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SELF-DETERMINATION, INDIGENOUS PEOPLES AND MINORITIES

JOSHUA CASTELLINO and JÉRÉMIE GILBERT*

I INTRODUCTION

The right of self-determination remains one of the most romantic of rights within the human rights agenda.¹ Enshrined as Article 1 of both the *International Covenant of Civil and Political Rights* (ICCPR) and the *International Covenant Economic, Social and Cultural Rights*, it is considered essential before any other rights can be recognised.² This dynamic presents an extremely difficult problem since Article 1 is framed:

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.³

The problem that has haunted the international community for a long time is to whom this right accrues and what the process of self-determination entails.⁴ This

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¹ For general reading on self-determination see: Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (1995); James Crawford, *The Rights of Peoples* (1995); Hurst Hannum, *Autonomy, Sovereignty and Self-determination: The Accommodation of Conflicting Rights* (1990).

² See Dominic McGoldrick, *The Human Rights Committee: Practice and Procedures of Law Making at the United Nations* (1991).

³ *International Covenant for Civil and Political Rights and International Covenant for Economic, Social and Cultural Rights*, GA Res 2200 (XXI) 21st sess, 1 (16 December 1966).

⁴ See Alexander Kiss, 'The Peoples' Right to Self-determination' (1986) 7 *Human Rights Law Journal* 165.

paper seeks to cast some light on these issues and to examine the claims of indigenous peoples and minorities to access this right. The paper begins with an examination of the evolution of self-determination. Second, it will attempt to demonstrate the manner in which self-determination has been interpreted through a brief analysis of United Nations (UN) documents relating to self-determination. One of the keys to determining the scope of self-determination is to identify and evaluate the constraints on the right. This section concludes by listing the restraints and limitations to the right as it is currently framed within international law generally and human rights law specifically.

Third, the paper will introduce the notions of minorities and indigenous peoples. It remains vital to be able to define these groups accurately, especially in terms of their entitlements. This section will seek to present working definitions of each based on generally accepted premises.⁵ Fourth, the paper will examine the jurisprudence of the Human Rights Committee to ascertain its attitude to the applicability of the right of self-determination to minorities and indigenous peoples.

The paper concludes by considering the ways in which the concept of self-determination is currently invoked, with a short critique of the applicability of self-determination discourse to national minorities and indigenous peoples. It postulates that the process of self-determination has relevance beyond the colonial contexts, and that this context can be effectively identified vis-à-vis specific minorities and indigenous peoples based on their current situations and their treatment within the domestic laws of a state.

II THEORY OF SELF-DETERMINATION

The first step towards an examination of self-determination is to agree on a definition for the term. While there is much written on self-determination, a precise definition remains elusive. Kingsbury captures this succinctly:

[S]elf-determination has long been a conceptual morass in international law, partly because its application and meaning have not been formulated fully in agreed texts, partly because it reinforces and conflicts with other important principles and specific rules, and partly because the specific international law practice of self-determination does not measure up well to some of the established textual formulations.⁶

The idea of self-determination is rooted in the Enlightenment period of the late eighteenth and nineteenth centuries.⁷ However, the point at which it begins to

⁵ For a discussion on the definition of a minority see Timo Makkonen, *Identity, Difference and Otherness* (2000) 59-148.

⁶ Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of indigenous Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189.

⁷ See Marti Koskenniemi, 'National Self-determination Today: Problems of Legal theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241.

become relevant to international legal discourse is its expression in the American⁸ and French Revolutions.⁹ Koskenniemi identifies two specific models of self-determination; namely, the classical and the secessionist models.¹⁰ He distinguishes the classical model from the secessionist model and suggests prerequisites useful to ways of examining self-determination and its relevance in different contexts.

The classical school of thought on self-determination is based on patriotic values, and on a Hobbesian reading of international society.¹¹ It postulates that ‘the authentic expression of human nature in primitive communities is something essentially negative’,¹² needing to be channelled into formally organised states to prevent *bellum omnium*.¹³ The classical view of self-determination understands nations to be collections of individuals who make the rational decision to join together to form a society. Self-determination can then be expressed through procedures established by the institutions of government in the society. Outside these procedures, self-determination is nothing more than ‘destructive, irrational passion’.¹⁴

According to Koskenniemi, the second school of thought can be described as the secessionist model. It is based on a romantic rather than a classical notion. This school of thought is arguably what Grotius had in mind when he discussed the notion of *jus resistendi ac secessionis*.¹⁵ A central conception here is that a ‘nation’ is something much more fundamental than the institutions of government of a society. It is concerned much less with the effective operation of the institutions of government through which popular will is expressed, and more with the objective to which this will is exercised and whether it manifests in an authentic community.¹⁶ It is the idea of authentic nationhood that leads Grotius to discuss the notion of secession. When a ‘nation’ is oppressed by another it has the right to rise up against that oppression and create its own institutions of government through which to express its community aspirations.

Koskenniemi suggests that under the classical notion of self-determination primitiveness is viewed as a virtue that was lost in the political struggle that underlines and organises political communities into states.¹⁷ Thus, the classical notion of self-determination views states alone as legitimate holders of collective

⁸ For a reading of the American Declaration of Independence and its relevance to international law see Thomas Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 1.

⁹ See Joshua Castellino, ‘Liberty, Equality and Fraternity: The Dubious Fruits of National Self-determination’ (1999) 1 *Turku Law Journal* 1.

¹⁰ Koskenniemi, above n 7.

¹¹ For a definition of international society as opposed to an international system see Hedley Bull, *Anarchical Society: A Study of World Order in Politics* (1995).

¹² Koskenniemi, above n 7, 249.

¹³ See generally, Castellino, above n 9, 9-10.

¹⁴ See Basil Davidson, *The Black Man’s Burden: Africa and the Crust of the Nation State* (1992).

¹⁵ See Benjamin Neuberger, *Self-determination in Post-Colonial Africa* (1993).

¹⁶ Koskenniemi, above n 7, 250.

¹⁷ *Ibid.*

personhood, thereby facilitating a particular form of political participation. By contrast, the romantic secessionist notion of self-determination attaches a high value to the notion of statehood only to the extent to which it represents communal identification. It appeals to individuals to sacrifice their immediate interests to struggle for the goal of the communal collective good.¹⁸

Arguably, the differences between the classical and romantic notions of self-determination underpin the modern confusion in the concept of self-determination.¹⁹ Thus, while many states, indigenous peoples, minorities and perhaps individuals might declare an aspiration for the fulfilment of the right to self-determination, they start from different premises and expect different processes to fulfil the right. This leaves considerable scope for confusion, which is exacerbated by the incomplete nature of the expression of the right as a human right and as a principle of international law.

In terms of Creole emancipation from Spain between 1810 and 1825 (and Portugal in the case of Brazil) both notions of self-determination were involved. Motivated by an overarching desire to discard the yoke of domination by Madrid and Lisbon, the Creoles, born of European parentage, struggled for control over a decision-making process, fuelled by aspirations of romantic, idealist notions. These ideals failed to include indigenous peoples and non-Creoles. Similar sentiments are visible in classical UN type decolonisation, which seemed to merge the two schools of thought, yielding a process by which Imperial European powers were effectively excluded through law, rather than revolution. The need to protect the territorial integrity of existing states is taken as given, thereby effectively dismantling the secessionist model and concentrating instead on the creation of an effective decision making procedure. This approach is borne out in human rights law in the approach of the Human Rights Committee in its interpretation of Article 1 of the *Covenant on Civil and Political Rights*, as will be discussed later.

III DOCUMENTS OF SELF-DETERMINATION

Under the United Nations, it is fair to say that the right to self-determination has been the vehicle of choice for achieving decolonisation.²⁰ It was seen as the principle sentiment of subjugated peoples seeking emancipation from the colonial yoke. No definition existed as to what amounted to 'subjugation'. However, a discussion worth flagging took place in 1960, shortly after the passage of the *Declaration on the Granting of Independence to Colonial Territories and Peoples* ('1960 Declaration').²¹ This particular document was framed explicitly in the context of colonial peoples and territories, and takes the attitude that the passionate

¹⁸ Also see Inis Claude, *Swords into Ploughshares* (1996).

¹⁹ Koskenniemi, above n 7, 253.

²⁰ Rigo Sureda, *The Evolution of the Principle of Self-determination: A Study of UN Practice* (1973).

²¹ GA Res 1514 (XV) UN GAOR, 15th sess, Supp No 16 UN Doc. A/4684 (1961).

yearning for freedom in all dependent peoples and the decisive role of such peoples is 'the attainment of their independence'.²²

The crux of the debate surrounded the meaning of 'dependent peoples', which was best reflected in Portuguese arguments of the time.²³ For the states emanating from decolonisation, 'dependence' was understood in contexts in which their territory was not contiguous with that of the Imperial state. To protect its colonial interests, the Portuguese insisted that its overseas possessions were in fact 'overseas Portuguese territories' and were part of Portuguese sovereign territory. As such, they were not dependent at all,²⁴ an understanding also reflected in Portuguese domestic legislation. The Portuguese position came to the fore over Portuguese obligations to report to the UN Trusteeship Council on all measures taken in relation to decolonisation under Article 73 of the UN Charter.²⁵ The government argued that any obligation to report on such territory would be in violation of the notion of territorial integrity, as justified by Article 2(7) of the UN Charter.²⁶ Arguments on similar grounds led to the *Rights of Passage Case*, which consisted of the right of Portugal to access its enclaves in independent India, namely Daman and Diu.²⁷ To counter such arguments, the 1960 Declaration contained the phrase 'colonialism in all its manifestations'.²⁸ The resolution declared:

That subjugation, domination and exploitation of peoples constitutes a denial of human rights and is contrary to the United Nations Charter.

- That all people have the right to self-determination.
- That inadequacy of democratic institutions etc should not serve as a pretext for delaying independence.
- That armed action or repressive measures against a people struggling for independence should cease, and the integrity of their national territory be respected.
- That immediate steps should be taken in Non-Self Governing Territories to move them towards their independence.
- That attempts to disrupt partially or totally the territorial integrity of a state was incompatible with the purposes and principles of the UN Charter.
- That all states would observe the Charter, the Universal Declaration and the principle of non-intervention in the internal affairs of another state.

²² Ibid.

²³ See Quincy Wright, 'The Goa Incident' (1962) 56(3) *American Journal of International Law* 617.

²⁴ Castellino, above n 9, 25.

²⁵ See Christopher Carrington, 'Decolonisation - The Last Stages' (1962) 38 *International Affairs*; also G Martelli, 'Portugal and the United Nations' (1964) 40 *International Affairs* [Library - JX1.I53 - check page nos and authors].

²⁶ See generally A J Jacobs, *Constitutional Developments in Portugal Since 1926* (1957); also Alberto Franco Nogueira, *The United Nations and Portugal: A Study of Anti-Colonialism* (translated from 2nd Portuguese edition, 1963).

²⁷ *Right of Passage Over Indian Territory (Merits)* [1960] ICJ Rep 6.

²⁸ Declaration on the Granting of Independence to Colonial Countries and Peoples, above n 21.

This Declaration is of great significance for the right to self-determination. It suggests that any subjugation, domination or exploitation of people constitutes a denial of human rights. This, when coupled by colonialism in all its manifestations, might initially suggest a broad ambit. Additionally, the call for ceasing armed repression against people struggling for self-determination, could be read as justifying the aims of movements seeking self-determination. However, the restrictions implied by clauses 6 and 7 render any such broad interpretation suspect, by explicitly bringing in the notion of territorial integrity and the requirement of compatibility with the UN Charter. These restrictions are also supplemented by the principle of non-intervention.

Resolution 1541 (XV) makes some key points about the issue of who was entitled to exercise the right of self-determination. The resolution was agreed to in direct response to the Portuguese objections raised above. It built on the *Rights of Passage* decision from earlier that year. The resolution begins by outlining, 'an obligation [that] exists to transmit information under Article 73 (e) of the Charter in respect of such territories whose people have not yet attained full measure of self-government'.²⁹

This obligation is emphasised as being a requirement, until such time as the territory has achieved a 'full measure of self-government'.³⁰ In direct response to the Portuguese defence under Article 2(7),³¹ Principle IV then clarifies the parameters of the obligation vis-à-vis territories, stating that it applied to information to be transmitted for 'a territory which is geographically separate and is distinct ethnically and/ or culturally from the country administering it'.³²

While geography is an important factor in determining reporting obligations under the resolution, the resolution also acknowledges other factors relevant to determining the relationships between states and their colonies, including administrative, political, juridical, economic and historical factors.³³

This resolution remains the clearest expression of what 'self-determination' actually entails in international law. Expressing this in the context of the definition of 'full measures of government' requires a process that must result in a decision whereby the people concerned vote in a free and fair election to:

²⁹ Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Res 1541(XV) UN GAOR, 15th sess, 948th plen mtg 29, UN Doc. A/4651 (1960).

³⁰ Ibid.

³¹ Charter of the United Nations Article 2(7) states that: Nothing contained in the contained in the present Charter shall authorise intervention by the United Nations or any other state in matters that are within the domestic jurisdiction of any state.

³² Principle IV, above n 29,29.

³³ Principle V, above n 29, 29.

- Constitute themselves as a sovereign independent state;
- Associate freely with an independent state; or
- Integrate with an independent state already in existence.³⁴

The International Covenants on Human Rights were the next key documents to address the right of self-determination. In these documents the importance of the right to self-determination cannot be stressed enough. As pointed out at the outset, the right is framed as being the first human right without which other political, civil, economic, social and cultural rights would be meaningless. The *travaux préparatoires* of the Covenants reveals that the reason for this is that it was considered vital for people to be able to control their own political destiny, before being able to adopt a rights based system that respects the other rights mentioned in the Covenants.³⁵ The key issues that need highlighting in this document are the following:

- The scope of the right of self-determination;
- The objective of the right of self-determination;
- The extent of the right of self-determination; and
- State party obligations in relation to the right of self-determination.

Self-determination, viewed as a human right, takes on more than the notion first emphasised in the context of Hobbesian philosophy. Rather, it is a practical enunciation of a right that ostensibly underpins all other rights. However, the overall theme of the discussion of the Covenants and the overwhelming focus on the colonial era, suggest that this expression of self-determination is hard to engage outside this very specific setting. In terms of scope, although the specification is that *all peoples* have the right to self-determination, the distinction of a 'people' from that of 'indigenous peoples' and 'minorities' also serves to limit the right to the context of a specific era, dating this aspect of the Covenants and preventing them from being living, dynamic mechanisms. Thus, while the objective of self-determination is the free determination of political status and pursuit of appropriate economic, social and cultural development, these entitlements are restricted to those defined narrowly as a 'people', severely restricting the scope of self-determination. The Human Rights Committee has argued, however, that Article 1 of the *Covenant on Civil and Political Rights* is still relevant in the context of 'internal' self-determination, but this argument is largely disappointing.³⁶ The use of 'internal' self-determination is premised on the notion that the physical dimensions of the entity are pre-determined; and it is only within that structure that non-peoples namely 'indigenous peoples' and 'minorities' may exercise self-determination. In the case of minorities, even 'internal' self-determination is open to question.

³⁴ See Castellino, above n 9, 28-9.

³⁵ See generally, McGoldrick, above n 2.

³⁶ See Committee on the Elimination of Racial Discrimination, General Recommendation XXI on self-determination, UN Doc. CERD/48/Misc.7/Rev.3 (1996).

It is with regard to the extent of self-determination that some progress is visible. Although framed broadly, the provisions of paragraph 2 have begun to gain acceptance in the context of the resources of 'indigenous peoples'. The recent jurisprudence of the Human Rights Committee suggests this is an option, though arguably the differentiation between this for 'indigenous peoples' and 'minorities' remains.³⁷ This issue will be re-examined in the concluding section of this paper. Finally, no exposition of the right of self-determination would be complete without a clear indication of state responsibility. In terms of the Covenant, this is described as a requirement to promote realisation of the right as well as respecting it 'in conformity with the provisions of the Charter of the United Nations'. This final clause brings in the implication of the territorial sovereignty of states and indivisibility of state territory, further limiting the scope of self-determination.

Thus, it must be emphasised that the principle of self-determination has been expressed as a right of colonial peoples. For other groups, however, its status as a right is doubtful. Whether it can be considered a norm of *jus cogens* depends on the interpretation of the *Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States* in accordance with the Charter of the United Nations ('1970 Declaration').³⁸ This document is based on the principles and purposes of the UN Charter, as reflected in Chapter One of that document. Its passage through the General Assembly had such wide consensus it has often been put forward as expressing norms of *jus cogens*.³⁹ While incorporating the 'principle of equal rights and self-determination' as one of its seven principles, there is considerable ambiguity in the text regarding the scope of the principle outside the traditional decolonisation agenda.⁴⁰ As a right to freely determine 'political status and to pursue ...economic, social and cultural development' without outside influence, the principle of self-determination imposes a duty on states. This is reflected in the 1970 Declaration.

Every State has a duty to promote, through joint or separate action, the realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

- (a) To promote friendly relations and co-operation among States; and

³⁷ See Martin Scheinin, 'The Right to Self-determination under the Covenant on Civil and Political Rights' in Pekka Aikio and Martin Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-determination* (2000) 179-202.

³⁸ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, GA Res 2625, UN GAOR, 25th sess, Supp No 28, 121, UN Doc. A/8028 (1970).

³⁹ Patrick Thornberry, 'The Friendly Relations Declaration', Vaughan Lowe and Colin Warbrick (eds), *UN and the Principles of International Law* (1991 **1994?**) **JX1977 .U42584/1994**.

⁴⁰ See Robert McCorquodale, 'Self-determination A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857.

- (b) To bring a speedy end to colonialism, having regard to the freely expressed will of the peoples concerned.⁴¹

The 1970 Declaration accepts that self-determination relates to the political status of a people. This is important and arguably is at odds with the findings of human rights monitoring bodies, which seek to introduce an element of ‘internal’ sovereignty that seeks to exclude the notion of political status, focussing instead on the virtues of equality and representation within a state.⁴² The Declaration also accepts that colonialism must be brought to a speedy end and calls upon states to act to further this end. This could be interpreted as expressing support for a wide range of means for the fulfilment of the right to self-determination. What is equally clear within the document, however, is that the discussion before the United Nations at the time, clearly related to decolonisation. While not explicitly defining the nature of the coloniser, the discussion and tone of the document are framed with regard to European colonisation of non-European lands. The 1970 Declaration remains, then, an expression of the situation facing colonial peoples and attempts to use it outside this parameter remain tenuous though some of the context might initially suggest its suitability to this task.⁴³ One argument examined in depth later in this paper is the extent to which indigenous peoples’ rights fit within the parameters of colonisation and whether there remains scope for this particular argument to be made.

Regarding self-determination, the following conclusions are offered, which ought to provide us with a framework for understanding and critiquing the principle:

- The right, initially expressed in the American and French revolutions at the end of the eighteenth century, was considered as one of guaranteeing democratic consent within an entity.
- While this notion of ‘democratic entitlement’ was central, in Wilsonian interpretation it was applied to minorities, with a view to giving them a choice of political lineage, determined through plebiscites.⁴⁴
- Self-determination made a reappearance in the UN era as it became the vehicle of choice of the decolonisation movement.
- The 1960 Declaration on colonial peoples gave this further legitimacy and became the basis for its expression in post war international law.

⁴¹ 1970 Declaration, above n 38.

⁴² Above n 36.

⁴³ Thornberry, above n 39, 21.

⁴⁴ For more on this issue see Ray Baker and William Dobbs (eds), *The Public Papers of Woodrow Wilson* (1925-1927).

- Three options were identified in clarification of its parameters in 1960 namely: a) secession to form a new state; b) association with an existing state; c) integration into an existing state.
- The transformation from political tenet to legal norm was completed with its expression as the first human right in the Covenants of Human Rights in 1966.
- The 1970 Declaration sought to enshrine this legal norm into a guiding principle of the United Nations, though it is clear that the context for that document remained traditional colonisation.
- Modern self-determination leaves open several vital questions: (a) whether it still has validity in a post-decolonisation⁴⁵ phase; (b) who is entitled to self-determination as currently expressed, and (c) to what extent should the availability of appropriate solutions temper the appropriateness of the legal norm.⁴⁶

IV INDIGENOUS PEOPLES AND MINORITIES: DEFINITIONS AND ENTITLEMENTS

Self-determination and the rights of minorities evolved around two fairly disparate axes and were inseparably linked by Wilsonian thought in the aftermath of World War I.⁴⁷ Within the United Nations system, and as reflected in Article 1 of the Human Rights Covenants, it can be categorically, but rather unhelpfully stated that ‘peoples’ are entitled to self-determination. As demonstrated above, who the ‘peoples’ are remains ambiguous. With the dynamics of ‘peoplehood’ left undefined in law, and with several vulnerable groups (primarily within post-colonial states) facing states determined to maintain their external boundaries, with national identities forged around dominant cultures, minorities and indigenous peoples have sought to step into the breach and declare their peoplehood to further their claims to self-determination.⁴⁸ Human rights law is extremely wary of such claims. The wariness stems from the fear of a continuously available process whereby groups within groups constantly seek to renegotiate their identity and their rights, until being finally satisfied with their bargaining position vis-à-vis other groups. Thus, the prime question sought to be addressed in this section is whether minorities and/or indigenous peoples can be considered to be ‘peoples’ in the sense of Article 1 of the International Covenants.

⁴⁵ With ‘decolonisation’ interpreted as being European domination over non-European peoples. As will be examined below even this remains problematic in the context of indigenous peoples.

⁴⁶ See Castellino, above n 9, 43-4.

⁴⁷ Anthony Whelan, ‘Wilsonian Self-determination and the Versailles Settlement’ (1994) 43 *International and Comparative Law Quarterly* 99.

⁴⁸ Fernand De Varennes, ‘Minority Rights and the Prevention of Ethnic Conflicts’. Paper prepared for the 6th session of the Working Group on Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2000/CRP.3 (2000).

A Are minorities 'peoples'?

When asked who minorities in international law are, the High Commissioner on National Minorities of the Organisation for Security and Co-operation in Europe famously stated, 'I recognise a minority when I see one'.⁴⁹ For the last few decades, human rights lawyers, lawmakers and academics have been unsuccessfully struggling to find a concise legal definition for a 'minority'. The definition used by the Special Rapporteur Francesco Capotorti is generally regarded as the best working definition in international law. It identifies a minority 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 culture, religion or language.⁵⁰

The fundamental criteria required by this definition are clear: a minority has to be a group that exists in a non-dominant position. Its composition must be based on a shared ethnic, religious or linguistic identity which is distinguishable from mainstream society. In addition, the group needs to either implicitly or explicitly reveal a sense of solidarity towards preservation of its identity. While this definition remains problematic and attempts have been made to suggest other definitions, it nonetheless does capture the essence of the debate and is therefore proposed as being allowed to stand as a working hypothesis for the purpose of this paper.⁵¹

Regarding the right of minorities to self-determination, the question posed is whether such groups based on their distinct ethnic, religious or linguistic groups can be regarded as 'peoples'. The argument is relatively logical since the dimensions of peoplehood are unclear and in any case, peoplehood itself is constituted on bases very similar to that of minority groups.⁵² From existing human rights documents it can be categorically stated that minorities do not have the right to self-determination. The reference to 'all peoples' in Article 1 of the Covenants is interpreted as applying to 'whole peoples' and not segments thereof, with 'whole' interpreted in the context of existing states.⁵³ The Declaration on Minorities⁵⁴ avoids the right to self-determination and in Article 8.4 strongly insists that nothing in the declaration should interfere with states' territorial integrity. This attempts to rule out the applicability of self-determination in the secessionary sense at least, as an option for minorities to pursue. Indeed, the only reference to any right of

⁴⁹ Max Van der Stohl in Makkonen, above n 5, 54.

⁵⁰ Francesco Capotorti, Special Rapporteur, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/384/Rev.1 (1977).

⁵¹ For more definitions on minorities see <<http://www.minority-rights.org>>.

⁵² Philip Ramaga, 'The Bases of Minority Identity' (1992) 14 *Human Rights Quarterly* 409.

⁵³ Patrick Thornberry, 'Self-determination, Minorities, Human Rights: A Review of International instruments' (1989) 38 *International and Comparative Law Quarterly* 867.

⁵⁴ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res 47/135 (18 December 1992) <<http://193.194.138.190/html/>>.

collectively organised destiny is the right for minorities to establish and maintain their own associations, a right that falls considerably short of a right of self-determination. Instead, the emphasis of international minority rights law has been towards seeking to provide access to political participation within mainstream society rather than creating room for the articulation of secessionist ideals.

In this sense international standards regarding minorities are based on equality, non-discrimination and protection of the right to enjoy one's culture, thus aiming to ensure effective participation and integration within society.⁵⁵ It can be argued this is, in a certain sense, the opposite of self-determination which may allow for separatism. International instruments relating to minorities implicitly rule out the entitlement of self-determination to minorities differentiating them in a very fundamental respect from the rights of peoples. Additionally, as suggested by Eide 'there is no disagreement that rights of persons belonging to minorities are individual rights, even if most cases can only be enjoyed in community with others. The rights of peoples, on the other hand, are collective.'⁵⁶

However, this categorical denial of self-determination to minorities is not as clear-cut as it might seem. Though international instruments suggest that minorities do not have a right to self-determination, it is important to remember that self-determination as a concept is based on the ideal of protecting oppressed peoples living under external oppression. In this sense, one of the arguments for a right to self-determination for minorities is based on the 1970 Declaration as examined above.⁵⁷ Passed within the decolonisation process, the declaration invites states to respect the principle of equal rights and self-determination of peoples. Though it reaffirms the fundamental importance of states' territorial integrity, the Declaration strongly insists on the duty of states to respect self-determination drawing a line linking equality and self-determination. As Wright highlighted, the Declaration seems to imply that if a government is not properly representative of all the constituent ethnic groups within its society, self-determination might be the tool to redress the imbalance between majorities and minorities.⁵⁸ Thus, self-determination could be viewed as a remedy for minorities or 'the last recourse to rebellion against tyranny'. This view is reaffirmed by the Vienna Declaration of 1993:

[The right to self-determination] shall not be constructed as authorising or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of*

⁵⁵ Gudmundur Alfredsson, 'Minority Rights: Protection by the United Nations' (1993) 14(1-2) *Human Rights Law Journal* 1.

⁵⁶ Asbjørn Eide, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', 6th sess, Sub Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 (2000).

⁵⁷ 1970 Declaration, above n 38.

⁵⁸ Jane Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19(4) *Oxford Journal of Legal Studies* 605, 605.

*peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*⁵⁹

This paragraph suggests that people living under a regime that is not respecting equality and non-discrimination might, as a last resort, have a right to break away, thus creating some room for oppressed minorities to make some claim towards people-hood. This indicates that the distinction between a minority and an oppressed people is not always clear. The distinction is blurred further when externally imposed boundaries are factored in. The distinction between ‘peoples’ and ‘minorities’ were not considered when boundaries were first drawn in foreign offices in Paris or London under colonial foreign policies. Several minorities within post-colonial states are in minority situations within the existing boundaries of their post-colonial countries as a pure result of colonial boundaries drawn for administrative reasons, having been transformed into international boundaries. As a result, they still claim to be under external oppression.

The Working Group on Minorities has recognised this difficulty in the context of more recent ethnic conflict in the former Yugoslavia. As José Bengoa, one of the members of the Working Group, put it:

In recent years the line of demarcation between groups which have declared themselves national and other groups, referred to as ethnic groups, which are not entitled to self-determination has become blurred to such an extent that it is difficult to distinguish between the two.⁶⁰

There is no definitive answer to the question as to whether minorities are ‘peoples’ entitled to self-determination in the face of oppression by their governments.⁶¹ The only expectation is that self-determination both as a principle, and as a right, must allow for a right to be governed without discrimination. To what extent such a principle might entitle minorities to become a people if the state government is discriminating against them remains ambiguous. One of the chief reasons for the narrow interpretation of the right of minorities to ‘external’ self-determination is the fact that it is states that consent to international human rights treaties; the very states that could potentially be vulnerable to claims for self-determination made by minorities.⁶²

⁵⁹ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (1993) (emphasis added).

⁶⁰ Jose Bengoa, ‘*Existence and Recognition of Minorities*’, 6th sess, Sub-Commission on Promotion and Protections of Human Rights, Working Group on Minorities, 81, UN Doc E/CN.4/Sub.2/AC.5/2000/WP.2 (2000) 81.

⁶¹ For instance consider the case of East Timor where the East Timorese minority in Indonesia claimed separate status as ‘*people*’ entitled to self-determination; a claim currently being made by other groups in Indonesia.

⁶² See the Indian objection to the right of self-determination and the French objection available, <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm>.

One argument that could be put forward in light of the increased importance of the human rights agenda is that if minorities remain victims of 'serious injustice', and if there is no other remedy available, they might be entitled to secede. This is referred to in theory as the 'remedial right to self-determination', and has never been practically enforced, though the situation that resulted in the creation of the state of East Timor through a UN sponsored plebiscite arguably comes closest to articulating such a notion.⁶³

B *Indigenous Peoples and the eternal quest for self-determination*

Notwithstanding the fact that the International Labour Organization and the World Bank have adopted their own definition, there is no internationally accepted definition of the term indigenous peoples. As in the case of minorities, references are most often made to a working definition proposed by Special Rapporteur Martínez Cobo in his study on discrimination against indigenous populations:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁶⁴

Even though this working definition is criticised, it is usually regarded as the most authoritative of various attempts within international legal discourse to define indigenesness.⁶⁵ In the debate relating to the right of indigenous peoples to self-determination two points need to be clarified. First, it is central to the definition of indigenous peoples that they have a specific relationship to a defined territory. In this sense indigenous peoples are sometimes referred as 'territorial minorities'. This point is central to the notion of indigenesness, since one of the core elements of the indigenous discourse is to ensure that indigenous peoples have a right over their ancestral territories.

⁶³ Though it may be argued that in Bangladesh secession was achieved through self-defence. See Joshua Castellino, *The Secession of Bangladesh in International Law: Setting New Standards?* (2000) 7 *Asian Yearbook of International Law* 83.

⁶⁴ Jose Martinez Cobo, Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

⁶⁵ For debates relating to definition, see Benedict Kingsbury, 'Indigenous Peoples in International Law: a Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law* 414.

Second, indigenous representation at an international level has led to the term 'peoples' replacing the previously patronising 'populations'.⁶⁶ Despite the reservations expressed by some governments over the fact that use of the term 'peoples' might lead to secession and separatism.⁶⁷ Chairperson Rapporteur Daes has emphasised that 'indigenous peoples are indeed peoples and not minorities or ethnic groups'.⁶⁸ Wiessner also highlights, 'if any traditional criteria of 'people' exist, indigenous groupings may very well meet them'.⁶⁹ Indeed indigenous peoples argue that they are sovereign nations with a right to self-determination to preserve their culture. Claims made by indigenous representatives, especially through the meetings of the two Working Groups in Geneva, are fundamental for the recognition of their right to self-determination. This is reflected within the draft *UN Declaration on the Rights of Indigenous peoples* ('Draft Declaration') currently under discussion in the Working Group.⁷⁰ Article 3 states, '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'.

Article 3 remains the most significant stumbling block to the adoption of the draft declaration. However, even if the Declaration were passed, its legal impact would remain questionable. The International Labour Convention No 169 remains the only binding instrument dealing with indigenous peoples rights. Its contribution to indigenous aspirations for self-determination is minimal given that the Convention states that, 'the use of the term "peoples" in this Convention shall not be constructed as having any implications as regarded the rights which may attach to the term under international law.'⁷¹ Similarly, the *Proposed American Declaration on the Rights of Indigenous Peoples* states that the use of the term 'peoples' in that document has no legal implication.⁷²

Whether or not oppressed national minorities or indigenous peoples have a right to self-determination in international law remains unclear. A positivist approach to law suggests that minorities and indigenous peoples are not the 'peoples' entitled to

⁶⁶ For a view of the patronising attitude towards indigenous people in general, see *Convention Concerning the Protection and Integration of Indigenous Populations and Other Tribal and Semi-Tribal Populations in the Independent Countries*, 107 ILO 1957 (1959).

⁶⁷ Report on the 5th Session of the Working Group, 56, UN Doc E/CN.4/Sub.2/1987/22. See also Luis-Enrique Chavez Chairperson-Rapporteur, *Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32*, 58th sess, UN Doc. E/CN.4/2002/1998 (2002).

⁶⁸ Erica Daes, Chairperson-Rapporteur, *Working Paper on the Concept of Indigenous Peoples*, Sub Commission on the Prevention of Discrimination and the Protection of Minorities, 14th sess, 47, UN Doc E/CN.4/Sub.2/AC.4/1996/2 (1996).

⁶⁹ Sigfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57.

⁷⁰ *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994).

⁷¹ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, (ILO No 169), 72 ILO Official Bull 59, 1989 (Entered into force 5 September 1991).

⁷² See *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights at its 1333rd sess, 95th regular sess, 26 Feb 1997, OEA/Ser.L/V/II.95, Doc 7, rev.1997.

self-determination. Rather the only 'people' entitled to self-determination are 'whole' peoples delineated by struggle against the Imperial European powers that colonised their territory beginning in the late 1800s and the towards the middle of the last century. However, as highlighted in this discussion, such a view is highly restrictive and does not accurately capture the breadth of views expressed in the constantly evolving regime of human rights law.

C Human Rights Committee, Self-determination: Minorities and Indigenous peoples

The only legally binding instrument referring to minorities is Article 27 of the *International Covenant of Civil and Political Rights* which specifically addresses the protection of minorities.⁷³ In its General Comment 23 on Article 27, the Human Rights Committee (HRC) has pointed out that the Covenant draws a clear distinction between the right to self-determination and the rights of minorities protected under Article 27. The Committee has highlighted that self-determination is a collective right whereas Article 27 aims at protecting the individual rights of members of a minority group.⁷⁴ However, in another General Comment relating more specifically to self-determination, the HRC has pointed out that self-determination as a legal principle is interlinked with political rights. Though the HRC did not enter the critical discussion of the substantive content of the right enshrined in Article 1 of the Covenant, it emphasised:

The Committee has noted that many [States] completely ignored Article 1, provide inadequate information in regards to it or confine themselves to a reference to election laws...With regard to paragraph 1 of Article 1, States parties should describe the constitutional and political process which in practice allow the exercise of this right.⁷⁵

Under the mechanism of state reports, the HRC has invited states to enforce the political (para 1), resources (para 2) and solidarity (para 3) dimension of self-determination. In its Concluding Observations on Canada, it stated:

The Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2).⁷⁶

⁷³ Article 27 states: In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

⁷⁴ Human Rights Committee, *General Comment 23 on Article 27* (Fiftieth session 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994) 38 ('General Comment 12').

⁷⁵ Ibid 12.

⁷⁶ Human Rights Committee, *Concluding Observations, Canada*, UN Doc CCPR/C/79/ Add.105, 07/04/1999.

In the case of Norway, the Committee invited Norway to report ‘on the Sami people’s right to self-determination under Article 1 of the Covenant, including paragraph 2 of that Article’.⁷⁷ By the same token, the Committee has referred to indigenous peoples right to self-determination in its concluding observation on Mexico.⁷⁸ In its concluding observations to the report submitted by Australia the Committee highlighted that, based on Article 1 paragraph 2, a ‘state party should take the necessary steps in order to secure for the indigenous inhabitants, a stronger role in decision-making over their traditional lands and natural resources’.⁷⁹ The HRC was responding to the contention made by the Australian government that it prefers the use of terms such as ‘self-management’ and ‘self-empowerment’ with respect to Article 1. The Committee took note of such a position but expressed its concerns at the insufficient implementation of such rights.

One of the more significant difficulties for the Committee was with regards to the receipt of individual complaints based on alleged violations of Article 1. Under the Optional Protocol 1 the HRC can only receive individual complaints against states that have acceded to the protocol.⁸⁰ In *Ominayak* the Committee affirmed that ‘the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right to self-determination ... which deals with rights conferred upon peoples as such’.⁸¹

Thus the Committee held that it could not receive complaints under Article 1 as the Optional Protocol is limited to individual complaints. Despite this view the Committee has on several other occasions pointed out that in the case of indigenous peoples, the preservation and use of their land resources constitute an essential right of persons belonging to such a group.⁸² Based on this approach, indigenous individuals have often linked their cultural claims over natural resources and land rights to a violation of their rights protected under Article 27 and Article 1.⁸³ The Committee has traditionally rejected this association. There has been a clear evolution in the jurisprudence of the HRC on this issue. Until recently, the position of the Committee was based on the fact that self-determination was not a valid

⁷⁷ Human Rights Committee, *Concluding Observations*, Norway, UN Doc CCPR/C/79/Add.112 (1999).

⁷⁸ Human Rights Committee, *Concluding Observations*, Mexico, UN Doc CCPR/C/79/Add.109 (1999).

⁷⁹ Human Rights Committee, *Concluding Observations of the Human Rights Committee*, Australia 24/07/2000. GA 55th sess, supp 40, UN Doc. A/55/40 vol. I (2000).

⁸⁰ For a list of states that have accepted the Optional Protocol see <http://www.unhcr.ch/html/menu3/b/a_opt.htm>.

⁸¹ Human Rights Committee, *Bernard Ominayak, Chief of the Lake Lubbock Band v. Canada*, Communication No 167/1984, GA 45th sess, Supp No 40, [13.3], UN Doc (A/45/40) (1990) 1.

⁸² Martin Scheinin, ‘The Right to Enjoy a Distinct Culture’ in Theodore Orlin, Allan Rosas and Martin Sheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (2000) 159.

⁸³ See Gundmundur Alfredsson, ‘Access to International Monitoring Procedures’ in Gundmundur Alfredsson, Jonas Grimheden, Bertram Ramcharan, Alfred De Zayas (eds), *International Human Rights Mechanisms: Essays in Honour of Jakob Th. Moller* (2001).

ground for individual complaints under the mechanism of the Optional Protocol. Nonetheless, the Committee has cautiously broadened its interpretation of the content of Article 1. Even though it has never found a violation of Article 1 and is perhaps unlikely to do so, the HRC has recognised that, based on the indivisibility and interdependence of human rights law, the content of Article 1 should be used as a way to interpret the content of other individual rights in the Covenant. This approach is clear in the case of *Diergaardt* as the Committee stressed that ‘the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Article 25, 26 and 27’.⁸⁴

This interpretation of Article 1 in conjunction with Article 27 has also been affirmed in the *Mahuika* case where the Committee specified ‘only the considerations of the merits of the case would enable the Committee to determine the relevance of Article 1 to the authors’ claims under Article 27’.⁸⁵

Individual cases, general reporting procedures, and the general comments of the Committee all strongly suggest that the right to self-determination is not a static right. The growing importance of Article 1 affirms that self-determination as a legal principle engenders some rights for indigenous communities. It can be argued that the Committee’s position reflected in its General Comments of 1994, that is, that the rights under Article 27 were to be clearly distinguished from the right of Article 1, has changed in light of recent decisions of the Committee in individual cases brought to the HRC. Regarding the interrelationship between Article 27 and Article 1, Scheinin has concluded that indigenous representatives should explore such correlation as a way of pushing for the recognition of their right to self-determination. Scheinin concluded that such a focus on ‘the resource dimension’ of the right to self-determination might be the way to reach agreement on Article 3 of the Draft Declaration. As he states, ‘for most indigenous peoples what self-determination is *really* about is their right to “freely dispose of their natural wealth and resources” and a negative guarantee of not to “be deprived of its own means of subsistence”’.⁸⁶

Another important point can be inferred from the decisions of the HRC. Indigenous peoples have a right to ‘interpretative’ self-determination when enjoying other rights protected by the Covenant. Since there are no cases involving minorities in this evolution of the right to self-determination, it could be argued that indigenous peoples are more entitled to self-determination (at least its interpretative value) than minorities. However, even though the number of cases involving indigenous peoples could invite this conclusion, it is important to keep in mind that the Committee has not specifically closed the door on self-determination for minorities.

⁸⁴ Human Rights Committee, *J G A Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, 10.3, UN Doc. CCPR/C/69/D/760/1997 (2000) (*‘Diergaardt’*).

⁸⁵ Human Rights Committee, *Mahuika et al. v. New Zealand*, Communication No.547/1993, 56th sess, Supp No 40, 3, UN Doc A/56/40 (Vol. II) (2000) (*‘Mahuika’*).

⁸⁶ Scheinin, above n 37, 198.

For example, recalling the relation between political participation and self-determination, the Committee in its Concluding Observations to the Republic of Congo, noted with concern:

[T]hat the Congolese people have been unable, owing to the postponement of general elections, to exercise their right to self-determination under Article 1 of the Covenant and that the Congolese citizens have been deprived of the opportunity to take part in the conduct of public affairs in accordance with Article 25 of the Covenant.⁸⁷

While this observation concerned the whole Congolese people and not a minority,⁸⁸ the position of the Committee shows that international law has certainly not closed the door on the link between political participation and self-determination. One important caveat needs to be borne in mind regarding the interpretation of HRC jurisprudence and its implication for doctrine. The individual complaints procedure that enables individuals' access to the Committee is restricted to those states that have signed the Optional Protocol to the Covenant on Civil and Political Rights. Therefore, while cases against Canada, Finland and Sweden may be frequent these are not the worst violators of the rights of minorities and indigenous peoples. Any conclusions made on this basis are likely to be flawed. Thus rather than offer evidence for the trend in human rights law, the individual cases merely reveal the direction of thought on the subject among the members of the premier human rights monitoring body.⁸⁹

V TOWARDS A NEW CONCEPTION OF SELF-DETERMINATION

The principle of self-determination has been conceived in different ways, by different authorities at different times. Starting as a principle guaranteeing 'democratic entitlement', it was asserted as a minority right in the Wilsonian era.⁹⁰ Realising the folly of such decisions in the face of an absence of clear parameters as to which groups were entitled to self-determination, the UN era saw a restriction of application to cases of decolonisation.⁹¹ As seen above, the human rights committee has continued to emphasise this notion when confronted by minorities and indigenous peoples in cases,⁹² and general comments on the subject.⁹³ This has been backed by a clarification by the Committee for the Elimination of Racial Discrimination, which differentiates between 'internal' and 'external' self-determination.⁹⁴ Arguably, the central flaw with this strict position is that it fails to

⁸⁷ Human Rights Committee, *Concluding Observations, Republic of Congo*, 20, UN Doc CCPR/C/79/Add.118, (2000).

⁸⁸ For the issue of 'whole' peoples see Thornberry above n 39, 18.

⁸⁹ For an updated list of states that have signed the Optional Protocol see <<http://www.unhcr.ch/pdf/report.pdf>>.

⁹⁰ Whelan above n 47, 99-115.

⁹¹ See Lea Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177.

⁹² See *Marshall v Canada* Comm No 205/1986 UN Doc CCPR/C/43/D/205/1996 (1991).

⁹³ General Comment 12, above n 74.

⁹⁴ Committee on the Elimination of Racial Discrimination, 48th sess, UN Doc CERD/48/Misc.7/Rev.3 (1996).

take into account the fact that the determination of political status is a vital aspect of self-determination. Watering it down to the extent where it seeks only to re-align relations within the state seems grossly unsatisfying. That said, it is clear what motivates the political exception⁹⁵ is the fear of a continuously available process through which smaller and smaller groups seek the right to potentially dismember existing states at great cost to the stability of the state system as it currently exists.⁹⁶ In stating the parameters of a principle of law, it is important to recognise the limitations of its implementation. However, it seems unsatisfactory to allow the limitations to affect the expression of the principle. For instance, the difficulty of designing effective hate speech legislation⁹⁷ has not prevented the international committee from stressing that it is a vital right in the stockpile of tools available to combat racial discrimination.⁹⁸ By analogy, it is important to be able to express the principle of self-determination in a definitive manner and to analyse its relevance in different circumstances, mindful of the difficulty for attainment and delivery. These difficulties (the threat to order and the fear of a continuously available process that yields uni-national and uni-ethnic states) are realistic and will need to inform implementation rather than expression.

With this in mind, this paper seeks to conclude with a fresh look at self-determination and especially its applicability to indigenous peoples and minorities. As analysed in section one, modern documents of self-determination are framed in the context of decolonisation. Thus, the first task in seeking to gain self-determination would be to examine whether a situation results from colonisation.⁹⁹ While many groups may allege that the treatment meted out to them by an unrepresentative state is unfair and quasi-colonial, the threshold for this would need to be considerably higher. Indigenous peoples would seem to have the best case of all for using the decolonisation rhetoric in their favour. Since indigenous peoples have all the rights of minorities; but in addition were deprived of their land through a process of subterfuge, it would seem that any attempt to redress the balance would need to be similar to a quasi-decolonisation process. In relation to the UN era

⁹⁵ For an enunciation of the doctrine of the political question, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002).

⁹⁶ Thomas Franck, 'Post-Modern Tribalism and The Right to Secession' in Catherine Brölmann, Rene Lefebvre and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (1993).

⁹⁷ See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002); Alon Harel and Gideon Parchomovsky, 'On Hate and Equality' (1999) 109(3) *Yale Law Journal* 507; Alon Harel, 'The Regulation of Speech: A Normative Investigation of Criminal Law Prohibitions of Speech' in David Kretzmer and Francine Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (2000), 247-74; Tasmin Solomon, 'Problems in Drafting Legislation Against Racist Abuse' (1994) 1 *Australian Journal of Human Rights* 2; Melinda Jones, 'Free Speech and the 'Village Idiot'' (2000) *University of New South Wales Law Journal* 1; Luke McNamara, 'The Merits of Racial Hatred Laws: Beyond Free Speech' (1995) 4 *Griffith Law Review* 29.

⁹⁸ See Committee for the Elimination of Racial Discrimination *General Recommendations VII*, 32nd sess, (1985) and *General Recommendation XV* 42nd sess, (1993) in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev.5 (2001).

⁹⁹ For general reading on the UN and decolonisation, see Sureta above n 20.

decolonisation, the options were straightforward, namely: the creation of an independent state; free association with an existing state; or integration with a pre-existing state. These options do not address the needs of indigenous peoples directly, yet the nuances contained within them remain significant for a strategy that puts forth this right within an international realm.¹⁰⁰ The Nunavut example in Canada demonstrates that there are other ways to express the claim to self-determination while still keeping within the broad parameters expressed in Resolution 1541.¹⁰¹

While it is true that the Nunavut peoples claim against the Canadian state is a good example of 'internal' self-determination, when offered to indigenous peoples, the principle of self-determination needs to include a range of options one of which could be secession. The real difficulty with offering secession as an option is not only its potential harm to order (arguably there are few places where such a kind of self-determination would be feasible at all) but also the precedent it sets for other states with indigenous peoples and minorities with similar aspirations. However, even if secession is rejected as an option for achieving self-determination it needs to be recognised that for those seeking self-determination, 'internal' self-determination is often seen as the penultimate stop on a train leading to full political self-determination. They view 'internal' self-determination in the same way the mandate or trusteeship system was conceived of within the UN, as an acceptance of sovereignty in abeyance, that would result in full membership in the international system of sovereign states at an appropriate time.¹⁰² Thus, in these circumstances, 'internal' self-determination presents nothing but a compromise solution. Its success as anything more than a compromise must be measured in terms of its sustainability over time.

There is a strong argument to be made for the entire range of self-determination options, including the potential option of secession, being available to indigenous peoples just as they were to colonial peoples. One caveat that needs to be stressed in this equation is the acceptance of the current territorial basis of existing communities. Failure to do so is potentially disastrous since it could result in attempts to re-align those states in which indigenous peoples do not live in contiguous zones. To consolidate the full range of self-determination options for indigenous peoples, it is equally important to clarify that the full range of options are not available to other groups. The HRC needs to reiterate its position that minorities do not have the right to self-determination. In terms of the *International Covenant on Civil and Political Rights*, a hierarchy of entitlements would develop whereby territorially based indigenous peoples would have the rights akin to a colonial peoples and would thus enjoy the full benefits of Article 1 including subparagraph 1(1). Indigenous peoples who do not inhabit distinct territories would

¹⁰⁰ This is also true for the International Labour Organization Convention No 169.

¹⁰¹ For the official website of the government of Nunavut see <<http://www.gov.nu.ca/>>.

¹⁰² Resolution 1541, above n 29. For more on the mandate system see, John Andrews, 'The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century' (1978) 94 *Law Quarterly Review* 408.

have the right of self-determination as given by Article 1(2). By contrast, minorities would have the rights guaranteed by Article 27. Minorities will be protected by a combination of non-discrimination and equality protections, with additional rights to special measures that ensure equal opportunities. Furthermore, minorities located in contiguous territory might still entertain claims to 'internal' self-determination. This exception would exist in the realm of remedial self-determination discussed above.

The proposed approach to rights of self-determination makes some important differentiations. First, it differentiates between indigenous peoples and minorities, a differentiation readily accepted in the literature and in the law.¹⁰³ Second, it brings indigenous peoples within the parameters of 'peoples' due to the similarities of their situation with colonial peoples and in recognition of the dispossession of their lands which first led to the creation of sovereign states upon their territories. This is particularly appropriate since dispossession usually occurred through a process of formal law either without consent, or through consent gained by the subterfuge of unequal treaties that failed to satisfy the basic rules of contract as well as customary legal norms at the time, or expressions of the *Vienna Convention on the Law of Treaties of 1969*.

Another way of conceptualising self-determination for indigenous peoples is to focus on the increasing jurisprudence of the HRC on the issue of the applicability of Article 1(2). As already pointed out in the previous section, the Committee has found in favour of indigenous peoples in relation to their right to self-determination in the context of 'subsistence'.¹⁰⁴ This approach is certainly a significant improvement on the previous decisions on indigenous peoples issues where the Committee was extremely reluctant to engage Article 1 at all.¹⁰⁵ However, by ruling that indigenous peoples might have access to rights only under 1(2) and not under the whole of Article 1, the HRC could be seen as taking an illogically restrictive view. While the *travaux préparatoires* to the Covenant makes it clear that the notion of self-determination was framed in relation to colonial peoples, it is incongruous that the notion of peoples contained in Article 1(1) would differ so radically from Article 1(2). It could be argued that since indigenous peoples are recognised as a 'people' for the purposes of 1(2) then that ought also to hold for Article 1(1). Thus, the applicability of 1(1) ought to be considered a derivative of acceptance of 1(2), as the Article as a whole was in place to deal with the situation of subjugated peoples. The only permissible distinction would be the one suggested above as to the potential resolution between different situations. Indigenous peoples living on contiguous territory could access rights that would be different to those indigenous peoples who lived among other groups whose rights would also need to be heeded. Of course this approach would be in direct opposition to the

¹⁰³ See especially Makkonen, above n 5.

¹⁰⁴ Scheinin, above n 37.

¹⁰⁵ Notably in the *Mikmaq Tribal v Canada*, Communication No. 78/1980, 39th sess, Supp No 40, 200, UN Doc A/39/40 (1984).

Committee's approach in General Comment 12,¹⁰⁶ though arguably that comment pertained to the previous, more conservative era of interpretation of Article 1.

Finally, there may be a new expression of self-determination emerging within groups who face a threat of physical extinction from within the state in which they exist. Given the strength of conviction in norms against genocide and crimes against humanity, it could be argued that should a state pursue such an agenda as a matter of policy, a natural right to self-defence would exist for the incumbent population. The expression of this right might well take the form of secession from the state. The right framed in this manner is close to *jus secessionis ac resistendi* as expressed by Grotius in *De Jure Pacis*. The right to secession in this instance would also be in keeping with the romantic notion of self-determination as expressed at the outset of this paper. In terms of international politics, the secessions of East Timor, Eritrea and Bangladesh would arguably come within this rubric, though the former were achieved through UN organised plebiscites.¹⁰⁷

VI CONCLUSION

In conclusion a few key issues need to be re-emphasised. First, in international law, self-determination varies tremendously among different groups. While this right has been conceived of in the UN era as a right of colonised peoples, the notion of 'colonisation' has been construed narrowly. Second, human rights treaty bodies tend to treat the right of self-determination as an exception to more readily available rights. This makes the right largely redundant in terms of the *International Covenant on Civil and Political Rights* since conventional twentieth century colonisation is at an end: and in any case the HRC was unlikely to have been asked to adjudicate on these.¹⁰⁸ Third, an apparent shift in attitude of the HRC reveals the possibility of entertaining cases under the rubric of Article 1(2) in relation to the sustainability of the rights of indigenous peoples. This is an interesting interpretation of the right of self-determination as a whole since it shows that indigenous peoples may be considered a 'people' for one purpose but not for another. This is linked to the fourth point which is crucial. In the framing of law and a commentary on legal policy it would be extremely foolhardy to permit the expression of any right that violates Charter based norms of international law and which has the potential to impact on state sovereignty. The impact of decolonisation on states holding colonies was considered an acceptable price to pay given the fact that states were not recognised as including 'overseas possessions'. Also, colonisation and domination were considered abhorrent in the aftermath of the decolonisation declarations in the UN. However, any extension of this right that seeks to fragment states into smaller uni-national or uni-ethnic elements would be

¹⁰⁶ General Comment 12, above n 74.

¹⁰⁷ The *Western Sahara Case* is also slated for decision through a plebiscite though the decision of who is entitled to vote continues to cause much consternation. See *Report of the Secretary-General on the situation concerning Western Sahara*, UN Doc S/2002/467 (2002).

¹⁰⁸ This is also true for the Committee for the Elimination of Racial Discrimination.

more difficult to establish and would be of dubious value in the pursuit of international peace and security.

Once again, the issue needs to be framed with a prescribed threshold. If the relationship and treatment between a state and territorially based indigenous peoples within it remains one of colonial domination, then the only way in which this group can access rapidly developing human rights law might be from the starting point of a right for that group to determine its own political status. Failure to accept this would relegate the group to secondary status and as a result deny them the benefits of evolving human rights principles. While resolution of issues of self-determination should be encouraged within the state structure, the possibility of alternative solutions should not be discarded at the outset. It is only through a process of enlightened self-interest that states and indigenous peoples can formalise their dialogue. It is in this sense that the extension of the right of self-determination to minorities ought to be particularly contested.

Self-determination as a principle has seen numerous changes since its early expressions. It has regularly transformed itself as a political principle in response to unfolding events. Giving such a principle of uncertain substantive content the authority of a legal tenet was arguably fraught with danger. Yet the forces of romantic self-determination, as well as the processes of classical self-determination recognised the principle as a vehicle for the expression of freedom in the face of oppression. In doing so both the notion of 'freedom' as well as that of 'oppression' were given the particular hue through the interpretation of the time in question. This temporal element has been the key to the development and growth of the norm of self-determination, and has also been the key to its many manifestations. While some have argued that 'internal' self-determination ought to be the modern extent of the right, this paper has argued that by itself, this remains inadequate.