the international society until it gained general recognition."[104]

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http://www.un.org/law/ilc/sessions/51/english/498.pdf on comments on Article 18 of the Draft laws of State Responsibility .

[102] Alesandar Margasevic, A View on the right of Self-determination in International law , (1956) JUGOSLAVENSKA REVISTA ZA MEDUNARODNO PRAVO 22,at 27.

[103] A. Quincy Wright, Recognition and self-determination (1954) American Society of International Law Proceedings 23, at 27.

[104] Manfred Lachs , " The Law In and of the United Nations ," (1960-61) 1 Indian Journal of International Law 429, at 432.

However, various writers challenged the position. Briggs, writing in 1950, noted that there was no right of self-determination under customary international law.[105] In 1957 Rivlin also submitted self-determination was not in it self a legal concept.[106] Similarly, Starke denied the validity of the concept. Despite the United Nations charter's provisions, he remarked, customary international law confer no right upon dependent people or entities to state hood.[107]

As most authors hold, it seems hard to submit that the rules of self-determination were part of positive rule of international customary law in the required period. In the specified frame of time, international responsibility for breach of customary rules of self–determination might be untenable if not farfetched. Accordingly, the argument to the effect of making the United Nations responsible for breach of customary rules of self-determination in 1950 might not have strong legal support.

Yet, this will not exhaust the issue of responsibility of the United Nations for the act in discussion. The responsibility of the United Nations for imposition of resolution has to be judged in relation to the United Nations Charter, which is the instituting instrument for the organization. Under the regime of responsibility of international organization, organizations are accountable for failing to fulfill the duties incumbent upon them by the constituting instrument of the organization. Thus, the question of responsibility of the United Nation has to take into account the provisions of the United Nations Charter. The questioned act of the organization should be accessed in light of the rules of self-determination as enunciated by

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[105] Herbet Whittaker Briggs, The Law of Nations : Cases Documents and Notes (New York : Appelton-Century – Crofts, 1952) at 65.

[106] Benjamin Rivin, Self-determination and Colonial Areas , (1955) Int'l Counts.No. 195 , 199. See also Clyde Eaglenton , Excess of Self-determination (1953) 31 Foreign Affairs 592, at 593.

[107] J.G. Starke . An Introduction to International Law, 4th eds. (London : Butterworths 1958) at 102.

the charter of the organization. The discussion will pursue to analyze the questioned act *vis-à-vis* the rules of self-determination enshrined in the United Nations Charter.

2.3.2. THE CHARTER OF THE UNITED NATIONS AND RULES OF SELF-DETERMINATION

The principle of self-determination has been stipulated in the charter of the United Nations. The Charter of the United Nations as a general multilateral treaty confers the principle of self-determination as forming part the conventional international law. [108] It confirmed and laid down a principle, which had long been "growing and maturing in international society until it gained general international recognition."[109]

Being drafted in the aftermath of the horrible war in history and its psychological impact, the United Charter has explicitly expressed the principle of self-determination. Article 1 paragraph 2 of the Charter of the United Nations states one of the purposes of the United Nations is to develop friendly relations among nations "based on respect for principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[110]

Also, article 55 of the charter states that the United Nations must promote objectives such as higher standard of living, full employment, cultural and educational cooperation, and human rights, "with a view to the creation of conditions of stability and well being- which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people." [111]

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[108] Aurelia Cristescu ,supra note 93, at 21.
[109] Manfred Lachs ,supra note 104, at 429.
[110] The UN Charter, supra note 13, Article 1.
[111] Ibid., Article 55.

The law of self- determination has also been indirectly expressed in relations to Trust and non-self-governing territories. Article 76 paragraph b of the Charter provides that one of the objectives of the trusteeship system is to promote the progressive development of the inhabitants of the territory towards self-government", considering inter-alias, 'the freely expressed wishes of the peoples concerned."[112]

Similarly, article 73 (chapter XI: Declaration Regarding Non-self-governing territories provides that:

> ...Members of the United Nations, which assumes responsibility for the administration of territories whose peoples have not yet attained full measures of self-government, recognize. ...the principle that the interest of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to develop self-government, to take due account of the political aspirations of peoples, and to assist them in the progressive development of their free political institutions.[113]

Cassses noted that it was in the United Nations Charter that "self-determination had been laid down in a multilateral treaty –a treaty...that had been conceived of as one of the major pieces of legislation of the new world community. The adoption of the UN charter marks an important turning point;" it said to signal "the maturing of the political postulate of self-determination into a legal standard of behavior. In 1945 this legal standard was primarily intended to guide the action of the [United Nations]."[114]

Although the principle of self-determination has been stipulated in the United Nations Charter, the Charter has not provided what the principle entails. The contents of the principle of self-determination as envisaged by the Charter should be discovered from discussions conducted in the drafting stages of the United Nations Charter.

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[112] Ibid., Article 76 paragraph b.
[113] Ibid., Article 73.
[114] Ibid., at 43.

Though member states were unable to positively define self-determination, under the Charter of the United Nations self-determination was understood to mean 'a free and genuine' expression of the will of the people. In the debated on the sub-committee, it was summarized "an essential element of the principle in question [of self-determination] is a free and genuine expression of the will of the people..."[115] It was also envisaged that "respect for the principle of self –determination is a basis for the development of friendly relations and is one of the measures for strengthening universal peace."[116] It can reasonably be concluded that the charter of the United Nations has envisaged the right of self-determination to guarantee the free and genuine consent of the beneficiaries of self-determination. The intention of the emphasis on 'genuine choice" is "to stress that where a people are afforded the right to express their views; they must truly free to do so."[117]

The rule of self-determination as stipulated in the United Nations charter was intended to guide the organization in the act of de-colonization. It was envisaged that organization should take into account the free and genuine choice of the beneficiaries of the self-determination thought the out come may not necessary be independence. As later developed by the United Nations resolution and practice integration or association have been employed as alternative modes of exercising the rules of self-determination.[118] However, in de-colonization process rules of self –determination has been clear in requiring 'free and genuine consent' in determining the final destiny of the concerned people. Any of the modes followed will only be legitimate if it is based on the free and genuine consent of the people concerned. Therefore, integration through a federal arrangement might not necessarily

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[115] Report of the Rapporteur of Committee 1 to Commission I (13 June !945),Documents of the United Nations Conference on International Organization ,G/29(Vol.VI,I/I/A/34(1) p.455. also quoted at Aurlia Cristescu , supra note 93, at 2.
[116] Ibid.
[117] Cassese, supra note 16, at 41.

contradict rules of self-determination if it is rooted in the genuine consent of the people concerned.

However, as will be shown after, the United Nations did not give due regard to the wishes of the people of Eritrea when it imposed a decision to integrate Eritrea under the sovereignty of imperial government of Ethiopia. The United Nations' resolution for the federation of Eritrea and Ethiopia breaches the rules of self-determination, for it was not founded on the true choice of the people concerned. Historical records show the majority of Eritreans expressed their wishes and sought independence in one way or the other. A document sent by the British governor to the British embassy in Addis Ababa declares " as late as August 19, 1949 at a conservative estimate, 75% of the population had adhered to the Independence Block"[119] - a party advocating for an immediate independence of the country. The minority group demanding an unconditional union with Ethiopia had no much support. As put by Trevasik, a then secretariat of the British military administration in Eritrea the leadership of the unionist party was "a self power seeking group of power –brokers with no mass support and representing narrow, selfish interests,"[120] as well "servants of the Ethiopian government."[121]

Yet, the reason for the adoption of the federal arrangement by the United Nations was then to come from consideration other than the wishes and welfare of the people of Eritrea. The imposition of Resolution 390V (A) can easily understand if one sees the context in which the United Nation passes the resolution. A brief discussion on the background to the resolution will follow.

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[118] "Reference re Secession of Quebec" supra note 86, para. 138.
[119] Department of State, Incoming Telegram, received August 22, 1949, from Addis Abeba, signed Merrel , to the Secretary of State ,No.171, August 19,1949. Quoted at Yohannes , supra note 1, at 94 .
[120] "Eritrea and The United Nations", supra note 2, at 34.
[121] G.K.N. Trevaskis, supra note 81, at 74.

2.3.3. THE CONTEXT IN WHICH THE RESOLUTION 390 V (A) WAS ISSUED

The preamble of Resolution 390 v (A) partly explains the motivations for the federal arrangement. It declares that United Nations took into consideration:

> The wishes and welfare of the inhabitants of Eritrea, including the views of the various racial, religious and political groups of the provinces of the territory and capacity of the people for self-government; the interests of peace and security in East Africa; and the rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea.[122]

in proposing the resolution aimed to dispose the colonial state of Eritrea.

However, it was Ethiopia's ambitions for a sea outlet that had been the main determining factor in the final outcome of the series United Nations conferences and meetings conducted to decide the fate of Eritrea and its people. The United Nation was manipulated by the dominant position of the United States and Great Britain to come with an arrangement geared more to keep their strategic and national interest rather the right of self-determination of the inhabitants. A brief survey of the background to the adoption of Resolution 390 (V) reveals the ulterior motive behind the resolution.

The Eritrean case came to the agenda of the United Nations when the victorious powers failed to agree on the disposition of former Italian colonies. After Italy was defeated in the Second World War, it signed a Treaty of Peace with the Allied force in Paris in 1946. Pursuant to the Treaty of Paris, Italy renounced claims to its former African colonies: Eritrea, Libya and Somalia. Though the four big powers (British, France, USA and USSR) were earlier negotiating on the future of former Italian colonies, the issue was first formally discussed in the Paris Peace Treaty. Article 23 of the Paris Peace Treaty stipulated that the

final disposition of former Italian colonies would be determined by an agreement between the four powers with in one year. In the event of failure to reach an agreement, the parties agreed to summit the case to the General Assembly of the United Nations. [123] After the four powers failed to agree on the issue, they sent a commission of investigation to study the political situation of the former Italian colonies. The commission presented it reports, but the big powers could not reach into consensus.

Consequently, disposition of the former Italian colonies was referred to the attention of the General Assembly. The General Assembly was mandated with a special function to give a binding recommendation on the future of the former Italian colonies. In the debate of the Third Secession of General Assembly, there were various proposals. Among which Bevion, British foreign Secretary and his Italian counter part; Count Sofia proposed the Bevion-Sfozia partition plan. The plan, inter-alias, provided for partition of Eritrea into two between the Anglo- Egyptian Sudan and Ethiopia.

Most Eritreans opposed the proposal, though it was backed by the U.K, USA and Ethiopia. A document from the state department revealed,

> The United States and United Kingdom have agreed to support the cession to Ethiopia of all Eritrea except the western province. The United States has give assurance to Ethiopia in this regard. Such a cession would be accompanied by guarantees by Ethiopia of minority rights and return of former Italian settlers.[124]

Thus, the debates at the Third Session were dominated with the idea of partition. However, the proposal was highly attacked by combination of Arab-Asian and Soviet block votes. As a result, an agreement could not be reached, and the case was adjourned to the next session of the General Assembly.

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[122] Resolution 390 V (A), supra note 97, preamble.
[123] Treaty of Peace with Italy , Feb 10, 1947,61, Stat. 1245,T.I.A.S.No.1648,49 U.N.T.S. 126,139) Article 23.
[124] A top-secret memorandum of March 5 1949, written with the UN Third Session in view, from Mr. Rusk to the secretary of state. Quoted in Bereket Habte Sellasie, supra notes 2, at 30.

At the Fourth Session of the General Assembly, an agreement was reached on the question of Libya and Somalia. The United Nations decided that Libya was to become independent by 1952, and Somalia was to become independent following a ten years trusteeship with Italy. Unfortunately, consensus could not be attained on the disposition of Eritrea. The United Nations General Assembly via Resolution 289 C (IV) established a commission of inquiry composed of representative of Burma, Guatemala, Norway, Pakistan and South Africa.[125] The commission was set up to, "ascertain more fully the wishes and the best means of promoting the welfare of the inhabitants of Eritrea." It was mandated to examine the question of disposal of Eritrea and come up with a proposal deemed appropriate for solution of the problem.[126]

Yet, from the outset, the task of the commission of inquiry was influenced by the off-stage diplomatic and political maneuvers of the US, Great Britain and Ethiopia. While the United Nations decided to send delegates to Eritrea, there was an on-going diplomatic motions aimed at securing control over the area. A letter written by the then secretary of defense James Forrestal to the secretary of state Dean Acheston hinted partly at the events happening behind the scene. It reads:

> From the stand point of strategic and logistical consideration it would be of value to the United states to have refineries, capable of supplying a substantial portion of our aviation needs, located close to a crude supply and also close to areas where naval task forces would be operating and where airfields would be located, yet far enough removed to be reasonably safe from effective enemy bombing.
>
> With respect to the Middle East, refineries located in Italian Somaliland and Eritrea would meet the forgoing conditions...therefore as long term-range provision of potential military value, it is believed that concession on rights should be sought for United States interests to construct and operate refineries in Italian Somaliland and Eritrea. [127]

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[125] General Assembly, Resolution .289, U.N. Doc.A/1251 (1949) at 11

[126] G.A.O.R., Fifth Session of the General Assembly, Plenary Meetings of the General Assembly, Annexes to the Summary Records of Meetings, 1949,at 35.

[127] Letter From James Forrestal to the Secretary of State, 13 Decemeber 1948. Quoated at Okbazgi Yohannes, supra note 1 at 96-97.

It goes on to state the need for involving Ethiopia a so-called 'friendly nation' for achieving the desired goal. The letter continues to disclose:

> It would appear that demands by our probable enemies for concession like nature would be invited if efforts were made by the United States to include the matter of concession to us in prospective United Nations agreements for the disposition of former Italian colonies. This would obviously be undesirable from the military viewpoint .It would, however, be satisfactory from the military viewpoint if the matter could be handled by separate agreement with friendly nations desiring control of Italian Somaliland and Eritrea.[128]

At this junction it would be important to note Ethiopia expansionist ambitions. The Ethiopian emperor Haile Selasie put his claim over Eritrea and Somaliland to President Frankly D. Roosevelt on his visit to the US in 1945. He sought the US government's help to pressure the British to accept his claims.[129] Ethiopia claims were also repeated in both Paris Conferences in July 1946 and in New York at the First Secession of the United Nations in December 1946. Thus, it was obvious that the letter of the Secretary of Defense was referring to Ethiopia when it mentioned 'friendly nations.' Not less than four months Akilu Habtewold, the vice foreign Minster of Ethiopia visited Secretary of State Dean Acheson at his head quarter with his American legal advisor. A document from the state department shows the pattern of mutual relationships between Ethiopia and US were developing. The letter partly reads:

> The secretary [of state Archeson] expressed the pleasure of the American government at the military facilities, which the emperor indicated he would grant to the US in Eritrea after that area has been ceded to Ethiopia. Mr. Aklilu responded that the emperor was pleased to be of help in this matter. Still speaking in the name of the emperor, Mr. Aklilu expressed satisfaction at the assignment of an American

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[128] Ibid.

[129] For Ethiopia's diplomatic efforts made government to gain control of Eritrea , See generally , Zewdie Reta , '*A Eritriaya Guday*' – The Eritrean case (1941-1963)(Addis Abeba : Central Printing Press ,September 1992).

military attaché to the mission in Addis Ababa and with the elevation of that mission to the rank of embassy.[130]

It is against these backgrounds that the UN mission was sent to study the wishes of the Eritrean people. The United Nations commission presented its finding to the General Assembly. The representatives of Burma, Norway, and South Africa recommended a close association of Eritrea under Ethiopian sovereignty, while Norway recommended unconditional union with Ethiopia. However, the representatives Guatemala and Pakistan recommended Independence following a ten years United Nations trusteeship.

It is of no surprise to observe diplomatic maneuvers and twists in the outcome of the mission noting the dominant role of the United State in the United Nations and as administrator of the country, Great Britain's unfettered position to manipulate facts. The United Nation Commission was influenced by off-stage deals among United States, Great Britain and Ethiopia. As the administering power of the country and co-sponsor of the partition plan, the British had a significant influenced on the out come of an Eritrean question. The commission was led to believe that the Eritrean population was divided between Christian and Moslem and that the majority (Christians) favored union with Ethiopia. The occupying power tried to exploit the difference between the two religions with an end in view. A clash between some Moslems and Christians was provoked by the administering power during the arrival of the commission of inquiry with an intention of creating division among the people.[131]

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[130] Department of state, Memorandum of Conversation, March 30, 1949. Quoted at "Eritrea and The United Nations," supra note 2 at 32. See on evolution of the Ethio-American connection, Okbazgi Yohannes, supra note 1, at 210-25.

[131] "Eritrea and The United Nations", supra note 2 at 33-34; also see Yohannes , supra note 1 at 139. The author exposes the British Military Administrations' underground political maneuvers conducted with the aim of implementing the partition plan. By the time the UN commission arrives in Eritrea, the foreign office designated Frank Stanfford as the British liaison officer in Eritrea. Stanfford was mandated: "to coordinate the Anglo-Ethiopian political offense against Eritrean nationalists, to beak up the anti-Ethiopian political parities in

The commission also reported that an independent Eritrea was not economically viable. Nevertheless, the country had a fairly well developed infrastructure with 2300 old industrial enterprises and 25% urbanized population .It was the most economically viable state among the three former Italian colonies. [132]

The background deals and political maneuvers had played a significant role in the United Nations resolution, which federated Eritrea under the crown of the Ethiopia. The right of the Eritrean people to self-determination was sacrified to accommodate strategic and political interest of the big powers and their ally. The match of ambitions of the American government to have a military base in the area and Ethiopian's desire for access to the sea put aside the wish of the Eritrean people. The dominant role of the United States in the United Nations tremendously affected the leverage of the United Nations decision. The denial of the right of self-determination was bluntly recorded in the statement of officials of both the US, Soviet Union and Ethiopian government.

John Foster Dulles speaking before the United Nations Security Council as a head of the US delegation in 1950said plainly that:

> From the point of view of justice, the opinion of the Eritrean people must receive consideration, Nevertheless the strategic interests of the United States in the Red Sea basin and consideration of security and world peace make it necessary that the country has to be linked with our ally, Ethiopia.[133]

Bereket Habte Selassie argues the phrasing of the former high-ranking US official shows the resolution was against the interest of the people of Eritrea, which was decidedly in favour of independence. To put it in his words: " the word 'nevertheless' coming as it does

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Eritrea, and to persuade the individual members of the United Nations commission to support the British plan of partition."

[132] Kahasai Berhane, "A Political and Legal Analysis of the Eritrean Question," Vol.7 in African Publication Project (N.J.: Red Sea Press: n.d.) at 5.

[133] Quoted in Linda Hieden , "The Eritrean struggle for Independence" (June 1978) 30, 2 Monthly Review at 15. See also "Eritrea and The United Nations", supra note 15, at 37.

after the sentence which recognizes the right of the people, provides additional evidence that the United States knew the wishes of the people of Eritrea to be decidedly for independence." The placing of the work nevertheless indicated at least the people did not genuinely and freely consent to integration with Ethiopia.

A Soviet Union delegate also expressed his objection to Resolution 390 V (A) as denying the people of Eritrea with the right of self-determination. "A decision is being imposed on the Eritrean people without its consent and, hence, in violation of the fundamental principle of the right of self-determination of peoples. The U.S.S.R. has consistently supported the proposal that Eritrea should be granted independence...the U.S.S.R. delegation objects to the proposal for the federation of Eritrea with another state...adopted without the participation of the people concerned that is without the participation of Eritrea."[134]

Similarly, the Ethiopian foreign Minister boastfully expressed how his country had exploited the cold war by openly staking the fortune and future of Ethiopia on the side of the western powers led by US in return for a deal in Eritrea.[135] It has been recorded that a military pact was signed between the American government and Ethiopia. In discharge of its treaty undertaking, the Ethiopian government granted the American government the use,

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[134] G. A.O.R., Excerpts from 316th Plenary Meeting of the General Assembly, Sixth Session, 2 December 1950, at 539-41. The Position of the Soviet Union in the question of Eritrea was characterized as political opportunism. At the early stage, the Soviet Union was strong supporter of the right of Eritreans for self-determination and independence of the colony. Ironically, it became the principal supplier of arms and experts of the Marxist Ethiopia government in its effort to crash Eritrea's independence movements. Kahasai Berhane, supra note 134, at 6.

[135] "Eritrea and the United Nations" supra note 2 at 35.Ethiopia was the only Black Country who participated in the Korean War, it sent a battalion composed of well trained Imperial bodyguard to fight on the side of the Us army. This had a significant diplomatic and political consumption with the UN with due regard to the debate over the divided report of the investigation commission which was held in an atmosphere dominated by the Korean War. More notably, it signed a military treaty for establishment of an America military in Eritrea with the government of the United States.

with concomitant extra territorial immunity and privileges, of the Kagnew Communication Base in Asmara for a period of 25 years.[136]

Not only are the motives behind the resolution but also the procedure pursued in adoption of the Resolution questionable. The United Nations law of self-determination was silent on methods of determining the wishes of the people. However, it has been common knowledge and practice that plebiscites, which involve direct consultation of the people by vote, have been employed as an impartial and clear method of ascertaining the choice of the people. [137] For instance as early as 1950's the Commission of inquiry in Togoland and the Southern and Northern Cameroon employed plebiscites to ascertain the wish of the people.[138]

In case of Eritrea, plebiscite was not held to ascertain the true wishes of the people even thought plebiscite would have been appropriate given the relative advanced political maturity of the people. The genuine wish of the people would have been better identified had the UN resort to plebiscite to identify the wishes and aspiration of the people. Though the United Nations had sent an investigation unit to study the wish of the Eritrean people, its act was questionable.[139] As put by the British administrator " the United Nations did no more than carry out casual observations of rival political gatherings at each center and address

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[136] The Kagew military base was the biggest out side of the US and was mainly military spot. It was a station of 60 million military complex connecting Europe with the Far East in the US. global communication network and it had about 3500 staff. See Okbazgi Yohannes, supra note 1, at 219.

[137] Sara Wambaugh , Plebiscites Since the World War (Washington : Carnegie Endowment for International Peace ,1933),at 28;see also Rosalyn Higgins, The Development of the International Law through the Political Organs of the United Nations(London , New York; Oxford Univeristy Press, 1963) ; Harold S Johnson , Self-determination within the Community of Nations(Leyden: A.W.Sijthoff , Printing Division , 1967).

[138] The first plebiscites in a trust territory were held in British Togo Land either to become independent, unite with Gold Coast or continuation as trust territory. See General Assembly, UN.DOC. A/2660 para .17; United Nations Year book, (New York: 1955), at 318. For plebiscites held in Cameron, see Trusteeship Council Documents, T/1440, at 31-32.

[139] Casseses, Supra note 3, at 222.

random questions to persons whose representative qualities it had no means of checking."[140]

To quote Casseses' observation :

> where the UN can be faulted is in its failure to organize a referendum in 1950 to establish the wishes of Eritreans. Actually, the manner in which the four commissions ascertained the will of Eritreans is highly questionable. In short, it seems that political and strategic consideration took the upper hand, and self-determination 'as genuine and free expression of will' of a people –was set aside.[141]

To cap, the thesis argues that the United Nation resolution federating Eritrea under the crown of Ethiopia denied the people of Eritrea the right to self-determination. The world organization was preoccupied with keeping the interest of the west and their ally got a slot of land in the Red Sea basin. The political maneuvers and manipulation and behind stage deals resulted in a solution which did not take into account the true needs and aspirations of the Eritrean people. Historical records have shown the deals behind the United Nations resolutions had more impact on the finally outcome than the consultations made to access the needs and aspirations of the people of Eritrea. The United Nations was supposed to seek the true wishes of the people and accordingly propose a solution that best promotes the welfare of the Eritrean people.[142] Nevertheless, other considerations prevailed over the interests of the people. The final outcome was seen to give more regard to the strategic and political interest of western powers. The writer argues the United Nation imposed a federal arrangement on the inhabitants of Eritrea. The action of the world organization denied them the right to choose freely their political future.

The matter has been summarized as follows:

> The imposed form of self-determination [enunciated by Resolution 390 V (A) can be easily understood if one sees the context in which the United Nation pass the resolution. ...The international standing of Ethiopia, former member of [League] of nations, its resistance to the Italian aggression and its geopolitical interests (an

[140] G.Travaskis, supra note 81, at 164.
[141] Casseses, supra note 3, at 222.

> outlet to the sea) seems to have weighted more heavily in the balance than the pure and simple recognition of the right of the Eritrean people to self-determination; even if on the other hand, the fact that the General Assembly resolutions was adopted on the basis of the report of the UN commission to Eritrea ..., which had carried out a direct inquiry into the wishes of the country's population ,attests , nonetheless, to the fundamental importance of the recognition of the right to self-determination as a condition of Resolutions 390 V(A) .[143]

Consequently, Resolution 390 V (A) was described as "not a classical tool of de-colonization under which colonial ruler transfers, or is induced to transfer, power completely to the colonized peoples."[144]

In standards of the rules of self-determinations, the actions of the United Nations are not congruent with the prevalent international law rules. Resolution 390 V (A) goes against the rules of self-determination. It is a vivid reality that the resolution contradicts the laws and practice of self-determination. Noting the resolution was dictated by consideration other than the wishes and welfare of the Eritrean people and not one sought by the Eritrean people affirms one to believe that the resolution undoubtedly violated the rules of self-determination. Thus, the overall legal impact of the resolution was to deny the people of Eritrea the right to self-determination. United Nations imposed the federal arrangement to satisfy the strategic and military interest of the big powers in sacrifice of the right of the people to self-determination. The act of the world organization violated the charter of the organization and resolution enacted pursuant to the charter. Therefore, the action of the world organization is against the rules of international law, and it hence gives rise to international responsibility of the United Nations.

So far, it has been dealt with the motivations for the adoption of Resolution 390 V (A) and circumstance in which it is adopted. Next, it will follow an exploration of the substance of the Resolution.

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[143] "Advisory Opinion on Eritrea," supra note 80, at 386.

2.4. THE MAIN FEATURES OF RESOLUTION 390 V (A)

Despite the fact that Resolution 390 V (A) have not satisfied fully the heartbeat of the people of Eritrea, it was not devoid of virtues. The resolution tried to guarantee right of the people of Eritrea albeit it failed to provided remedies in time of breach. The salient elements of the Resolution 390 V(A) may be summarized as follows.

First, the resolution gave implied recognition to the national identity of the people of Eritrea and territorial integrity of Eritrea based on the colonial boundaries. The people of Eritrea has been mentioned three times in the resolution.

Second, the resolution called for establishment of an autonomous Eritrea government with clearly domestic jurisdiction in legislative, executive, and judicial matters.[145]

Third, it guaranteed the Eritrean people " the fullest respect and safeguards for their institutions, traditions, religious and languages. »[146]

Fourth, the constitution was enshrined with bill of rights and fundamental freedoms that aimed to guarantee Eritreans the enjoyment of all rights and freedoms.[147]

Finally, the resolution and constitution envisaged for an Eritrean government based on democratic principles.[148]

Notwithstanding the above-enumerated virtious elements of the Resolution federation Eritrea with Ethiopia , the resolution have had basic flaws.The federal act did not guarantee the equality of the component parts, which is an essential element of a federal arrangement. It also failed to provide a neutral arbiter to settle dispute arising between the parties. It did not call for international dispute settlement or internal supervision once the

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144 "Eritrea and The United Nations", supra note 2, at 80.
145 Resolution 390 V (A), supra note 97, at paragraph 2.
146 Ibid., at preamble sub- paragraph C.
147 Ibid., at paragraph 7.
148 Ibid., at paragraph 1.

federation was established. Consequently, the people of Eritrea were « subjects of right with out remedy."[149]

Despite the fact that the federal arrangement was an attempt to guarantee right of the Eritrea people to self-determination, albeit it was not, at the outset, supported by majority of the people, it became the victim of its making . There was grave mistake on the part of the planners of the resolution to integrate Eritrea a relatively democratic country under the crown of a feudal Ethiopia government. It was hardly conceivable to expect an empire that was endeavoring by all counts to swallow the Eritrea to conform to the pit and substance of the democratic federal rules and observe the right of the Eritrean people to self-determination.

The federal arrangement could have been the next best thing, short of independence for the Eritrean people. However, its flaws made it a prey of the insatiable Ethiopian expandionist ambitions. The pitfalls of the Resolution were vivid in the aftermath of the implementation of the resolution. Eritreans were short of working mechanism to check or challenge Ethiopia's violation of resolution of the United Nations provision. As will be submited later , this was more evident when Ethiopia abrogated the federal arrangement in flagrant violation of international law.

In summary, the United Nations failed to guarantee the "genuine and free" consent of the people in adoption Resolution 390 V (A) in an attempt to de-colonize Eritrea. The resolution did not only reflect the true wishes and aspiration of the people but it failed to provide mechanisms that guarantee its observance. The overall impact is to deny the right of the people of Eritrea to self-determination. Therefore, the act of the United Nation that imposed Resolution 390 V (A) breached the right of self-determination of the people of

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[149] "Eritrea and United Nations", supra note 2, at 81.

Eritrea. Accordingly, the world organization is legally accountable for breach of rules of self-determination.

Having presented the responsibility of the United Nations emanating from imposition of Resolution 390 V (A), the paper will proceed to discuss the responsibility of the United Nations for failing to fulfill its duties of protecting the right of the people of Eritrea. It will address the silence of the world organization when Ethiopia in violation of the United Nations' resolution unilaterally abolished the federal arrangement.

2.5. ABROGATION OF RESOLUTION 390 V (A) AND INDIFFERENCE OF THE WORLD ORGANIZATION

Responsibilities of international organizations arise not only from positive acts but also from negative acts. The United Nations may be held accountable for failing to meet duties expected from it. One of the objectives of the United Nations has been stated in the charter of the organization to develop friendly relationship among nations based on principle of self-determination, and to further international peace and security. Accordingly, its trusteeship organ is empowered to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government and independence based on the freely expressed wishes of the people. Under the Charter and resolution of the United Nations and treaties enacted in accordance with the charter, the United Nations is mandated to ensure that the right of self-determination of people is respected. It is duty bound to eradicate colonialism and to work for promoting the rights of the colonial people is respected. This duty does not only include taking action to eradicate colonialism but also ensure the actions remains not tampered.

In the Eritrean case, the United Nations is faulted for its omission when Ethiopia abrogated the UN sponsored federal scheme in 1962 and gave deaf ear to repeated pleas of Eritreans in the thirty years of struggle. The world organization has duty to protect the right of self-determination of the Eritrea people. The duty of the United Nations organization did not lapse with the adoption of Resolution 390 V (A) and its implementation. The organization had the duty to ensure the federal scheme remains intact. Anze Matinzeo the commissioner of a UN appointed commission that drafted the constitution of the government of Eritrea put the duty of the United Nations as follows.

> With regard to the application of the General Assembly's resolution after the entry into force of the federal act and the constitution of Eritrea, the panel (of jurists) expressed the following view: ' it is true that once the federal act and the Eritrean constitution have come into force the mission entrusted to the General Assembly under the peace treaty with Italy will have been fulfilled and that the future of Eritrea must be regarded as settled, but it does not follow that the United Nations would no longer have any right to deal with the question. The United Nations' Resolution of Eritrea would remain an international instrument and, if violated, the General Assembly could be seized of the matter.[150]

The duty of the Untied Nations to remain seized of the matter in case breach of the resolution comes from the rules of self-determination. The rules of self-determination have imposed clear responsibilities upon the United Nations to protect and guarantee the right of the people to self-determination. An assessment of the contemporaneous customary and conventional rules of self-determination indicates the United Nations had legal obligation to protect the right of the Eritrea people to self-determination in the time of abrogation and its aftermath. During this period, the laws of self-determination have evolved enough to impose clear duty on the world organizations. The paper will consecutively submit the treaty laws of self-determination and customary rules of self-determination as they stood in the time in issue.

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[150] Final Report of to the United Nations Commissioner to Eritrea, Chapter II, at para. 201.

In what follows, the paper will try to assess the treaty and customary rules of self-determination that existed in that period, respectively. It will then proceed to present the omission of duties on the part of the United Nations.

2.5.1. TREATY LAWS OF SELF-DETERMINATION

During this period, the treaty laws of self-determination have evolved enough to impose clear duties upon the United Nations. In the addition to the aforementioned provision of the United Nations charter, the principle of self-determination has been enshrined in subsequently enacted United Nations' resolutions. Notably, it has become an important rule of conventional international law with the adoption of United Nations Resolution 1514 (XV) – Declaration on Granting of Independence to Colonial Countries and Peoples; and Resolution 2625(XXV) - Declaration Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Resolution 2625XXV).

The Declaration on Granting of Independence to Colonial Countries and Peoples (Resolution 1514) represents a significant step in putting into effect the right of self-determination in accordance with the provisions of the United Nations Charter. It is intended to make the principle of self-determination universally applicable.[151] It explicitly stipulates, "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and cooperation."[152] The Resolution goes on to state, "all people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and

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[151] Gebre Hiwet Tesfagiorgis , supra note 4, at 85.

cultural development."[153] The General Assembly proclaimed the necessity of urgency for an unconditional end of colonialism in all its forms and manifestations[154], and it was underlined that inadequacy of political, economic, social or educational preparedness should never be used as a pretext for delaying independence.[155]

Many view Resolution 1514 as the standard by which the international community judges colonial matters.[156] It has served as a guide to United Nations' role in the de-colonization process. The resolution implied "the right of the colonies to secede from the Parent State and to form independent countries."[157] The declaration on granting independence represents a legal and political formulation by the international community, of the principle of equal rights and self-determination. According Pomerence, "because of the resolution for many representatives of the United Nations, self-determination has not only been transformed from a political or moral principle to a full legal right; it has become the preemptory norm of international law, capable of overriding all other international legal norms."[158]

The Declaration Concerning Friendly Relations and Cooperation among states in accordance with the charter of the United Nations (Resolution 2625XXV) is also another significant legal instrument in reference to self-determination. It is the most compressive formulation of the principle of equal rights and self-determination of peoples. The Declaration reaffirmed the right of self-determination enshrined in the Charter of the United Nations. The resolution declared that the principle of self-determination constitutes a basic

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[152] Declaration on Granting Independence, supra note 6, at Paragraph 1.
[153] Ibid., at Paragraph 2.
[154] Ibid., at Paragraph 5.
[155] Ibid., at Paragraph 3.
[156] W.Ofuatey-Kodjoe, The Principle of Self-determination in International Law (New York: Nellen, 1977) at 121.
[157] Anne F. Bayefsky,ed., Self-determination in International Law : Quebec and Lessons learned (Toronto: York Univeristy , 2000) at 1.

principle of international law. The declaration underlines the subjection of people to alien subjugation, domination and exploitation constitutes a major obstacle to promotion of international peace and order, constitutes a violation of the principle of self-determination as well a denial of fundamental human rights, and is contrary to the Charter of the United Nations. It also revealed the responsibility entrusted to the United Nations by the United Nations Charter to implement the principle of self-determination.[159]

Further, the declaration stressed importance of implementing the principle of self-determination for the purposes of promoting friendly relationships and co-operation among states and a speedy ending to colonialism. It brings out a close link between the principle of self-determination and other principles of international law concerning friendly relations and cooperation among states.[160]

Resolution 2625 (XXV) marks "a progressive development as well codification of the rules of self-determination. [161] Its purpose was to interpret the United Nation charter in a "progressive manner"[162]. Together with Resolution 1514(XV), the Declaration on Friendly Relationship elevated the right of self-determination from a concept of moral and political principle to a legal principle of universal application. They set legal norms on which claimants of self-determination have been able to base their case, and by which the United Nations has been able to determine the legitimacy of those claims[163]

Besides, in the Declaration on the occasion of the Twenty-fifty Anniversaries of the United Nation - Resolution 2627 member states reaffirmed their determination to the principle of international law concerning friendly relations and cooperation among states in

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[158] Michala Pomerance, Self-determination in Law and Practice (Hague: Martinus Nijhoff Publishers,1982) at 1.
[159] Declaration Concerning Friendly Relations and Cooperation, supra note 7, at 121-122.
[160], Ibid.
[161]Aurelia Crustescu, supra note 93, at 10.
[162] Laing, supra note 8, at 216.

pursuance to the charter of the United Nations. Member states underlined that the United Nations could provide the most effective means to strengthen the freedom and independence of people and they condemned all actions, which deprive people those rights.[164] Similarly, the Declaration on the Strengthening of International Security-Resolution 2734), the General Assembly called member states to adhere strictly in their international relations to the purposes and principles of the United Nations charter which includes the rules of self-determination.[165]

It has been affirmed that the recognition by the General Assembly of the principle of equal rights and self-determination of peoples as a principle of the charter and a basic principle of international law puts an end to the theoretical dispute concerning the legal nature of the principle.[166] The close link between self-determination and international peace and stability makes the principle of self-determination as one of the basic principle of conventional international law. It is no longer left to the realm of domestic jurisdiction; a breach of the principle constitutes a threat to world peace and security.[167] Thus, United Nations laws and international practice lead to the conviction that the principle of self-determination is a universally recognized right under contemporary international law, and a "legal binding principle enjoying universality and constituting a general rule of international law.[168]

In summary, the principle of self-determination has been enshrined in various United Nations legal instruments. These different international legal treaties are included as sources

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[163] Gebre Hiwet Tesfgiorgis, supra note 4, at 91.

[164]Declaration on The Occasion of The Twenty Anniversary of the United Nations, General Assembly Resolution 2627 (XXV).

[165] Declaration on the Strengthening of International Security, the General Assembly, Resolution 2734.

[166] Aurelia Cristescu , supra note 93, at 22.

[167] Ibid.

[168] Ibid , at 22.

of international law in article 38, paragraph 1 of the statue of International Court of Justice. Therefore, the principle of self-determination has formed part of the conventional law. As a fundamental rule of international law, it guarantees rights of the beneficiaries of self-determination and imposes duties on the United Nations to guarantee their right. The conventional rules of self-determination, as it has been evolving through time, have put a legal obligation of a continuing nature over the United Nations. In particular, during the period when Ethiopian government abrogated the federal scheme arranged by the United Nations, the rules of self-determination have developed enough to impose clear duties upon the United Nations. The United Nations has been under a legal duty to respect, promote and take actions to ensure the right of people to self-determination is guaranteed. In case of failure to comply with the duties required by the rules of self-determinations, the United Nations is accountable for its non-compliance. Accordingly, as it will be shown later the United Nations is legally accountable for omitting its duties when Ethiopia abrogated the federal scheme in flagrant infringement of the rules of self-determination.

Besides, the responsibility of the United Nations for its negative acts comes from the rules of customary international law as they develop through the specified period. Next follows an analysis of customary rules of self-determination and the associated question of responsibility of the United Nations.

2.5.2. THE CUSTOMARY LAW OF SELF-DETERMINATION

Similarly, in the relevant time the rules of self-determination have been evolving and maturing to achieve the status of customary international law. In the duration, few dispute the fact that rules of self-determination have achieved the status of customary international

law. The United Nations has played a pivotal role in the formation of general standards in the laws of self-determination.[169] It has "proclaimed new values, gradually enshrined them in resolutions and promoted the hammering out of treaty rules and monitored their observance."[170] Aurelia Cristescu argues resolutions of the United Nations and the Security Council as well as decision of the international court of justice have contributed in the formation of the customary rules of self-determination.[171]

Though the legal effect of the United Nations resolution is less settled, in the area of self –determination the resolution of the organization has exceptionally played a crucial role in forging the customary rules of international law. Treaty laws of self-determination are highly credited to the development of norm of customary international law. The practices of the United Nations in the de-colonization process have also contributed in creating rules binding member states. The United Nations has played an instrumental role in de-colonizing process. The de-colonization committee of the United Nations has embarked various African and Asian countries from the yoke of colonization. The vital role played by United Nations' declarations and resolutions such as those regulation rules of self-determination in developing customary international law has been described as follows:

> In view of the greater solemnity and significance of a declaration, it may be considered to import, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon states.'[172] (Emphasis added)

Moreover, the practices of states in the area of self-determination have indicated maturity of the principle to customary norm of international law. United Nations' repeated

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[170] Ibid.

[171] Cassese , supra note 3, at 88.

[172] Legal Affairs of the United Nations secretariats, E/CN.4/L.610.PARA.4.

resolutions concerning self-determination were evidences of state practice, which strengthened over years the customary international law of self-determination against colonialism.[173] The fact that the principle of self-determination is embodied in the constitutions of several countries and various treaties and administering powers has given firm recognition to the right of self-determination of the colonized people.[174] Umozurike concludes that United Nations declarations and state practice have accelerated the emergence of the principle of self-determination as a norm of customary international law. [175]. They have not only contributed to the formulation of the law on de-colonization but to the interpretation and practical application of the rules of law relating to self-determination.[176] Thus, it is less disputed to state that the principle of self-determination has become a customary norm of international law in the required time.

Although it is widely accepted that the principle of self-determination has achieved the status of customary international law in the specified period, it is not even easy to determine the date on which the rules of self-determination emerged as forming as a norm of customary international law. According to Sahovic with the adoption of Resolution 1514, self-determination achieved a rule of customary international law.[177] His position is that since Resolution 1514 expressed the overwhelming majority of the international community, and it could be taken to reflect the general legal conviction of the binding nature of the principle of self-determination. In the same tone, Emerson underscored that Resolution 1514 could

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[173] Umozurike , Self-determination in International Law (Hamden : The Shoe String Press , Inc., 1972)
[174] Ibid., at 189.
[175] Ibid.
[176] Aurelia Cristescu , supra note 93, at 23.
[177] Milan Sahovic, " Principle of Equal rights and self-determination of peoples", in Principles of International Law Concerning Friendly Relationship and Cooperation," in Milan Sahovic ed. (Belgrade: Institute of politics and Economic ; Dobbs Ferry , N.Y. : Oceania Publications , 1972) at 340.

"without exaggeration be taken as almost amendment of the charter," and extension of the anti-colonial activities of the Untied Nations.[178]

On the other hand, Wilson warned against suggesting a specific date. He wrote that " it is all tempting to grasp seemingly pivotal events like the passing of Resolution 1514 (XV) in 1960.....as evidence of this change and ignore the gradual evolution of ideas , as evidenced by the practice of states ,which led to these major events."[179]

However, it might be reasonable to refer the time when Declaration on Granting Independence to Colonial People was adopted as a critical year in formulating the norm of customary international law. Resolution 1514 has been termed as a 'Magna Carta '" of de-colonization that marked "the beginning of the irreversible trend towards full de-colonization."[180] Consequently , it is tenable to argue Resolution 1514 has better molded the principle of self-determination and elevated it into a binding norm of international law; even though the principle was evolving over a long period of time.

Therefore, the responsibility of the United Nations for omitting its duty prescribed by customary rules of international law may arguably taken to commence from early 1960 and extends of over a period of time. It has a continuing character. As will shown later, in our case the responsibility of the United Nations for breach of rules self-determination may be considered to commence at least from the year of the adoption of resolution 1514.

In short, it has been submitted that the principle of self-determination is one of the fundamental norms of international law. It forms part of the customary as well conventional international law. Thus, the rules guaranteeing the equal rights and self-determination are

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[178] Rupert Emerson , Colonialism , political development and the United Nations, (1965) 19 International Organizations, 484, at 488-93.
[179] Heather A. Wilson , International Law and the Use of force by National Liberation Movements (Oxford : Clarendon , 1988) at 78.
[180] Hector G. Espeill, supra note 10, at 8.

part of the regime governing the international arena. As such the principle of self-determination constitutes one of the rules regulating the activities of subjects of international law. The United Nations charter and subsequent declarations elevated the principle of self-determination into an international standard measuring the conduct of states and international organizations. Accordingly, rules of self-determination guarantee that peoples, communities and groups benefit from full enjoyment of their rights, and they, in turn, impose corollary duties on international actors including states and the United Nations to respect, promote and guarantee the right. The principle has been crowned with the authority to judge the acts of the United Nations, for it is a subject possessing legal personality in the international forum. It constitutes a legal norm the breach of which gives birth to the responsibility of the United Nations. Thus, the conducts of the world organization that breach obligations under the rules of self-determination establish the legal ground for making the organization responsible.

In summary, the discussion has shown that the United Nations has legal responsibility for acts violating rules of international law. As a subject of international law, the United Nations has a duty to act pursuant to rule of international law applicable to its scope of activities. If the actions of the organization fall short of legality, it may be held accountable for non-observance of international law. One element of legal responsibility - breach an international norm exists if the act of the United Nations encounters against a rule of conventional or customary international law. In the Eritrean case, the United Nations omitted the duty of protecting and ensuring the right of self-determination of the people. In what follows the paper will proceed to present legal responsibility of the United Nations for failing to fulfill the duties imposed by the rules of self-determination in the Eritrea case.

2.6. OMISSION OF DUTY AS BREACH OF RULES OF SELF-DETERMINATION

In the above discussion, the duty of the United Nations did not lapse with the adoption of Resolution 390 V (A), but it was supposed to ensure the resolution remains inaction. In case of violations, the organization was expected to remain seized of an action. However, what followed the adoption of the federal act was ironically to the opposite. The United Nations failed to protect the federal scheme proposed by it in the disposition of Eritrea. It remained indifferent when Ethiopia illegally abrogated the federal scheme imposed by the United Nations in flagrant violation of resolution of the United Nations and the federal law enacted pursuant to the United Nation resolutions.

The United Nation resolution decided that Eritrea should have an autonomous government based on principle of democratic government. [181] With the aim of putting the federal arrangement into effect, it established a commission composed of panel of jurists to draft a constitution for the autonomous government of Eritrea.

The panel of jurists came up with a constitution enshrined with fundamental principles of democracy and human rights. The constitution vested the Eritrea government with the legislative, executive and judicial powers with respect to matter within its jurisdiction. The jurisdiction of the Eritrea government was stipulated to include, inter-alias, various branches of the law (criminal law, civil law and commercial law etc.); the organization of the public services; internal police; health; education; exploitation of natural resources and regulation of industries, internal commerce; trades and professions and others. On the other hand the federal government was conferred jurisdiction over defense, foreign affairs,

[181] Resolution 390 V (A) , supra note 97, parargraph 3.

currency and finance, foreign and interstate commerce, foreign and interstate commerce, and external and interstate communication, including ports.

The Eritrean constitution also stated that the government of Eritrea should be based on the principle of democratic government. It also called for direct or indirect fair and periodic election as well as prescribed organs of government working in the interest of the people. It was stipulated that the organs of the government and public officials would have no power other than those conferred on them by the constitution, by- laws and regulations, which give effect to them. Further, the constitution declared that the people should enjoy basic rights and fundamental freedoms. And, it provided a detailed bill of rights and fundamental freedoms. The federal act also clearly stated the provision of the federal arrangement could not be amended or violated by any body other than the General Assembly.

However, the reality was sadly different. The government of Ethiopia started to violate systematically the provisions of the federal act and the United Nations resolution as soon as the federal act was put into action. Three years after the federation entered into force, the representative of the imperial government in Eritrea expressly affirmed the intention of the Ethiopian government. In a speech he made to the Eritrean Assembly, he stated, "there is no internal and external affairs, as far as the office of his Imperial Majesty's representative is concerned, and there will be none in the future .The affairs of Eritrea concerns Ethiopia as a whole and the emperor."[182]

Utilizing various tactics, the emperor started to dismantle the integrity of the Eritrean government. The chief executive was pressured to resign. Other critics and opponents were either jailed or exiled. The extension of the feudal system with a king as

[182]Quoted in "Eritrea and United Nations", supra note 2, at 43.

sovereign to Eritrea replaced the rule of law by rule of man. Masses of students, workers and teachers protested against the Ethiopian move but they met with further grave violations of human rights-shootings, arbitrary arrest, the banning of labor union activities and closing of industries. The 1958 strike organized by general workers of Eritrea was the bloodiest one.

Contrary to the provision of Resolution 390 V (A) Ethiopian language was imposed up on the people. The United Nations called for full respect and safeguards the institutions, traditions, religious and languages of the Eritrean people. The Ethiopian government replaced the official languages of Tigrinya and Arabic by Amharic, which is alien language to the Eritrean society.

The illegality of the Ethiopian government got worse and worse. In 1958, the Eritrean Assembly was forced to vote to lower the Eritrean flag and raise the Ethiopian flag. Eritrean government was changed into Eritrean administration; chief executive was turned into a chief administrator. Eritrean seals and stamps were abandoned. The Assembly was made to vote to replace the Eritrean constitution and accept the Ethiopian penal code. The violations reached a climax when Ethiopia unilaterally abrogated the federation and annexed Eritrea. In a hypocritical move, it used bribery, intimidation and naked force to pressure the Eritrean Assembly to vote for abolishing of the federation. As it has been sadly forecasted, the federation was finally abolished and Ethiopia annexed Eritrea.

In the life span of the federation and after its abolition, the people of Eritrea called the United Nations to protect their right of self-determination. Through several of its organizations, the people of Eritrea tried to make their petition, but to their dismay, they had not been able to be heard by the United Nations. It was only when the people of Eritrea presented the world with the fully independent country fait-accompli in 1991 that the United Nations blessed the hard-won independence.

In the last sad years, the world organization omitted its duty imposed by the rules of self-determination and resolution 390 V (A). In 1980's the International Commission of Jurists aptly expressed in 1980's the conspiracy of silence of United Nations and its members as follows:

> Of all the people who, since the Second World War, have been the victims of great power rivalries and ambitions, perhaps the one with the greatest claim for consideration is the people of Eritrea. Nevertheless, no nation has yet been willing to raise the issue of the rights of this people in the United Nations. The truth is that the 'Eritrea questions' is a source of embarrassment both to the United Nations itself and to almost all 'interested parties'. [183]

The reason was obviously the failure of the organization to undertake properly the duty entrusted to it. The body allowed it to be manipulated and used by the combined efforts of Ethiopia and its Western alliance, and remained silent when Ethiopia abrogated the United Nations Resolution 390V(A).

Under the regime of responsibility of the international organization, the United Nations' omission to protect the right of the Eritrea people is tantamount to breach of an international obligation. Consequently, it constitutes an element for responsibility of the international organization. Thus, the United Nations is accountable for breaching of the rules of self-determination.

The undue silence of the United Nations violated the duty imposed by both treaty and customary rules of self-determination. The negative acts of the United Nations tantamount to an international wrongful act and results in legal responsibility under rules of international law. The international wrongful act has a continuing character.[184] It materialized over an expended period. Thus, the organization has legal responsibility for the period in

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[183] International Commission of Jurists, supra note 99, at 14.
[184] See generally Wolfram Karl, supra note 101, at 100-101. James Crawford, supra note 101.

which its act remained incongruent with the international legal obligations prescribed by the rules of self-determination.

To sum up, as an organ mandated to ensure the de-colonization of people based on respect to self-determinations, the United Nations had a moral and legal responsibility for acts violating the rules of self-determination. As a sponsor of the United Nation Charter and United Nations declarations, the United Nations is accountable for breaches of their provision.

The United Nations resolution that federated Eritrea and Ethiopia was meant to dispose of the former Italian colony. As such, it should have taken the interests and welfare of the people of Eritrea as the main factor in the disposition of the colony. However, history witnessed that political and strategic interests prevailed over the right of self-determination of people. The Untied Nations imposed a federal arrangement that aimed to secure the interest of the West in particular, the US and their so-called historical ally Ethiopia. The actions of the United Nation violated rules of international law.

The laws of self-determination guarantee colonized people with the right to decide freely their political future. Accordingly, any territorial change should take into consideration primarily the interests of people concerned. The people should determine in an informed and democratic way their destiny. Anything less would not be in line with the laws of self-determination. The United Nations resolution to federate Eritrea with Ethiopia was not based on an informed and truly expressed will of the people of Eritrea. The organization moved to serve other interests at the expense of the right of self-determination. The motivations for the resolution and finally, the resolution itself fell short of the demands of self-determination. The action of the international organization denied the people of Eritrea the right to self-determination. Consequently, it effects in question of responsibility.

Further, the organization should also be held responsible for its inaction in the abolition of the federal scheme it set up .The unilateral abolition and resultant annexation was against the rule of international law. The act violated the resolution of the United Nation and laws of self-determination. It was a gross violation of the right of self-determination. Though not welcomed by the people, the federation act tried to include provision prescribing the establishment of democratic constitution and called for respect to human rights and freedoms. Yet, as the federation was not meant from the outset to serve the interest of the people and ensure the right of the people to self-determination, it was violated not long after its entry into force. To the dismal of the people of Eritrea, the United Nations remained indifferent to the grave violation of the laws of self-determination. As a guardian of the right of self –determination and sponsor of the federation, the United Nations should have taken action to ensure the right of the people of Eritrea. On the contrary, it failed to hear petitions of the people of Eritrea calling for an action against the illegal move.

As put by some authors, the federal arrangement was from the outset an engagement for the annexation that was predicted to come shortly.[185] Thus, the cumulative effect of the actions and inaction of the world organization violated rules of international law. It denied the right of the Eritrean people to self-determination. The United Nations breached the duty incumbent upon it by the rules of self-determination. The deeds of the organization are actionable under the regime of responsibility of international organization. The denial of Eritrea peoples' rights of self- determination raises an action for responsibility of the world organization.

The illicit act of the organization was described as follows:

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[185] Ruth Iyob, The Eritrean struggle for independence : Domination, Resistance, Nationalism, 1941-1993 (Cambridge: New York: Cambridge University Press, 1995).

> The United Nations has a direct responsibility in the outbreak of Eritrean conflict. It brought an end to a classical colonial situation only to allow a new style of colonialism to intervene, a style of colonialism that does not proclaim itself as such, which does not come under the cannon of law, but which is recognizable by its effects.[186]

In effect, it had "legalized the sell out' of Eritrea and its decision became the root cause of the conflict that pursued for more than three decades. [187] Therefore, the United Nations should be held accountable for the breach of laws of self-determination.

Consequently, the organization has a moral and legal duty to make good for the damages resulted from its illicit acts. Under the rules of international responsibility, it is duty owed to make reparation for injuries resulting from its acts. The thesis goes on to deal with the follow up issue of reparation.

Therefore, the United Nations was under an obligation to act when its Resolution was unilaterally violated. As a sponsor of the federal arrangement that integrated Eritrea under the crown of Ethiopia, it is expected to ensure the full materilization of the legal scheme. However, the United Nations, unfortunately, had not or had little engagement in Eritrea since the entering into force of the Resolution in general and the aftermath of the official abrogation of the United Nations sponsored integration scheme in particular.[188]

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[186] Alain Fenet , supra note 97, at 293.

[187] Yohannes , supra note 1, at 176.

[188] After the coming into effect of Resolution 390 V(A) , there was few engagement of the United Nations in the Eritrea. In mid and late of 1980's, the United Nations intervened via providing humanitarian aid to areas

CHAPTER III

3. THE UNITED NATIONS'S DUTY OF REPARATION FOR BREACH OF RULES OF SELF-DETERMINATION

It has been shown that the United Nations is responsible for breach of the rules of self-determination. Under rules of international law, international responsibility gives rise to reparation. The discussion will proceed to establish the duty of reparation of the United Nations for violations of the rules of self-determination.

One of the principal tenets of the regime of responsibility of international responsibility is to provide remedies for those whose rights have been infringed due to violation of rules of international law. International responsibility was articulated well as a principle that establishes an obligation to make good violations of international law producing injury. [189] The duty to make reparation is enshrined by principles of traditional international law.[190] Accordingly, the United Nations is duty bound to make reparation for breach of rules of self-determination, thus it has the duty to make good for injuries caused by its acts. In relation to rules of self-determination, the United Nations is accountable for breach of rules and duty owed to make reparation for damage resulted from their breach. The above presentation have shown that on disposing of Eritrea, a former colony of Italy, the United Nations acted in violation of the duties of rules of self-determination. Under the rules of responsibility of international organization, the United Nations is under a legal duty to make reparation for injuries sustained from breach of the rules of self-determination. The position is buttressed by various sources of international law.

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serious affected by draught and famine. See generally , United Nations , United Nations and Independence of Eritrea (New York : United Nations' Department of Publications, © 1996) UNDPI 1850 CACODOC

[189] C .Eagleton , The Responsibility of States in International law (New York University Press, 1928) at 22.

[190] F.V. Gracia Amador and et al , Recent Codification Of The Law of State Responsibility For Injuries To Aliens (New York: Ocean publication Inc., 1974), " Titles and texts of the Draft Articles on State

Authors widely held that international responsibility gives rise to reparation for the damage sustained. Eaglenton wrote the ideas of responsibility stressing reparation are made for injury committed is "as old as morality itself."[191] International legal responsibility was regarded as the consequence of the breach or non-performance of an international obligation; and it entitled an aggrieved [organization] owed the wrongdoer a duty to make reparations.[192]

In addition, it has been reported that international law and practice indicated international responsibility entails "a duty to make reparation for injury sustained, a duty incumbent on [the actor], which violated or did not comply with an international obligation." [193] George Schwarzenberger described the recognition of the duty to reparations as an evolving process: "International judicial institutions have slowly groped their way towards the articulate formulation of the rule that the commission of an international tort entails the duty to make reparations."[194] Thus, a breach of an international obligation imports the duty to make reparation for the damage sustained as a consequence of that.

On the other hand, some authors submitted the legal effect of international responsibility to go beyond reparations. Contemporary international law is considered to cover not only the duty to make reparation for damage done to an injured party but also includes the other possible legal consequences of the breach of an international obligation.[195] In the words of Brian D.Smith, "[international] responsibility denotes the juridical position

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Responsibility of States for International Wrongful acts adopted by the Draft Committee on the Second Reading, Part one » supra note 66, chapter II , Articles 34 et seq.

[191] Eagleton , supra note 189, at 22-23.

[192] Ibid.

[193] Amador et al, supra note 190, at 8 See also " Titles and texts of the Draft Articles on State Responsibility of States for International Wrongful acts adopted by the Draft Committee on the Second Reading, Part one" supra note 66, in article 31 stipulated that " the responsible state is under an obligation to make full reparation for injury caused by international wrongful act"

[194] George Schwarzenberger , International law (London : Stevens, 1957).

[195] Amador et al , supra note 125, at 85.

of the obligor- state after a breach of an international obligation."[196] It is the consequence and sanction against a state for failing to observe rules of international law.[197] It encompasses both civil and criminal responsibility arising out of a breach of international obligations.[198]

However, one thing remains undisputed among the international publicists. There is doctrinal consensus to the effect that international responsibility gives rise to a duty of reparation for the injury sustained.

Case law also supports the position that any breach of international law entails reparation for the wrongs done. In the *Chorzow Factory* proceeding, the permanent international court of justice stated, "it is a principle of international law, and even a general conception of law, that any breach of an engagement invokes an obligation to make reparation in adequate form.... Reparation is the indispensable complement of a failure to apply of [international law]" [199] The court emphasized the fact that the duty to make reparation automatically follows a breach of an international obligation.[200]

Following the reasoning of *the Chorzow Factory case,* in *Velasquez Rodriguez Case*, the Inter-American Court of Human Rights affirmed the principle that any violation of an international obligation, which results in harm, creates a duty to provide adequate reparation.[201] Anthony Gifford argues the principle is just as much valid in the case of illegal actions on a larger scale that affect entire peoples as it is often held in case of acts violating

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[196] Brian D.Smith, supra note 67, at 6.
[197] Ibid.
[198] Amador , supra note 190, at 8. See also James Crawford , Special Rapporteur, " Second Report on State Responsibility," supra note 101, for discussion on criminal and civil responsibility of states.
[199] Case concerning the Factory at Chorzow , (1929) Series A, No.17..Publications of the Permanent court of International Justice, collection of judgements, 29.[here in refereed as **The Chorzow factory case**]. See also the ICJ advisory opinion in the case of **Reparation for injury suffered in the services of United Nations**; supra note 54, at 184.
[200] The Chorzow Factory Case, Ibid., at 16
[201] Velasquez Rodriguez Case,(1988). Ser. L./ V/III, doc. 13 Inter-Am. C.H.R. 35, OAS, at 19.[here in after referred as **The Velasquez Case**]

individual rights.[202]

International practice has also shown that reparation have resulted from a breach of international legal rules. For instance, in 1952, the Federal Republic of Germany reached an agreement with Israel for the payment of $222 million, following a claim by Jews who had fled from Nazi-controlled countries.[203] Similarly, in 1990, Austria made payments totaling $25 million to survivors of the Jewish Holocaust. Japan has made reparations payments to South Korea for acts committed during the invasion and occupation of Korea by Japan in World War II. The UN Security Council on its part passed a resolution requiring Iraq to pay reparations for its invasion of Kuwait. The Untied Nations went further to establish a multinational agency for facilitating the payment of reparations to parties injured by the Iraq invasion of Kuwait.[204]

Experience of the United Nations also indicates that the organization has made reparation for breach of international laws. In the field of humanitarian law, the United Nations has been responsible for damages caused by its military forces. It has paid and entered into various agreements to compensate persons suffering damages originating from the activities of its forces. The organization paid highest number of claims out of the Congo operation. In a letter, dated 6 August 1965 addressed to a Soviet representative to the United State, the Secretary General wrote, "it has always been the policy of the United Nations, acting through the Secretary General, to compensate individuals who have suffered damages

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[202] Anthony Gifford, " THE LEGAL BASIS OF THE CLAIM FOR SLAVERY REPARATIONS " (2000) 16Human Rights Spring, 17.
[203] Ibid., at 18.
[204] Stanley J. Glod, International Claims Arising from Iraq's Invasion of Kuwait, (1991) 25INT'L LAW. 713, at 719; see also Gregory Townsend , " THE IRAQ CLAIMS PROCESS: A PROGRESS REPORT ON THE UNITED NATIONS COMPENSATION COMMISSION & U.S. REMEDIES" (1995)Loyola of Los Angeles International and Comparative Law Journal 973, at 999.

for which the organization was legally liable."[205] In line with that, the organization mandated the office of the secretariat to study and present the third party claims and limitation of liability for damages caused by United Nations forces. The fact that the United Nation General Assembly opted to discuss and accept liability in relation to the United Nations forces is evidence showing the duty to make reparation for breach of international organizations is in line with the practice of the United Nations.

In short, various sources of international law and practices have indicated that a breach of an international obligation entails the duty to make reparation. International actors that violated a prevalent rule of international law are legally responsible to make reparations in an adequate form. As an organ mandated with various and major tasks the United Nations has a duty to make good the injuries caused by its acts. In reference to the de-colonization process, the United Nations is accountable for breach of rules of self-determination and duty owed to make good for failures. The above presentation has shown that on disposing of Eritrea, a former colony of Italy, the United Nations breached the rules of self-determination. It has imposed a "federal" arrangement oriented to serve the political and strategic interests of the big powers in disregard to the free choice of the people of Eritrea. It has also failed to protect the federal scheme when Ethiopia unilaterally abrogated it in flagrant violation of the rules of self-determinations. The actions and omission of the organization give rise to international responsibility and duty to make reparations for injures effected .It has been submitted that the United Nations is legally responsible for violating the rules of self-determination and denying the people of Eritrea the right to self-determination. Accordingly, it has a duty to make reparation for the damage sustained by its illegal acts.

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[205] Secretary General, Letter dated August 6, 1965 from the Secretary General addressed to the acting permanent representatives of the U.S.S.R to the United Nations (S/6507) , reprinted in (1965) United Nations' Juridical Year book, at 41.

Once the legal argument on reparation of the United Nations is settled, the policy issue that will arise is if the organization is supposed to make reparation. International moral and legal obligation commends repairing past wrongs. Because of the United Nations is the principal political and legal representative of the world community, it has the legal and moral obligations to bear the burdens of the international community. Even though the organization is currently under serious financial constraints, this will not in any way immune the organization from assuming legal duty to make reparation for damage caused as a result of its acts in international obligations.

Therefore, international legal rules and practices substantiate the argument that runs the United Nations is responsible to make reparation for injury sustained because of its acts in violation of rules of self-determination.

3.1. INJURIES SUSTAINED AND FORM OF REPARATION

It has already been underlined that international responsibility entails the duty to make reparations in an adequate form. In the Eritrean case, the United Nations has an obligation to make reparation in an adequate form for damages sustained by the people of Eritrea as a consequence of its acts in breach of international obligations.

Question of reparation demands a thorough assessment of the damages sustained by the people of Eritrea because of the improper acts of the organization. Though it is not the intention of the paper to assess in detail the injuries sustained in the almost half –century struggle of the Eritrean people against domination and for their right to self-determination, it will try to mention some of the major injuries suffered by the unfortunate people. In the past bitter decades, the people of Eritrea have suffered incalculable human and material damages.

They have gone through the unimaginable ordeals to reclaim the denied right of self-determination and determine their political, economic, social and cultural futures. Though a detailed official account of the damages is not yet available, they may be broadly categorized as human and material losses. [206]

The imposition of the federal arrangement and followed resistance of the people have led to the longest liberation struggle in Africa. To enjoy finally their right of self-determination, the people of Eritrea have suffered a tremendous human suffering. According to assessment of the government of Eritrea, the struggle for independence demanded the lives of hundreds thousand freedom fighters and civilians. About a million people, one fourth of the population fled the country and migrated to various countries.

The amount of the material loss is incalculable. Various infrastructures were looted, deliberately destroyed, or left to decay. All industries inherited from the Italian colonizers were also moved to Ethiopia or became non-functional. Fertile farms become war fields and forests were destroyed to the extent of extinction. In mid of the twenty-century forests covered a considerable part of the country. Sadly at the turn of the century only a little of it remains with forest. The effect of this is to cause ecological changes and repeated reoccurrence of droughts and famines.[207]

To sum up, the total damages suffered by the people of Eritrea are tremendous in term of human and material losses. Though not any imaginable amount reparation can be commensurate with the amount of damages suffered, the United Nations, at a minimum, should bear the responsibility to repair some of the injury sustained. The organization is

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[206] Bokuretsion Haile, The Collusion on Eritrea (Asmara: University of Asmara, 2000), at 206-211. The author enumerated the injury sustained to include damages sustained on infrastructure, archeological findings, ecology and demography, culture and tradition as well cottage industries and factories.

[207] Lionel Cliffe, " The Impact of war and the response to it in different Agrarian Systems in Eritrea" (July 1989) Vol.20, No.3 Development and Change, 373 at 375 et seq.; Kidane Mengisteab, « Rehabilitation of

obliged to try to make reparation in an adequate and pertinent mode of reparation pursuant to the international principles of reparation.

Van Bowen, a rapporteur on the issue of the right to restitution, compensation and rehabilitation for victims of gross violation of human rights, summarizes the modes of reparation to be restitution, indemnity, satisfaction and declaratory judgment.[208] In his report, he further argues, "the right to restitution, compensation and rehabilitation is intimately linked with the concept of [international] responsibility."[209]

The basic principle governing the form of reparation for breach of rules of international has been also underlined in the Chorizo factory (indemnity) case as follows:

> The essential principle contained in the actual notion of an illegal act-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals- is that reparation must, as far as possible, wide out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act has not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if in need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it –such are the principle which should serve to determine the amount of compensation due for act contrary to international law.[210]

The decision of the court in the Chorzow factory implied reparation primarily involves restitution in kind and indemnity comes into effect if restitution in kind is not possible.

Degraded Land in Eritrea's Agricultural Policy : An Exploratory Study » In Gebre Hiwet Tesfagiorgis (Trendon, N.J. :The Red Sea Press Inc., c1993) at 112-113.

[208] Van Boven, Report on issue of the Right to Restitution, Compensation and Rehabilitation for victims of gross violations of human rights, E/ CN.4/Sub.2/1990/10 at 5. See " Titles and texts of the Draft Articles on State Responsibility of States for International Wrongful acts adopted by the Draft Committee on the Second Reading, art one » supra note 66, chapter II , Articles 34 states " full reparation for the injury caused by an international wrongful act shall take the form of restitution, compensation and satisfaction either singly or in combination."

[209] Van Boven, Ibid., at 4.

[210] The Chorzow Factory Case, supra note 199, at 47.

On the same line, the Inter America human rights tribunal states in the Velasquez Rodriguez Case, reparation to include "fair compensation taking into account both material and moral damages." [211]

Noting that the people of Eritrea have already secured the independence of their country and the damages suffered are not mostly reparable in kind, the most appropriate method of reparations in the case is indemnity. Indemnity embodies "compensation for all damages which resulted from the unlawful acts, including a profit which would have been possible in the ordinary course of action... "[212] The United Nations is required to provide a commensurate amount of indemnity to compensate the damages sustained as a consequence of its acts. Though it might not be practically and politically feasible to demand the organization to make reparation for all the injury sustained, the rules of international responsibility of international law demands the organization to make reparation to an amount feasible to the damages sustained by the people of Eritrea. At a minimum, moral and legal responsibility will require the organization to make reparation to the people of Eritrea. For instant, the organization may indemnify the victimized people in form of financial aid or development assistance.

In conclusion, various sources of international law indicate international responsibility entails the duty to make reparations in an adequate form. On disposing of Eritrea, the United Nations has breached the duties incumbent upon it by the rules of self-determination. The acts of the organization have denied the people of the right to self-determination, and it resulted in unimaginable suffering and misery. The people of Eritrea suffered a tremendous human and material loss. Under the provisions of the regime of

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[211] Velasquez Rodriguez Case, supra note 201, at 15.
[212] Van Boven, supra note 208, at 5.

responsibility of international organization, the United Nations is accountable for its acts in breach of rules of self-determination. Consequently, it is commendable to make reparation for the injuries resulted from its acts. The United Nations should indemnify the victimized people in an adequate form. At a minimum, the United Nation is under a legal and moral duty to provide indemnity in forms of aid or help in the developmental plans of the country.

CONCLUSION

The current stage of development of rules of international law makes accounting international organizations for their misdeeds commendable. The regime of responsibility of international organizations demands holding the United Nations responsible for acts in breach of international obligations. The responsibility of United Nations has two legal bases.

First, international legal personality of the United Nations entails the duty to be held responsible. The reasoning is rooted in the advisory opinion given by the International Court of Justice in the Reparations case. It has been underlined that legal responsibility entails rights and corresponding duties. It is a settled principle of international law that the international legal personality of the United Nations gives birth to legal responsibility.

Second, the responsibility of the United Nations comes from the applications of the rules of inter-state responsibility. The rules of interstate responsibility are applicable in establishing responsibility of the United Nations. Of course, the process requires giving due consideration to the inherent peculiar natures of the organizations.

Under the rules of responsibility of international organizations, two elements are required to establish responsibility of the United Nations. They are breach of international obligation and attribution of the breach to the organizations. Accordingly, the United Nations is responsible for conducts of its organs that breach of international legal norms.

One of the fields where the United Nations may be held accountable is a rule of self-determination. Though precedents are mainly available in the area of international humanitarian norms, rules of international responsibility demand rending the organization accountable in other fields as well. The organizations may be responsible for breach of duties imposed by the rule of self-determination. The principle of self-determination is one of the fundamental rules of international law governing the international arena. As a prominent

international organ, the United Nations is obliged to respect and observes the rules of self – determination. The fact that rules of self-determination forms part of the customary and conventional international law imposes a duty on the organization as well imports corresponding responsibility for non-compliance. At least, the United Nations is responsible for breach of its charter and declarations enshrined with the principle of self-determination.

The United Nations is international responsible for breach of rules of self-determinations in disposing Eritrea, former Italian colony in early 1950's. The responsibility of the organizations emanates from positive and negative acts. The United Nations imposed a flawed federal arrangement upon the people of Eritrea with no or less regard to their free choice. In determining the future destiny of the people, the United Nations was manipulate or allowed itself to be manipulated by western powers and their allies. As a resulted, the organization came up with the resolution that gave more service to political and strategic interests of the big powers than the right of the people to self-determination.

Besides, the United Nations also omitted duties imposed by rules of self-determination by remaining indifferent when Imperial government of Ethiopian abrogated its federal scheme in flagrant violation of rules of self-determination. The overall legal impact of the action and inaction of the United Nations is to deny the people of Eritrea the right to self-determination. Thus, the people of Eritrea were singled out from exercising the right to self-determination to determine their destiny.

The rules of international law stipulate responsibility entails making adequate reparation for the damage sustained as a consequence of the international wrongful act. The positive and negative acts of the United Nations and resultant denial of the right of self-determination of the people of Eritrea effected in tremendous human and material losses. The regime of international responsibility requires the United Nations to adequately make

good the damages sustained by the people of Eritrea as a result of its wrongful acts. At a minimum, the organization should make reparation to material damage sustained, not to mention the irreparable human sufferings.

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