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# Untangling the International Law on Self-Determination

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I for ne fight not for glory, nor riches, nor honours, but for Freedom alone,  
which no good man gives up except with his life.





## Self-determination: a legal concept?

- Autonomy, nationhood, statehood: clear potential for conflict, both violent and ideational
- Multiple and overlapping appeals to the law: was Marx right? ('between equal rights, force decides'?) Or is there any place for law to mediate and reduce conflict?
- Self-determination and territorial integrity in a false opposition; they are not opposites
- Taking a practical-historical approach, let us reconstruct *four forms* of self-determination



## Classic UN authorities on self-determination

- **The Charter of the United Nations (1945):**

Article 1: “The Purposes of the United Nations are:  
[...]

“2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples[...]

- **UN General Assembly Resolution 1514(XV) (1960):**

Paragraph 2:

“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development”

- **The UN Human Rights Covenants, 1966:**

Common Article 1:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

- **Declaration on Friendly Relations, annexed to UN General Assembly Resolution 2625(XXV) (1970):**

Principle 5:

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, 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.

“Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter[.]”

# The 'Essential' Character of Self-determination



**East Timor (Portugal v Australia),  
Merits, Judgment, (1995) ICJ Reports  
90, at [29]:**

“In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable [...]; it is one of the essential principles of contemporary international law.”

**Legal Consequences of the  
Separation of the Chagos  
Archipelago from Mauritius in 1965,  
Advisory Opinion of 25 February  
2019, ICJ General List no. 169, at  
[161]:**

“In the Court’s view, the law on self-determination constitutes the applicable international law[.]”



## Beyond the internal-external binary

- Traditionally, international lawyers have relied upon the ‘internal’ and ‘external’ classification
- Internal self-determination: no adjustments to existing boundaries, territorial integrity remains intact
  - Relies on participation of relevant people in self-governance
  - Yet resting on two core principles that have outward effect:
    - Legitimacy of governance rests on the consent or will of the people
    - No external or foreign interference, to be determined internally by the people—or else illegitimate
- External self-determination: claims to territorial autonomy and secession: clear conflict with territorial integrity
  - Broad range of practices associated with it—unacceptably vague
  - The unifying effect (a new sovereignty, the end of an existing sovereignty) insufficient: conceptually confusing



## Disentangling self-determination

- Four *independent and distinct forms* of self-determination in fact detectable in practice—from 14<sup>th</sup> century Scotland to *Chagos Islands*:
  - *Polity-based*: people in a political community claiming they form an autonomous unit, equal to others
  - *Colonial*: independence in the face of domination by another
  - *Remedial*: redress against a severe abuse of rights vis-à-vis other groups that has shattered political community
  - *Identitarian*: claim to autonomy not based in political community but in shared characteristic, such as culture, religion or language



## Polity-based self-determination

- Classic Western formulation used in American and French Revolutions
- The form of government of a State is determined by the collective will of its people (*pouvoir constituant*)
- French Declaration: sovereignty lies in the Nation, above and beyond any corporate body or individual: they are aggregated into one unit
- American Declaration of Independence lay in lack of legitimate representation in governance
- Widely copied throughout the 19<sup>th</sup> century by national and secessionist movements in Europe & Latin America
- Foundational principle of international law reflected in *sovereign equality* (Art 1 UN Charter) and *non-interference* (Art 2(1) and Art 2(4) UN Charter)
- Arguably the essence of statehood and with it, the essence of international law as a State-based system: the State as a *fact*





## Identitarian self-determination

- Departure from polity-based self-determination, though might lead to the creation of a new polity
- Claim of independence by a group *within an existing State* based on some shared character or identity between individuals
- In fact practice is relatively limited as usually secessionary claim arises out of other grievances (see remedial secession)
  - Norway, 1814 and 1905 (citing no historical wrongs)
  - \*\*\*Potentially, in a different sense, the logic behind the national movements to unify Italy and Germany in the 19<sup>th</sup> century, as well as various Pan-American movements
  - Quebec referendum, 1995
  - Scotland referendum, 2014
  - Catalonia referendum, 2017
- Fundamentally reformist/revolutionary impulse: the existing polity is not sufficient, and either internal reform or dissolution must take place
- Identity of the group is a *fact*, and political arrangements *ought* to flow from such fact; territorial integrity must yield!
- *Kosovo Advisory Opinion* did no favours to identity-based claims

# Remedial self-determination



- Though its legal character today is the ‘hot topic’ (*Kosovo, Katanga Peoples’ Congress, Secession of Quebec*), there are deep historical roots and substantial practice
- The link to identitarian self-determination perhaps opportunistic
- Conceptually: rests on a notion that internal arrangements have failed, and such failure provides justification for reform/revolution (American revolution: tax claims; Haitian revolution: slavery)
- Historical practice of States invoking remedial self-determination/secession too abundant to mention: Venezuela, Belgium, Greece, Finland, Liberia
- Yet GA Declaration on Friendly Relations, 1970: ‘safeguard clause’
  - Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour



## Colonial self-determination

- Early ‘colonies’ that fit any definition thereof (Ireland, the British colonies in America, the Boers) did not invoke colonial self-determination
- Generally understood in our Charter era (e.g. Mandate and Trusteeship systems), as the notion of ‘colony’ has generally been understood in Europe’s imperial expansion
- Wilson’s Fourteen Points & Lenin’s Socialist International perhaps the clearest early articulations against colonialism *per se*
- Clearest legal basis in the 20<sup>th</sup> century and justified the trebling of UN membership from 1950-1975—but not its quadrupling
- *Namibia, Western Sahara, East Timor, Chagos Islands*: clear conceptual thread progressively in favour of colonial self-determination—but notably not *jus cogens* in *Chagos!* (did the minority get it right?)
- Seems rooted in political consensus as to colonialism *per se* rather than philosophical argument: why does the ‘happy colony’ (Falklands, Gibraltar, Greenland) still have the right to secession?



## Why taxonomy matters

- Sparks: ‘species’ of self-determination within a wider *genus*
- Though all these claims can potentially be accepted and institutionalised—thus generating legal rights—in practice such recognition *through law* has hardly been uniform (favouring polity-based and colonial self-determination claims)
- The positivist can make better sense of practice
- The moral philosopher (natural lawyer) can understand the foundations behind the various claims
- Critical scholarship: can identify the premises that structure the discourse relating to self-determination
- Interactions between the *four forms*:
  - Polity-based self-determination structurally excludes the other three forms: it extends to existing States!
  - Colonial self-determination rests on political and legal consensus; though clearly *related* to the latter two, it *need not* rest on them
  - Identitarian and remedial claims rest on social and historical facts, and combinations thereof

## Further reading



Forthcoming publication (in press, out by December):

- G Hernández & T Sparks, 'Categorising Self-Determination: Four Forms', forthcoming in (2021) 63 *German Year Book of International Law*