GLOBAL STUDIES RESEARCH SERIES

Research Report 10

July 2023

The Theory and Practice of Self-Determination:
Challenges for International Law, Prospects for Global Governance

Kiraan Chetty

Author:
Kiraan Chetty is a Researcher in Global Law and Governance at the NZ Centre for Global Studies, and Tutor in Philosophy at the University of Auckland. The author's research is focused on normative identity and global justice in international political and legal theory.

Table of Contents

Definitions

Decolonisation: The process whereby colonised peoples undo, reject, or revolt against a colonising power.

Demos: The people within a democracy.

Bilateral: When an act is or decision is undertaken by one party, in agreement with another.

Claimant: The party making a legal claim against another, in a judicial process.

Codification: The process of formalizing, or making formal, a case or customary law into statute.

Customary International Law: Legal rules which are derived from generally-accepted international practice (customs).

Erga Omnes: A legal obligation in relation to, and for the good of, all, such that all states benefit from its respect.

Inviolability: Of a legal rule or principle, unable to be breached or limited.

Jurisprudence: The philosophy of law, variously termed 'legal theory' or 'legal philosophy', concerning the conceptual foundations and philosophical underpinnings of law, its nature, sources, and structure.

Jus Cogens: A fundamental and absolute norm of international law, which is inviolable.

McKenzie Friend: A person who assists a self-representing claimant or respondent in a legal proceeding.

Multilateral: When an act is or decision is undertaken by one party, in agreement with two or more parties.

Plebiscite: A vote or referendum in which all members of a group are direct decision-makers over an issue.

Positive Law: Laws which are posited (created) by humanity, rather than laws which are inherent or divine.

Purposive Approach: A method of statutory interpretation wherein judges interpret the law according to what the legislature intended for it to be (i.e., the legislature's purpose in making the law).

Respondent: The party responding to a legal claim made against, in a judicial process.

Secession: The process by which a new state withdraws from, and as a subset of, an existing state. Usually identified as being unilateral, though inclusive of bilateral and multilateral withdrawals.

Sovereignty: Having exclusive legal jurisdiction and political authority over a territory.

Statutory Law: Legal rules derived from legislation, covenants, and treaties.

Sui Generis: A distinct or unique right, rule, law, or principle.

Territorial Integrity: The undisturbed right of a sovereign entity to exercise exclusive jurisdiction over its territory.

Unilateral Act: When one party undertakes an act or decision, without regard to, or agreement from, others.

List of Cases

- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Judgement, I.C.J. Rep. 2022 (July 22), p. 1.
- Decision Regarding Communication No. 266/03 (Kevin Mgwanga Gunme et al v. Cameroon) ACHRLR 266 (2003).
- *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Rep. 1995 (June 30), p. 90.
- *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgement, I.C.J. Rep. 2012 (July 20), p. 422.
- *Re Secession of Quebec* [1998] 2 SCR 217

List of International Court of Justice Advisory Opinions

- Accordance with international law of the unilateral declaration of independence in respect of Kosovo
- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
- Western Sahara

List of Treaties

- Covenant of the League of Nations
- ILO Convention 169
- International Convention on the Elimination of All Forms of Racial Discrimination
- Montevideo Convention
- Treaty of Munster
- Treaty of Osnabruck
- United Nations Charter

List of UN Resolutions

- Resolution 1514 (Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960)
- Resolution 1541 (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, 1969)
- Resolution 2625 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 1970)
- Resolution 61/295 (Declaration on the Rights of Indigenous Peoples, 2007)
- Resolution 65/308 (Admission of the Republic of South Sudan as a Member of the Organization, 2011)
- Resolution 68/262 (Territorial Integrity of Ukraine, 2014)

1. Introduction
Concepts, Customs, and Conflicts

Consider a world in which we only had one state. Now consider a world in which we had a thousand. Which might we prefer? And which might we imagine to be better for global governance?

Herein lies the problem of self-determination. In a world without it, we have absolute imperialism; in a world with it, we have total chaos. We, the subjects of international law, are constantly in a battle over the qualified middle – between the intolerable and the unmanageable, between global empire and local volition.

The problem of self-determination is not so much that it, in itself, is contested: self-determination has the rare privilege of being almost-universally affirmed.[1] In theory (in law, politics, philosophy, and psychology), self-determination is supported by authorities as being centrally valuable to ourselves on the individual, familial, communal, national, and international levels. That self-determination enriches our lives and identity, and strengthens international justice is not in question.

Rather, the question arises when we see to its manifestation. The central challenge is how something so important as the right to self-determination could be justifiably limited, if it at all.[2] As much as the United Nations Charter declares the worth of self-determination – which it does more so than any other international treaty or convention – its practice remains the most consequential source of hope, despair, and conflict in the modern age. In the words of one legal observer: "No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes, as self-determination".[3]

In fact, speaking to both its grandeur and perplexity, self-determination seems to provoke exactly these sorts of 'no other' proverbs. If all we knew about self-determination were found in these pithy maxims, we would know that: "no other doctrine of international relations has been invoked as frequently in the twentieth century" as it;[4] that "no other area of international law is more indeterminate, incoherent, and unprincipled" than it;[5] that there is "no other term in modern political discourse which is used with more emotion and passion" than it;[6] and that without it, "no other right could be fully enjoyed".[7]

Whether as a rule, principle, ideal, or procedure, the concept of 'self-determination' – however complicated – is here to stay. For it to remain politically viable, however, we need to reexamine its ontology and teleology: its existence and function. As we leave the modern age in which it was moulded, self-determination is confronted by challenges unique to our time. How we, in the 21st century, manage to keep alive and accommodate the concept will determine how the next stage in our global history unfolds.

The aim of this paper is threefold: (i) to explore the theoretical foundations of self-determination, (ii) to examine the practical implications and challenges that follow, and (iii) to chart a course for its future direction in global terms. Taking self-determination seriously – if, indeed, we believe that is still worth doing – requires us to think critically about its use (and abuse) as a key doctrine of international law; no longer can we take for granted what we did, in its establishment.

To that end, I begin first with an exploration of self-determination as a concept, descriptively and normatively, in Section 2. Through legal theory and political theory, then the philosophy, and on to the psychology, of self-determination, I construct its theoretical foundations; strong and diverse as we find them to be. In Section 3, I examine the practice of self-determination; from its historical origins through to its judicial development, I explain how self-determination actually occurs – finding the modern processes to be elusive, giving rise to a central practical problem: what to do with secession. In Section 4, in moving from theory to practice, I develop a theoretical praxis, considering first the relevant theoretical challenges self-determination proposes and then the practical responses. In Section 5, recommendations are made to that effect.

---

[1] Arguments against self-determination are few and far between, and where they are found, their main purpose seems to be encouraging us to think critically about the concept, rather than to reject it altogether. See, for instance, Reid, *"Against the Right of Self-Determination."*

[2] Coleman, *'Determining the Legitimacy of Claims for Self-Determination: A Role for the International Court of Justice and the Use of Preconditions'*, 58.

[3] Danspeckgruber, *The Self-Determination of Peoples: Community, Nations, and State in an Interdependent World*.

[4] Schoenberg, *"Limits of Self-Determination,"* 91.

[5] Teson, *'The Conundrum of Self-Determination'*, 1.

[6] Neuberger, *National Self-Determination: A Theoretical Discussion*, 391.

[7] GA/SCH/4085.

2. The Theory of Self-Determination:
Four conceptual contexts

There are four prominent accounts of self-determination – as a legal principle, as a political ideal, as a philosophical concept, and as a psychological need – which all give reasons, though sometimes with qualifications, in support of the notion. While there is some purpose in treating these in a more traditional order (from psychology to philosophy, to the political and legal), I judge it here to be potentially insightful to reason my way in reverse order.

(a) Legal
Let us then begin with the jurisprudence of self-determination which remains a heavily contested space. The foundational questions are the following:

- What is self-determination?
- Is self-determination a legal principle or legal rule?
- Can self-determination be a distinct legal concept, truly distinguishable from a moral or political one?
- Is there a right to self-determination, and if so, who holds it?
- How should the right to self-determination be manifest?
- Does the right to self-determination extend to the right to secession?
- Is the right to self-determination inviolable?

Defining self-determination has never been an easy task – in fact, it seems to have been a complicated endeavour from the beginning. Consider the first legal case of self-determination in 1920-21, wherein international jurists, instructed by the League of Nations, determined whether Åland could be independent of Finland: self-determination, they found, "is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion".[8] What is self-determination? The question is as complex as its answer is elusive.

Analyses usually begin with Woodrow Wilson's Fourteen Points in 1918, a statement outlining negotiating principles for peace and diplomacy in territorial disputes of the time and which, although not used, is taken to express an underlying sentiment of self-determination.[9] Wilson used the term "self-determination" in justifying his Fourteen Points to the US Congress: self-determination "is not a mere phrase. It is an imperative principle".[10] According to a Wilsonian definition, self-determination occurs when the people's will is respected and where people are "dominated or governed by their own consent". This definition seems to be both procedural and institutional in its account: a people are self-determining when they elect, by some process, to recognise an institution as expressing their will.

UN language on self-determination sometimes provides us with a clearer formula, at least with respect to the practice of self-determination involves. Initially formulated in 1960, UN Resolution 1514 on Granting of Independence to Colonial Countries and Peoples, stipulated that peoples are self-determining when "they freely determine their political status and freely pursue their economic, social and cultural development".[11] Later refined in 1970 – and what is lauded as probably the clearest legal provision[12] – Resolution 2625's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States provides that:

> all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[13]

The 1970 formulation here is more comprehensive than its 1960 predecessor though there is still clarification required. What is notable is the departure from previous definitions of a practical, procedural, or institutional nature Instead, Resolution 2625 adds another element: an accompanying recognitional duty. Self-determination proper occurs when a people are able to freely conduct their own affairs **and** where the responsibility for other states to respect that ability is met. Self-determination, then, is contingent upon recognition of the determining people by others.

---

[8] Commission of Rapporteurs, *Report Presented to the Council of the League of Nations by the Commission of Rapporteurs*, 3.
[9] Woodrow Wilson, Fourteen Points. For a critique of this interpretation, see Manela, "Imagining Woodrow Wilson in Asia: Dreams of East-West Harmony and the Revolt against Empire in 1919."
[10] 11 February 1918: President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances
[11] UNGAR 1514
[12] Kohen, "Self-Determination," 134.
[13] UNGAR 2625

Judicial definitions, on the other hand, are more aspirational in tone. Rather than seeing it as a determinative factor, judiciaries have taken self-determination as a guiding ideal for normative judgements,[14] which are, however,rejected, at least by the Commission of Rapporteurs, as being a legal rule.[15] The UN's International Court of Justice in considering South Africa's League of Nations-mandated administration of Namibia, rather took a purposive approach in their interpretation: "the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned".[16] It found that South Africa had an immediate obligation to withdraw from Namibia – thereby allowing the Namibians self-determination and sovereignty – and determined that member states had a similar obligation to legally and politically shun South Africa until such time as they had withdrawn: a duty of non-recognition.[17] We see now that the doctrine of self-determination has at least two associated yet parallel duties for states: a duty to recognise self-determining peoples and a duty not to recognise imperial states.

Conceptually, self-determination is separated into two relational categories: (i) internal self-determination and (ii) external self-determination.[18] While this distinction is not expressed in international legislation or case law, it has developed within the academic literature to make sense of its irregular application (why some peoples are recognised to be self-determining while others are rejected) and the silence of international law on secession. Each refers to different claimants and respondents in disputes and where they are located in geographical proximity and in social relationship to each other.

External self-determination – and what the international law has traditionally been seen to sanction – refers to the situation where a people in one place have been dominated or colonised by a people in a different (usually very distant) place.[19] Representing an anti-imperialist jurisprudence, external self-determination is epitomised, for instance, by the Indian independence movement against the British Empire.[20] This would seem to echo the conclusion of a purposive approach to defining self-determination, given the explicit mention of 'decolonisation' as a motivating factor of the international law.[21]

The issue of proximity is illustrated in 1960, when the General Assembly in Resolution 1514 explicitly affirmed a right to external self-determination, derived from positive international law and jus cogens. It declared that 'the subjection of peoples to **alien** subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.[22]

Internal self-determination, in contrast, is a distinct situation, and poses a greater challenge to conventional approaches. It refers to the situation where a people in one place have been dominated by a different or similar people, in the same or proximate place.[23] We might consider the case of Quebec to be a leading example: the House of Commons of Canada has recognised the province of Quebec as a distinct "nation within the united Canada".[24] However, without a majority of Quebecois wanting independence through referendum, the Supreme Court of Canada denied Quebec a right of unilateral secession – but similarly denied Canada's right to object to secession if majority support in Quebec was had.[25]

International law also provides some support for internal self-determination. The ILO's Indigenous and Tribal Peoples Convention (1989) provides that on their land – which may be part of an independent state's territory – indigenous and tribal peoples have the right to fully-realise their 'social, cultural, religious, and spiritual values and practices'.[26] Similarly, in

[14] Matthew, "The Normative Status of Self-Determination in International Law", 609; Klabbers, "The Right to Be Taken Seriously: Self-Determination in International Law," 186.

[15] Commission of Rapporteurs, at [28].

[16] International Court of Justice, 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 267', 79.

[17] Milano, 'The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de facto regimes', 1-2.

[18] Senese, "External and Internal Self-Determination", 19.

[19] Resolution 1541: "territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it", 29.

[20] Brass, *The Politics of India Since Independence*.

[21] Toki, 'Decolonization and the Right to Self-Determination for the Pacific", 181; Resolution 1514: "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations", 67.

[22] Resolution 1514, 6 [emphasis added].

[23] Mehmood, "Demystifying External Self-Determination and Remedial Secession in International Law: A Case Study of Kashmir", 1.

[24] Baydefsky, *Self-Determination in International Law: Quebec and Lessons Learned*.

[25] Reference Re Secession of Quebec [1998] 2 SCR 217

[26] Indigenous and Tribal Peoples Convention 1989, art 5.

2007, UN General Assembly's resolution on the rights of indigenous peoples affirmed the indigenous right to self-determination, even within a formerly-colonial and now-independent state territory.[27] However, internal self-determination should not be taken for granted; notably, Australia, Canada, New Zealand, and the United States initially rejected the motion to adopt the resolution at the General Assembly.[28]

The legal conundrum arises from an examination of authorities: it is uncertain whether international law provides only for external or internal self-determination, or both. It is of further concern that both manifestations of self-determination have some judicial and legislative support, but that internal self-determination (which may be legitimate) may be irreconcilable with the UN Charter: if one affirms an internal self-determination then one must necessarily reject the principles of sovereignty and territorial integrity.

Self-determination presents an open challenge to the political authority of the state and proposes to disrupt that authority through breaking away from it. The problem is, then, which does the international community value most: the principle of self-determination, the principle of sovereignty, or the principle of territorial integrity? Each forms the foundation of international law; yet one cannot be manifestly superior to the others – a jurisprudential paradox.

If, however, the solution is to delimit self-determination by rejecting internal self-determination, then the case of South Sudan's independence in 2011 is mystifying: it meets the definitional requirements of internal self-determination (a people self-governing away from a similar or different but proximate people), and so should be rejected on account of Article 2 of the UN Charter, which prohibits challenges to state sovereignty and territorial integrity. Yet the international community has widely recognised South Sudan's independence, presenting itself with a troubling inconsistency.[29]

This problem is further illustrated in Resolution 1514 itself, which, though clearly affirming self-determination, strongly condemns what could be interpreted as internal self-determination. It reads: "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".[30] The concern here is that certain self-determination movements will necessarily involve a disruption of national unity and territorial integrity, which, if it does, undermines self-determination altogether.

While the right to self-determination as *sui generis* seems to support a spirit of liberation, the resolution's Article 2 limits the type of liberatory efforts that international law deems legitimate. Self-determination appears to have a justifiable limit: where movements promote independence (from a foreign, occupying power) with unity of the state intact, then it is justified; where movements promote independence (from a domestic power) with disunity and disintegration, then it is unjustified.

In other words, the right to external self-determination seems to confer a right to independence, while the right to internal self-determination appears only to confer a right to greater autonomy.

(b) Political

Whether as a legal rule or legal principle, self-determination has overtly political tones and, some argue, revolutionary components, having emerged from forceful political movements and ideas. It therefore seems appropriate to explore the political theory of self-determination, whose foundational questions are:

- What is political self-determination? Is self-determination a political ideal or political obligation?
- How can a state accommodate competing claims to self-determination?
- To what extent should the right to self-determination be realised?
- Does democracy provide a sufficient forum for self-determination?

In the political theory of self-determination, foremost is the principle of autonomy. Although speaking individually, the definitional language strongly mirrors the statutory language of collective self-determination: autonomy is "on the part of the individual to be his own master", according to Isaiah Berlin.[31] Autonomy, the leading and, in many ways, primary political principle on which self-determination is based, is applied at the group level to mean something like *on the part of the people to be their own master*, a reconstruction closely resembling the Wilsonian conception.[32]

---

[27] UNGA Resolution 61/295: Declaration on the Rights of Indigenous Peoples (2007)
[28] Gover, "Settler–State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples", 345.
[29] The South Sudan case is further discussed in Section 3(c) below.
[30] Resolution 1514, 67.
[31] Isaiah Berlin, "Two Concepts of Liberty",178.
[32] Cf Berlin, 179.

Autonomy comes in several forms, and the preferred form directly correlates with the mechanisms for implementation. For some, autonomy is consent-based.[33] For others, autonomy is simply non-domination.[34] Others still, find autonomy not in what a person does, but in how others react to what that person does: autonomy, for these political theorists, is about respecting the decisions of others; letting them be autonomous and recognising their right to do so.[35] Yet still others see autonomy within the realm of 'destinations and risks': when a group successfully makes a decision about itsown destiny, having sensible regard for the risks various destinations hold, then it has autonomy.[36]

The practice of self-determination on each of these accounts has invoked theoretical questions which challenge the central tenets of our modern democratic institutions and principles. Democracy seems to say something about how we come to arrange the systems we live by – that is, the methods we use to come to a collective decision.[37] But what is essential to democracy is not just the 'how' but also the 'who'.[38] Plato (in)famously argued that some are inherently better suited, more intellectual, to make decisions on behalf of the people – they are the ones who should rule.[39] On the contrary, others contend that it is not just in the intellect of the elite, but the wisdom of the masses that democracy finds its value.[40]

What does this mean for self-determination? If democracy is valuable because we – all – contribute to our political fate, self-determination poses a serious threat to that thesis. Self-determination has the power to disrupt and even sever the *demos*. By definition, the pursuit of autonomy of one group who live in a community of groups, rejects the idea that the group as a whole should have say over their future. Democracy places every person as central to the administration of all people, whereas self-determination places a qualification and limitation on that privilege: "we, those members of my peoples", are best suited to determine our affairs. While we are inclined to reject the Platonic account, given our valuing of egalitarianism, self-determination follows Plato's line of reasoning; though it is not necessarily inherent intellectualism that is the prerequisite, but cultural wisdom (or social epistemology) that allows a 'people' to flourish within its own domains.

How could a 'demos' operate in wanting to maintain a collective, while sects within that collective prefer to govern themselves? How can democracies accommodate claims to self-determination, which necessarily challenges the authority of the State to operate? These remain the long-standing challenges of multicultural states.[41] In this case, and coincidental with the international law on self-determination, it is the externalist view which prevails. In democracies, peoples who wish to self-determine are really aiming for greater autonomy, rather than full independence away from the State.

Rather than offering self-determination, the external view equivocates *greater autonomy* with *self-determination*. Given the value of democracy, it seems better to contain and cater for a people, than to allow them to separate themselves from the democracy. Self-determination is limited to greater autonomy (over independence), for the sake of the welfare of the demos. This is the trade-off the International Court of Justice regularly makes in deciding whether to recognise a people's right to self-determination.[42] Political theory, naturally about managing competing rights claims, has given primacy to compromise over freedom,[43] and legal theory has aligned itself with this consideration.

(c) Philosophical

If self-determination is important, then philosophical discussions provide the conceptual foundations for why that is so. However, the normative philosophical discussions focus, as they usually do, on (i) the human condition and (ii) justice. In the philosophy of self-determination, foundational questions are:

- Is self-determination good for the human condition, and if so, why?
- How should we understand the 'self' in self-determination?
- Does self-determination compliment or conflict with our understanding of ourselves, and ourselves in relation to government?
- What is the moral basis for self-determination?

---

[33] Wolff, *In Defense of Anarchism.*

[34] Pettit, *On the People's Terms: A Republican Theory and Model of Democracy.*

[35] Rawls, *A Theory of Justice.*

[36] Walzer, *Spheres of Justice.*

[37] Schumpeter, *Capitalism, Socialism, and Democracy.*

[38] Christano and Bajaj, "Democracy".

[39] Plato, *The Republic*, Book VI.

[40] Anderson, "The Epistemology of Democracy," 8; Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many.*

[41] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights.*

[42] Hunnum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, 38.

[43] Rawls, *Political Liberalism*, 482.

- How does self-determination relate to state legitimacy and authority?
- How should self-determination manifest for justice?

European continental philosophy – one of the two main traditions of philosophy, more based on the subjective experience of reality – is influential in the development of the philosophy of self-determination. Hannah Arendt is one example who offers a philosophical definition similar to the Berlinian, Wilsonian, and international law conceptions. Self-determination, when encompassed in sovereignty over oneself is "the ideal of uncompromising self-sufficiency and mastership".[44] For Arendt, self-determination is a state of being which we should aim to embody in our interaction with life. It is through our mental idealisation of sovereignty over oneself, and the realisation of that sovereignty in our actions and in the phenomenon of life, that we can have legitimate integrity with our identity.

This mental or thinking-type self-determination, Arendt argues, is not just pertinent to us; it is a condition of proper and justified subjection to authority.[45] In the idea of government, we submit ourselves to an external authority. We, as individuals, and communities, are only justified in doing so if our reasoning process involves a decision to self-determine our submission – that means, giving up some of our autonomy – and a governing authority is only legitimate if it is built on that freedom of the self to decide. This, for Arendt, is a sort of a contractualist notion: we self-determine a contract with the official to establish authority, but that authority is only legitimate if it is based on true consent.[46]

Thus, for Arendt, it is the individual's experience with self-determination, as a form of sovereignty over oneself, that makes government legitimate. Other continental philosophers have written, sometimes central to their opus, about the value of self-determination. Kant speaks of the fulfilling role in human dignity of individuals being 'self-legislators',[47] and sees sovereignty over oneself as the basis for autonomy.[48] Not only is sovereignty and autonomy linked, but so too is self-determination and the legitimacy of the law. For Kant, "the will [read: self-determination] is not merely subject to the law but subject to it in such a way that is much be viewed as also giving the law to itself".[49] Hegel, similarly, has spoken of the 'struggle for recognition' of people's and individual's will in being free to live their lives as individuals.[50]

Analytical philosophy also provides supporting accounts of self-determination in relation to the philosophical concept of justice, though with important limitations. Iris Marion Young has proposed that the foundation of a just society is one in which political institutions embody self-determination. Young defines self-determination as "distinct, contiguous, and bounded territory over which the group has exclusive jurisdiction and with which others may not interfere".[51] For Young, however, self-determination can only be justifiably manifest through public institutions – and not necessarily through the people more-broadly.[52] The extent of self-determination for Young, then, is limited to external self-determination. Internal self-determination wouldn't be justifiable, since she argues institutions are sufficient enough to produce the self-determination peoples seek, within the existing polity.

John Rawls, in considering the moral analysis of foreign policy and international aid, suggested that the aim of normative international relations is in building a people up so that they become self-sufficient. Our goals in interacting with other states, especially developing ones, should be guided by a 'duty to assist' in which we have responsibility to aid in the cultivation of just government in other states.[53] But, he argues, we are only obliged in fulfilling this duty to the point that we secure adequate self-government for the developing state's people – that is where self-determination and respect for sovereignty of the state kicks in, and our duty to assist dispenses.[54]

Other analytical accounts provide support for self-determination, but also they provide important qualifications. These accounts argue that self-determination is morally important – as, however, is the welfare of citizens. The needs of a people or peoples to self-determine must be balanced with the needs of the collective (encompassing many peoples) to access basic needs and to live a minimally good, safe life. Internal self-determination movements risk serious consequences for society: often, but not always, independence or secession movements are preceded by political disenfranchisement, leading to civil

---

[44] Arendt, *The Human Condition*, 234.
[45] Ibid.
[46] Rancesca Raimondi, "The Presumption of Political Freedom", 157-158.
[47] Kleingeld and Willaschek, "Autonomy Without Paradox: Kant, Self-Legislation, and the Moral Law," 1.
[48] Kant, *Groundwork of the Metaphysics of Morals*, 53.
[49] Kant, 39.
[50] Khurana, "The Self-Determination of Force: Desire and Practical Self-Consciousness in Kant and Hegel," 179.
[51] Young, *Inclusion and Democracy*, 255.
[52] Young, "Self-Determination as a Principle of Justice", 31.
[53] Kenehan, "In Defense of the Duty to Assist," 308.
[54] Rawls, *The Law of Peoples*.

disobedience, leading to violence or civil wars.[55] Stability sometimes takes priority over autonomy.

Self-determination, like other political principles, is not a rule to implement always, but an ideal which one should aim for, so long as it remains just to do so; that is, so long as it does not seriously compromise justice. We, in democratic societies, constantly make this compromise: freedom is of the utmost importance, and yet we limit freedom for the sake of a well-functioning democracy (think of jury-duty, taxes, travel restrictions, libel and defamation).[56] Perhaps, given that egalitarianism and collective decision-making is so central to democracy, then democracy in itself is enough to manifest self-determination. Joshua Cohen has argued this case.[57] For him, deliberative democracy takes in account enough of the peoples' will to warrant against an internal self-determination; deliberative democracy already provides, within limits, for a peoples' right to self-determine.

Self-determination promotes human flourishing and a just society, but it – like any other right – is not absolute. Several philosophers offer the view that humanitarian intervention, for instance, which breaches self-determination of the state, is justified in the instance of mass human rights abuse.[58] In global justice, we have a natural concern for cases wherein self-determination leads to unjust and inhumane circumstances.[59] We consider self-determination to produce good – evidenced in its status as *erga omnes* [60] - but we balance its goodness with the goodness of other things (welfare or non-suffering).

In Rousseau, the 'general will' embodied in self-determination is automatically just,[61] although this is hard to reconcile with very real instances of self-determination that have led to suffering.[62] Some argue it is morally permissible for foreign states to intervene in the affairs of another state, if doing so is justified by humanitarian concerns. Self-determination, under this theory, is not inviolable or universally good; it, like any other good, is qualified. This is ultimately the majority view of political philosophers and ethicists and it is on the philosophy of global justice in relation to breaching self-determination, that the Responsibility to Protect (subject to UN Security Council authorisation) has been built.[63] Still, for others like Jeff Mahan[64] and Allen Buchanan,[65] intervention, even on humanitarian grounds is so serious, just because of the value of self-determination, that reasons for intervention cannot be light: it must be robust, morally sound, and particularly forceful to be legitimate.

So, on philosophical accounts, self-determination is very important for human development and dignity, but it comes with important qualifications, which we observe for the sake of other goods.

(d) Psychological
As with the philosophy of self-determination, the psychology is also centrally focused on the human condition. However, the main focus is on why and how, empirically, self-determination is psychologically enriching. Foundational questions are:
  - Does self-determination psychologically enrich us, and if so, how does it do so?
  - Is the mental health and wellbeing of individuals and communities dependent on their need or desire to self-determine?
  - What is the relationship between self-efficacy and self-determination?
  - How to we cultivate a psychologically valuable practice of self-determination?

In order to understand the psychology of self-determination, it is necessary to gain an understanding of basic needs. Motivated by images of poverty, suffering, and hardship, we have developed a moral responsibility to help others, even those who may be distant from us.[66] But scarcity and the general bounds of human limitations pose a problem: how can we alleviate suffering, when we have limited resources to do so? Normative theorists have developed a response to this

---

[55] See Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts*, 295–297.
[56] Human rights frameworks sometimes takes necessary limitations of rights in account. In the New Zealand Bill of Right Act 1990, for instance, s 5 provides: "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
[57] Parkinson, "Deliberative Democracy and Legitimacy," 1.
[58] Lee, *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*.
[59] Brock, *Global Justice*, 172.
[60] Klabbers, "The Right to be Taken Seriously: Self-Determination in International Law," 196.
[61] Rousseau, SC, 1.7.5.
[62] Ayolo, "Reconciling Just Causes for Armed Humanitarian Intervention," 313.
[63] Thakur and Maley, *Theorising the Responsibility to Protect*.
[64] Mahan, "Intervention and Collective Self-Determination," 1.
[65] Buchanan, "The Internal Legitimacy of Humanitarian Intervention," 71.
[66] Pogge, "Priorities of Global Justice," 6.

question that, in view of scarcity, obliges us (at least) to aim at guaranteeing minimal standards of a decent life for all people.[67] We can't commit our resources to all causes, so it seems prudent to prioritise certain humanitarian goals: a major one being the ability for people to live a good, safe life. What this requires is naturally different as between different people, but we can agree that some features are necessary, and common, conditions for a good life – which we call 'basic human needs'.

In psychology, these have been ordered so that we can prioritise various values (including humanitarianism); an effort principally led by Abraham Maslow.[68] In a pyramid which orders needs, on the Maslow account, the lowest threshold for basic human needs are the physiological ones: food, water, warmth, rest. Moving upwards, we have safety needs: personal security, employment, resources, health, property. The next level is love and belonging: friendship, intimacy, family, sense of connection. Further up, we have esteem: respect, self-esteem, status, recognition, strength, and freedom. Finally, at the top of the pyramid, are self-actualisation needs: meeting one's full potential. In the political philosophy of needs, some argue that basic physiological needs is all we are morally obligated to guarantee people.[69] Others argue that it is not the needs themselves, but the ability to pursue those needs so as to enable human flourishing, and not just human subsistence, which we ought to aim for.[70] Yet others argue that it is a combination of basic needs *and* basic liberties that a state has a duty to deliver to its people, which is sometimes seen as a condition for state legitimacy.[71]

The psychology of self-determination, under the domain of the conveniently-named "Self-Determination Theory", is founded on three basic human needs: autonomy, competency, and relatedness – which would sit on the fourth level of the pyramid.[72] Under Self-Determination Theory, autonomy is "experience of a behaviour as volitional and reflectively self-endorsed".[73] Competency is "the experience of behaviour as effectively enacted",[74] While relatedness is "relatedness is defined as an individual's inherent propensity to feel connected to others".[75] Each are important for human development.

These are considered basic needs under the theory because they allow humans a path to self-realisation and motivates us to act in following that path. Wellbeing under this approach is seen as being conditional on these three modes of self-determination, and so is presented as psychologically valuable because they develop the sense of oneself. A belief in oneself is important for humans, as they feel causation and accomplishment in their actions.[76] This, known also as self-efficacy, promotes a sense of achievement, and motivates humans to aspire to act in a way that they know will bring about success.

A people, as a community of individuals, and not just a coincidental collective, who strive for self-determination seem to cultivate the sense of connectedness that is required for wellbeing. There are of course criticisms of this thesis – because the need for community can led people to 'otherness' and exclusivity – though the empirical literature supports, to an extent, the idea that belonging to a people who are working together toward a common cause, provides psychological nourishment for individuals.[77] The psychology therefore supports self-determination, indicating the right to self-determination may be more than a political, cultural, or legal term: it may fulfil our needs for psycho-social-spiritual development.

3. The Practice of Self-Determination in Public International Law

(a) Historical Overview
The practice of self-determination is not entirely new; it is accepted to be relatively new, modern invention and certainly how we have formalised it is new, compared to other, older international practices. But it has a longer history of development, both conceptually (as above) and in international law practice, than is generally recognised. The League of Nations, as a precursor to the United Nations, is a relevant starting-point, though the Westphalian international system, as a precursor to the League of Nations, seems more appropriate.

---

[67] Pozler, "Basic Needs in Normative Contexts."
[68] Erickson, "Maslow's Basic Needs Theory and Decision Theory," 210.
[69] Narváez, *Basic Needs, Wellbeing and Morality: Fulfilling Human Potential.*
[70] Nussbaum, *Creating Capabilities: The Human Development Approach.*
[71] Brock, 71-74.
[72] Deci & Ryan, "Self-Determination Theory", 489.
[73] Niemiec and Ryan, "Autonomy, Competency, and Relatedness in the Classroom," 135.
[74] Ibid.
[75] Ibid.
[76] Bandura, *Self-Efficacy: The Exercise of Control.*
[77] Brock and Atkinson, "What Can Examining the Psychology of Nationalism Tell Us About Our Prospects for Aiming at the Cosmopolitan Vision," 165.

The practice of self-determination can be traced to the Peace of Westphalia (1648) through the Treaty of Münster and the Treaty of Osnabrück.[78]. The treaties, intended to end prolonged and deadly religion-motivated wars across Europe, have been identified as the origin of modern international relations.[79] Through lengthy negotiations, delegations agreed to terms which, in essence, formally established sovereignty and the right of states to determine their own affairs within the territories over which they have sovereignty.[80]

This notion of Westphalian sovereignty did not end there; it has become a peremptory norm of international law (*jus cogens*) such that later developments took it as fundamental to their purpose. This we see with the creation of the League of Nations in 1920. The first *general* intergovernmental body in history,[81] it had the sole motivating purpose of maintaining world peace.[82] Following the end of the First World War, and the devastation it caused, states were motivated to pursue peace, and non-war methods of dispute resolution, to avoid the horrors of war.

The League's Covenant (Article 10) was a motion against external aggression,[83] and through this, the preservation of sovereignty, territorial integrity, and self-determination. In avoiding war (Article 12), members were obligated to submit to mediation and arbitration should disputes arise, administered by (Article 14) a Permanent Court of International justice. The Covenant (Article 22) gave a form of protection to non-self-governing territories, which naturally retain a right to self-determination, which required advanced nations to commit themselves, through resources, to the development of self-government of those territories, with the well-being of the people in mind. The League of Nations ultimately failed its mission, leading to the Second World War.[84]

Despite the overwhelming failure of the League in preventing a new world war, the need to maintain peace through an intergovernmental agency remained. After the Second World War, again impacted by the horrors of war and the witness of crimes against humanity, the United Nations was formed in 1945 in similar fashion with the UN Charter.[85] With the same intentions and purpose of the League, the Organisation formally began with those 'sovereign' States as Members, and now sees a membership of 193 sovereign entities.

The development of the United Nations is especially important for self-determination. While the right of self-determination was implicit in the Peace of Westphalia and the League Covenant, the UN Charter affirmed this notion explicitly. Article 1, Section 2 sets out one of the four main purposes of the Charter: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".[86] Here we see, for the first time, the term "self-determination" being used in an international treaty. Given the primacy of the right to self-determination – that it is mentioned in the Purposes section – is significant and signals the fundamental nature the UN took of it.

References to self-determination are made throughout the Charter,[87] but as noted earlier, is also made through resolutions passed by the General Assembly. Among the most important, and relevant for our purposes, is the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[88] If reference in the Charter were not enough, the Declaration made absolutely clear that peoples are sovereign, to be independent, and to be respected in their self-determining.[89] It declared: (1) that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" and (2) that "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".[90] Thus, the right to self-determination become jurisprudentially authoritative.

---

[78] Kampmann, "The Treaty of Westphalia as Peace and Settlement and Political Concept," 64.

[79] Schmidt, "The Discourse of the Peace of Westphalia in International Relations Literature," 601.

[80] Conversi, "Sovereignty in a Changing World: From Westphalia to Food Sovereignty," 484.

[81] The Central Commission for the Navigation of the Rhine is said to be the first intergovernmental body in 1815, though its scope was limited to matters specific to navigation on the Rhine river.

[82] Scott, *The Rise and Fall of the League of Nations*.

[83] Covenant of the League of Nations, art 10.

[84] Pedersen, "Back to the League of Nations," 1091.

[85] Russell, *United Nations: A History of the UN Charter*.

[86] UN Charter Art 1(2).

[87] It's mentioned again in Article 55, for instance.

[88] UN General Assembly Resolution 1514.

[89] Humphrey, "Political and Related Rights" 171.

[90] Resolution 1514, Art. 1-2.

(b) Judicial Development

As much as the right to self-determination has been enshrined in international treaties, it is affirmed in international case law. Judicial processes at the League of Nations and the United Nations have made a number of formal rulings and delivered advisory opinions supporting external self-determination, and strongly condemning states who breach their obligation to recognise it.   Four major cases are identified here: Åland Islands, Namibias, Timor Leste and Palestine.

Åland Islands

The first international case regarding self-determination was that of the Åland Islands attempt at independence from Finland, in 1920-1921. Originally a part of Sweden, over 90% of the Åland Islands population identified as Swedish.[91] Finland (which was not governing the Åland Islands) pursued its own self-determination and state sovereignty movement, and made a unilateral declaration of independence from Russia in 1917.[92] While the move naturally invoked a sense of autonomy, it also cultivated a zeitgeist of nationalism.[93] This created a perceived existential threat for the Swedish-identifying Åland Islands population, who sought independence from Finland to secure its own cultural identity.

The Åland Islands-Finland dispute then underwent arbitration. The Åland Islands, having undergone a referendum in 1919, found 95% support for independence, and sought official recognition for its independence through the League of Nations. A Commission of Jurists, followed by a Commission of Rapporteurs, acting in judicial advisory capacities, delivered judgements which affirmed the right to self-determination, but which ultimately denied the Åland Islands independence.[94] It found that self-determination was not so much a legal rule as a legal principle, which should guide but not dictate. The Commissions considered that Finland's accommodations for the Åland Islands – in allowing it to maintain its culture – was enough to satisfy the requirements of a 'preservation of its national characters'.[95]
Possibly the jurists were, in this case, not wholly guided by international law, but also give weight to political considerations.

Namibia

In 1971, the International Court of Justice issued an advisory opinion, in which it found South Africa's presence in Namibia illegal, and its associated acts in Namibia to be invalid.[96] Finding that South Africa breached Namibia's right to self-determination, the Court advised Member States of their obligations to recognise the illegality and invalidity of South Africa's position, and strongly reminded them of their legal obligations, under international law, to immediately sever relations with the South African Government.[97] The most relevant conclusion is the Courts statement situating the centrality of self-determination in the UN system: "the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned".[98]

Timor Leste

The Court in *East Timor (Portugal v Australia)* established self-determination as a right *erga omnes*: a right that is recognised to be universally beneficial, of concern to all States, and a right which all are obligated, at all times, to observe.[99] Erga omnes status is reserved for international norms of the highest quality, a status not easily attained.[100] Other erga omnes rights include, for instance, the right against torture,[101] and genocide.[102] Portugal, in attempting to maintain colonial administrative power over East Timor argued that Australia's presence violated the East Timorese people's right to self-determination, an argument which the Court found to be "irreproachable" – beyond criticism.[103] It is noteworthy here that the self-determination argument was not advanced by the colonised people, but by the coloniser, Portugal; demonstrating that the right can be abused as much as it can be used.

---

[91] Jansson, "Branding Åland, branding Ålanders: Reflections on place identity and globalization in a Nordic archipelago," 120; Ulrika, Coping Mechanisms among the Finland-Swedes," 15.
[92] Finland Declaration of Independence
[93] Suodenjoki, "Informing as National Indifference? The Case of Finnish Citizens' Collaboration with the Russian Authorities, 1899–1917," 253.
[94] Commission of Rapporteurs.
[95] Commission of Rapporteurs.
[96] International Court of Justice, *Legal Consequences of the South African Presence in Namibia.*
[97] Ibid.
[98] Ibid at [53].
[99] East Timor (Portugal v Australia).
[100] Linderfalk, "International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes," 2.
[101] International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) at [449].
[102] *The Gambia v Myanmar* at [111].
[103] *East Timor (Portugal v Australia)* at [29].

Palestine

The fourth case concerned Israel's construction of a wall in Palestine. The ICJ, in an advisory capacity, found the relevant customary law in the General Assembly's Resolution 2625 (Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States).[104] The Declaration proclaims that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State".[105] The Declaration established a duty not to interfere with self-determination, and to refrain from intervening in matter of domestic jurisdiction. Israel, the Court found, in impeding the right of the Palestinian people to self-determine, breached its legal obligations.[106]

(c) Modern Processes

In the post-formal decolonisation era, how a people come to self-determine today is not clear. There is no set custom or treaty setting out a procedure for self-determination, though there are some common features, from which a process can be derived. These are best illustrated through case studies, which are presented here. From the South Sudan experience, there are two stages of self-determination which a people need to pass to successfully self-govern. The first stage regards the people itself, and the second stage regards the people in relation to the international community.

The first stage of self-determination begins with civil discontent, and moves to identity-construction, culture building, social organising, political motivation, and administration of the people concerned. South Sudan is the most recent country to successfully claim self-determination, now widely recognised by the international community. The independence of South Sudan catalysed from two civil wars: the First Sudanese Civil War and the Second Sudanese Civil War, between northern Sudan and southern Sudan, in 1955-1972 and 1983-2005, respectively.[107] The UK had established a colonial presence in Sudan and, while recognising a distinction between the peoples of northern and southern Sudan, chose to manage it under one single administration, of Sudan.[108] It largely prioritised the preferences of the northern Sudanese people, which created discontent for the southern Sudanese.

Thereafter, with discontent brewing, having been subject to prejudice as an ethnic minority, the southern Sudanese began constructing its 'people'. The south Sudanese people began to develop a distinct political discourse, separating itself from the Islamic ideals of the northern by producing an education system based on "secular, Western, and modernist" principles.[109] It constructed an identity that was distinct from, and parallel to, the identity in the north, and through education, built a culture around that identity. The southern Sudanese then organised itself socially and politically, solidifying its representation in Sudanese politics, and already creating self-governments on its territory.[110] Then came the more formal processes: in January 2011, the southern Sudanese people held an independence referendum, in which 98% voted in favour.[111] Then, in July 2011, South Sudan formally declared itself independent of North Sudan.

From this case study, the first-stage process rests on a proposal that the collective:
1. Is motivated by discontent.
2. Constructs a unifying identity.
3. Builds culture.
4. Organises itself, socially.
5. Organises itself, politically.
6. Administers a forum for decision-making.
   a. The people, now identified, organises a group procedure to self-determine.
   b. The people, resolved to self-determine, present a Declaration of Independence.
   c. The people enter into negotiations with its occupying power.
   d. The people succeed; a new nation is formed.

The second stage of self-determination – once the collective organises itself, the people are identified, and it is resolved to self-determine – is for the people to be recognised by others. This is key for external legitimacy: a people may be legitimate to itself, having passed the first state of self-determination, but it is through that people's engagement with the international

---

[104] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Territory of Palestine*.

[105] Resolution 2625.

[106] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Territory of Palestine* at [149].

[107] Salman, "South Sudan Road to Independence: Broken Promises and Lost Opportunities," 344.

[108] Oluwo, "Southern Sudan beyond Self-Determination: Lessons, Challenges and Prospects," 292.

[109] Breidlid, "The role of education in Sudan's civil war", 41.

[110] LeRiche and Matthew, *South Sudan: From Revolution to Independence*, 29.

[111] De Vries and Schomerus, "Fettered Self-determination: South Sudan's Narrowed Path to Secession," 26.

community that their self-determination becomes real, when self-determination *proper* holds. Without recognition as a state, the people will face backlash from the international community, which may include legal use of force against them.

For South Sudan, having established a referendum commission, it seemed crucial from the very outset of the independence process, to involve the United Nations by requesting electoral support,[112] implyinga willingness for international cooperation, which would help to legitimise the self-determination movement. After the referendum was held, South Sudan's referendum commission reported the results to the UN Security Council, which then passed a resolution encouraging members of the General Assembly to recognise the new nation as sovereign.[113] The next step was application for membership in the United Nations, South Sudan's first engagement with the international community. Very soon after the independence referendum's result was announced, which occurred on the 7th of July 2011, with the state officially declaring independence on the 9th July 2011, the Security Council, having promptly examined its application, recommended South Sudan's membership to the General Assembly on the 13th July 2011.[114] The next day, South Sudan was approved by the General Assembly to be admitted as a member of the United Nations.[115]

Although not clarifying of how a people come to this stage, the UJNGA resolution 1541 of 1960 sets out the eligibility – in the eyes of the UN – of a successful transformation from a non-self-governing people to a self-governing state: a "full measure of self-government" is recognised by the UN to have been reached when either (i) it becomes a sovereign independent state, or (ii) it freely associates with an independent state, or (iii) it freely integrates with an independent state.[116] This is only somewhat helpful; we are still left in the dark about how a state comes to hold any of these conditions.

Given this, the second stage would structure itself as follows. International recognition rests on a proposal that:
1. The people engage with the United Nations prior to formal independence.
2. The people declare independence to the United Nations.
   a. The people become a sovereign state; or
   b. The people freely associate with an independent state; or
   c. The people freely integrate with an independent state.
3. The people, now a state, apply for membership to the United Nations.
4. The people, as a state, are admitted to the United Nations; a new nation is recognised.

Without official direction on how to self-determine, and who is eligible for self-determination, groups are left themselves to decide on these important legal questions. If they get it right, they gain successful recognition. But if they guess wrong, they face serious consequences, rejection of independence by the international community, and further prospects of conflict.

There emerges, then, a need for determining who the people are, and how they should, consistent with international law, come to self-determine.

(d) The Problem of Secession
The above sketch of a two-stage process for modern self-determination may emit an impression of a linear, straight-forward, organised process. In reality, self-determination does not always come about through peaceful negotiations. Deadly conflict preceded South Sudan's independence – it wasn't all peaceful – but essential to its self-determination was an agreement, the Comprehensive Peace Agreement, between South Sudan and north Sudan,[117] reflecting an eventual bilateral negotiation. The greatest challenge to modern international law, however, is the situation in which a people wish to unilaterally claim self-determination and declare independence. This is known as secession.[118]

Secession, more often than not, is a violent affair.[119] Given international legal institutions aim for peace and global stability, secession poses a serious threat; should secession be considered an ordinarily available route to recognition, the international community might see an unsustainable proliferation of new states, with a barrage of competing claims and potential

---

[112] "South Sudan vote put in doubt". Al Jazeera. Archived from the original on 2 December 2010. Retrieved 19 April 2023.
[113] Statement by the President of the Security Council.
[114] S/PRST/2011/14
[115] UN General Assembly resolution A/RES/65/308 (14 July 2011)
[116] UNGA Resolution 1541, adopted by a vote of 69-2-21 (15 December 1960).
[117] Ahmed, "The Comprehensive Peace Agreement and the Dynamics of Post-Conflict Political Partnership in Sudan," 133.
[118] Christakis, "Secession".
[119] Roeder, *National Secession: Persuasion and Violence in Independence Campaigns.*

conflicts.[120] However, some sovereigns do present an anomaly to the trend of state hesitancy to unilateral secession: St Kitts and Nevis is one such example. Their Constitution includes an express provision for unilateral secession, should Nevis meet the conditions for that.[121]

The legal, political, and moral question has emerged: is unilateral secession permitted by international law? Conceptually, it seems that there is a distinction between what the two modes of self-determination have attached to them. External self-determination we could agree carries with it a right to independence. The question is whether internal self-determination carries a right to secession.

Domestic law, in upholding the authority of a state's legal order, usually prohibits secession: national sovereignty and territorial integrity being dependent on the unity of the state. For instance, the Supreme Court of Canada denied Quebec the right to unilateral secession, while recognising it as an independent nation. In Canadian domestic law, which tookke primacy over customary international law, secession is illegal. International law, on the other hand, is notably lacking on the subject. The Court concluded that international law does not prohibit secession, while domestic law does. Butit left open the possibility of a bilateral secession, where a successful independence referendum in Quebec is held. In that case, Canada "would have no basis to deny the right of the government of Quebec to pursue secession".[122]

In international law, unilateral secession may also be possible. The International Court of Justice, in its advisory opinion 'Accordance with international law of the unilateral declaration of independence in respect of Kosovo', declared that "the scope of the principle of territorial integrity is confined to the sphere of relations between States".[123] What this meant was that the people vying for self-determination cannot yet be considered a 'state'. Territorial integrity, which secession would violate, is illegal for other states to violate, but a non-state could: in other words, the non-state seceding actor is not bound by international law. The ICJ can only enforce international law as the operation of relations *between states*, and not between a non-state actor and a state.

This is a problem: without international law expressly prohibiting unilateral secession, we appear to have an unlimited right for non-State actors to unilaterally secede.[124] By definition, entities which wish to secede are non-State actors; they openly challenge the standing and authority of the State over them. All peoples, then, who wish to self-determine cannot be stopped by hard forms of international law. They may, should they wish to go through the internal judicial process, be prevented by domestic law, and therein is the problem: peoples absolutely determined to self-govern will do so one way or another: the use of force (legal or otherwise), violent civil disobedience. The ICJ, while recognising that unilateral secession is not prohibited by international law, has warned that international law is not silent in cases where serious rights breaches occur separately or simultaneously with unilateral secession acts.[125] In these cases, the ICJ will condemn unilateral secession.

If international law permits unilateral secession, we find ourselves worse placed for international development on the issue. The possibility of constant, non-justiciable uses of force in civil wars will – by its nature – be detrimental to humanitarian and peace efforts in nations, developed or developing. On the other hand, should unilateral secession be prohibited, the State will always have a valid right to object against a people to self-determine, if it is not in their interest to allow it. We would never again see the development of new states, effectively putting an end to the right to self-determination, and thereby strongly undermining the foundational principles of the UN Charter.

---

[120] We might wonder on what basis a proliferation of new states may be "unsustainable". While various metrics may be devised, the standing concern in the international relations literature is that of security: with more international actors comes a greater chance of international conflict. See Boniface, 'The Proliferation of States,' 109.
[121] St Kitts and Nevis Constitution.
[122] *Reference Re Secession of Quebec* [1998] 2 SCR 217
[123] International Court of Justice, "Accordance with international law of the unilateral declaration of independence in respect of Kosovo" at [80].
[124] Abel, "Is There a Right to Secession in International Law."
[125] International Court of Justice, Kosovo.

4. Analysis:
From Theory to Practice

In section (a) below, I sketch theoretical concerns with the right to self-determination. In section (b), I consider how, in practice, we might respond to these concerns.

(a) Theoretical Challenges

(i) The 'Self' in Self-Determination

A fundamental problem with the international law on self-determination is that it is severely lacking in definitional terms. Not only does it lack in a general definition of 'self-determination', but it also lacks in the definition of the 'self', or the 'people' involved, and how they may legitimately go about 'determining' their states of affairs. Despite how ubiquitous these terms are in UN legislation, the job of treaty interpretation is largely left up to the collective, whoever they may be.[126]

Discussions on the 'self' have, however, taken place in other fields, from which we could be informed. In democratic theory, the salient question is: who are 'we, the people'; whose interests are we taking into account when we are undertaking our democratic deliberations? This issue, known as the 'Boundary Problem', concerns who or what the *demos* should be.[127] Who the people are is far from settled, and yet the conclusion we come to radically changes the outcomes we produce. In a democracy, it is essential to be inclusive in whose interests we accommodate in our polity.

But, in the right to self-determination, the issue of the self is more problematic. An open definition, which is found in the absence of an articulated one, can cause problems for the groups to whom the term applies, and the institutions which respond to it. Under international law as it stands, any group of humans is eligible for a claim to self-determination. Potentially qualifying groups are left with uncertainty about how to organise themselves enough to be seen as legitimate grouping in the international community. Which groups of humans should be recognised? Are there limitations to the kinds of groups that should self-determine? Are some groups better grouped than others? These are all questions to which we do not find answers in international law.

The absence of a definition can be detrimental to self-determination movements. A definition provides juridical assurance to peoples wanting to self-identify: a criterion can allow groups to organise themselves in a way which guarantees them status. The lack of a definition allows bodies to arbitrarily reject recognition on unfair and political grounds – as scholars have noted about the UN has done in practice.[128]

(ii) Between Races, Ethnicities, Cultures and Religions

Democratic theory will not be wholly relevant here, though it may be minimally useful. The reason is because we are not here dealing with a political group or an already established demos, but rather dealing with a social group. The 'people' in self-determination movements usually coalesce around ethnic, racial, cultural, or religious commonalities – and, more often than not, a combination of two or more of them. Disputes and statutory provisions have involved all four, for instance:

> Race: In Australia, a continuing independence movement involves the indigenous Aboriginal People and Torres Straight Islanders, against the European colonisers.[129]

> Ethnicity: In Ethiopia, peoples within the state are guaranteed under the Constitution to have a right to self-determination and a right to secession. The Ethiopian Government, at least as a constitutional principle, has given status to over 80 ethnicities who may be eligible for claim rights.[130]

> Culture: For Canada, the peoples in dispute were the French Settlers (Quebecois) and the British settlers.[131]

> Religion: For India and Pakistan, the Hindu and Muslim peoples, respectively, gained independence from the United Kingdom of Great Britain and Northern Ireland.[132]

---

[126] French, *Statehood and Self-Determination Reconciling Tradition and Modernity in International Law,* 97.

[127] Nili, "Democratic Theory, the Boundary Problem, and Global Reform," 99.0

[128] Cohen, "The Concept of Statehood in United Nations Practice", 1128

[129] Merlan, "Indigenous Movements in Australia," 473.

[130] Federal Democratic Republic of Ethiopia Population Census Commission, *Summary and Statistical Report of the 2007 Population and Housing Census*, 16.

[131] Courtois, "Is multicultural politics compatible with Quebecois nationalism?" 54.

[132] Panigrahi, *India's Partition: The Story of Imperialism in Retreat.*

The UNESCO International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples adopted for its purpose a definition of peoples which extended far beyond these categories: "a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life".[133] There contains nine separate criteria for 'peoples', though this is not affirmed by UN statute.

Undertaking a metaphysical analysis in any one of these categories will lead to problems. Race is a prominent example. What is a race, and who belongs?[134] Is it biological, or historical, or cultural, or political? Some see race and ethnicity to be two interchangeable terms, both conceptually and in how we practice using these social terms. But how we ultimately decide to interpret these terms will affect our international legal practice.[135]

A concern now is that, as we move away from colonial settings and towards a globalised context, we wonder what defines the concept of 'people', when peoples increasingly identify themselves with non-historical, non-racial, non-ethnic, non-cultural, non-linguistic, non-religious, non-ideological, non-territorial, and non-economic traits. Notably, these categories are fixed in their relation to physical places and beings, whereas in the digital age, we must have regard for 'online identities'.[136] Without a definition of 'people', are non-traditional orientations – say those involving ethical beliefs, sexual practices, political ideals, or digital unions – also equally eligible for a claim to self-determination? The UN, as it currently stands with sovereign states, is not prepared to address these new concepts.

(iii) Formal and Information Organisation
In continuing this concern over who the 'self' or 'people' are, we should have regard for how persons come to be together as a people. An apparent expectation is that the mechanisms, forums, and procedures for organising peoples resemble something the United Nations can identify as being acceptable. This is implicit in the way the UN composes itself – through formal bodies, councils, and structures[137] – but it is made explicit in motions condemning invalid forms of determination.

In Russia's annexation of Crimea, for instance, the UN rejected Crimea's claim to self-determination and to freely associate with Russia, because of a dubious referendum process in which armed Russian soldiers were present.[138] The concern was whether the way in which the people of Crimea organised was acceptable, when fear, force, intimidation, and misinformation played a role in the process. Various states, intergovernmental bodies and law commissions have since widely denounced the annexation as illegal and invalid, indicating a qualified view of legitimate organising methods.[139]

While clearly reasonable in some cases, such an expectation may prove too exclusive to accommodate the diversity of cultural practices and modes of organisation in other cases. Consider how sub-tribal groups may come together to form a tribe. These organising practices will, by definition, not resemble those distinctly Western methods of organisation implemented at the UN: whereas international law and legal practice is based on justice and equality, indigenous and tribal practices are often based rather on balance and equity.[140] Should a tribe want to make a claim to self-determination, the fact that they have lacked a recognisable form of organisation may lead to a rejection of recognition – and yet, indigenous modes of sovereignty is protected and is required to be respected under our international legal regime.[141] What we find, then, is that we should be aiming for flexible and responsive recognition of diverse organising principles.

---

[133] United Nations Educational, Scientific, and Cultural Organisation, Report of the International Conference of Experts Held in Barcelona, 17.
[134] Glasgow et al, *What is Race?: Four Philosophical Views.*
[135] Kempin. "The Right to Self-Determination of Ethnic Groups: The Canton of Jura in Switzerland," 250
[136] Victoria and Langille, *Virtual Identities and Digital Culture*; Reyes, "Virtual Communities," 99.
[137] UN Charter, Art 7 and 9.
[138] Office of the United Nations High Commissioner of Human Rights, Report on the human rights situation in Ukraine 16 February to 15 May 2016.
[139] Resolution 68/262; Venice Commission, 'Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation of Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles'.
[140] Vismara, *The contemporary nature of tribalism. Anthropological insights on the Libyan case;* Tso, "The Process of Decision Making in Tribal Courts," 225; Melton, "Indigenous Justice Systems and Tribal Society," 126.
[141] Shrinkhal, "Indigenous sovereignty and right to self-determination in international law: a critical appraisal,' 71.

(iv) Methods of Determination

Holding a plebiscite is seen as a legitimate, perhaps the most authoritative, method of acceptable group decision making.[142] When coupled with election monitoring, such as those services provided by the Organisation of American States, the European Union, the Commonwealth, or the African Union, the ability for a state to object to a self-determination claim becomes limited or even, as some Courts have found, non-existent.[143]

A referendum is seen as the legitimate option because it results in more peaceful outcomes; in contrast, some independence movements, even successful ones, that did not use referenda have resulted in severe violence.[144] Still, independence referenda do not guarantee peace or success: the Bosnian case provides a visceral example. What form referenda take, which questions are used, how votes are submitted, and how results are calculated have all been determinative features of recognition.[145]

A concern is that disenfranchised peoples will, by definition, lack the means and resources to enact formal decision-making procedures that are taken to be legitimate. Even in cases of developed nations, as in the Scottish nationalists' want of self-determination from the UK, independence is extremely expensive: the 2014 referendum costed £15.8m, two million pounds over-budget. Even if it the vote were successful, its estimated break-away from the Pound Stirling, and setting up a Scottish currency, would cost over £1.5bn.[146] If this is what it costs a wealthy, well-developed nation to self-determine, what hope to poorer, developing, and disenfranchised people have? The costs alone are enough to suppress peoples' access to the right of self-determination. Similarly, minority groups within self-determining peoples have problems with accessing and being included in the composition of the vote.[147]

A separate concern is international law and its institutional ability to accommodate cultural pluralism.[148] Plebiscites may not be the method of choice for cultural groups and, even when held, they may not align with what the UN considers to be acceptable. Given that a purposive reading of the Charter would find that, as a rule and matter of principle, the UN rejects methods contrary to its values, some methods of group decision-making will be seen as normatively illegitimate. Peoples who may have a legitimate claim to self-determination but who have come to it through non-egalitarian means will not be recognised. This is not an entirely theoretical concern, many indigenous real and current methods of decision-making are contrary to UN values: as in cases where only men, or elders, or religious leaders decide the fate of a community.[149] How, if at all, international legislation responds to various methods of determination will be crucially decisive of recognition.

(b) Practical Responses

(i) A Right to Self-Identify

The closest we get in international law to defining a people is in the Montevideo Convention, wherein a 'state' (which we can read as a 'people', since this is what self-determination movements aspire to be) is regarded as having: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states".[150] Each of these criteria can be analysed and deconstructed to avail a variety of interpretations, but it is unlikely that such a rigid approach is inclusive enough to allow all peoples access to self-determination – if, indeed, that is our aim.

That technique is easy enough to follow for external self-determination movements. Remembering that the definition of external self-determination involves relations between one people in one place who have been dominated by a different people in a different place,[151] it is much easier to identify the entities involved – we need only locate the coordinates of each's administrative capital in relation to the other. Given the availability of historical documents tracking imperialism, this does not seem to pose any real difficulty. However, grouping the dominated class as one, singular, monolithic people does.

---

[142] Guibernau, Rocher, and Casnas, "A Special Section on Self-Determination and the Use of Referendums: Catalonia, Quebec and Scotland."

[143] As in the Canadian case. *Reference Re Secession of Quebec.*

[144] Pavkovic, *Creating New States. Theory and Practice of Secession.*

[145] Qvortrup, "Voting on Independence and National Issues: A Historical and Comparative Study of Referendums on Self-Determination and Secession."

[146] Huang, Sampson, and Schneider "Scottish independence would be 2-3 times more costly than Brexit, and rejoining the EU won't make up the difference."

[147] Shelton, 66.

[148] Quane, "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?" 675; Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards', 21.

[149] Zardo, "Gender Inequality and Indigenous Peoples' Right to Self-Determination and Culture," 1055.

[150] Montevideo Convention, art 1.

[151] Above, section 2(a).

Internal self-determination movements require something else. A new system should guide – not determine – the status of a people, such that the people alone are self-determining of their composition. Institutions should aim to develop an accompanying 'right to self-identify', in which groups with prima facie eligibility for the right to self-determination get automatic access to. This is not so much an invention of a right, but an extension of existing rights: the right to self-determination already invites peoples to freely determine their own affairs, all groups within should have a right to determine their association or departure with said people.

The motivation comes from the misconceptions or wilful ignorance governing powers can have when controlling an independence vote on behalf of others. The case of *Kevin Mgwanga Gunme et al v Cameroon* serves as very real example. [152] In 1961, the UN administered two questionable votes of the British Cameroons (a territory comprising two states, Northern Cameroons and Southern Cameroons, each independent of their neighbouring state, Cameroon). The vote away from British colonial rule asked whether the British Cameroonians wished to "achieve independence by joining" either Nigeria or Cameroon. [153] Approximately 70% of Southern Cameroons voted to join Cameroon, while 60% of Northern Cameroons voted to join Nigeria, and each amalgamating with their preferred states thereafter. [154]

What is notable here is that independence in which either could establish a sovereign of their own was not on the table. Neither were allowed to self-identify, they were only allowed to self-determine insofar as their identity aligned with the two options they were given. As a result, in 2003 fourteen representatives of their tribes from south-west Cameroon, in the African Court on Human and People's Rights, claimed a breach of the right to self-determination of the southern Cameroonian people by the governing Republic of Cameroon. [155] The claimants' case was that their English-speaking people were wrongly grouped with the French-speaking Cameroon, never once being allowed to actually self-determine. Southern Cameroon, now identifying as Ambazonia, is unrecognised by Cameroon, leading to an ongoing armed dispute known as the 'Anglophone Crisis'. [156] What this case illustrates is that t is not just that a people should decide for themselves who they are, it is also that a people should decide for themselves who they are not.

This could be formalised with the development of a supranational commission aimed at identifying eligible groups – similar to the functions of a truth and reconciliation commission. [157] Without limiting the ability of groups' access, such a commission should hear from a people wanting to self-determine before they initiate formal procedures and invite representatives of related groups to determine their association or disassociation with said people as *amicus curae*, McKenzie friends, or third-party intervenors. An advantage of developing an institution with this practice is that it provides the people with a sense of integrity, and also assures the international community with a sense of due diligence, leading to more probable recognition. It could also serve as a 'pressure valve' to a state that is unresponsive to an oppressed people's claim, bringing international attention to their plight in a formal setting; thereby creating a form of soft power. [158]

(ii) Post-modern Peoples
What kinds of people should be recognised? As noted, in principle, nine kinds of peoples are regarded (academically, though not legally) as having claims to self-determination: where they share a common historical tradition, a racial identity, an ethnic identity, a cultural homogeneity, a linguistic unity, a religious affinity, an ideological affinity, a territorial connection, or a common economic life. [159] Given the prevalence of identity politics in postmodern contexts, [160] it is not unlikely that international law should need to prepare for claims based on non-traditional features: such as shared ethical belief, common political cause, connected gender or sexual practices, or digital unity for instance.

Indeed, contemporary identity politics can rightly be categorised as a generic struggle for internal self-determination, if we take internal self-determination only to mean 'greater autonomy' within an existing state. [161] Each group in a multi-cultural, secular, liberal or pluralist society are vying for greater autonomy within their state; the ability to express their freedoms to

---

[152] Weldehaimanot, "The ACHPR in the Case of Southern Cameroons," 87.
[153] Okereke, "Imperial Antecedent of the Anglophone Conflict in Cameroon," 115.
[154] Johnson, "The Case Concerning the Northern Cameroons," 1162.
[155] *Kevin Mgwanga Gunme et al v Cameroon*.
[156] Pommerolle and Heungoup, "The 'Anglophone Crisis': A tale of the Cameroonian postcolony," 527; Bang and Balgah, "The Ramification of Cameroon's Anglophone crisis: conceptual analysis of a looming "Complex Disaster Emergency."
[157] Seremani, Farias, and Clegg, "New Order and Old Institutions: South Africa and the Institutional Work of the Truth and Reconciliation Commission," 578.
[158] I am grateful to the reviewer for raising this point.
[159] As above, section 4(b).
[160] Kelley, "Identity Politics and Class Struggle."
[161] As noted above, in Sec 2(a).

the fullest extent, based on their distinct or sometimes intersecting identities. The question for us to consider is whether, in the future, claims to self-determination will coalesce around more postmodern features of identity, and how we should respond, if at all, to these claims. This is especially important if we take internal self-determination to include a right to secession, and not just a right to be accommodated.

Without a concrete definition or limiting principle of 'self' and 'people', there is no current reason for why postmodern peoples should be excluded from the right to self-determination. Either a limiting definition should be adopted or a flexible framework for adjudicating these types of unconventional claims will need to be developed. If the former, then adopting a definition should have regard to the changing understanding of terms like 'race', 'ethnicity', and 'culture', the last two of which are especially problematic and may already include notions of ethical and political connection.[162]

The preference of international law will always be stability over change,[163] so, in being realistic to that goal, the definition must balance the practical need for procedural continuity (stability) with the need to be inclusive of new or nuanced identities (change). International law will only promote peace if it is responsive to the needs of the peoples it seeks to protect and liberate, or else, as we have seen, civil discontent and violence ensues. If the latter, then a commission determining the status and extent of peoples (as discussed above), could suffice.

(iii) Sensitivity to Informal Legal Orders

Recognition is central to the function, legitimacy, and authority of the rule of law.[164] To whom recognition is granted is what concerns us here: as a matter of practice, recognition of sovereignty and independence is given to formally organised entities. Self-determining groups which establish councils, congresses, and constitutions to organise themselves construct necessarily non-state (but still formal) legal orders,[165] and it is these groups to which primacy is given in practice. We must, however, have concern for – and be sensitive to – the validity of non-state informal legal orders.

Formal non-state legal orders are offered sufficient protection under current international law to have access to self-determination: those with orders, systems, and organisations recognisable to the UN as acceptable will be afforded sovereignty.[166] So we should have regard to informal non-state legal orders, where they form the methods of group organisation. What these informal organising processes look like will, and does, vary widely, though these can include customary resolutions, tribal determinations, historical connections between people and land, or religious association.

How, for instance, was the case of the Maluku Islands – comprising two provinces of Indonesia with a population of over 3 million spread over 1,027 islands – coming together to be one self-determining people (as 'Moluccans') different to how a separate group of Indonesian islands, the now semi-autonomous Aceh Islands – with a population of over 5 million over 119 island – came together to be a different self-determining people, the Acehnese. Territorial disputes in each were settled through customary dispute resolution processes, and the organising principles were based on religious affiliation.[167]

What is to be discouraged is attempting to formalise informal organisations. Despite the benefits that codification brings,[168] it risks breaking the character of the people and damaging the very value of a non-state and informal orders – self-determination *simpliciter* – in the first place.[169] Moving forward, what will be required is implementing a virtue of sensitivity and integrity of the people. The recognition of peoples should not be rejected because they are organised through informal means; respecting self-determination will require respect for the methods by which people come together.

(iv) Equality of Procedure

In view of the cost of organising a people and the diversity of methods of self-determination, it would be appropriate to establish a legal doctrine recognising the equality of procedures, wherein formal (typically, Western) methods of decision-making are declared normatively equal to other, non-Western, and typically more-informal ones.[170] A judicial body must have regard for, and an appreciation of, cultural pluralism.[171] It is not possible, or indeed desirable, for different peoples to

---

[162] Bernasconi, *Critical Philosophy of Race: Essays*.

[163] Vincy and Parisi, "Stability and Change in International Customary Law," 279.

[164] Roughan 'The recognition in authority: roles, relations, and reasons," 171.

[165] Michaels, 'What Is Non-State Law?'.

[166] As discussed above.

[167] Albrecht et al., *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, 107.

[168] Symeonides, "Codification and Flexibility in Private International Law."

[169] Van Niekerk, 'State initiatives to incorporate non-state laws into the official legal order: a denial of legal pluralism?" 349.

[170] Yates and Oliveira, "Culture and Decision Making," 106.

[171] Piciocchi, *Courts, Pluralism and Law in the Everyday*.

have the same methods of decision making, and it is less desirable to take some procedures as inferior to others, especially where those procedures are central to the people's identity.

In doing so, we are aiming at avoiding a form of global indirect discrimination.[172] Indirect discrimination occurs when policies and practices which are on its face non-discriminatory are applied in a way that is discriminatory, and qualifying acts or omissions of this sort are prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination.[173] While no formal treaty or customary law denounces or makes superior any one form of decision-making, we should be mindful that 'facially equal' legislation can have discriminatory effect.

In self-determination, this would manifest where a Court only accepts the status of a self-determining people only where they have held a referendum and no other methods of determination, as in the Canadian-Quebec case. That preference is given to independence referenda can be discriminatory for those peoples who cannot afford to do so, or to whom the practice is contrary to their own cultural practices. Methods of decision-making – in determining whether to secede – will vary between peoples: our approach must not be to change the practices of those people, but to change the laws that we submit them to.

5. Recommendations

In view of the theoretical concerns and practical challenges to self-determination discussed above, the following recommendations are advanced:

(a) Definitional Clarity
Statutory Declaration on the Meaning of 'Self-Determination'
The United Nations should adopt a resolution expressly declaring the statutory interpretation of the word 'people' to which the right of self-determination applied. It should pursue a two-step approach in which an objective criterion stipulating the extent (but not composition) of a group is defined, and a subjective criterion allowing the composition (but not extent) of a group to self-identity. The former is taken to ensure sustainability, while the latter is taken to pursue sensitivity. Judicial bodies should exhibit consistency in applying the definition, and in doing so, provide some guarantee to peoples attempting to organise themselves accordingly.

(b) Group Agency
A Commission on the Determination of Peoples
A 'Commission on the Determination of Peoples' should be permanently established to guide, monitor, and mediate peoples in determining their own composition. Based on principles of free association, equal justice, reconciliation, restitution, inclusivity, cooperation, and transparency, the Commission should present an open invitation for emerging peoples to determine their status as a 'people' and allow dissenting peoples the opportunity to detach. The purpose of the Commission, as a supranational body, should be to impartially guide (and not determine) peoples, and its aim should be to reduce violence by providing an open forum to encourage peaceful unilateral, bilateral, and multilateral negotiations.

(c) Procedural Accessibility
An International McKenzie Friend Fund
An 'International McKenzie Friend Fund' should be permanently established to grant legal representation and advice to prospective self-determining peoples, through consulting and instructing qualified McKenzie Friends. As a form of international legal aid, it should grant peoples, acting in good faith, funds to pursue self-determination claims and seek advisory opinions and judgements in relevant judicial bodies. The scheme should be based on recognising the value self-determination has as an *erga omnes* obligation in international law and on reducing disparity between peoples accessing it. The source of its funding should, in part, recognise a reparative responsibility which former imperial powers carry.

(d) Collective Jurisprudence
The Global Self? A Philosophy of Global Governance
An accompanying jurisprudence for global governance should be developed to provide a theoretical framework for the justiciability of self-determination. It should prioritise integrating the various conceptual accounts of self-determination, while assessing the practical challenges of implementing this as a normative foundation. Philosophical theses could centre on globalising the 'self' in self-determination, so that issues of global concern can be engaged with in a way that emphasises unity and justice, cooperation and fairness between peoples, and their states. Institutions should have regard for the spirit of self-determination, and the underlying philosophy that follows.

---

[172] Yu, "Direct Discrimination and Indirect Discrimination: A Distinction with a Difference."
[173] International Convention on the Elimination of All Forms of Racial Discrimination.

Annex

Current and Former Self-Determination Cases

Governing State	NSG Territories (UN Special Cttee) Governed Entity	Other Territories Governed Entity
USA	American Samoa Guam Virgin Islands	Puerto Rico
UK	Gibraltar Pitcairn Falkland Islands/Malvinas Anguilla Bermuda British Virgin Islands Cayman Islands Montserrat St. Helena Turks & Caicos Islands	Scotland Northern Ireland Chagos Islands
France	New Caledonia French Polynesia	Comoros
Morocco Algeria	Western Sahara	
New Zealand	Tokelau	Cook Islands Niue
Canada		Quebec
Spain		Catalonia Basque
Cyprus		Northern Cyprus
Turkey, Syria, Iraq, Iran		Kurdistan
Israel		Palestine
Russia		Crimea Donbass regions
Serbia		Kosovo
India		Kashmir
Nigeria		Biafra
Solomon Is.		Malaita

Bibliography

Abel, Mia. "Is There a Right to Secession in International Law?" *E-International Relations* (Online).

Ahmed, Einas. "The Comprehensive Peace Agreement and the Dynamics of Post-Conflict Political Partnership in Sudan." *Africa Spectrum* 44, no. 3 (2009): 133-147.

Albrecht, Peter, Helene Maria Kyed, Deborah Isser and Erica Harper. *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*. International Development Law Organisation: 2013.

Aleksandar Pavkovic, with Peter Radan. *Creating New States: Theory and Practice of Secession*. Aldershot: Ashgate, 2007.

Aloyo, Eamon. "Reconciling Just Causes for Armed Humanitarian Intervention." *Ethical Theory and Moral Practice* 19, no. 2 (2016): 313–328.

Anderson, Elizabeth. "The Epistemology of Democracy." Episteme 3, no. 1-2 (2006): 8–22.

Arendt, Hannah. *The Human Condition*. Chicago: University of Chicago Press, 1958.

Augestad Knudsen, Rita. "In Court: 'Self-Determination' and Freedom in the ICJ Case on Kosovo." In The Fight Over Freedom in 20th- and 21st-Century International Discourse, 173–209. Switzerland: Springer International Publishing AG, 2020.

Bandura, Albert. *Self-Efficacy: The Exercise of Control*. New York: W.H. Freeman, 1997.

Bang, Henry Ngenyam and Roland Azibo Balgah. "The Ramification of Cameroon's Anglophone Crisis: Conceptual Analysis of a Looming "Complex Disaster Emergency." *Journal of International humanitarian Action* 7 (2022).

Bayefsky, Anne F. *Self-Determination in International Law: Quebec and Lessons Learned*. The Hague: Kluwer Academic, 2000.

Bernasconi, Robert. *Critical Philosophy of Race: Essays*. New York, NY: Oxford University Press, 2023.

Boniface, Pascale. 'The Proliferation of States.' *Washington Quarterly* 21, no. 3 (1998): 109-127.

Brass, Paul R. *The Politics of India Since Independence*. 2nd ed. Cambridge: Cambridge University Press, 1994.

Breidlid, Anders. "The role of education in Sudan's Civil War." *Prospects* 43 (2013): 35-47.

Brock, Gillian, and Quentin D. Atkinson. "What Can Examining the Psychology of Nationalism Tell Us About Our Prospects for Aiming at the Cosmopolitan Vision?" *Ethical Theory and Moral Practice* 11, no. 2 (2008): 165–179.

Brock, Gillian. *Global Justice: A Cosmopolitan Account*. Oxford: Oxford University Press USA - OSO, 2009.

Buchanan, Allan. "The Internal Legitimacy of Humanitarian Intervention." *The Journal of Political Philosophy* 7, no. 1 (1999): 71–87.

Christakis, Theodore. "Secession" in the *Oxford Bibliography of International Law*. Oxford: Oxford University Press 2012.

Christiano, Tom and Sameer Bajaj, "Democracy", *The Stanford Encyclopedia of Philosophy* (Spring 2022 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2022/entries/democracy/>.

Christoph Kampmann. "The Treaty of Westphalia as Peace Settlement and Political Concept: From a German Security System to the Constitution of International Law." In *International Law and Peace Settlements*, 64–85, Cambridge: Cambridge University Press, 2021.

Cohen, Rosalyn. "The Problem of Statehood in United Nations Practice." *University of Pennsylvania Law Review* 109, no. 8 (1961): 1127-1171.

Coleman, Andrew. 'Determining the Legitimacy of Claims for Self-Determination.' *St Antony's International Review* 6, no. 1 (2010): 57-78.

Commission of Rapporteurs, *Report Presented to the Council of the League of Nations by the Commission of Rapporteurs* (League of Nations Council, 1921).

Conversi, Daniele. "Sovereignty in a Changing World: From Westphalia to Food Sovereignty." *Globalizations* 13, no. 4 (2016): 484–498.

Courtois, Stéphane. "Is multicultural politics compatible with Quebecois nationalism?" *Globe (McGill University. Quebec Studies Programme)* 10, no. 1 (2007): 53–72.

Danspeckgruber, Wolfgang. *The Self-Determination of Peoples: Community, Nations, and State in an Interdependent World* (Lynne Reinner Publishers, 2002)

De Vries, Lotje and Mareike Schomerus. "Fettered Self-Determination: South Sudan's Narrowed Path to Secession." *Civil Wars* 19 (2017): 26-45.

Deci, Edward and Richard Ryan. "Self-Determination Theory." *International Encyclopedia of the Social and Behavioral Sciences*. Online: Elsevier, 2015.

Erickson, Gary M. "Maslow's Basic Needs Theory and Decision Theory." *Behavioral Science* 18, no. 3 (1973): 210–211.

Federal Democratic Republic of Ethiopia Population Census Commission, *Summary and Statistical Report of the 2007 Population and Housing Census*, Addis Ababa, 2008.

Fon, Vincy and Francesco Parisi. "Stability and Change in International Customary Law." *Supreme Court Economic Review* 28 (2009): 279

French, Duncan. *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*. Edited by Duncan French. Cambridge: Cambridge University Press, 2013.

Glasgow, Joshua, Sally Anne Haslanger, Chike Jeffers, and Quayshawn Spencer. *What Is Race?: Four Philosophical Views*. New York, NY: Oxford University Press, 2019.

Gover, Kristy. "Settler-State Political Theory, 'CANZUS', and the UN Declaration on the Rights of Indigenous Peoples". *European Journal of International Law* 26, no. 2 (2015) 345-373.

Guibernau, Montserrat, François Rocher, and Elisenda Casanas Adam. "Introduction: A Special Section on Self-Determination and the Use of Referendums: Catalonia, Quebec and Scotland." *International journal of politics*, culture, and society 27, no. 1 (2014): 1–3.

Gurr, Ted. *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (Washington, DC: USIP Press, 1993), 295–7 (especially Table 10.1).

Hanwei Huang, Thomas Sampson and Patrick Schneider. "Scottish independence would be 2-3 times more costly than Brexit, and rejoining the EU won't make up the difference." (Online), access at: https://blogs.lse.ac.uk/brexit/2021/02/04/indyref2-scottish-independence-would-be-2-3-times-more-costly-than-that-of-brexit-and-rejoining-the-eu-wouldnt-make-up-the-difference/

Howse, Robert, and Ruti Teitel. "Humanity Bounded and Unbounded: The Regulation of External Self-Determination Under International Law." *Law & Ethics of Human Rights* 7, no. 2 (2013): 155–184.

Humphrey, John P. "Political and Related Rights." In *Human Rights in International Law*. Oxford: Oxford University Press, 1986.

Hannum, Hurst. *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*. Pennsylvania: The University of Pennsylvania Press 1996.

Isaiah Berlin, "Two Concepts of Liberty." In Isaiah Berlin and Henry Hardy (eds) *Liberty*. Oxford: Oxford University Press, 2002.

Jansson, David. "Branding Åland, Branding Ålanders: Reflections on Place Identity and Globalization in a Nordic Archipelago." *Place Branding and Public Diplomacy* 8, no. 2 (2012): 119–132.

Johnson, D.H.N. "The Case Concerning Northern Cameroons." *The International and Comparative Law Quarterly* 13, no. 4 (1964) 1143-1192.

Kannen, Victoria, and Aaron Langille. *Virtual Identities and Digital Culture*. Milton: Taylor & Francis Group, 2023.

Kelley, Robin. "Identity Politics and Class Struggle." New Politics 6, no. 2 (1997).

Kenehan, Sarah. "In Defense of the Duty to Assist: A Response to Critics on the Viability of a Rawlsian Approach to Climate Change." *Critical Review of International Social and Political Philosophy* 18, no. 3 (2015): 308–327.

Khurana, Thomas. "The Self-Determination of Force: Desire and Practical Self-Consciousness in Kant and Hegel." In *Begehren / Desire*,179–204. Berlin, Boston: De Gruyter, 2018.

Klabbers, Jan. "The Right to Be Taken Seriously: Self-Determination in International Law." *Human rights quarterly* 28, no. 1 (2006): 186–206.

Kleingeld, Pauline, and Marcus Willaschek. "Autonomy Without Paradox: Kant, Self-Legislation and the Moral Law." *Philosophers' Imprint* 19, no. 6 (2019): 1–18.

Kohen, Marcelo. "Self-Determination." In Viñuales, Jorge (ed), *The UN Friendly Relations Declaration at 50: an Assessment of the Fundamental Principles of International Law* (Cambridge: Cambridge University Press, 2020).

Kymlicka, Will. *Multicultural Citizenship a Liberal Theory of Minority Rights*. Oxford: Clarendon Press, 1996.

Landemore, Hélène. *Democratic Reason Politics, Collective Intelligence, and the Rule of the Many*. Princeton, N.J: Princeton University Press, 2013.

Lee, Steven. *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*. Dordrecht: Springer, 2007.

LeRiche, Matthew and Mathew Arnold. *South Sudan: From Revolution to Independence*. Hurst Publishers, 2012.

Linderfalk, Ulf. "International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes." *Nordic journal of international law = Acta scandinavica juris gentium* 80, no. 1 (2011): 1–23.

Manela, Erez. "Imagining Woodrow Wilson in Asia: Dreams of East-West Harmony and the Revolt against Empire in 1919." *The American Historical Review*, 111, no. 5 (2006): 1327–1351.

McMahan, Jeff. "Intervention and Collective Self-Determination." *Ethics & International Affairs* 10, no. 1 (1996): 1–24.

Mehmood, Fatima. "Demystifying External Self-Determination and Remedial Secession in International Law: A Case Study of Kashmir." *Asia-Pacific journal on Human Rights and the Law* 23, no. 1 (2022): 1–46.

Melton, Ada Pecos. "Indigenous Justice Systems and Tribal Society." *Judicature* 79 (1995): 126.

Merlan, Francesca. "Indigenous Movements in Australia." *Annual review of anthropology* 34, no. 1 (2005): 473–494.

Michaels, Ralf. "What is Non-State Law?" In Michael A Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*. Cambridge: Cambridge University Press, 2015.

Narváez, Darcia. *Basic Needs, Wellbeing and Morality: Fulfilling Human Potential*. Edited by Darcia Narváez. Cham, Switzerland: Palgrave Macmillan, 2018.

Neuberger, Benyamin. *National Self-Determination: A Theoretical Discussion* (Cambridge University Press 2018).

Niemiec, Christopher & Richard Ryan. "Autonomy, Competence, and Relatedness in the Classroom Applying Self-Determination Theory to Educational Practice." *Theory and Research in Education* 7 (2009): 133-144.

Nili, Shmuel. "Democratic Theory, the Boundary Problem, and Global Reform." *The Review of Politics* 79, no. 1 (2017): 99–123.

Nussbaum, Martha C. (Martha Craven). *Creating Capabilities: The Human Development Approach*. Cambridge, Mass: Belknap Press of Harvard University Press, 2011.

Okereke, C. Nna-Emeka. "Imperial Antecedent of the Anglophone Conflict in Cameroon." *Georgetown Journal of International Affairs* 23, no. 1 (2022): 114-122.

Olowu, Dejo. "Southern Sudan beyond Self-Determination: Lessons, Challenges and Prospects." *India Quarterly* 67, no. 4 (2011): 291-306.

Panigrahi, D. N. *India's Partition: the Story of Imperialism in Retreat*. London: Routledge, 2004.

Parkinson, John. "Deliberative Democracy and Legitimacy." In *Deliberating in the Real World*. Oxford: Oxford University Press, 2006.

Pedersen, Susan. "Back to the League of Nations." *The American Historical Review* 112, no. 4 (2007): 1091–1117.

Pettit, Philip. *On the People's Terms: A Republican Theory and Model of Democracy*. Cambridge: Cambridge University Press, 2012.

Piciocchi, Cinzia. *Courts, Pluralism and Law in the Everyday: Food, Clothing and Days of Rest*. Milton: Taylor & Francis Group, 2023.

Plato, and Benjamin Jowett. *The Republic*. Translated by Benjamin Jowett. Minneapolis, Minnesota: First Avenue Editions, 2015.

Pogge, Thomas. "Priorities of Global Justice." *Metaphilosophy* 32, no. 1-2 (2001): 6–24.

Polzler, Thomas. "Basic Needs in Normative Contexts." Philosophy Compass 16, no. 5 (2021).

Pommerolle, Marie-Emmanuelle and Hans de Marie Heungoup. "The "Anglophone Crisis": A Tale of the Cameroonian Postcolony." *African Affairs* 116, no. 464 (2017): 526-538.

Quane, Helen. "Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?" *Oxford Journal of Legal Studies* 33, no. 4 (2013): 675–702.

Qvortrup, Matt. "Voting on Independence and National Issues: A Historical and Comparative Study of Referendums on Self-Determination and Secession." *Revue française de civilisation britannique* 20, no. 2 (2015).

Qvortrup, Matt. *Independence Referendums: History, Practice and Outcomes* (The National Research Institute of Papau New Guinea, 2018).

Raimondi, Francesca. "The Presumption of Political Freedom: Deconstructing the Origins of Democracy." *Symposium (Canadian Society for Continental Philosophy)* 17, no. 1 (2013): 150–169.

Rawls, John, *The Law of Peoples; with, The Idea of Public Reason Revisited*. Cambridge, Mass.: Harvard University Press, 1999.

Rawls, John. *A Theory of Justice*. Original ed. Cambridge, Mass: Belknap Press of Harvard University Press, 1971.

Rawls, John. *Political Liberalism*. Expanded ed. New York: Columbia University Press, 2005.

Reid, Kyla. 'Against the Right of Self-Determination.' (August 9, 2011). Available at SSRN: https://ssrn.com/abstract=1905257 or http://dx.doi.org/10.2139/ssrn.1905257

Reuter, Tina Kempin. "The Right to Self-Determination of Ethnic Groups: The Canton of Jura in Switzerland." *International journal on minority and group rights* 23, no. 2 (2016): 250–269.

Reyes, Antonio. "Virtual Communities: Interaction, Identity and Authority in Digital Communication." *Text & talk* 39, no. 1 (2018): 99–120.

Roeder, Philip G. *National Secession: Persuasion and Violence in Independence Campaigns*. Ithaca: Cornell University Press, 2018.

Roughan, Nicole. "The role of Recognition in Authority: Roles, Relations, and Reasons." *Jurisprudence* 14, no. 2 (2022): 171-201.

Russel, Ruth. *United Nations: A History of the United Nations Charter*. Washington D.C., The Brookings Institution, 1958.

Salman, M.S. Salman. "South Sudan Road to Independence: Broken Promised and Lost Opportunities." *Global Business and Development Law Journal* 26, no. 2 (2013) 343-414.

Saul, Matthew. "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?" *Human rights law review* 11, no. 4 (2011): 609–644.

Schmidt, Sebastian. "To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature." *International Studies Quarterly* 55, no. 3 (2011): 601–623.

Schoenberg, Harris. "Limits of Self-Determination." *Israel Handbook on Human Rights* 6 (1976): 91-103.

Schumpeter, Joseph A. *Capitalism, Socialism and Democracy.* 4th ed. London: Unwin University Books, 1954.

Scott, George. *The Rise and Fall of the League of Nations.* London: Hutchinson, 1973.

Senese, Salvatore. "External and Internal Self-Determination." *Social justice* 16, no. 35 (1989): 19–25.

Seremani, Tapiwa, Carine Farias, and Stewart Clegg. "New Order and Old Institutions: South Africa and the Institutional Work of the Truth and Reconciliation Commission." *Organization studies* 43, no. 4 (2022): 573–593.

Shelton, Dinah. "Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon." *The American Journal of International Law* 105, no. 1 (2011): 60–81.

Shrinkhal, Rashwet. "'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal." *AlterNative : an international journal of indigenous peoples* 17, no. 1 (2021): 71–82.

Suodenjoki, Sami. "Informing as National Indifference? The Case of Finnish Citizens' Collaboration with the Russian Authorities, 1899–1917." Journal of Finnish studies 25, no. 2 (2022): 253–279.

Symeonides, Symeon. "Codification and Flexibility in Private International Law." *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* 2011.

Teson, Fernando. 'Introduction: The Conundrum of Self-Determination'. In Fernando Teson (ed), *The Theory of Self-Determination* (Cambridge University Press 2016).

Toki, Valmaine. "Decolonization and the Right of Self-Determination for the Pacific." *Studies in Law, Politics, and Society* 70, no. 70 (2016): 181–207.

Tso, Tom. "The Process of Decision Making in Tribal Courts." *Arizona Law Review* 31 (1989): 225.

Ulrika, A. "Coping Mechanisms Among the Finland-Swedes." *Folklore* 124, no. 1 (2013): 15–27.

van Niekerk, Gardiol. "State Initiatives to Incorporate Non-State Laws into the Official Legal Order: a Denial of Legal Pluralism?" *The Comparative and international law journal of southern Africa* 34, no. 3 (2001): 349–361.

Vinuales, Jorge E. *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law.* Cambridge: Cambridge University Press, 2020.

Vismara, Elena. *The Contemporary Nature of Tribalism. Anthropological Insights on the Libyan Case.* Bergen: Chr. Mischelsen Institute, 2018.

Walzer, Michael. *Spheres of Justice: A Defense of Pluralism and Equality.* New York: Basic Books, 1983.

Weldehaimanot, Simon. "The ACHPR in the Case of Southern Cameroons." *Sur: International Journal on Human Rights* 9, no. 16 (2012): 85-106.

Wolff, Robert. *In Defense of Anarchism.* New York: Harper & Row, 1970.

Xanthaki, Alexandra. "Multiculturalism and International Law: Discussing Universal Standards." Human rights quarterly 32, no. 1 (2010): 21–48.

Yates, J. Frank, and Stephanie de Oliveira. "Culture and Decision Making." *Organizational behavior and human decision processes* 136 (2016): 106–118.

Young, Iris Marion, "Self-Determination as a Principle of Justice." *Philosophical Forum* 11, no. 30 (1979): 31.

Young, Iris Marion, *Inclusion and Democracy*. Oxford: Oxford University Press, 2000.

Yu, Andy. "Direct Discrimination and Indirect Discrimination: A Distinction with a Difference." *The University of Western Ontario journal of legal studies* 9, no. 2 (2019).

Zardo, Mario Noel Leoni. "Gender Inequality and Indigenous Peoples' Right to Self-Determination and Culture." Amsterdam University International Law Review 28, no.4 (2013): 1053-1089.