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### **FOUNDATION COURSE ON HUMAN RIGHTS LAW**

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The right to self-determination in International Law  
*Basis and Critics*

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# Introduction

At the end of the Second World War, the world is polarized into two blocks. Western Europe, composed of the most important colonial powers, is particularly influenced by the United States of America (US) as rich and powerful saviour. This influence resulted in the creation of diverse alliances and organizations: The European Union, the North-Atlantic Treaty Organization, as well as the United Nations (UN) ex-League of Nations. It led in a large promotion of worldwide peace, freedom and security, starting by the liberalization of colonialized region. Already in 1918, the US declared themselves in favour of the disperse of the European colonial empires. Indeed, at the 14 points discourse of the President Woodrow Wilson, the concept of self-determination of peoples made its first apparition in the International Law doctrine<sup>1</sup>.

France, the United Kingdom, Spain, Belgium, Portugal and the Netherlands were dominating major part of the African continent, the Indian sub-continent and pacific Asia, as well as other territories all around the World (Appendix 1). From 1945 to 1989 approximatively, those States have been confronted to phase of decolonization, proclamation of independence and independence wars (Appendix 2). The process of decolonization has been long and intense and often source of conflict. For example, France has been confronted to one of its most traumatizing national event during this period: the decolonization of Algeria and its fight for independence from the French empire.

To reinforce the right to independence of colonialized people and accelerate the process of decolonization<sup>2</sup>, the United Nations have taken the *Declaration on the Granting of Independence to Colonial Countries and Peoples* in 1960. They affirmed in the preamble “Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and

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<sup>1</sup> “Wilson’s Fourteen Points, 1918”, *Office of the historian*, Department of State – United State of America. <https://history.state.gov/milestones/1914-1920/fourteen-points> (last view Nov. 21rst 2016)

<sup>2</sup> “Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”, Preamble of *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly of the United Nations, resolution 1514 (XV), 14 December 1960. [http://legal.un.org/avl/pdf/ha/dicc/dicc\\_e.pdf](http://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf) (last view Nov. 21rst 2016)

*discrimination associated therewith*”<sup>3</sup>. Thus, it is during this period that the concept of Right to Self-Determination takes all its importance and place in Human Right Law.

The Right to self-determination is defined by the article 1 of the International Covenant on Civil and Political Rights taken in 1996<sup>4</sup>, which states as followed: “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”<sup>5</sup>. In other words, the right to self-determination corresponds to the right of peoples to choose, by themselves and freely, their political status and form of society.

However, it rises lot of questions, issues and prerequisites: how define peoples? What are the different options offered to those peoples? Do all peoples have the capacity to form a State if they choose independence? What are the prerequisites? Which importance do we have to give to the concept of Nation in this process? What is the role of the international community? This is, indeed, a controversial and criticised notion of international law. Thus, this paper is going to be focused on the legal basis of the Right to self-determination in International law and the critics it is facing.

As a preliminary work to a master thesis, which will be presented in order to validate the Master’s degree in International Law, this paper is going to present in which measures the right to self-determination is a Human Right, before to develop the different critics opposed by the doctrine.

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<sup>3</sup> *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly of the United Nations, resolution 1514 (XV), 14 December 1960. [http://legal.un.org/avl/pdf/ha/dicc/dicc\\_e.pdf](http://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf) (last view Nov. 21st 2016)

<sup>4</sup> *International Covenant on Civil and Political Rights*, General Assembly of the United Nations, resolution 2200A (XXI), 16 December 1966. <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last view Nov. 21st 2016)

<sup>5</sup> *Idem*

# Self-determination: A Human Right

The right to self-determination is recognized as Human right (1.). Its legal foundations themselves are criticized (2.).

## Legal basis

A debate has been opened by the law doctrine concerning the nature of the right to self-determination. If it seems that there is no doubt about it is part of customary international law, it appears that lawyers have disagreement to affirm this right as *Jus Cogens* norm<sup>6</sup>.

According to the paragraph 102(2) of the Restatement of the Law (1987): “*Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.*”<sup>7</sup>. In this way, a customary international law is a generally practised by States and accepted as law. It has to gather two criteria. First, it results from actions or omissions by States regarding a specific situation. Second, it has to fulfil the *opinion juris sive necessitatis* principle<sup>8</sup>. This last criterion is difficult to observe and to prove. It results from the proof that the State has the belief that the custom has effect of law. In its Advisory opinion of 1970, concerning the continued presence of South Africa in Namibi, the International Court of Justice affirmed that the right to self-determination is a customary international law<sup>9</sup>.

Concerning the *Jus Cogens* norms, it seems that there is no consensual definition<sup>10</sup>. They are norms superior to any treaties and law, as the article 53 of the Vienna Convention states: “*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only*

<sup>6</sup> McCorquodale (R.), “*Self-determination: A Human Right approach*”, *The International and Comparative Law Quarterly*, Cambridge University Press, Oct. 1994, p.858

<sup>7</sup> ABASS (A.), *op.cit.*, p.83

<sup>8</sup> *Ibidem*, p.84

<sup>9</sup> *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, **Namibia Case**, *International court of Justice*, 1970. In: McCorquodale, *op.cit.*, p.858

<sup>10</sup> Linderfalk (U), “*The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*”, *The European Journal of International Law*, 2008, p.855

by a subsequent norm of general international law having the same character.”<sup>11</sup>. Thus, because the right to self-determination is defined, defended and stated in many treaties and conventions, it appears it could be considered as a *Jus Cogens* norm, even if the doctrine is divided concerning this issue.

Indeed, as a first step, the right to self-determination appears in the UN Charter in its preamble and its article 1 (2) and its article 55<sup>12</sup>. Then, it has integrated more and more specific conventions:

- *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 1960 which states: “1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation. 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”
- *International Covenant on Civil and Political Rights (ICCPR)*<sup>13</sup> and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>14</sup> in their article 1 (1) define and affirm the right to self-determination by stating as it has already been exposed above.
- *Declaration on the Rights of indigenous peoples* is the most accurate text about the right to self-determination. It notably states in its article 3 “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” and its article 4 “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>15</sup>.

<sup>11</sup> *Vienna Convention on the law of treaties*, Vienna 1980, United Nations, *Treaty Series* vol. 1155, p. 331

<sup>12</sup> *Charter of the United Nations*, San Francisco 1945

<sup>13</sup> *International Covenant on Civil and Political Rights*, General Assembly of the United Nations, resolution 2200A (XXI), 16 December 1966. <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last view Nov. 21st 2016)

<sup>14</sup> *International Covenant on Economic, Social and Cultural Rights*, General Assembly, resolution 2200A (XXI), 16 December 1966. <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (last view Nov. 21st 2016)

<sup>15</sup> *Declaration on the Rights of indigenous peoples*, General Assembly of the United Nations, A/RES/61/295, 13 September 2007. [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (last view Nov. 21st 2016)

Thus, it appears that the legal framework of the right to self-determination is large enough to affirm that it is a *Jus Cogens Norm*.

This Human right is a particular one as it is a collective one and not an individual one. Indeed, thinking to Human Rights, it appears that they are focused on the human, the person such as the freedom of expression, freedom of association or religion for example. To the contrary, the right to self-determination concern all people as a community, as a group<sup>16</sup>.

For this reason, the right to self-determination is offering different options to peoples. The law doctrine split the concept into two others: the external self-determination process and the internal one. The external one is defined in this way because it is source of new relations between a self-determined State and the international community. This is the reason why it has been mainly used in the de-colonization process<sup>17</sup>. It can be done in three different ways: 1) the emergence of a fully new independent and sovereign State 2) the free association of a territory to an independent State or 3) its integration to an independent State, as the resolution 1541(XV) the UN General Assembly states<sup>18</sup>. To the contrary, the internal self-determination is an internal process between a State and its minorities or indigenous peoples. Through this process, those people are choosing their political status as inhabitants of a State<sup>19</sup>.

Thus, it appears that the legal framework of the Right to self-determination is covering the different situations in which peoples could need to self-determine themselves regarding their situation as human. However, this framework is criticized, as well as the different options offered to those people.

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<sup>16</sup> Musafiri (N), "Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/ National Minority?", *International Journal on Minority and Group Rights*, 2012, p.487

<sup>17</sup> McCorquodale (R.), *op.cit.*, p.863

<sup>18</sup> *Idem*

<sup>19</sup> *Ibidem*, p.864

## Three major critics to the right to self-determination legal basis

The law doctrine opposes three major critics to the right to self-determination legal basis. First, it questions the importance in international law of the *Jus Cogens* norm. Second, it questions the relevance of the internal right to self-determination. The third and last one concern the accessibility to the right of self-determination.

### Are *Jus Cogens* norms applicable in practice?

In his article “*Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/ National Minority?*”, Nobirabo Musafiri, asks the following question: “*how can a State be bound by a category of principles to which they may not have freely consented? On what basis can peremptory norms be distinguished from other rules of international law?*”<sup>20</sup>. Through this issue, he rises and shares the concerns of Prosper Weil, but also of Martii Koskenniemi, who are questioning the real applicability of those concepts by leaning on the fact that even in cases of the International Court of Justice, the *Jus Cogens* norms have not been put in practice at several occasions<sup>21</sup>.

### The internal right to self-determination: a disruptive element to States?

The second major critic opposed to the concept and applicability of the right to self-determination is the risk of disruption and fragmentation of States included by the internal right to self-determination. It is notably highlighted by Jan Klabbers in his article “*The Right to Be Taken Seriously: Self-Determination in International Law*”. He cites, for example, Antonio Canesse saying “*Self-determination is attractive so long as it has not been attained; alternatively, it is attractive so long as it is applied to others. Once realized, enthusiasm dies fast, since henceforth it can only be used to undermine perceived internal and external stability*”<sup>22</sup>. He is making reference to the perverse effect of the right to self-determination as

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<sup>20</sup>Musafiri (N.), *op.cit.*, p.482

<sup>21</sup>*Ibidem*, p.482-484

<sup>22</sup>Klabbers (J.), “*The Right to Be Taken Seriously: Self-Determination in International Law*”, *Human Rights Quarterly*, Feb.2006, pp. 187-188

it can be used by people with bad intentions to disrupt fragile States or regions by influencing peoples to start a self-determination process<sup>23</sup>.

Because this risk exists, the Declaration on the Granting of Independence to Colonial Countries and Peoples has planned safeguards, which are also source of critics.

### The access to the right to self-determination questioned

This critic concerned essentially the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Indeed, in its article 6, it states “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”<sup>24</sup>. In other words, the process of self-determination has to be peaceful and without attempting to the public order. This seems to be a utopia in most of case when self-determination rhymes with fight for freedom, life and dignity. The Palestinian case appears to be, here, particularly relevant.

If the legal framework of the right to self-determination is facing critics, it is also the case concerning the definition of the people concerned by this right.

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<sup>23</sup> *Ibidem*, p.188

<sup>24</sup> *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly of the United Nations, resolution 1514 (XV), 14 December 1960. [http://legal.un.org/avl/pdf/ha/dicc/dicc\\_e.pdf](http://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf) (last view Nov. 21st 2016)

# Self-Determination: A Right for all People

The right to Self-determination has been developed through the year from a right essentially for colonized peoples to a right for all people (1.). Today, this issue is facing two main critics (2.).

## Who is concerned?

At the emergence of the concept, it concerned essentially colonized people, as it has been demonstrated above through the invocation of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Through the year, the concept finally started to concern all peoples as the ICCPR and ICESPR, before being re-focused on specific peoples: indigenous peoples and minorities through *Declaration on the Rights of indigenous peoples*<sup>25</sup>.

This evolution seems to have followed the evolution of the state of peoples all around the year. When the large movement of promotion of freedom and peace all around the world started after the cold war, the right to self-determination has been enlarged to more peoples. Then, when the colonial empires have been dismantled to the profit of the Human Rights, the notion has been re-focused on the peoples which were still in need of self-determination process: indigenous people and national minorities.

In one hand, indigenous people are defined as followed: “*Indigenous peoples claim their lands because they were there first or have occupied them since time immemorial. They are also groups that have been conquered by other people and are racially, ethnically and culturally different. They have thus been subordinated by or incorporated in alien states, which treat them as outsiders and, usually, as inferiors.*”<sup>26</sup>. In another hand, national minorities are defined as “*a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion*

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<sup>25</sup> McCorquodale (R.), *op.cit.*, p.5

<sup>26</sup> Musafiri (N.), *op.cit.*, p.492

or language”<sup>27</sup>. In both case, those people, essentially concerned by the internal right to self-determination, have a particular status in the society which justifies their right to obtain a particular political status<sup>28</sup>.

However, even if they benefit from this particular status, it seems that the law doctrine has made critics concerning the way the international law protects them. It also makes critics on the applicability of the right to self-determination to some case of de-colonized people.

### A critic regarding the protection under the international law of the people concerned by the right to self-determination

The law doctrine addresses a main critic regarding the protection under the international law of the people concerned by the right to self-determination. This one concerned the decolonized people.

### The applicability of the right to self-determination to imperfect-decolonization processes questioned

The case of the Western Sahara is a clear example of imperfect-decolonization and failed self-determination process. Indeed, since 25 years, the Saharaouis people is waiting for the obtaining of a defined political status, without success. Indeed, after the decolonization of the region from France and Spain, the case of the Western Sahara has been shelved. Since 25 years, the United Nations are in charge of 1) assuring the cease-fire between the rebel groups and the Moroccan forces claiming the appurtenance of the territory to their country 2) putting in place a referendum of self-determination of Saharaoui peoples<sup>29</sup>.

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<sup>27</sup> *Idem*

<sup>28</sup> Art.3 and 4 *Declaration on the Rights of indigenous peoples*, General Assembly of the United Nations, A/RES/61/295, 13 September 2007. [www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf) (last view Nov. 21st 2016)

<sup>29</sup> Liegeois (M.) and Ponsin (S.), “*La MINURSO, 25 ans au service de la paix au Sahara occidental* », *Recherches internationales*, 2015

This case questions the right to self-determination: when the process of decolonization is imperfect, when peoples are still without State and when the political and regional issues are not facilitation the resolution of the conflict, is the process of self-determination still relevant?

# Conclusion

The right to self-determination benefits from a complete legal framework.

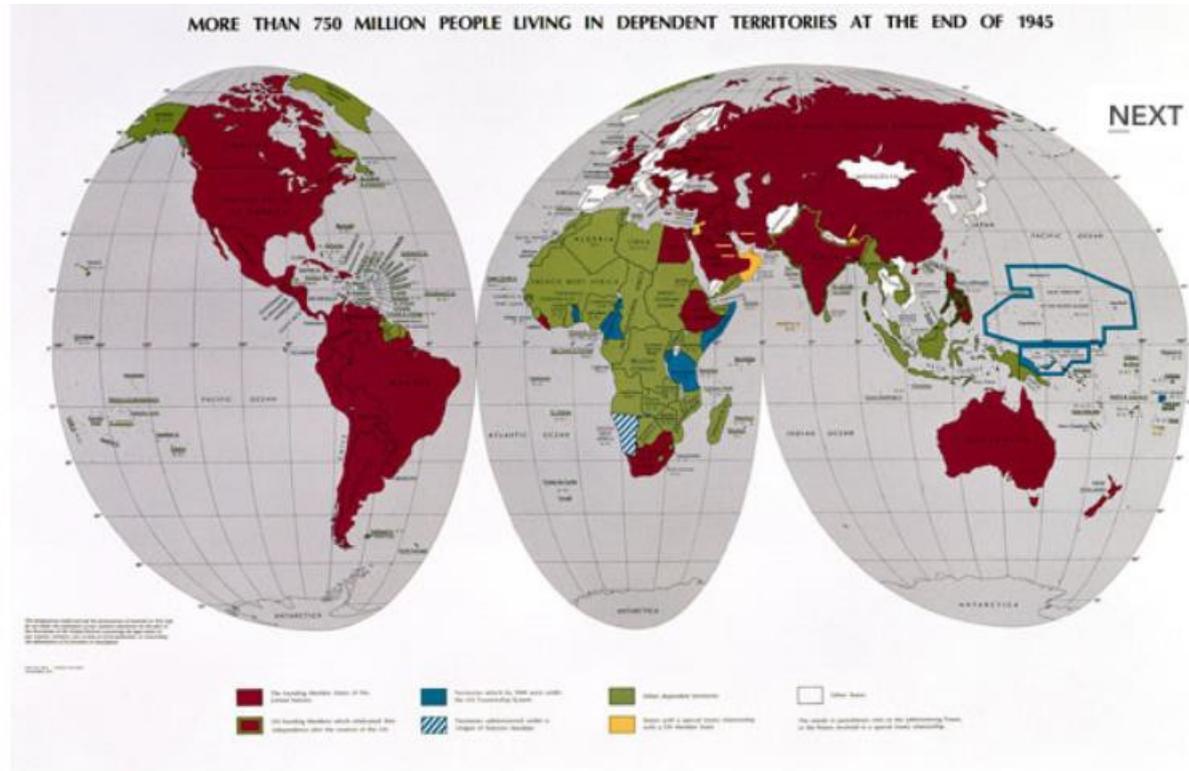
However, it seems that beyond the different critics given by the law doctrine, the right to self-determination is also facing other difficulties. Indeed, beyond legal issues, this concept is confronted to political ones.

Indeed, in one hand and from a realistic point of view, it seems that the right to self-determination is increasing the risk of disruption of the worldwide equilibrium by fragmenting the international communities in multiple States.

In another hand, it appears that, for a part of the Western world, the right to self-determination, as right of particular people, is near or far the emergence or resurgence of collectivists reflexes. This is going in opposition with the globalization and homogenization of culture and identities extoled by the XXI century society.

# Appendixes

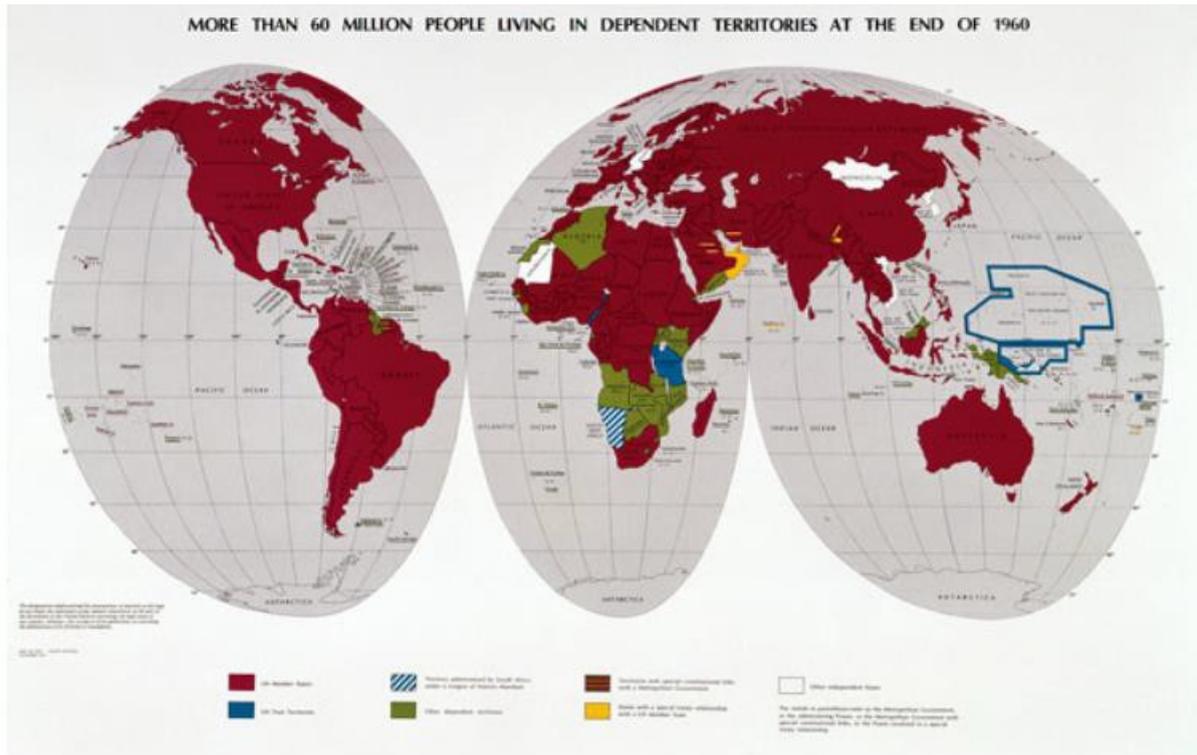
1 – Map – More than 750 million people living in dependent territories at the end of 1945



14 December 1975 - Exhibit in commemoration of the fifteenth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations Headquarters, New York: Reproduction of a map showing the world as it was in 1945.

In: McWhinney (E.), *“Introductory note: Declaration on the Granting of Independence to Colonial Countries and Peoples, New York, 14 December 1960”*, Audiovisual Library of International Law. <http://legal.un.org/avl/ha/dicc/dicc.html> (last view Nov. 21st 2016)

## 2 – Map – More than 60 million people living in dependent territories at the end of 1960



14 December 1975 - Exhibit in commemoration of the fifteenth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations Headquarters, New York: Reproduction of a map showing the world as it was in 1960.

In: McWhinney (E.), *“Introductory note: Declaration on the Granting of Independence to Colonial Countries and Peoples, New York, 14 December 1960”*, *Audiovisual Library of International Law*. <http://legal.un.org/avl/ha/dicc/dicc.html> (last view Nov. 21st 2016)

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