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TURNING SELF-DETERMINATION ON ITS HEAD

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Turning Self-Determination on Its Head

Dimitrios Molos

Abstract. With its intimate association with important moral values and political ideals, the principle of self-determination has served as a beacon of hope for the cultural survival of a wide array of minority communities living under foreign rule. Yet, the lack of clarity surrounding the nature, content and scope of this right in international law has resulted in much resistance from sovereign states concerned with maintaining their sovereignty, territorial integrity and political unity in the face of what are often viewed as subversive challenges to their political and legal authority. The general approach to self-determination has been to try to identify the appropriate type of right-holder, and then to allow each group of that type to determine its political status. I propose to turn this approach on its head by beginning with various aspects of the determination component, and then identifying the conditions of groups to be entitled to specific measures of self-determination. My proposal avoids the difficulties of social ontology and the individuation of communities that has long plagued the right to self-determination. On the basis of my analysis, I conclude with four suggestions for a feasible approach to the right to self-determination in international law.

National aspirations must be respected;
peoples may now be dominated and
governed only by their own consent.
Self-determination is not a mere phrase.
It is an imperative principle of action,
which statesmen will henceforth ignore at their peril.¹
US President, Woodrow Wilson

The phrase is simply loaded with dynamite.
It will raise hopes which can never be realized.
It will, I fear, cost thousands of lives...
What a calamity that the phrase was ever uttered!
What misery it will cause!²
US Secretary of State, Robert Lansing

I

Introduction

With its intimate association with important moral values and political ideals, the principle of self-determination has long served as a beacon of hope for a wide array of minority communities living under foreign rule. It is a key instrument in the United Nations' mission to establish global peace, stability and justice, as well as a potent ideal with the ability to garner widespread and enthusiastic support from across the political spectrum, and to mobilise sizeable movements for political change. Yet, the lack of clarity surrounding its nature, content and scope in international law has resulted in much resistance from sovereign states, which tend to covet their sovereignty, territorial integrity and political unity against what they regard as subversive challenges to their legal authority. Given this dynamic, it is not surprising that

¹ Woodrow Wilson, "War Aims of Germany and Austria (Feb 11, 1918)," in *The Public Papers of Woodrow Wilson: War and Peace*, eds. Ray Stannard Baker & William E Dodd (New York: Harper & Brothers, 1927), 182.

² Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin Company, 1921), 97-98.

struggles for self-determination tend to be passionate and all-encompassing, or that they often have the potential to destabilise not only individual states, but entire regions – in Lansing’s words, self-determination is ‘simply loaded with dynamite’. The upshot is we are confronted with the task of honouring the right to self-determination without causing massive domestic, regional and international explosions with their concomitant devastation on human lives. At its most basic, this is the essence of the problem of self-determination in international law, and the subject of this paper.

The general approach to self-determination has been to identify the proper right-holder, and then to allow right-holding groups to determine their political status. The problem of the self component is an old and familiar difficulty, and international lawmakers have struggled with it on numerous occasions. Yet, this problem’s full magnitude has not been properly appreciated, or so I will argue, and, consequently, international lawmakers continue to repeat past mistakes. The problem is that social reality is too complex for the uncontroversial individuation of nations, peoples or some other similar community, and this difficulty raises questions about the right to self-determination’s ability to serve as the organizing principle of the international legal order. To take the dynamite out of self-determination, I propose that we turn it on its head.

This paper is divided into three sections. In the first section, I review the self-determination principle to highlight its relationship with nationalism, democracy and sovereignty, as well as its moral legitimacy, its ability to incite serious controversy, and its explosive implications.

In the second section, I analyze the role of self-determination in international law prior to and immediately after the First World War, during the drafting of the United Nations’ Charter (1945),

during European decolonisation, and leading up to the United Nations Declaration on the Rights of Indigenous Peoples (2007). Until the UNDRIP, there was a resounding consensus that the right to self-determination was confined to ‘abnormal’ situations where groups were not located within the political boundaries of a sovereign state. Now, there is significant uncertainty about its content because it is unclear whether there has been an expansion in the notion of ‘abnormal’ situations, or whether international law recognises a role for self-determination in ‘normal’ situations too.

In the third section, I discuss the exciting recent developments in indigenous rights in international law, and I relate the right to self-determination of indigenous peoples to the history of the right in international law and the problem of the self component. While it is still too early to assess the UNDRIP’s impact, it is quite clear that the old problem of identifying the proper right-holder has resurfaced, and it has resurfaced in a form that threatens to erase some of the recent progress in indigenous rights. Based on this analysis, I conclude with four suggestions for a feasible approach to the right to self-determination in international law, a proposal that would effectively turn self-determination on its head.

II

The Political Principle of Self-Determination

The literature on self-determination distinguishes between the concept’s constituent parts: (i) the *self component* identifies the right-holder, whereas (ii) the *determination component* specifies the control, power, or autonomy exercised by this entity over its

affairs. Each component may be expanded or contracted for different purposes. In its broadest form, the principle of self-determination holds that *any* collection of individuals who identify themselves as a group is entitled to *any* level of autonomy. This formulation is unlikely to garner much popular or scholarly support, so the self component tends to be restricted to a specific type of group, typically a nation or people. This endeavour has yielded distinct ‘nationalist’ and ‘democratic’ versions of self-determination.

For many scholars, self-determination was a natural corollary of eighteenth-century European nationalism. Broadly, nationalism is the view that there ought to be some sort of congruence between the national and political, and the nationalist ideal advocates ‘a state for each nation, and a nation for each state’.³ There is a related, but distinct, interpretation from the democratic tradition. This version holds that government should be democratic in the sense captured by US President Abraham Lincoln in his Gettysburg Address: “government of the people, by the people, for the people.”⁴ Quite often, the democratic and nationalist versions are conflated due to the familiar ambiguities of the terms ‘nation’ and ‘people’. The problem is that, in ordinary usage (and too often in the academic literature and legal documents as well), these terms are subject to both cultural and political interpretations, such that a ‘nation’ or ‘people’ could refer to either a cultural or a political group. To avoid the confusion generated by this conflation, it is prudent to situate the term ‘nation’ within the nationalist tradition, and the term ‘people’ within the democratic tradition.

³ Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983), 1.

⁴ Abraham Lincoln, *The Gettysburg Address (November 19, 1863)* (Minneapolis: Compass Point Books, 2005), 8.

This semantic point about ‘nations’ and ‘peoples’ allows us to distinguish between two distinct self-determination claims. On the one hand, the nationalist view holds that the nation should govern itself because there is something objectionable about foreign rule, but it does not stipulate that the nation should be governed *democratically*. The nationalist ideal of congruence between the national and political seeks to adjust political boundaries to avoid foreign rule or colonisation, but it does not necessarily prescribe democratic governance. On the other hand, the democratic view prescribes democratic rule within a territorially-defined political community without any regard for the citizenry’s cultural traits. On this view, the ‘people’ is synonymous with the ‘citizenry’, and self-determination amounts to democratic self-government.

The nationalist and democratic views of self-determination are not necessarily mutually inconsistent, and they often form a coherent coupling, but there is the possibility for tension between them. The democratic view functions as a legitimizing principle for the sovereign state system. It holds that a politically-defined people should be free to govern itself without external interference, and political independence, territorial integrity and legal sovereignty are considered preconditions for this freedom and its exercise. But, as Martti Koskenniemi notes, “there is another sense of national self-determination which far from supporting the formal structures of statehood provides a challenge to them.”⁵ The nationalist view requires that nations have (at least) whatever powers are required to protect their survival and promote their culture and identity, even if secession is required. In theory, at least, these two views of self-

⁵ Martti Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice,” *International and Comparative Law Quarterly* 43, no. 2 (1994): 246.

determination could coexist harmoniously within political arrangements offering internal autonomy over cultural affairs to nations within democratic sovereign states, but too often in practice, the democratic view is used to legitimise democratic states as political communities, while the nationalist view encourages secessionist claims to political independence. This is a paradoxical feature of self-determination: it is a principle of moral legitimacy for sovereign states, while concurrently subverting their legitimacy and exerting secessionist pressure on them.⁶

Yet, the international community has never accepted the self-determination principle as the sole, or even primary, factor in the assessment of claims to statehood, secession or independence.⁷ Nonetheless, Hurst Hannum speculates, “no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination.”⁸ Another paradoxical feature of the self-determination principle is that, when expressed as an abstract ideal, it tends to garner

⁶ The interplay of these two views of self-determination is a constant feature of the politics around self-determination in international law.

⁷ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 7.

⁸ *Ibid.*, 27. The widespread and enthusiastic support for self-determination among liberals, libertarians, democrats, communitarians, socialists, feminists and nationalists is not difficult to understand. The ideal of self-determination is associated with the idea of government of, by and for the people, and important moral values, like liberty, freedom, autonomy, agency, democracy, equality, subsidiarity and recognition. According to Isaiah Berlin, given the choice of being ruled by a co-national dictator or a “cautious, just, gentle, well-meaning administrator from outside”, people would rather be ruled by a dictator from their midst. Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 157-158. For Jan Klabbers, the explanation is straightforward: “Being governed from the outside would imply being less than fully free and, therewith, being less than fully human”. Jan Klabbers, “The Right to be Taken Seriously: Self-Determination in International Law,” *Human Rights Quarterly* 28 (2006): 187.

instant, widespread and enthusiastic support; however, when transformed into a concrete policy proposal or legal right under international law, it tends to rouse fervent opposition and serious controversy. If self-determination is to function as a concrete political principle or legal right in those situations where it is most needed, then it is necessary for scholars of international law and political theory to explicate sensible connections between the abstract ideal and their proposals. It is fair to say, in my estimation, that the international community has been moving slowly toward such a balance.

Yet, it is also fair to say that, despite many noteworthy revisions to the nature and content of self-determination in international law over the last century, self-determination has remained loaded with dynamite. It is not difficult to see why this is the case. On the one hand, the ideal of self-determination has been criticised for being impossible to actualise because human communities are often so comingled as to preclude their separation into homogeneous, territorially-defined political units. Former UN Secretary-General Boutros Boutros-Ghali warned that “if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security, and well-being for all would become even more difficult to achieve”.⁹ Of course, even this warning presupposes a reasonably clear understanding of the self component, and there remains much controversy over what type of community should be self-determining, how to distinguish this type of community from similar communities that lack this right, and how to individuate particular communities of this type under conditions of disagreement and contestation.

⁹ Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General, UN Doc A/47/277-S/24111 (1992), 5.

These are familiar problems, and they do not disappear, even if we assume that only nations have a right to self-determination. After all, we are still left with the question of what characteristics or properties distinguish nations from other similar communities without self-determination, and how to individuate one nation from its neighbours. It is my contention that these are intractable problems for the right to self-determination, for reasons that will be explained below. For now, it is sufficient to note that self-determination has been criticised for being an impossible ideal, and for recklessly establishing expectations that cannot be satisfied.

On the other hand, and this point was expressed well by Lansing in the opening quote, self-determination is loaded with dynamite because it forms the basis of destabilizing movements; that is, the quest for self-determination itself may be pernicious as it wreaks instability and disorder. Self-determination may still be a beacon of hope for colonised peoples, but Klabbers notes that it becomes subversive when it favours “a breakup of states over other modes of settlement and coexistence.”¹⁰ Self-determination does not necessarily entail independent statehood, since it is consistent with various forms of internal political autonomy, but Klabbers is gesturing toward a general tendency toward divisive political conflict. To sum up all too briefly what is a complicated and diverse process, it is often the case that minority communities have grievances directed toward state governments. The logic of self-determination as a principle of political legitimacy encourages the state to present itself as a nation-state by exaggerating the unity and cultural similarity of its citizens, thereby further neglecting and marginalizing minority communities already under assimilationist pressure. The state claims a right to self-determination within its jurisdiction, while

¹⁰ Klabbers, “Self-Determination in International Law”, 187.

the minority community claims a right to self-determination over its own affairs. State representatives insist on universal policies treating all citizens equally, while representatives of the minority community seek ‘special’ accommodations or internal political autonomy or even secession also in the name of equality. Given the association of self-determination with liberty, freedom, autonomy, agency, democracy, equality, subsidiarity and recognition, as well as the dehumanizing aspect of heteronomous governance, it is hardly surprising that ignored, unaddressed or disregarded grievances from minority communities tend to escalate into significant struggles for self-determination.

When we factor into the equation that most struggles between states and minority communities have an international component, self-determination appears to be loaded with enough dynamite to destabilise not only individual states, but also entire regions. This international component may be due to a minority community in one state forming a majority in a neighbouring state (e.g., the German-speaking population in South Tyrol), or a minority community being dispersed within more than one state (e.g., the Kurds in Turkey, Syria, Iran and Iraq). Hannum notes, “[i]f ethnic or communal violence increases, geopolitical concerns often dictate the involvement of outside actors in the conflict, and central governments frequently allege (often correctly) that foreign governments encourage separatist conflicts.”¹¹ This international dimension to struggles for self-determination makes the prospect of secession even more inviting, and tend to complicate efforts to reach a reasonable resolution.

There is a pressing need for scholars of international law to clarify the nature and content of the right to self-determination, even though “[they] need not be reminded of [its] revolutionary

¹¹ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 4-5.

and unclear character.”¹² There are only a few things about self-determination upon which scholars agree with little controversy. One is that much confusion surrounds this right in international law, political theory and practice, and ordinary discourse; another is that it is a matter of the utmost importance that we work through this confusion. At present and for much of its history, Lansing’s prophetic words have held true: the right to self-determination has indeed raised hopes within minority communities which would not be realised, and much misery has been wrought in its name. With the importance of the moral values and political ideals associated with self-determination on the one hand, and the imperative to avoid destabilizing violent conflict on the other, we turn in the next section to the history of self-determination in international law to determine its nature and content throughout its evolution, and to assess the successes and failures of the international community in working with a potentially explosive principle.

III

A Brief History of Self-Determination in International Law

“Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles.”¹³ This section reviews the right to self-determination in international law during four significant periods: (i) the Paris

¹² Koskenniemi, “National Self-Determination Today,” 241.

¹³ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 27.

Peace Conference after the First World War (circa 1919), (ii) the drafting of the United Nations Charter (1945), (iii) the European decolonisation project (circa 1960s), and (iv) the post-decolonisation period (circa 1970-2006). In brief, this history reveals a gradual evolution of its status from political principle to legal right, a definite preference for prioritizing the self over the determination component, and a slow, but inconsistent, expansion of the self component.

The ideal of self-determination “has long been one of which poets have sung and for which patriots have been ready to lay down their lives”,¹⁴ but in the nineteenth century, the success or failure of claims to self-determination depended on the external support of the Great Powers.¹⁵ Hannum explains, “the winners and losers were determined more by the political calculations and perceived needs of the Great Powers than on the basis of which peoples had the strongest claims to self-determination.”¹⁶ Self-determination may have informed the political rhetoric of the time, but it had no legal standing.

Yet, at the Paris Peace Conference after the First World War, the self-determination principle emerged as an obvious instrument for the re-division of Europe after the collapse of the Austrian, German, Russian and Ottoman empires; however, it was applied only within the narrow context of defeated empires, and other borders were not adjusted to eliminate national minorities. While it would not be unfair to question the motivations of the victorious states’ representatives, even with suitably honourable intentions, they would have encountered the problem of ascertaining which communities demanding self-determination were entitled to it and what criteria they satisfied to

¹⁴ *Ibid.*, citing John P Humphrey.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 28.

be so entitled. Koskenniemi believes that, because it was not possible for this problem to be tackled in a consistent way, “[o]ther principles – sovereign equality, territorial integrity, sanctity of treaties – as well as economic and strategic considerations came to dictate the conditions and modalities for the application of self-determination”.¹⁷ Thus, the problem of the self component had reared its ugly head.

Like in the nineteenth century, “self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers”.¹⁸ Valerie Epps points out the irony of the use of the phrase ‘self-determination’ during “a time when victorious states expected to, and certainly did, redistribute conquered lands after warfare with no regard for the wishes of the residents”.¹⁹ Nonetheless, at this time, the concept did gain some traction, but not enough for self-determination to be considered even a legal principle of international law.

This point is illustrated in two League of Nations reports on the Aaland Islands. In the first report, the primary issue concerned the jurisdiction of international law to decide on the possibility of the Aaland Islands seceding from Finland to join Sweden.²⁰ The International Committee of Jurists considered the nature and content of self-determination, as well as a significant exception to its application: “Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be

¹⁷ Koskenniemi, “National Self-Determination Today,” 253.

¹⁸ *Ibid.*; see also Hannum, *Autonomy, Sovereignty, and Self-Determination*, 28.

¹⁹ Valerie Epps, “Evolving Concepts of Self-Determination and Autonomy in International Law: The Legal Status of Tibet,” *Journal of East Asia and International Law* 1 (2008): 219.

²⁰ *The Aaland Islands Question (On Jurisdiction)*, Report of International Committee of Jurists, LNOJ, Sp Supp No 3 (October 1920).

pointed out that there is no mention of it in the covenant of the League of Nations.”²¹ Ultimately, it concluded that “Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part.”²² In a second report, notwithstanding its recognition that the vast majority of the Aaland Islands population would opt for union with Sweden, the Commission of Rapporteurs re-affirmed the general conclusion that there was no right to self-determination in international law, and that such a right would be a threat to the sovereign state system and international peace.²³

Yet, there was a significant exception based on the distinction between ‘normal’ and ‘abnormal’ situations. For international law, the normal situation involves stable sovereign states cooperating as members of the international community. In abnormal situations, there is a deficiency of territorial sovereignty “because the State is not yet fully formed or because it is undergoing transformation or dissolution”.²⁴ Under abnormal conditions, where a political entity lacks sufficient sovereignty, the principle of self-determination may be used – in conjunction with

²¹ *Ibid.*, 5.

²² *Ibid.*

²³ “Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.” *The Aaland Islands Question (On the Merits)*, Report by the Commission of Rapporteurs, LN Council Doc B7/21/68/106 (16 April 1921), 4.

²⁴ *Aaland Islands Question (On Jurisdiction)*, 5-6 (my italics).

geographic, economic, security and other similar considerations – to facilitate its transition to a normal sovereign state. Even though these reports affirm that, at that time, there was no right of self-determination in international law, they do identify a role for self-determination in the transitional process of establishing an international community of sovereign states.

It is not surprising that the right to self-determination was not initially recognised as a fundamental right of the United Nations regime. Whatever its political significance, there was a consensus among legal scholars that it was not a rule of international law.²⁵ The UN Charter does mention the ‘principle’ of self-determination twice, however. Articles 1(2) and 55 outline the UN’s purpose of developing “friendly relations among nations based on the principle of equal rights and self-determination of peoples”. While the term ‘nations’ is somewhat unclear here, there is a consensus that it designates states, since international relations are normally conducted between states, and since the general view in 1945 was that only states had rights under international law.²⁶

In her thorough and persuasive analysis, Helen Quane explains that, in articles 1(2) and 55, on the basis of context, purposes and ordinary language, there are three possible interpretations of the term ‘peoples’ as sovereign states, Non-Self-Governing Territories, or Trust Territories.²⁷ Non-Self-Governing and Trust Territories were administered by other states. To use the terminology of the League of Nations reports on the Aaland Islands Question, these territories lacked a full measure of

²⁵ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 33.

²⁶ Helen Quane, “The United Nations and the Evolving Right to Self-Determination,” *International and Comparative Law Quarterly* 47, no. 3 (1998): 539-540.

²⁷ *Ibid.*, 541.

sovereignty as political units in an abnormal situation, but they were thought to be transitioning from their abnormal condition to sovereign statehood. Given these options, Quane concludes that, in 1945, the self-determination principle applied to all three categories, but not to ‘peoples’ taken in its ordinary (nationalist) meaning as groups characterised “by a common language, religion or ethnicity.”²⁸ When the principle applied to states, it was logically equivalent to the sovereign equality of states principle, and it was possible to speak of the legal right of sovereign states to self-determination as a right to non-interference with their domestic affairs.²⁹ When applied to Non-Self-Governing or Trust Territories, the principle signified an entitlement to independence from foreign administration, but in this context, there was no legal right to self-determination – only an aspirational legal principle to be pursued with the aim of eventually establishing self-governing states.³⁰ In short, the UN Charter includes a legal right to self-determination for states in the sense of sovereign equality of states and the right to be free from foreign interference, but no similar right for peoples as sub-state minority communities.

In the context of decolonisation, the vague self-determination principle developed into a ‘legal right under international law’. In 1960, this evolution culminated in Resolution 1514 (XV).³¹ In the preamble, the General Assembly stresses its awareness of “the passionate yearning for freedom in all dependent peoples” and “the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace”. Article 1 outlines the

²⁸ *Ibid.*, 539-540.

²⁹ *Ibid.*, 547.

³⁰ *Ibid.*

³¹ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), 15 UNGAOR, Supp No 16, UN Doc A/4684 (1960).

legal motivation: “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 [...] world peace and co-operation.” Thus, the General Assembly proclaims “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”. To this end, it declares in article 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.”³²

Nonetheless, not ‘all peoples’ had a right to self-determination. Resolution 1514 restricted the self component within the scope of the decolonisation project to only dependent peoples in former European colonies “without further regard for ethnicity, language, religion, or other objective characteristics of such colonised peoples (apart from the fact of colonisation itself)”.³³ There is much evidence for this narrow interpretation of ‘peoples’. It can be found in (i) the overall context of decolonisation, (ii) the title and purpose of the Resolution, (iii) the overwhelming number of speeches by state representatives directed solely to the plight of colonial peoples,³⁴ and (iv) subsequent legal practice.³⁵ There is overwhelming evidence that Resolution 1514 extends the right to self-determination to colonial peoples, but not to internal sub-state communities.³⁶

³² *Ibid.*, (my italics).

³³ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 36.

³⁴ Quane, “United Nations and Self-Determination,” 548.

³⁵ *Ibid.*, 548-552.

³⁶ If the General Assembly assumed that the right to self-determination had already been exercised by peoples organised into sovereign states, also known as normal conditions, then the extension of the self component to include colonial peoples would be a matter of bringing abnormal situations to an end.

Thus, the apparent extension of the right to self-determination to ‘all peoples’ should not be taken at face value.

More evidence for this territorial interpretation of ‘peoples’ is available through the *uti possidetis* principle – a Roman legal concept literally meaning ‘as you did possess, so you shall possess’. Quane explains, the trend during the decolonisation period was for the right to self-determination to be applied to “the entire inhabitants of a colonial territory” without regard to “ethnic origin, language or religion.”³⁷ “This paradoxical principle [...] simultaneously casts off colonialism but insists on [...] one of the most powerful manifestations of colonial power, namely the determination of borders.”³⁸ Accordingly, colonial peoples were defined territorially as the entire population of a European colony rather than by their cultural, national, ethnic, linguistic or other traits.

Thus, Koskenniemi explains, the General Assembly contained the right to self-determination’s “potentially explosive nature by applying it principally to the relationships between old European empires and their over-seas colonies.”³⁹ Moreover, it guarded against an expansion of the self component by explicitly affirming that “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”.⁴⁰ Again, this provision lends weight to the interpretation of ‘peoples’ as territorially-defined without regard to nationality, ethnicity, language, religion or other traits. Also, the General Assembly added the usual prohibition against intervention in the internal affairs of states, and a re-affirmation

³⁷ Quane, “United Nations and Self-Determination,” 551-552.

³⁸ Epps, “Self-Determination and Autonomy in International Law,” 221.

³⁹ Koskenniemi, “National Self-Determination Today,” 241.

⁴⁰ *Resolution 1514*, art 6.

of the sovereign rights, territorial integrity and political independence of all states.⁴¹

In 1970, in Resolution 2625 (XXV), the General Assembly addressed the definition of ‘people’ and the larger issue of whether the right to self-determination existed outside the narrow context of decolonisation.⁴² There was no change in its interpretation.⁴³ In accordance with ‘the salt water thesis’ or ‘blue water requirement’, only colonised people in territories outside the European coloniser state have a right to self-determination. There is no right to self-determination for sub-state communities, since the principle of sovereign equality of states guarantees that “the territorial integrity and political independence of the State are inviolable”.

Interpretations of the self-determination principle have tended to centre on the self component. The governing assumption has been that once the self component is explicated, the determination component may be identified straightforwardly. In the pre-UN era, self-determination took different forms ranging from secession to direct international protection. In the post-1945 period, the usual form of self-determination has been political independence, but independence was not a necessary result. Resolution 2625 clarifies the determination component’s scope: “The establishment of a sovereign and independent State, the free association or integration with an independent State or *the emergence into any other political status freely determined by a people* constitute modes of implementing the right of self-determination

⁴¹ *Ibid.*, art 7.

⁴² *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), Annex, 25 UNGAOR, Supp No 28, UN Doc A/5217 (1970).

⁴³ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 34.

by that people.”⁴⁴ This wide scope was not used by any former colony to establish an unusual inter- or intra-state political arrangement.

This flexibility in the determination component may appear a welcome development, but it may serve to narrow the scope of the self component further. If any self-determining group may emerge unilaterally into any ‘freely determined’ political status, then undue pressure is placed on the self component as states try to reduce its scope in order to prevent sub-state communities from seceding. According to Michla Pomerance, “the Wilsonian dilemmas have persisted. Except for the most obvious cases of “decolonization”, objective criteria have not been developed or applied for preferring one claim over another or for delimiting which population belongs to which territory.”⁴⁵ Yet, as Quane observes, “the right was only ever intended to apply to colonial peoples. Attempts to overextend the principle simply generate confusion and possibly create or reinforce unrealistic expectations among groups of non-colonial peoples whose claims to self-determination will not be recognised by the United Nations.”⁴⁶ While the General Assembly appeared to be playing with dynamite with its confused and confusing rhetoric of a right to self-determination for *all peoples*, the decolonisation period marked a significant development in the evolution of self-determination as a legal right for colonial peoples.

“This process of decolonization was assumed to be concluded,” according to Siegfried Wiessner, “in the mid-1970s after the demise of Franco and Salazar, the dictators of the last European colonial powers. The Western Sahara and East Timor

⁴⁴ *Ibid.*, (my italics).

⁴⁵ Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff, 1982), 39.

⁴⁶ Quane, “United Nations and Self-Determination,” 558.

controversies were just part of the cleanup of this relatively orderly process”.⁴⁷ In the post-decolonisation era, however, there was a continuing debate among international lawyers about the existence of a right to self-determination in customary international law, and its potential applicability beyond European colonial settings.⁴⁸

Although General Assembly resolutions are not legally binding, Hannum is adamant that the unanimous adoption of resolutions proclaiming the right to self-determination reveals that it is a right in international law.⁴⁹ Yet, Quane disagrees because there were nine abstentions from the vote, and “[t]he abstention of all the colonial powers and their dissent on key provisions undermine suggestions that the resolution proclaimed rules of general international law”.⁵⁰ She concludes, I think correctly, “the resolution was not legally binding at the time of its adoption but it did contribute to the subsequent development of international law in this area”.⁵¹

There is widespread agreement in the academic literature that, by the early 1970s, there was a legal right to self-determination for states and for colonial peoples.⁵² This agreement was reached even though there were plenty of instances where former European colonies had been denied a right to self-determination and left as “fair prey for neighbouring, non-European states with real or purported historical claims to the territories in question”.⁵³

⁴⁷ Siegfried Wiessner, “Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples,” *Vanderbilt Journal of Transnational Law* 41 (2008): 1151.

⁴⁸ See Hannum, *Autonomy, Sovereignty, and Self-Determination*, 44.

⁴⁹ *Ibid.*, 45.

⁵⁰ Quane, “United Nations and Self-Determination,” 551.

⁵¹ *Ibid.*

⁵² *Ibid.*, 558.

⁵³ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 37.

These exceptions are noteworthy breaks in a general pattern of respecting the right of colonial peoples to self-determination, and continue the longstanding tradition of the inconsistent application of the international law on self-determination.⁵⁴ While it may be a fruitful exercise to inspect these exceptions for an underlying explanation for these ostensible violations of international law, the pressing question for scholars has been self-determination's applicability outside the context of decolonisation. Did other types of peoples have legitimate claims invoking the right to self-determination?

According to Pomerance, "no State has accepted the right of *all* peoples to self determination".⁵⁵ Even the African states, which helped develop the right to self-determination in the context of decolonisation, have adopted "a very narrow interpretation of the right in the postcolonial context of independence" as a response to the extreme cultural heterogeneity of their states.⁵⁶ For these states, as for most sovereign states, the principles of sovereign equality of states, territorial integrity and political unity are paramount. Even though peoples "who are not living under the legal form of a State" have a right to self-determination, there is no right to secede from "an existing State Member of the United Nations".⁵⁷ Hector Gros Espiell explains that any secession disrupting "the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter".⁵⁸ Quane argues that

⁵⁴ Quane, "United Nations and Self-Determination," 552-553.

⁵⁵ Pomerance, *Self-Determination in Law and Practice*, 68.

⁵⁶ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 46-47.

⁵⁷ Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Report of the Special Rapporteur, UN Doc E/CN4/Sub2/405/Rev1, 50.

⁵⁸ *Ibid.*, 50.

state practice makes it very unlikely that self-determination has developed into a rule of customary international law.⁵⁹ With the exception of Bangladesh's independence from Pakistan after a bloody war, the international community did not accept any secessions between 1945 and 1991.⁶⁰ Since 1991, the self-determination principle was used to determine state boundaries after the disintegration of numerous multinational states; e.g., the Soviet Union and Yugoslavia.⁶¹ Koskenniemi points out that these applications of the self-determination principle were consistent with the precedent of the Aaland Islands reports as the dissolution of old states created an 'abnormal situation' requiring 'transformation' into 'normal' sovereign states.⁶² Ultimately, Quane concludes, the international community "has consistently rejected a legal right to self-determination for ethnic, linguistic and religious groups within States".⁶³

The 'domestication' of self-determination by restricting it to the European decolonisation project alone has been challenged for being conceptually and morally arbitrary. After all, any nationalism prescribing congruence between the national and political will not distinguish between external and internal forms of colonisation.⁶⁴ During the 1980s, critics increasingly objected to the inconsistent application of the right to self-determination between seemingly comparable cases of alien rule.⁶⁵ In Koskenniemi's words, "the [legal] definition of colonisation as

⁵⁹ Quane, "United Nations and Self-Determination," 563-564.

⁶⁰ Margaret Moore, "Introduction: The Self-Determination Principle and the Ethics of Secession," in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998), 1.

⁶¹ *Ibid.*

⁶² Koskenniemi, "National Self-Determination Today," 246.

⁶³ Quane, "United Nations and Self-Determination," 564.

⁶⁴ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 8-9.

⁶⁵ Koskenniemi, "National Self-Determination Today," 242.

“alien subjugation, domination and exploitation” is not limited to a Third World context but seems to cover all situations where a foreign minority imposes its rule on the majority.”⁶⁶ If the injustice to be ameliorated by the right to self-determination is the wrong of “alien subjugation, domination and exploitation”, then minority communities may have persuasive claims to that right as well. To quote once more from Lansing’s personal notes: “It is an evil thing to permit the principle of ‘self-determination’ to continue to have the apparent sanction of the nations when it has been in fact thoroughly discredited and will always be cast aside whenever it comes in conflict with national safety, with historic political rights, or with national economic interests affecting the prosperity of a nation.”⁶⁷

IV

UNDRIP and the Self-Determination of Indigenous Peoples

In the post-decolonisation era, scholarly opinion converged on the conclusion that indigenous peoples did not have a right to self-determination, despite widespread sympathy with their struggles and the persuasiveness of the argument for the conceptual and moral arbitrariness of the salt water thesis.⁶⁸ During the UNDRIP’s drafting, the inclusion of a right to self-

⁶⁶ *Ibid.*, 247-248.

⁶⁷ Lansing, *The Peace Negotiations*, 104.

⁶⁸ According to Gros Espiell, “The United Nations has established the right of self-determination as a right of peoples under colonial and alien domination. The right does not apply to peoples already organized in the form of a State which are not under colonial and alien domination, since resolution 1514 (XV) and other United Nations instruments condemn any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country.” Gros Espiell, *Right to Self-Determination*, 10.

determination often seemed far too ambitious. Alexandra Xanthaki explains, “[s]tates were very vocal [...] that such a right is only recognised to whole populations of states; and prior practice and the prevailing interpretations were generally not favourable to indigenous peoples”.⁶⁹

Given this background, it was astounding that, in 2007, the General Assembly voted overwhelmingly to adopt the UNDRIP with provisions for indigenous self-determination.⁷⁰ In part, this result was surprising because, in 2006, the UNDRIP’s progress was halted abruptly when the African Union Assembly (AUA) of fifty-three countries withdrew its support.⁷¹

Unsurprisingly, the AUA was concerned about article 3, which established indigenous peoples’ right to self-determination.⁷² It was a major concern that the UNDRIP did not completely exclude the possibility of secession or external self-determination, even though indigenous peoples rarely advance secessionist claims. With the revisions required to garner the AUA’s support, article 3 proclaims that “[i]ndigenous peoples have the right to self-determination”, and article 4 explains that this right is “the right to autonomy or self-government in matters relating to their

⁶⁹ Alexandra Xanthaki, “Indigenous Rights in International Law over the Last 10 Years and Future Developments,” *Melbourne Journal of International Law* 10 (2009): 30.

⁷⁰ While eleven states abstained, only four states voted against the declaration: Australia, Canada, New Zealand, and the United States.

⁷¹ Wiessner, “Indigenous Sovereignty”, 1159-1160.

⁷² Wiessner explains, “It did not allay their fears that the original Article 31 was moved up to Article 3 *bis*, which arguably reduced the exercise of the right of self-determination in Article 3 to a right to “autonomy or self-government in matters relating to their internal and local affairs.” The protesting African nations were unconvinced by Article 45, which stated that the Declaration did not give indigenous peoples any right to perform acts contrary to the UN Charter, presumably including the principle of the inviolability of territorial integrity.” *Ibid.*, 1160.

internal and local affairs.”⁷³ Along with article 46, these provisions extend to indigenous peoples a right to self-determination as a right to *internal* political autonomy over their domestic affairs, without undermining the legal sovereignty, territorial integrity or political unity of states.

The AUA was concerned also about the lack of a definition for the term ‘indigenous peoples’, and this concern did not lack merit. While it is not difficult to comprehend why indigenous peoples emphasise their need to define themselves and to determine their memberships, subjective self-identification alone cannot establish indigeneity. Without objective criteria, any group could proclaim itself indigenous in order to claim indigenous rights. Despite the very real dangers associated with essentialism and artificially cramming the diversity of indigenous peoples into a legal definition with cumbersome objective criteria, “the identity of the legitimate holder of a right must be discernible for a court or other decision maker to adjudicate a claim based on that right [...] Defining the legitimate holder of a right is necessary to effectively protect that person from violations of such right”.⁷⁴ This type of definitional question has plagued international law over the last century with its failures to define ‘nations’, ‘peoples’ and now ‘indigenous peoples’.

Nevertheless, the AUA was convinced to drop its insistence on a definition of indigenous peoples in exchange for a preambular clarification that “the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into

⁷³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

⁷⁴ Wiessner, “Indigenous Sovereignty”, 1163.

consideration”. This compromise allows for a desirable flexibility in the interpretation of the text, but at the cost of legal unclarity.⁷⁵

Despite this serious problem, indigenous peoples – whoever they happen to be – have a right to self-determination as internal political autonomy; that is, a right to self-government short of secession. This is a significant development for indigenous peoples and the right to self-determination in international law, especially considering that the four states opposing the UNDRIP have since reversed their positions and provided qualified endorsements of the declaration. However, the UNDRIP is not legally binding, and it is unlikely that it codifies customary law concerning indigenous peoples because states with sizeable indigenous populations voted against it. Also, Xanthaki adds, “some states who voted in favour of the *Declaration* made it rather obvious that they did not intend to lay down a rule of customary international law. In fact, the language of the *Declaration* itself does not support its reading as customary international law.”⁷⁶ Though the UNDRIP is not legally binding, it may become binding as its provisions are reinforced by state practice and *opinio juris*.⁷⁷ The suggestion that the UNDRIP merely crystallises customary law devalues its significance and overlooks actual practices regarding indigenous peoples beyond Australia, Canada, New Zealand and the United States.⁷⁸

⁷⁵ A United States representative, for instance, has claimed that the UNDRIPs failure to define the phrase ‘indigenous peoples’ is “debilitating to the effective application and implementation of the declaration”, especially “if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration”. *Ibid.*, 1164, citing US Advisor Robert Hagen.

⁷⁶ Xanthaki, “Indigenous Rights in International Law”, 36.

⁷⁷ Siegfried Wiessner, “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges,” *European Journal of International Law* 22, no. 1 (2011): 130.

⁷⁸ Xanthaki, “Indigenous Rights in International Law”, 35-36.

It is still too early to assess what impact the UNDRIP will have on indigenous communities or the right to self-determination in international law. There is room for cautious optimism, but there are good reasons to worry too. In particular, we should be worried that the old problem of the self component has arisen again.

Prior to the UNDRIP, international law had consistently denied the claims of any sub-section of an established state to secession or self-determination. The jurisprudence was fairly clear: there was a legal right to self-determination for states as a right to sovereign equality or non-interference with domestic affairs, and there was a legal right to self-determination for colonial peoples within the context of European decolonisation. There was no legal right to self-determination for sub-state communities seeking secession. With the UNDRIP, however, international law suggests that there is a right to self-determination for indigenous peoples as a right to some significant measure of internal political autonomy.

But this monumental extension may be internally unstable for the simple reason that the legislation does not provide enough information to identify indigenous peoples for the purposes of international law. A quick survey of the international law on peoples, national minorities and indigenous peoples yields the conclusion that there are no established legal definitions for any of these complex social categories. Hannum proclaims, “[a]s is true for the concepts of “minority” and “people,” it has thus far proved impossible to arrive at a commonly accepted definition of “indigenesness”.⁷⁹ Without a legal conception of indigenous peoples for the purposes of international law, the recent legal gains of indigenous peoples risk being quickly eroded.

⁷⁹ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 88.

After all, there is historical precedent for the General Assembly to declare rights without specifying the nature of the right-holder. Given the absence of a legal definition and the lack of a procedure to identify the legitimate right-holders, international courts have refused to decide in favour of secessionist claims, especially when we consider the stakes of a court-ordered breakup of a sovereign state. Instead, the courts have held counterintuitive interpretations of the relevant categories in line with the current jurisprudence, thereby retreating to the legal status quo *prior to the relevant declaration*. Any gains for all peoples vis-à-vis self-determination were quickly withdrawn for peoples residing outside the context of European decolonisation. There is an important lesson here: when treaties fail to provide a definition for the relevant right-holding group, international courts will not legislate a definition for them, and any legal benefits conferred from the new treaty will likely be lost. To preserve the legal rights within the UNDRIP, international law requires a definition of indigenous peoples and soon.

The need is time-sensitive because the undefined legal category will be strained under the pressure of uncertain self-determination claims. We should expect to see a migration of non-indigenous groups to the category of indigenous peoples for the simple reason that international law seems to recognise rights for indigenous peoples that other groups want, think they too are entitled to, but do not currently have. The lack of a legal conception of ‘indigenous peoples’ facilitates this migration, the resultant flooding of the category, and the corresponding increase in claims. It is unlikely that the right to self-determination for indigenous peoples will be able to withstand this stress indefinitely.

Will Kymlicka shares this worry. He is concerned that the General Assembly’s attempt to draw a sharp distinction in legal

status between indigenous peoples and all other minority groups is morally problematic, conceptually unstable, and politically/legally unsustainable.⁸⁰ “The problem is not simply how to justify the sharp difference in legal rights [...] but how to identify the two types of groups in the first place. The very distinction between indigenous peoples and other homeland minorities is difficult to draw outside the original core cases of Europe and European settler states”.⁸¹ Moreover, it is far from clear “how we can draw this distinction in Africa, Asia, or the Middle East, or whether the categories even make sense [there]. Depending on how we define the terms, we could say that none of the homeland groups in these regions are ‘indigenous’, or that all of them are”.⁸² Thus, Kymlicka concludes, “whether we say that all groups are indigenous or that no groups are indigenous, the upshot in either case is to undermine the possibility of using the category of ‘indigenous peoples’ as a basis for targeted norms within post-colonial states”.⁸³

The problem is not a lack of possible definitions of ‘indigenous peoples’, however. There is an array of definitions available, but it is unlikely that the court’s decision to adopt any one of them would help matters. Influential definitions are offered by the UN Working Group on Indigenous Populations,⁸⁴ the UN Indigenous Study Conclusions,⁸⁵ the International Labour

⁸⁰ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 278.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*, 279.

⁸⁴ Jose Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Peoples*, UN Working Group on Indigenous Peoples, E/CN.4/Sub.2/1982/2/Add.6 (1982).

⁸⁵ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 89.

Organization⁸⁶ and the World Bank.⁸⁷ In these definitions and the academic literature, there are five common conditions of indigeneity:

- (i) *a historical continuity condition* recognizing that indigenous peoples are descendants of peoples conquered and/or settled by a foreign people;
- (ii) *an ancestral territory condition* recognizing that indigenous peoples occupy their ancestral lands, but that they do not have a full measure of self-governance;
- (iii) *a minority status condition* recognizing that indigenous peoples live as minority, non-dominant or quasi-colonial communities without a sufficient measure of self-governance;
- (iv) *a distinct culture condition* affirming that indigenous peoples are culturally distinct from the mainstream or dominant portion of the larger society, that they retain many features of the culture inherited from their ancestors, and that they are committed to maintaining aspects of their distinct culture in perpetuity; and,
- (v) *a subsistence economy condition* claiming that indigenous peoples have primarily subsistence-oriented economies.

Only condition (v) is likely to arouse serious controversy. Even though there is often a tension between “the centralized, urban, technologically sophisticated character [of contemporary society]” and “the decentralized, rural, technologically traditional societies [of indigenous peoples]”,⁸⁸ and even though many indigenous peoples have subsistence-oriented economies, it is

⁸⁶ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No 169*, International Labour Organisation, 76th Sess, 28 ILM 1382 (1989).

⁸⁷ World Bank, *Operational Directive 4.10: Indigenous Peoples* (2005).

⁸⁸ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 90.

clear that not all do. Condition (v) excludes indigenous peoples who have moved away from a primarily subsistence-oriented economy. Also, this condition functions to trap indigenous peoples in the past as other peoples are permitted to alter their communities and practices. For at least these reasons, the subsistence economy condition is arbitrary and unjustifiable vis-à-vis many significant indigenous rights, like the right to self-determination.

Setting aside the subsistence economy condition, the other four conditions apply well not only to indigenous peoples in Australia, Canada, New Zealand and the United States,⁸⁹ but also to groups usually thought to belong to other types of minority communities, including national minorities (like the Kurds), Asian hill tribes (like the Hmong), Middle Eastern and African nomadic or pastoralist tribes (like the Tuarag of the Sahara or the Jie of Uganda), and south American forest-dwellers (like the Waiapi of Brazil).⁹⁰ The search for an acceptable conception of indigeneity must meet the challenge of including the extraordinary variety of groups that most observers would consider to be indigenous, while simultaneously excluding non-indigenous groups.

Thus, we find ourselves pulled in two different directions. On the one hand, we need a legal definition of ‘indigenous peoples’ to assist the courts in adjudicating contested claims, and to decrease the chances of the courts reverting to the legal status quo prior to the UNDRIP. On the other hand, settling on a

⁸⁹ Indigenous peoples in Australia, Canada, New Zealand and the United States are often assumed to form the core of the category of indigenous peoples. Kymlicka, *Multicultural Odysseys*, 266.

⁹⁰ Contra Kymlicka, Wiessner includes within the category of indigenous peoples groups from around the globe, “such as the !Kung San in Botswana, Angola, and Namibia, the Twa in Rwanda, the Pygmy in the Republic of Congo, and the Maasai in Kenya and northern Tanzania.” Wiessner, “Indigenous Sovereignty”, 1163-1164.

concrete definition risks being over-inclusive or over-exclusive, thereby undermining the category. Given these pressures, it is not difficult to understand why legal and political theorists have been searching for adequate legal definitions for these social categories.

As a conceptual exercise, the search for a suitable definition of ‘indigenous peoples’ is hardly pressing, but given the stakes for indigenous communities and their legal rights under the UNDRIP, the definitional question is crucial. “In the end,” Hannum argues, “definitional questions become truly important only if inclusion in or exclusion from a particular definition has legal implications [...] No state objects to complete self-definition by indigenous peoples for social or cultural purposes; many *would* object to such a practice if it necessarily implied state obligations towards the persons or groups so designated”.⁹¹ In international law, at present, “too much depends on which side of the line groups fall, and as a result, there is intense political pressure to change where the line is drawn”.⁹² We should expect many sub-state nationalist groups and other non-indigenous communities to redefine themselves as indigenous peoples. Ironically, but unsurprisingly, this is simply the flip-side of the earlier trend of indigenous peoples claiming to be nations to further substantiate their claims to self-determination.

This ‘back-door route’ for non-indigenous minorities to gain significant legal rights may seem prudent, but it is not a sustainable strategy. This tendency, “if it continues, may well lead to the total collapse of the international system of indigenous rights”.⁹³ Unless the present course can be corrected, Kymlicka predicts that, first, “more and more homeland groups [will] start to adopt the indigenous label”, and, second, “the international

⁹¹ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 90-91.

⁹² Kymlicka, *Multicultural Odysseys*, 284.

⁹³ *Ibid.*, 287.

community will start to retreat from the targeted indigenous rights track”.⁹⁴ His worries seem warranted.

Kymlicka suggests a remedy based on a series of targeted declarations of rights for various minority communities. Based on his earlier work on liberal multiculturalism, it is not surprising that he would like to see targeted declarations for national minorities and immigrants as well. What is perhaps more surprising is the expansion of his earlier tripartite social ontology to include also the Afro-Latinos and forest-dwellers in Latin America, hill tribes and caste groups in Asia, pastoralists in Africa, and Roma in Europe.⁹⁵ Each of the proposed targeted declarations would be “premised on the assumption that there are standard threats or predictable patterns of injustice suffered by these types of minorities”.⁹⁶ This multi-targeted approach is expected to relieve some of the pressure from the definitional questions. After all, as long as the rights of hill tribes address the persistent concerns of hill tribes, there will be little incentive for hill tribes to present themselves as indigenous peoples, national minorities or immigrants.

Kymlicka’s proposal is interesting and sensible, and it deserves to be evaluated in its own right, but I will not be able to assess it here. Instead, I will suggest that it may reveal part of the problem with the current targeted approach to group rights. A quick survey of minority group rights in international law will reveal a general pattern of targeted group rights without adequate definitions for the groups in question. In this paper, we have seen this problem resurface again and again and again from the principle of *national* self-determination to the right to self-determination of *all peoples* to the right to self-determination of

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 300.

⁹⁶ *Ibid.*

indigenous peoples. In each case, international law has advanced a group right without defining the right-holder. This significant omission has led many scholars on a ‘wild goose chase’ as they have tried to outline subjective and/or objective conditions for the individuation of nations, peoples and indigenous peoples. Kymlicka’s proposal highlights the problem that too many groups do not fall within international law’s limited social ontology, and his proposal aims to solve a very real problem.

Although Kymlicka is concerned primarily with international norms of minority rights rather than the right to self-determination itself, his proposal may be adapted to our purposes. He may be interpreted as advocating that international law should offer some version of the right to self-determination to indigenous peoples, national minorities, and to whatever other type of social group that is entitled to some measure of self-determination. This approach requires a series of legal definitions for the relevant “selves”, but it places less pressure on any one of these definitions, as long as they are balanced enough to not furnish these groups with an incentive to redefine themselves as belonging to another type of group. If indigenous peoples, national minorities, forest-dwellers, hill tribes and pastoralists have a similar enough right to self-determination, then it will not matter (at least with regard to self-determination) within which legal category a group is placed. This multi-targeted approach to the right to self-determination in international law has the virtues of reducing the pressure to get any one legal definition correct, expanding the scope of communities entitled to this right, and reducing the incentives for groups to redefine themselves to attain a legal right to which they believe they are morally entitled.

Kymlicka’s multi-targeted approach may have the additional benefit of pressuring the international community and its members to clarify their positions on self-determination.

Currently, too many states reject completely the idea that there are sub-sections of *their* population entitled to self-determination, even in the form of internal political autonomy. These states have supported various versions of the right to self-determination in international law, but their support has been based on their view that there are no groups within their jurisdictions entitled to even some meagre measure of self-determination. On Kymlicka's multi-targeted approach, these states may retreat from their earlier pronouncements, or, more optimistically, they may honour their legal commitments and enter into negotiations with these communities. After all, while there is some plausibility to China's claim that there are no indigenous peoples within its territories, it is extremely unlikely that China will be able to substantiate a credible claim to not having any minority communities whatsoever within its territories. Moreover, China is not alone in denying the presence of minority communities with a right to self-determination within its territories, since many other states hold a similar position. Kymlicka's multi-targeted approach may have the benefit of forcing the international community to clarify its position on the right to self-determination, but this benefit may come at the cost of a wholesale retreat from the hollow declarations of the past.

There are definite risks for the putative legal rights of minority communities on Kymlicka's multi-targeted approach, but there are also difficulties associated with revising international law's social ontology. But, perhaps, the problem of social ontology has yet to be adequately understood and appreciated. Perhaps, the problem is not that Kymlicka's liberal multiculturalism began with three categories, when it should have had at least nine. Perhaps, the problem is that individuals have organised into social groups and these groups do not fall neatly enough into a nine-category social ontology or even a twenty-seven-category one. Perhaps, the most significant problem is that international law does not have

to wade into the murky waters of social ontology at all. Let me explain.

Kymlicka's multi-targeted approach to minority rights under international law is a response to a few related problems, such as the problem of the self component, the problem of the definitional questions, and the problem of neglected types of community. This approach presumes that social reality is carved up into determinate types of social community, and that these types come with a corresponding set of legal rights.

But social reality does not consist of neatly individuatable social groups or types of social group. And if cultural communities merit protection and promotion based on their contribution to our lives, then there are many types of cultural community worthy of such protection. These cultural communities may be distinguished based on metaphysical, moral, legal, political, religious, linguistic, or any number of other differences, and their scope may range from the local to the global. Whenever we attempt to impose a social ontology onto our complex and multifaceted social world, we will inevitably be met head-on with the frustrating realisation that we are unable to find unproblematic conditions for a group to qualify as a group of a particular kind, that we are confronted with troubling counter-examples revealing that our conditions are overly exclusive or inclusive, and that we struggle to individuate the boundaries of these groups, especially the boundaries between them and their closest neighbours. It is often assumed that these difficulties are epistemic, pertaining to our knowledge of the social world, but this is a mistake. The difficulties in arriving at a descriptively adequate social ontology are metaphysical – they arise from the highly complex and multifaceted nature of social reality itself. As such, the problems related to social ontology are not problems related to our attempts to get the facts right, but

rather problems brought about by the imposition of an inaccurate model of social reality. If this analysis is correct, then the problems associated with developing an adequate social ontology will likely prove intractable.

But I have suggested already that international law does not need to wade into the murky waters of social ontology at all. The general tendency in international law theorizing has been to begin with a conception of a type of group and then outline a set of rights and privileges for all and only groups of that type. This approach assumes the priority of the type of group over its members' legal rights and privileges, but it seems to me that we would have a better theoretical foundation were we to begin with specific measures, rights, prerogatives, and so on, and then determine the requisite conditions for groups to qualify for them. This approach would circumvent the search for a social ontology able to deal with the problems listed above.

With self-determination, since the relevant 'selves' have a right to determine their political status from the complete range of available options, there has been an obsessive preoccupation with the self component. This view is the logical consequence of the sovereign state model undergirding the UN regime, and it serves to correct abnormal conditions brought about by the disintegration of sovereign states. Since the international community has not been prepared to permit sub-sections of a state to secede without that state's consent, the right to self-determination's scope has been severely restricted. The threat of secession has hampered the widespread application of the right to self-determination as some measure of internal political autonomy, and this is an unfortunate by-product of the conflation of the nationalist and democratic traditions within a sovereign state model. When confronted with the possibility of destabilizing and violent domestic conflict or, worse still, regional or global

conflict, the international community has opted, first, to try to maintain the status quo, and second, only when it was unavoidable, to establish new political arrangements. The spectre of secession has spooked states and the international community into an adversarial and defensive stance against claims for some measure of self-determination by sub-state communities. The spectre of secession needs to be excised as we endeavour to take the dynamite out of self-determination.

V

Conclusion: A Proposal for an Alternative Approach

To this end, I suggest an alternative approach based on four principles. First, we should appreciate and maintain the conceptual distinction between the nationalist and democratic traditions of political thought. Much devastation has been wrought by the false promises of international lawmakers through their confused and confusing pronouncements of rights for all people, which have impacted the expectations of political activists, international lawyers and academics alike. It is very important to be clear about what legal terms like ‘nations’ and ‘peoples’ mean. The distinction between the nationalist and democratic traditions is not solely for the purposes of clarity though: it also permits us to recognise the right to self-determination of minority communities without threatening the territorial integrity and political unity of established states by separating cultural forms of self-determination from political ones. It would be a mistake to continue to underappreciate the clarity and functionality provided by this principled distinction.

Second, in international law, a self-determining group has the right to choose its political status within the international order, and we have seen how the possibility of secession has limited the scope of the right to self-determination to abnormal situations. Many commentators have suggested that we should distinguish between secession and self-determination to reduce the stakes of minority self-determination. In a similar vein, I suggest that the right to self-determination be construed not as a single right with many available options to be chosen solely by the rights-holder, but as an umbrella concept enveloping many specific provisions from secession to the establishment of private educational or religious institutions for a minority community to respect for holidays and so on. This dissection of self-determination into specific measures allows groups to be more specific with their claims. Treating self-determination as an umbrella concept and being specific about the types of self-determination measures possibly available to minority communities would provide for greater flexibility and clarity in the international law of minority rights. Rather than subdivide the self component, my proposal partitions the determination component.

Third, once we have a comprehensive list of self-determination measures (perhaps with a procedure for alternative measures based on a legally-determined negotiation process), the next step would be to outline the requisite conditions for a group to qualify for each specific measure. On my proposal, a group could qualify for some measures without qualifying for others, and this result is desirable because communities differ widely in their characteristics and conditions, and what is appropriate for one group may not be appropriate for another. For instance, a group may qualify for its own private or state-funded educational institutions without qualifying for internal political autonomy, perhaps on the ground that its population is too dispersed. My proposal shifts attention away from the features characteristic of

a particular type of group, and onto the requisite conditions for groups to qualify for a particular self-determination measure.

Fourth, my provision-centred proposal involves reversing the priority of the self and determination components. Consequently, lawyers, legal theorists, political and social scientists, historians and philosophers would devote less time elaborating necessary and/or sufficient conditions for a group to count as a token of a particular type, and, instead, devote their energies to enumerating the qualifying conditions for particular self-determination measures. This task is not easy, but it is more manageable than the present quest for a social ontology mirroring social reality's complexity and richness. With these changes to our approach to the right to self-determination in international law, I believe we can make solid progress in our pursuit of justice for minority communities without destabilizing sovereign states. This is my proposal for taking the dynamite out of self-determination by turning it on its head.

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