RETHINKING SELF-DETERMINATION

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Abstract

This article seeks to find an answer to the question of what it means to be self-determining by exploring the relationship between self-determination and statehood in the post-colonial context. It contends that statehood should not be understood as the necessary end of the right to self-determination. Rather, being self-determining means that a people are able to pursue their interests. That may be achieved by the attainment of independent statehood, but it may also be achieved by a variety of arrangements involving degrees of autonomy within existing states, where the interests of states and peoples are merged.

The right to self-determination easily qualifies as one of the most controversial norms of international law.[1] According to hitherto prevailing doctrine, self-determination was concerned with the right of a people to become an independent state.[2] This has proved both the attraction and tragedy of the right; for although it implies the inviting notion of popular sovereignty, in practice it stimulates instability and disorder by licensing the disintegration of existing states.[3] Stated in the abstract, self-determination conveys a general principle most people will immediately endorse. Yet paradoxically, the more concrete it is made, the more controversial it appears.[4] This has led Cassese to posit that self-determination features a "built-in ambivalence", in that it is attractive so long as it is only applied to others; once realised, it undermines both internal and external stability.[5]

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1 J Klabbers "The Right to be Taken Seriously: Self-Determination in International Law" (2006) 28 *HumRtsQ* 186 at 186.

2 J Crawford *The Creation of States in International Law* (2nd ed, OUP, Oxford, 2006) at 107.

3 C Tomuschat "Self-Determination in a Post-Colonial World" in C Tomuschat (ed) *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht 1993) at 11; Klabbers, above n 1, at 187.

4 M Koskenniemi "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 4 *ICLQ* 241 at 264.

5 A Cassese *Self-Determination of Peoples: A Legal Reappraisal* (CUP, Cambridge 1995) at 5–6.

Self-determination has always been plagued by the problem that the exercise of self-determination by one group automatically entails the denial of the same right to another. The Aaland Islands dispute of the 1920s made clear that allowing Swedish-speaking Finns to separate from Finland would compromise the self-determination of the Finns. The legitimacy of Finnish independence would surely be undermined if the Finns constituted not one, but two or more peoples.[6] Self-Determination therefore both supports and challenges statehood, promoting both the integrity and political independence of the state as well as a substate peoples' right to self-government and secession.[7] This conceptual conflict is manifested in the legal tension between the right of peoples to self-determination and the right of states to territorial integrity.[8]

The development of self-determination as an international legal right was defined by the politics of decolonisation. Through providing the legal basis for statehood for former colonies, self-determination facilitated the creation of approximately 70 per cent of states in the world today.[9] Yet the application of self-determination has not been so straightforward outside that context. Self-determination has proved a sensitive issue, marred by confusing state practice, deceptively complex resolutions of international organisations and scant and reticent jurisprudence from courts.[10] Very few groups' claims to self-determination have led to independence;[11] some have achieved self-government without recognition;[12] and others have received intermediate forms of recognition.[13]

Yet the right to self-determination remains highly relevant. It is frequently and widely sought. Most wars of the last half-century have been fought over issues of group autonomy and independence.[14] Politically active substate groups are present in 116 of the world's largest 161 states.[15] Together, such

6 See "Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aland Islands Question" in *La Question des Iles d'Aland: Documents diplomatiques publies par le Ministere des Affaires Etrangeres* (1920); see also Klabbers, above n 1, at 190.

7 Koskenniemi, above n 4, at 245–249.

8 *Fronteir Dispute (Burkina Faso v Republic of Mali)* [1986] ICJ Reports 554 at [25]; N Tsagourias "International Community, Recognition of States and Political Cloning" in C Warbrick, S Tierney (eds), *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, London 2006) at 229.

9 T Oommen "New Nationalism and Collective Rights: The Case of South Asia" in S May, T Modood, J Squires (eds) *Ethnicity, Nationalism and Minority Rights* (CUP, Cambridge, 2004) at 128.

10 Cassese, above n 5, at 2.

11 Eritrea is one exception.

12 For example, Somaliland since 1996.

13 For example, Palestine.

14 T Gurr *Peoples Versus States: Minorities at Risk in the New Century* (United States Institute of Peace Press, Washington, DC, 2000) at 195.

15 At 195.

groups constitute one sixth of the global population. Substate group autonomy is therefore very much a live issue.

In light of this, this essay seeks to provide an account of the right to self-determination adjusted for the needs of the post-colonial world. This account will draw from a reappraisal of the relationship between self-determination and statehood, which it has been generally understood to guarantee. The essay seeks to answer what self-determination might guarantee for peoples seeking to rely on it, with particular focus on whether statehood is a necessary aspect of the right, or whether an alternative approach may hold more promise in the post-colonial era.

Part I traverses the development of the right to self-determination, from its conceptual origins to its adoption into international law. Part II considers the problems that have arisen in practice from approaching self-determination as a right to statehood, and their implications. Particular reference is made to the contrast between the application of the right to populations of former colonies and other substate peoples, and to the subordination of collective rights in the international legal system. Part III makes the case for reappraising the right. It begins by assessing whether statehood is the end of self-determination, or whether it is better construed as a means of achieving it. Furthermore, it considers whether statehood is capable of acting as a legal entitlement, and provides an alternative theoretical narrative for self-determination which seeks to merge the interests of states and peoples. Part IV outlines a more nuanced and holistic conception of self-determination as a peoples' right to pursue their own interests, drawing from the lessons derived in the parts preceding it.

Limitations

This essay does not seek to define 'peoples' entitled to self-determination. Though that question is important, this essay is nonetheless confined to reappraising what the right might guarantee for peoples seeking to rely on it, with particular reference to the relationship between self-determination and statehood. Regarding beneficiaries of the right, this essay will do no more than here observe that despite the lack of agreement on how 'peoples' should be defined in the abstract, claims of particular groups to constitute a people often go unchallenged. The International Court of Justice (ICJ) has readily recognized peoples in the *Western Sahara*,[16] *East Timor*[17] and *Israeli Wall* decisions.[18] The Badinter Committee similarly differentiated between various peoples after the dissolution of Yugoslavia.[19] It is the empowerment

16 *Western Sahara (Advisory Opinion)* [1975] ICJ Reports 12.

17 *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Reports 90.

18 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, at [118].

19 Badinter Arbitration Committee, Opinion No. 2, reproduced in A Pellet "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples" 3 *EJIL* (1992) 178.

given to a people by the right to self-determination and the implications this poses for states that explains why states are so anxious to eschew recognising given ethnic groups as "peoples, rather than any actual complexity with recognizing a people in practice."[20] Therefore, the development of a more workable understanding of the content of the right may well reduce the contention obfuscating definition of 'peoples'.[21]

Moreover, peoples who may seek to rely on the right to self-determination will largely be compendiously referred to as 'peoples', 'substate peoples' or 'substate groups'. For simplicity's sake, this essay treats peoples generically and so draws no distinction between indigenous peoples, ethno-nationalist groups or other peoples for whom the right is relevant. It is hoped that the understanding of self-determination advanced at the conclusion of this paper is sufficiently flexible to accommodate the differences between these groups. Further, it is recognised that though the term 'substate' is used, some peoples are located in more than one state and some may also constitute a majority in particular states. The use of 'substate' is not intended to exclude such groups. For this reason, generic use of the term 'minorities' will generally be avoided.

I. Genesis of the Right to Self-Determination

The concept of self-determination has a pedigree of some vintage. It is traceable at least to the Hebrews' exodus from Egypt with the intent of forming their own nation, estimated to have occurred in approximately 1000 BC.[22] In the modern era, the idea of self-determination originated in enlightenment era philosophy on political nationalism.[23] Reflected in the American Declaration of Independence, this held that governments derive "… their just powers from the consent of the governed" and that "… it is the right of the people to alter or to abolish it, and to institute new government";[24] an idea further shaped by the French Revolution of 1789. In the 19th and early 20th Centuries, self-determination was interpreted by nationalist movements as meaning each nation has the right to constitute an independent state, and accordingly that only nationally homogenous states are legitimate.[25]

Self-Determination gained political currency in the aftermath of World War I. In his seminal *Fourteen Points Address*, United States President Woodrow Wilson called for the restructuring of states according to nationalist desires to facilitate "autonomous development" of the peoples

20 Tomuschat, above n 3, at 12.
21 Klabbers, above n 1, at 203.
22 Exodus 1:2, *The Bible*; T Franck "Emerging Right to Democratic Governance" (1992) 86 *Am. Jur. Int'l Law* 46 at 53.
23 Koskenniemi, above n 4, at 242.
24 Declaration of Independence of the United States of America, 4 July 1776, Preamble.
25 D Thurer, T Burri "Self-Determination" in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008, online edition <www.mpepil.com>) at [2].

concerned.[26] Although not fully realised in the Paris Peace Treaties, Wilson's call for self-determination was reflected in plebiscites held by the Allies in disputed areas and provided the basis of the mandates system established in the Covenant of the League of Nations.[27] The Versailles Peace Conference itself authorized 26 consultations with different European groups seeking self-determination, leading to the independence of states including Poland and Czechoslovakia.[28] However self-determination was not applied to peoples within the victorious states; so peoples such as the Flemish and Irish were left without satisfaction.[29] Self-determination was understood as a political principle rather than a general legal right at this time. In the context of the Aaland Islands dispute, the International Commission of Jurists was prepared to find the principle may exceptionally guide the establishment of new states where the continuance of existing states is uncertain, but could not generally apply to justify the dismemberment of established states.[30]

After the Second World War self-determination became the most dynamic concept in international relations.[31] State and UN practice gave the principle considerable legal significance. The 1945 Charter of the United Nations at Article 1(2) states a purpose of the United Nations is to "… develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…". Article 55 refers to self-determination as one of several principles informing the United Nations' promotion of economic, social and cultural growth, and it is implicitly referred to in Articles 73 and 76(b) as informing the administration of Non-Self-Governing and Trust Territories. These articles gave Trustee states clear obligations to promote progressive development toward self-government or independence within trust territories in accordance with the wishes of the peoples concerned. Self-determination was seen to require democratic consultation with colonial peoples, legitimated by an international presence at elections and plebiscites.[32] The inclusion of self-determination in the charter marks an important turning point, signalling its maturing from a political postulate to a legal standard of behaviour.[33]

26 Reproduced in *Public Papers of Woodrow Wilson*, R Baker and W Dodd (eds), 1927, 155-162; see in particular points V and IX-XIII. Self-determination was also promoted by Lenin, though for the different agenda of facilitating the realisation of worldwide socialism; see Cassese, above n 5, at 13.

27 Covenant of the League of Nations, [1919] UKTS 4 (Cmd. 153)/[1920] ATS 1/[1920] ATS 3 (signed 29 April 1919, entered into force 10 January 1920), Article 22.

28 Franck, above n 22, at 92, 53.

29 M Craven 'Statehood, Self-Determination and Recognition', in M Evans (ed), *International Law* (3rd ed, OUP, Oxford 2010) at 231.

30 International Commission of Jurists, above n 6, at 68–70.

31 Franck, above n 22 at 53.

32 At 55.

33 Cassese, above n 5, at 43.

Since the Charter, self-determination has been addressed and developed in so many UN conventions and resolutions that their sheer number makes enumeration impossible.[34] Most notably, the identical first articles of the twin 1966 International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR) provided in universal terms that "[a]ll 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." The UN General Assembly has also affirmed the right in the 1960 Decolonisation Declaration,[35] the 1970 Friendly Relations Declaration,[36] the 1974 Helsinki Final Act,[37] and 1993 Vienna Declaration.[38] The UN Security Council has supported the application of the right in particular contexts including Namibia and Western Sahara.[39]

Despite this extensive affirmation, critics have argued self-determination is still no more than a political principle because it is too vague and too complex to entail specific rights and obligations.[40] During the drafting of the twin 1966 covenants, Western states in particular initially argued self-determination was merely an ill-defined political principle, unsuited to treaties enumerating individual and not collective rights.[41] Yet proponents successfully insisted self-determination was fundamental and a precondition to the enjoyment of all other enumerated rights and freedoms. It was consequently given pride of place in the Covenants. Accordingly, by the end of the 1970s, most textbooks addressed self-determination as a legal right.[42] Moreover, the right has arguably become an international legal custom authorizing independence, at least in the context of decolonisation.[43] It is well accepted that UN General Assembly Resolutions can have quasi-legal implications, including relevance for the development of international legal customs, where they are passed

34 K Doehring, "Self-Determination" in B Simma (ed) *The Charter of the United Nations: A Commentary* (1994) at 70.

35 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res 1514 (XV) 14 December 1960, Article 2 (hereafter "Decolonisation Declaration").

36 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (hereafter "Friendly Relations Declaration").

37 Final Act of the Conference on Security and Cooperation in Europe, 14 ILM 1292 (1975), at VIII (hereafter "Helsinki Final Act").

38 1993 Vienna Declaration and Programme of Action (adopted by the World Conference on Human Rights in Vienna, 25 June 1993) at 2 (hereafter "Vienna Declaration").

39 See for example UNSC Res 301, 20 October 1971 (Namibia); UNSC Res 377, 22 October 1975 (Western Sahara); UNSC Res 384, 22 December 1975 (Portugese Timor); UNSC Res 1598, 28 April 2005 (Western Sahara).

40 Thurer, Burri , above n 25, at [8].

41 Franck, above n 22, at 58.

42 Koskenniemi, above n 4, at 242.

43 Cassese, above n 5, at 171; A Rosas "Internal Self-Determination" in C Tomuschat, (ed) *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht 1993) at 247.

by a large majority and acted on, because they constitute evidence of state practice and belief.[44] Aside from its status as a right, self-determination has been treated as an interpretive principle for international law, a standard of legitimacy for new international legal developments, and a principled basis for negotiations to resolve international disputes.[45]

II. Self-Determination and the Restriction of Statehood

Though the consistent and extensive affirmation of self-determination outlined above paints a rosy portrait of its development, closer inspection reveals the canvass is tainted with the stains of inconsistent application and unmet expectations. This is because although self-determination has generally been equated with the attainment of statehood, states have adamantly resisted the possibility of a right to secede for peoples other than colonial populations. Outside that particular context, territorial integrity and sovereign rights have been consistently regarded as of paramount importance.[46] Consequently, populations of colonies were able to invoke the right to attain independence, while substate peoples within the former colonies and other states were not.[47]

This has led to significant problems with the traditional understanding of self-determination as a right to statehood. Firstly, self-determination has only led to statehood for colonial populations. Consequently, substate peoples have encountered the catch-22 that self-determination can be used to escape oppressive colonial regimes, but not oppression in post-colonial states. Secondly, the attainment of statehood under the rubric of external self-determination has proven elusive outside the colonial context. Meanwhile, the alternative model of internal self-determination has suffered from inconsistent and inadequate development. Thirdly, the development of the right has demonstrated that understanding self-determination as statehood has proved fruitless in an international legal system that subordinates collective rights.

A. Self-Determination and Colonies

The Charter of the United Nations treats self-determination in vague terms, providing no definition of what it entails despite its inclusion as a purpose of the organisation.[48] Explication therefore fell to subsequent resolutions and

44 *Fisheries Jurisdiction Case (Second Phase)* [1974] ICJ Reports 3, at 162 per Judge Petern.

45 Thurer, Burri, above n 25, at [14], [28], [30]; though notable, these functions of self-determination are not the focus of this paper.

46 Cassese, above n 5, at 122.

47 Albeit with some exceptions.

48 Cassese, above n 5, at 48–52.

conventions. Through this elucidation, the capacity for self-determination to lead to statehood was effectively restricted to the populations of colonies, to the exclusion of substate peoples. The Decolonisation Declaration restricted self-determination to the victims of alien subjugation, domination or exploitation. This terminology was understood as referring to those colonised by European powers.[49] In practice, defining the beneficiaries of the right by their subjugation and not their nationality meant colonial populations could be treated as homogenous groups. This is supported by Article 6 of the Declaration, which prohibits disruption of the territorial integrity of colonial countries. Similarly, though the identical first articles of both the ICCPR and ICESCR framed the right in universal language, Article 1(3) colours "all peoples" with reference to Non-Self-Governing and Trust Territories, thus implicitly restricting the principle to the colonial context.[50] This is furthered by separate provision for the rights of minorities in Article 27, which was intended to protect national minorities instead of self-determination.[51]

The Friendly Relations Declaration, Helsinki Final Act and Vienna Declaration continued this restrictive approach to the right. The language of the Friendly Relations Declaration again couches self-determination as a general right, but this is affected by explicit reference to ending colonialism and identifying the subjection of peoples to alien subjugation as breaching the right.[52] Moreover, the right is qualified:[53]

> 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.

Self-determination is therefore explicitly restricted by states' rights to territorial integrity.[54] The language of the Vienna Declaration essentially mirrors that in the Friendly Relations Declaration.[55] While the Helsinki Final Act does not colour the right with colonial references to alien subjugation,[56] it

49 Decolonisation Declaration, Article 1 as informing Article 2.

50 J Dilk "Re-evaluating Self-Determination in a post-colonial World" (2010) 16 *Buff Hum Rts L Rev* 289 at 295.

51 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel Kehl, 1993) at 19–20, referring to the travaux preparatoires.

52 Friendly Relations Declaration, Principle V.

53 Friendly Relations Declaration, Principle V (7).

54 Koskenniemi, above n 4, at 242.

55 Vienna Declaration, at 2.

56 Helsinki Final Act, Principle VIII.

also promotes the inviolability of frontiers and territorial integrity in absolute language.[57] This posed no issue for decolonisation because colonies were understood to be territorially distinct from the state, so their independence did not disrupt state boundaries.[58] For peoples other than colonial populations, the affirmation of territorial integrity precluded the exercise of self-determination from leading to the same result.

The right was therefore tailored to treat peoples subjected to alien subjugation, meaning populations of colonies, differently to other peoples, particularly the substate groups within them. All peoples are entitled to self-determination, but the commitment to territorial integrity, scholastically known as *uti possidetis*, meant colonial peoples could become independent while the secession of substate groups within colonies was not legitimated.[59] This served the interests of the imperial powers because it enabled de-colonisation to proceed without getting lost in the sometimes paralytically complex socio-political realities of colonial territories, thus facilitating a simple dissolution of colonial rule.[60] Yet such a strict limitation of the right is an arbitrary distinction, purporting to deny self-determination to substate groups while ignoring whether populations arranged under colonial borders are at all homogenous. In fact, many are not. Obamefi Awolowo, Premier of the Western Region of Nigeria, observed that:[61]

> Nigeria is not a nation. It is a mere geographical expression. There are no 'Nigerians' in the same sense as there are 'English,' 'Welsh,' or 'French.' The word Nigerian is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not.

The creation of such unfounded distinctions between comparable situations of alien rule erodes the legitimacy of the right.[62] The political nationalism from which the right originated made no distinction between peoples under colonial or any other kind of foreign rule.[63] Moreover, the application of *uti possidetis* in the determination of post-colonial boundaries sits uneasily with the official ideology that decolonisation was to restore authentic communities destroyed by alien rule.[64]

57 Helsinki Final Act, Principles III and IV respectively.
58 Cassese, above n 5, at 334; J Duursma "Preventing and Solving Wars of Secession: Recent Unorthodox Views on the Use of Force" in G Kreijen (ed) *State, Sovereignty and International Governance* (OUP, Oxford, 2002) at 350.
59 Franck, above n 22, at 54.
60 Dilk, above n 50, at 294; Nigeria, for example, includes hundreds of ethnic groups.
61 O Awolowo *Path to Nigerian Freedom* (Faber & Faber, London, 1947) at 47–48.
62 See T Franck, *The Power of Legitimacy among Nations* (OUP, Oxford, 1990) at 153–174.
63 Koskenniemi, above n 4, at 242.
64 At 243.

Changing the content of self-determination for groups other than colonial populations is a significant qualification. As prefaced above, self-determination has generally been understood as being predicated on statehood.[65] This simple equation was the model guiding the decolonisation process.[66] Through this process, self-determination led to the creation of around 70 per cent of states in the world today.[67] Statehood and self-determination have been so closely linked in prevailing thought on the right that some have gone so far as to say secession to form an independent state is "inherent" in self-determination.[68] Affirming the supremacy of territorial integrity over the right to self-determination therefore does not qualify the right so much as directly contradict it. It is perhaps impossible in the post-colonial world to imagine a situation where secession would not disrupt territorial integrity. The promotion of these competing rights has thus compromised the traditional understanding of self-determination by precluding the result expected from it.

Catch-22

Differentiated treatment robbed the peoples of the former colonial world of their right to exercise state-building according to anything but a pre-ordained Western design.[69] Where post-colonial states have inherited multi-ethnic populations and a tendency towards autocracy, this approach creates a perverse catch-22 for substate groups: self-determination can legitimately be invoked to escape oppressive colonial regimes, but not to escape subsequent oppression in the post-colonial state.[70] Thus self-determination was exercisable by Nigeria, the Congo and Mali, but denied to Biafra, Katanga and Azawad. No persuasive, principled distinction was advanced for why these instances of oppression should be treated differently. Undoubtedly, this incoherence has undermined self-determination's legitimacy.[71]

The international community has leant on this approach to self-determination to dismiss autonomy-related conflicts between states and

65 Dilk, above n 50, at 291.

66 Tomuschat, above n 3, at 18.

67 Oommen, above n 9, at 128.

68 Duursma, above n 58, at 353.

69 Dilk, above n 50, at 290.

70 At 300; see also J Heller *Catch 22* (Simon & Schuster, USA, 1961): There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle. "That's some catch, that Catch-22," he observed. "It's the best there is," Doc Daneeka agreed.

71 Franck, above n 22, at 86.

substate peoples as purely domestic issues. This was the express approach of the UN and Organisation of African Unity in respect of the attempted secession of Biafra from Nigeria.[72] Such an approach protects territorial integrity and state sovereignty, but has proved catastrophic. When self-determination is understood as a right to statehood, states seeking to maintain their territory tend to treat claims to self-determination as zero-sum games. The prevalence of autonomy-related conflict evinces that confining those claims as purely domestic issues to be dealt with by states hostile to them has often not proven conducive to peaceful settlement. For Biafra, the ensuing civil war with Nigeria resulted in the loss of millions of lives due to atrocities, disease and starvation due to Nigerian army blockades.[73]

Treating claims to self-determination as purely domestic issues is an illogical attitude considering self-determination conflicts are palpably not domestic matters. Self-determination denied and associated conflict has precipitated the flight of refugees, placing onerous economic, social and political constraints on neighbouring states of refuge.[74] As Yugoslavia amply demonstrated, the confrontation of demands for self-determination and attempts to suppress such moves is capable of generating such a climate of violence that international peace and security are put in jeopardy.[75] Despite this, the international community has maintained this dismissive approach to the rights of substate peoples and largely allowed states free reign on responding to dissent within their own populations.

B. Self-Determination Outside Decolonisation

Although the capacity for self-determination to guarantee statehood was restricted to the populations of former colonies, it is nonetheless clear that the right was intended to apply outside the decolonization context. States negotiating the 1966 Covenants specifically rejected the idea self-determination should only apply to colonies and trust territories. Even those initially disinclined to recognize self-determination as a legal right insisted that if self-determination was to be included, it must apply to peoples everywhere.[76] Yet this spirit of inclusiveness had its limits. As established above, self-determination would only legitimate independent statehood for colonial populations. What self-determination was intended to guarantee for

72 OAU, *Resolution Adopted by the Fourth Ordinary Session of the Assembly of Heads of State and Government*, AGH/Res.51 (IV) (Sept. 11-14, 1967); UN Press Release, Transcript of Press Conference by Secretary-General, U Thant, No. SG/SM/1062, at 13, 14 (Jan. 28, 1969). See also the *Report of the United Nations Human Rights Committee to the General Assembly*, UN Doc A/39/40, 1984, at 143 [6], which promotes the same approach.

73 Dilk, above n 50, at 301.

74 Franck, above n 22, at 54.

75 Tomuschat, above n 3, at 18.

76 Franck, above n 22, at 55.

other potential beneficiaries of the right was left indistinct, except for the negative definition that it would not be statehood.

This creates a dichotomy between internal and external self-determination. External self-determination is the classic conception of self-determination as independence. Internal self-determination is an alternative model, exercisable within existing states. Understanding self-determination as statehood has proven problematic outside the decolonisation context, because external self-determination has been allowed only exceptionally. Meanwhile, internal self-determination has suffered from inconsistent and inadequate development, thus reducing its utility as an alternative.

External Self-Determination

Outside the context of decolonization, the existence of a right to independent statehood has been marginalised. It is generally treated as a separate question from self-determination, instead referred to as a right to secession.[77] Distinguishing the right to self-determination from the question of secession is arguably a cynical attempt to erode the legitimacy of secession by separating it from the pedigree associated with self-determination. Moreover, this approach enables claims to secession to be framed as security issues rather than legitimate political dialogue. This is significant because states can justify bypassing democratic processes, negotiation and discussion when an issue is framed in this manner.[78] In the *Kosovo* decision, Judge Koroma legitimized this attitude by arguing against the ICJ discussing the existence of any right to secession, lest such a judgment be used as an instruction manual for separatist groups.[79]

Although the question of secession is marginalized, it is at least implicitly still recognised as a possible outcome of the right to self-determination. The Friendly Relations Declaration affirms the superiority of the territorial integrity of states, but only to the extent: [80]

> … states [conduct] themselves in compliance with the principle of equal rights and self-determination of peoples … and [are] thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

77 Sometimes termed "remedial secession".

78 W Kymlicka "Justice and Security in the Accomodation of Minority Nationalism" in S May, T Modood, J Squires (eds), *Ethnicity, Nationalism and Minority Rights* (CUP, Cambridge, 2004) at 157.

79 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Reports 403, Separate Opinion of Judge Koroma.

80 Friendly Relations Declaration, V(7).

The possibility of secession is thus logically admitted.[81] It is clear this residual right to secede would be exceptional. State practice would indicate the threshold for a state to be no longer "possessed of a government representing the whole people belonging to the territory" is very high. The African Commission on Human and Peoples Rights has suggested secession would not be acceptable in the absence of concrete evidence of human rights violations of such a magnitude that the territorial integrity of the perpetrating state should be called into question.[82] International acceptance of secession outside the decolonization context is very rare. South Sudan and Kosovo are recent examples, but both were exceptional, justified by the severe and sustained violations of human rights visited on their respective populations by their former governments. As precedents for a right of secession, they set a high threshold of repression.[83]

The legitimacy of attempted secessions tends to be recognized ex post, once de facto secession has effectively already been achieved. This has often only been the case where the former parent state assents to separation, as occurred in the context of decolonisation, in the disintegration of the USSR and Yugoslavia, and in the formation of the Slovak and Czech Republics from Czechoslovakia.[84] Eritrea was only recognized as having successfully seceded to form an independent state after thirty years of conflict with Ethiopia, and only then because Ethiopia agreed to the separation.[85] Similarly, the United Nations avoided taking a stand on the secession of East Pakistan and only admitted Bangladesh after it had emerged and consolidated itself.[86] Therefore, self-determination has only exceptionally led to statehood outside the context of decolonisation.

Internal Self-Determination

Meanwhile, the alternative of internal self-determination has suffered from inadequate and inconsistent development. While some internal self-determination arrangements have arisen, this has occurred on an ad hoc fashion and only in some states, whereas others have resisted the idea.

Internal self-determination is the logical reconciliation between self-determination and territorial integrity. It is envisaged, if indirectly, by the qualification to the right in the Declaration on Friendly Relations.[87] Unfortunately, the instruments establishing self-determination do not specify

81 Cassese, above n 5, at 119.

82 *Katangese Peoples' Congress v Zaire*, Merits, Communication No. 75/92, IHRL 174 (ACHPR 1995).

83 Indeed, some even dispute the extent to which they can be considered precedents: see Thurer, Burri, above n 25, at [42]–[43].

84 Duursma, above n 58, at 353.

85 At 354.

86 Dilk, above n 50, at 305.

87 Cassese, above n 5, at 110.

how this model of the right is to be implemented.[88] Article 1 of the twin Covenants refers to a people freely determining their political status, freely pursuing their economic, social and cultural development and freely disposing of their natural wealth and resources.[89] The Declaration on Friendly Relations provides exercise of the right can involve, aside from statehood, "… the free association or integration with an independent State or the emergence into any other political status freely determined by a people."[90] What these broad statements entail in practice is not clear. Despite finding self-determination to usually be fulfilled internally, the Supreme Court of Canada in *Re Secession of Quebec* did not illuminate what internal self-determination might usually involve beyond repeating this wording from the Declaration.[91] Conversely, some guidance for the particular situation of indigenous peoples' is present in the United Nations Declaration on the Rights of Indigenous Peoples, Article 4 of which provides that indigenous peoples exercising their right to self-determination have the right to autonomy or self-government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous functions.[92]

Internal self-determination could logically be understood as a right to self-government at a regional level, ideally within a federalist constitution. This is the understanding implicit in *Re Secession of Quebec*. A number of states have successfully accommodated substate group claims to self-determination and autonomy through such arrangements. In Canada, the Quebecois enjoy regional autonomy in their own province, as well as representation in the national legislature.[93] Indigenous populations were accorded similar privileges with the formation of the new province of Nunavut in 1999.[94] In Spain, the use of federalism to accommodate substate peoples including the Catalans and Basques is widely agreed to have assisted in consolidating democracy in the post-Franco transition.[95] The formation of the canton Jura in Switzerland in 1979 is exemplary. The canton was created and its proportions determined through a series of referenda at each the federal, regional and local levels of the State.[96] Russia has pre-empted open rebellion through power- and

88 At 124.
89 ICCPR & ICESCR, Art 1.
90 Friendly Relations Declaration, Principle V.
91 *Reference Re Secession of Quebec* [1998] 2 RCS 217.
92 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), Article 4.
93 See *Reference Re Secession of Quebec*, above n 91.
94 Via the Nunavut Act (S.C. 1993, c.28) and the Nunavut Land Claims Agreement Act (S.C. 1993, c.29) (Canada).
95 Kymlicka, above n 78, at 154.
96 Thurer, Burri, above n 25, at 38.

revenue-sharing arrangements with some 40 regional groups, most of whom were asserting sovereignty.[97]

However, this idea is resisted in some quarters out of fear that allocating substate national groups a defined territory and autonomous institutions to administer it gives them the tools for secession.[98] Substate group claims to self-determination and autonomy are accordingly treated as security threats rather than legitimate political discourse because they are framed as disloyal to the state.[99] This enables governments to bypass democratic processes, thus avoiding public discussion of the merits of the issue.[100] In an atmosphere of mutual distrust, governments will avoid making any concessions to ethnic groups claiming jurisdiction over their own matters, out of fear that any such positive response would set in motion a process which could lead to a break-up of the state.[101] This attitude is evident in Eastern and Central European states such as Montenegro, for example, where the presence of an Albanian-language university was deemed a national security threat, leading to its demolition.[102]

Non-territorial autonomy is promoted as an alternative to federalism. This would give substate groups autonomy over their own institutions without creating a territorial basis for secession.[103] Moreover, it avoids the issue that not all substate identities are territorially definable. However, even if this was to avoid securitising the issue of substate group autonomy, it remains controversial because it foregoes accepting the legitimacy of historically and morally informed claims of (some) substate peoples to areas of land. As Kymlicka argues, it is unthinkable that the Scots, Quebecois, Catalans and other groups currently enjoying federal autonomy would willingly revert from it.[104] Therefore, although some peoples presently enjoy internal self-determination, there is no coherent theory of how it should be implemented. Internal self-determination arrangements have developed in an ad hoc fashion, and only in some states. In others, any claim to self-determination has been actively resisted.

The absence of any viable, reliable alternative to external self-determination encourages the use of force by substate groups to achieve de facto secession capable of later affirmation.[105] If claims to internal autonomy are ignored and framed as disloyal and unacceptable, there is no incentive for claimants

97 Gurr, above n 14, at 208; Gurr writes that unfortunately similar compromise proved unreachable in Chechnya, whose leadership refused to settle for anything less than independence.
98 Duursma, above n 58, at 367.
99 Kymlicka, above n 78, at 158.
100 At 157.
101 Tomuschat, above n 3, at 14.
102 Kymlicka, above n 78, at 158.
103 At 165.
104 At 165.
105 Duursma, n 58, 352.

to pursue autonomy within the existing state. This has unfortunately proven conducive to conflict where substate peoples seek secession rather than a nebulous concept of internal self-determination. The prevalence of this form of conflict is evident in the fact most wars of the last half-century have been fought over the issues of group autonomy and independence.[106]

C. Subordination of Collective Rights

The inconsistent approach to the application of self-determination reflects the value framework of the international system, which resists engaging with self-determination as a collective right. The international system is not value-neutral. Western or Eurocentric conceptions of rights are treated as universal and transcendental of particular ideology.[107] Because it is a collective right, self-determination is disadvantaged in a system based on Western-centric conceptions of rights as primarily belonging to individuals. Collective rights are not foreign to Western thinking: rights of free assembly and trade unions involve collective elements.[108] However, but for self-determination, states alone monopolise collective rights to govern. The invocation of a similar right by national collectives challenges states' legitimacy and is accordingly resisted.[109]

Moreover, states are the primary subjects of international law. Substate and indigenous peoples are subordinate in the international legal system.[110] International law is created by states for states, which, through its rules, seek to guarantee stability in their mutual relations.[111] State claims to territorial integrity are considered natural and acceptable in the international legal system because they support, and are supported by, states' position at the top of the international legal hierarchy.[112] In contrast, substate peoples' claims to self-determination challenge states in a system where the approval of states is necessary to advance the claim. These claims are therefore disadvantaged on two levels: the invocation of self-determination by the sub-state group is restricted by the statist paradigm, while the same paradigm supports rights directly inconsistent with it.

The subordination of collective rights is apparent from the manner in which agreements and Resolutions on self-determination qualify the right

106 Gurr,above n 14, at 195.

107 See, for example, the concept of jus cogens norms.

108 Both are enshrined in the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at 20(1) and 23(4).

109 Rosas, above n 43, at 227.

110 For example, only state practice and belief contributes to the development of customary international law.

111 Tomuschat, above n 3, at 4.

112 D Otto "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" (1995) 21 *Syracuse J Intl L & Com* 65 at 70.

with reference to territorial integrity. By ensuring self-determination would pose no threat to territorial integrity, the inequality between states and sub-state nationalists is maintained. Further, it is apparent in the dismissal by the international community of self-determination claims and conflicts outside the colonial context as purely domestic matters, as discussed above.

Moreover, it is present in the reductive and evasive treatment of both external and internal self-determination in the jurisprudence of the United Nations Human Rights Committee (the Committee). The Committee has consistently resisted engaging with self-determination as a collective right by finding it non-justiciable and finding it to have merely interpretive value for analogous individual rights. As long as individuals within the group are found to enjoy rights to culture and non-discrimination, the self-determination of the group is considered to be sufficiently respected.[113]

The Committee is empowered by the Optional Protocol to the ICCPR to hear communications regarding alleged breaches of Covenant rights.[114] It has interpreted this power as extending only to communications regarding individual rights in the Covenant. Though the text of the Optional Protocol uses the term "individual", this was adopted to exclude claims by non-governmental organisations rather than to exclude consideration of non-individual rights.[115] The *Mikmaq* decision saw the Committee refuse to allow standing to a representative of the Mikmaq people because he did not point to any breach of any provisions of the ICCPR that affected him as an individual, finding the collective right of peoples to self-determination was not justiciable under the Optional Protocol.[116] Since then, the Committee has consistently dismissed self-determination arguments within communications as non-justiciable.[117] However, the Committee found communications based on self-determination issues could be heard if they were framed as breaches of Article 27, concerning the individual rights of members of minority groups.[118]

More recently, the Committee held in *Mahuika* that the function of the Article 1 right is to help interpret Article 27.[119] Reducing the affirmatively expressed right to self-determination to merely having interpretive value for analogous individual rights demonstrates a consistent, active refusal to engage with self-determination as a collective right. Moreover, it connects self-

113 Klabbers, above n 1, at 205.

114 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 302 (signed 16 December 1966, entered into force 23 March 1976).

115 Nowak, above n 51, at 18.

116 *AD (Mikmaq Tribal Society) v Canada (Admissibility)* UNHRC 78/1980, UN Doc CCPR/C/22/D/78/1980 (29 July 1984).

117 See for example *Lubicon Lake Band v Canada* [1990] UNHRC 1; UN Doc CCPR/C/38/D/167/1984 (10 May 1990), and *Croes v Netherlands* [1988] UNHRC 14; UN Doc CCPR/C/34/D/164/1984 (16 November 1988).

118 *AD (Mikmaq Tribal Society) v Canada (Admissibility)*, above n 116; see also *Lubicon Lake Band v Canada*, above n 117.

119 *Mahuika v New Zealand* [2000] UNHRC 547/1993, UN Doc CCPR/C/70/D/547/1993 (27 October 2000).

determination with the limitations written into those individual rights, thus undermining the absolute manner in which the right to self-determination is expressed.[120] This approach undermines the group aspect that is so central to self-determination. Breaking down the collective right into rights for the collective's separate members undermines the very thing the collective right seeks to advocate.

Moreover, the ICJ's jurisprudence on the right has been inconsistent and evasive. The Court has generally proved more inclined to treat self-determination as a principle rather than a legal right capable of being enforced.[121] The Court is not in the habit of equating self-determination with secession.[122] Despite the arbitrariness of such a limitation, the ICJ explicitly doubted the application of the right outside the colonial context in the *Kosovo* decision.[123] This was despite the fact the UN General Assembly has recognized the post-colonial application of the right for both Palestine and the inhabitants of South Africa,[124] and the fact the ICJ itself implicitly adopted post-colonial self-determination in the *Israeli Wall* case.[125] The Badinter Committee also assumed the principle applied to the formation of new states from the former Yugoslavia.[126] Previously, the ICJ had affirmed the submission that self-determination is a right *erga omnes*.[127] Yet the Court has also readily affirmed *uti possidetis*, finding self-determination was restricted to former colonial territories whose borders became fixed at independence.[128]

D. Assessment

It has proved both the attraction and tragedy of self-determination that hitherto prevailing doctrine equated it with a right to independent statehood.[129] Understanding self-determination as statehood has proved

120 Cassese, above n 5, at 54.

121 Klabbers, above n 1, at 195-199; referring in particular to *Western Sahara (Advisory Opinion)* [1975] ICJ Reports 12; and *Fronteir Dispute (Burkina Faso v Republic of Mali)*, above n 8.

122 Klabbers, above n 1, at 198.

123 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, above n 79, 82; see in particular Separate Opinion of Judge Koroma, at [4].

124 See, among others, UNGA Res 48/94 [20 December 1993].

125 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n 18, at 118; see in particular Separate Opinion of Judge Higgins, at [30].

126 Badinter Committee, Opinion 2, above n 19.

127 *East Timor (Portugal v Australia)*, above n 17, at [29]. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Reports 16 at 31, and *Western Sahara (Advisory Opinion)*, above n 16.

128 *Fronteir Dispute (Burkina Faso v Mali)*, above n 8, at [20].

129 Tomuschat, above n 3, at 11.

highly problematic outside the process of decolonization. This is because, despite being frequently sought by peoples invoking the right to self-determine, statehood and secession have been adamantly resisted by states. Peoples' efforts to attain statehood through self-determination have therefore largely been frustrated, while the development of the alternative model of internal self-determination has been ad hoc and inconsistently approached. Unfortunately, this international legal position has failed to prevent (if not contributed) to the prevalence of conflicts fought over group autonomy and independence.

III. Self-Determination and Statehood Reassessed

The foregoing analysis chronicles a right with promise, but which has failed to bear fruit for many who have sought to rely on it. This result is ultimately due to the fact that although self-determination was understood to be a right to statehood, it was not designed to apply as one. Consequently, the experience of peoples seeking to invoke the right has differed dramatically between colonial populations and other peoples. But the process of decolonization is over. Palau, the last Trust Territory, became independent in 1994.[130] The end of colonies means self-determination no longer needs to apply differently across different contexts and claimants. This creates the opportunity for a reappraisal of the right to self-determination, with a view to establishing a coherent, workable understanding of the right and what it guarantees for peoples that meets the needs of the post-colonial world.

A proper assessment of what self-determination may guarantee in the post-colonial context requires a re-evaluation of the relationship between self-determination and statehood. The attainability of statehood has defined the right and the experience of those seeking to invoke it. It is therefore pertinent to assess whether it is necessary, or even any longer possible for statehood to be an entitlement of a self-determining people.

This essay now turns to examine the relationship between self-determination and statehood. Firstly, it will argue that the attainment of statehood is better understood as a means to achieving self-determination, rather than as the end of the right itself. Accordingly, statehood is not necessary for the exercise of self-determination. Secondly, it will contend that statehood cannot serve as a legal entitlement for peoples entitled to self-determination because it is a politically determined status. Moreover, it is submitted that self-determination is not a suitable legitimating criteria for statehood. Thirdly, it will posit that, from a theoretical perspective, equating self-determination with statehood is an unduly narrow approach

130 The legal framework for independence on 1 October 1994 was established by Proclamation No. 6726, 59 Fed. Reg. 49,777 (Sept. 27, 1994) and Compact of Free Association with Palau, Pub. L. 101-219, 103 Stat. 1870.

to the right that fails to recognize the importance of relationships between peoples and the states they are connected to. Instead, self-determination should be understood in a manner that appreciates the importance of these connections and which seeks to merge the interests of each actor.

A. Ends and Means

It is clear that self-determination has previously been broadly equated with statehood. Yet there are numerous examples of peoples who have not attained statehood who are nonetheless generally considered to be self-determining; or at least to exercise a significant degree of self-determination.[131] Accordingly, self-determination must be broader than the attainment of statehood alone, capable of being achieved through statehood or other means. Statehood is therefore better understood as one means by which self-determination can be achieved, rather than as its end. However, this begs the question, if statehood is not (or not necessarily) the end of self-determination, what is?

The ICCPR and ICESCR can inform a more nuanced view of self-determination. The twin Covenants provide that, by virtue of the right to self-determination, peoples may not only "freely determine their political status", but also "freely pursue their economic, social and cultural development."[132] The peoples' choice of political status is but one element of the right. The other is the peoples' pursuit of their interests. Reading those elements together, peoples should logically take on a political status that best facilitates their pursuit of those interests. Rather than serving as the essence of the right, the choice of political status is better understood as facilitating the peoples' advancement of their interests, through which the right is fully realized.

This understanding of self-determination is consistent with the historical foundations of the right. President Wilson's call for self-determination was to provide for the "autonomous development" of peoples, and protect them from oppression.[133] Early manifestations of self-determination in the inter-war period lay, not in granting peoples independence, but in holding plebiscites where they could vote for either statehood, affiliation, or integration with an existing state, according to how the people preferred their interests to be advanced and protected.[134] Statehood was merely one political status that might be selected, even if it were often the more attractive choice.

Accordingly, a people can be self-determining without becoming an independent state. Many substate groups in Western states have been successfully accommodated without the dismemberment of the state. Canada, for example, affords both Quebecois and indigenous populations their own provinces within a federal constitution. Similarly, federalism has

131 See the discussion in the previous section on internal self-determination.

132 ICCPR and ICESCR, Article 1(1).

133 See Baker and Dodd, above n 26; see also Dilk, above n 50, at 289.

134 Franck, above n 22, at 53.

been used by Spain to accommodate substate groups such as the Catalans and Basques. The Swiss canton system has facilitated the same treatment for substate groups. These peoples are not considered to not be self-determining, despite their not having attained independence. Moreover, empirical analysis has found substate groups agitating for independence are usually willing to settle for more limited forms of autonomy.[135] This further evinces that statehood is not necessary for self-determination; rather, it is one means by which self-determination can be realised.

That statehood is a means to self-determination is also apparent from the continuous nature of the right. The right to self-determination is not exhausted on attainment of independence; indeed, its utility would be greatly diminished if that were the case.[136]. Self-determination is a continuing entitlement that may be invoked by a people deciding their political status and afterwards to ensure the continuation of that status.[137] The reference to peoples' free pursuit of economic, social and cultural development in the terms of the twin Covenants could not sensibly be understood as anything but an ongoing entitlement.

Understanding the relationship between self-determination and statehood in this manner opens the door to a more holistic and nuanced appreciation of the right. Because the realisation of self-determination does not depend on a people obtaining any specific political status, peoples can focus on finding political arrangements suited to their particular circumstances and the interests they seek to advance.

B. Statehood, Fact and Law

Understanding self-determination as a right to statehood presupposes that statehood is a legally determined status. While statehood undoubtedly carries significant legal implications, the question of whether or not an entity is a state is, in reality, political in nature.[138] Accordingly, statehood cannot serve as a legal entitlement for a people seeking to invoke the right to self-determination.

If statehood were legally determined, there would need to be accepted criteria for distinguishing between states and other entities. Yet international law has traditionally avoided setting criteria for statehood. Classical positivist writing treated states as preceding international law and, therefore, incapable of being defined by it.[139] Although the development of criteria has been

135 Gurr, above n 14, at 208.

136 J Salmon "Internal Aspects of the Right to Self-Determination: towards a Democratic Legitimacy Principle?" in C Tomuschat (ed) *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht, 1993) at 269. See also Thurer, Burri, above n 25, at 22.

137 Cassese, above n 5, at 54.

138 Whether or not statehood *should* be legally or normatively determined is an important question, but nonetheless one beyond the scope of this essay.

139 Koskenniemi, above n 4, at 245.

attempted, states have proven averse to accepting them. The international community rejected definition of statehood by the International Law Commission, in part due to controversy over whether such criteria would apply only to 'new' states, rather than act as a measure by which the validity of existing states could be assessed.[140] The extreme diversity of states makes finding coherent criteria a vexed exercise involving two competing risks. If criteria are too specific, the claims to statehood of numerous existing states may be undermined. Conversely, criteria general enough to include all states may fail to explain why some non-state entities are not states.

The criteria set out in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States is the closest the international community has come to agreed requirements for statehood. Despite being an agreement of the Pan American Union[141] with only 19 signatories, the criteria set in Article 1 of this convention is said to have attained the status of customary international law.[142] Article 1 provides that a state must have a permanent population; defined territory; government; and capacity to enter into relations with other states. No qualitative or quantitative requirements accompany these criteria.[143] Of the two risks set out above, it is clear the drafters were more cognizant of the former.

A state must have a population, but it is not necessary for the population to be of a particular minimum size. The population of Vatican City sits around 800.[144] In contrast, Indian sub-state groups including the Santals and Bihls are denied statehood despite having populations as great as the largest 45 per cent of states.[145] Moreover, there is no requirement that state populations be culturally or ethnically homogenous. As little as 10 per cent of states would remain valid if that were the case.[146]

Similarly, a state must have territory, but this need not be of any particular size or even completely defined.[147] Albania was admitted to the League of Nations in 1920 despite lacking fixed boundaries, and its delineation remained in issue four years later when considered by the Permanent Court of International Justice in the *Monastery of Saint-Naoum*.[148] Israel's territorial borders have remained in dispute since its inception. The United States illustrates territory need not even be contiguous. Furthermore, territorial boundaries need not correspond to ethnic and national communities affected

140 Craven, above n 29, at 220.
141 Now known as the Organisation of American States.
142 Craven, above n 29, at 220.
143 At 220.
144 Vatican City State "Population" <www.vaticanstate.va>.
145 Oommen, above n 9, at 137.
146 At 128.
147 See the *North Sea Continental Shelf Case (Judgement)* [1969] ICJ Reports 3 at [46].
148 *Monastery of Saint-Naoum (Advisory Opinion)* [1924] PCIJ Series B, No. 9.

by them.[149] Borders have often been the result of negotiations between superpowers focusing on strategic military interests, with little regard for geography, ethnicity or commercial convenience.[150]

A state must also have an effective government. This criteria is considered by some as the most crucial because a state's territory and population are essentially defined with reference to the extent of the exercise of governmental power.[151] The International Commission of Jurists in the Aaland Islands' dispute found a new state only exists once it is strong enough to assert itself throughout its territories.[152] Yet states have nonetheless been accepted as states despite lacking effective control. Judge Huber in the *Island of Palma's Case* recognized territorial sovereignty cannot be exercised in fact at every moment on every point of territory.[153] Meanwhile, ineffectiveness is not taken to create space for secession of a de facto effective government. The Supreme Court of Canada in *Re Secession of Quebec* firmly rejected a principle of effectivity giving rise to statehood.[154] The ineffectiveness of governments of failed states has not been taken to allow for the creation of new states. For example, Somalia is a state in name only, having not had an effective government for decades, whereas the relatively effective Somaliland in the north of Somali territory is arguably a state in everything but name.

The final requirement that a state have the capacity to enter into relations with other states is often dismissed as a consequence of statehood rather than a requirement.[155] Though technically correct, this criticism ignores the importance of recognition by other states for distinguishing states from other entities. The indeterminacy of the other mooted criteria leaves recognition as the only effective measure of statehood. Only when a state is recognized as a state does it engage the rights and duties of statehood, including sovereignty and territorial integrity.[156] For example, Croatia declared independence in 1991, but was only treated as a state from 1992, when recognized by the international community.[157] Moreover, a lack of recognition deprives nascent state entities of these rights. One need look no further than the experience of Biafra to see the consequences of a lack of recognition for entities otherwise fulfilling all criteria of statehood.[158]

149 N Yuval-Davis "Borders, Boundaries and the Politics of Belonging" in S May, T Modood, J Squires, J (eds), *Ethnicity, Nationalism and Minority Rights* (CUP, Cambridge, 2004) at 218.

150 *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* Separate Opinion of Judge Ajibola, [1994] ICJ Reports 7 at 6 [8].

151 Crawford, above n 2, at 56.

152 International Commission of Jurists, above n 6.

153 *Island of Palma's Case*, Hague Court Reports 2d 83 (1932) (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. 4rb. Awards 829.

154 At [141] per Judge Huber.

155 Craven, above n 29.

156 Tsagourias, above n 8, at 222.

157 At 224.

158 Biafra is discussed above.

Because recognition determines whether an entity is accorded the rights and duties of statehood, it acts as a constitutive criterion for statehood.[159] Yet recognition is a political act, considered to be a free and discretionary act of the recognising state. Because states are not legally bound to either recognize or refuse recognition, the decision whether to recognise is a politically determined act not dependent on any particular legitimating criteria.[160] The ICJ has held no relevant political factor is excluded from consideration when determining the parallel question of whether to grant UN membership to a nascent state.[161] Moreover, the political nature of recognition is evident from the fact that policymakers, not judges, decide whether to recognise an entity as a state.[162] Courts defer to the advice of the executive when determining the standing of non-recognised entities in domestic courts.[163] Recognition is clearly not approached as a legal question.[164]

It is therefore submitted that statehood is a political question for which no purely legal authority can be constituted.[165] Accordingly, it cannot serve as a legal entitlement for a people seeking to invoke the right to self-determination. The attainability of statehood is better understood as dependent on political considerations. The legitimacy of colonialism had lapsed by the 1960's. Therefore, for colonial peoples, the right to self-determination may have only formalized what politics had already decreed – the granting of independence to the former colonial territories.[166] Because colonies were territorially distinct from the metropolitan state, their independence did not compromise territorial integrity.[167] Outside the context of decolonization, the attainment of independence has been restricted to exceptional cases, such as where the parent state assents to separation,[168] where de facto separation and independence is already achieved,[169] or where extreme human rights violations justify overriding the territorial integrity of the state.[170]

Even if statehood were a legal question, and was, moreover, a consequence of self-determination, this would imply self-determination is a requisite for statehood. Accordingly, self-determination would become a principle of legitimacy for states, implying a state should consist of a 'people'. The state

159 Rather than merely declaratory; for an in-depth analysis on constitutive and declaratory theories of recognition, see Crawford, above n 2, at 3–36.

160 Salmon, above n 136, at 260.

161 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the United Nations Charter) (Advisory Opinion)* [1948] ICJ Reports 56.

162 Tsagourias, above n 8, at 223.

163 *GUR Corporation v Trust Bank of Africa Ltd* [1986] 3 All ER 449; 75 ILR 675 (CA).

164 Whether recognition should be governed by an international legal norm is a separate question beyond the scope of this essay.

165 Craven, above n 29, at 218.

166 Koskenniemi, above n 4, at 241.

167 Duursma, above n 58, at 350.

168 As in the case of the disintegration of the USSR and the division of Czechoslovakia.

169 As in the case of Eritrea and Bangladesh.

170 As in the case of Kosovo.

itself would be reduced to the formal, political shell for which nationhood of a people provides the substance.[171] As stated above, as few as 10 per cent of states are close to ethnically homogenous.[172] Such a standard for states would thus be revolutionary because it would challenge the legitimacy of the vast majority of existing states. Such a requisite is inappropriate on both principled and pragmatic grounds. The principle of non-intervention attaching to sovereignty excludes any compulsory principle of legitimacy. The system relies on the presupposition that states may be constituted and operate in a number of different ways, the choice of which must be respected from outside.[173] Moreover, as is established above, no criterion of legitimacy is applied in the field of recognition of governments.[174] Even if it were appropriate for there to be legitimating criteria for statehood, contemporary debate on the issue centres on whether democracy should be a requisite for a state, not on state composition.[175] Quality of rule is the primary concern, not homogeneity of population. In principle, entitlement to self-determination should not be taken to serve as a criterion of legitimacy for statehood.[176]

Nor should it take on such a role from a pragmatic perspective. The globe hosts nearly 200 states, but also 3,000 linguistic groups and 5,000 national minorities.[177] Former UN Secretary-General Boutros Boutros-Ghali alerted the world to the dangers of self-determination taken too far, warning that: [178]

> If every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult to achieve.

The prospect of 5,000 nationally homogenous independent states inspires at least as much trepidation as admiration.[179] The map cannot simply be redrawn according to available national identifications, because those identifications are not territorially distinct and often overlap.[180] Such a change

171 Koskenniemi, above n 4, at 246.
172 Oommen, above n 9, at 128.
173 Salmon, above n 136, at 259.
174 At 262.
175 See generally Salmon, above n 136, and Franck, above n 22.
176 The question of whether there is or should be any legitimating criteria for statehood is beyond the scope of this essay.
177 W Danspeckgruber, (ed) *The Self-Determination of Peoples: Commmunity, Nation and State in an Interdependent World* (Lynne Reinner, Boulder, 2002) 'Introduction'.
178 B Boutros-Ghali "An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping" UN Doc A/47/277 – S/24111, 1992, at [17].
179 H Hannum *Autonomy, Sovereignty and Self-Determination: the Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1990) at 454.
180 Koskenniemi, above n 4, at 256.

would serve to make self-determination a principle of division, rather than a principle of empowerment, protection and unification as it once was.[181]

C. Individualist and Relational Approaches to Self-Determination

From a theoretical perspective, equating self-determination with statehood is an unduly narrow approach to the right that fails to recognise the importance of relationships between peoples and the states they are connected to. The orthodox understanding of self-determination as independent statehood treats self-determination as a right to non-interference, whereby outsiders have no right to interfere within the jurisdiction of the self-determining people, and the people has no right to interfere with the business of others.[182] This is an individualistic understanding of what it means to be self-determining, reflecting J S Mill's harm principle: that the: [183]

> … only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others... Over himself, over his own body and mind, the individual is sovereign.

On this approach, self-determining peoples, being independent, have no obligations with respect to outsiders and enter into relationships voluntarily. This presupposes peoples are independent of the need for relationships or influence from others within their private sphere.[184] Such an individualist conception of self-determination may have been appropriate in the context of decolonisation, because the exercise of self-determination did not jeopardise existing states. Outside that context, such an individualistic understanding is inadequate because it fails to take into account the importance of the ways peoples seeking to become self-determining and the states they are connected to are related and connected, including through kinship, history and proximity.

This individualist account of self-determination is not the only possible conception of the right. Relational Feminism argues such an image fails to recognize that peoples are embedded in institutional relations that make them interdependent in many ways. Peoples acquire a sense of self through recognition by other actors with whom they have relationships, and act in reference to a complex lattice of social relations that both constrain and

181 Tomuschat, above n 3, at 4.

182 I Young, 'Two concepts of Self-Determination', in S May, T Modood, T and J Squires, J (eds) *Ethnicity, Nationalism and Minority Rights* (CUP, Cambridge, 2004) at 182.

183 J S Mill *On Liberty* (Watts & Co, London, 1929) at 11–12.

184 Young, above n 182, at 183.

enable.[185] Self-determination as non-interference falsely assumes peoples ought to be independent in the sense they are self-reliant and need nothing from others.[186] From a relational perspective, the idea that autonomy consists in the atomised people controlling their sphere independently to the exclusion of others is a dangerous fiction. The fact peoples have these links and relationships should not preclude them from being considered self-determining.

In contrast, a relational account of self-determination holds a more appropriate conception of autonomy should promote the capacity of peoples to pursue their own interests in the context of relationships where others may do the same.[187] Peoples should have the capacity to choose and pursue their own ends because they are peoples, not because they occupy a sphere separate from others. It should be recognised and not denied that peoples are related to those around them in many ways, including through kinship, history and proximity. Peoples and states are not easily separable; the populations of each are often related and integrated within the same geographic areas and rely on the same resources. Rather than promoting independence and non-interference, a relational account of autonomy holds that relationships should be structured to support the maximal pursuit of peoples' ends.[188] This recognises that the way relationships between peoples and states are managed may influence the effectiveness of peoples' self-determination,

Republicanism can inform a similar criticism of the orthodox understanding of self-determination as non-interference. On this account, non-interference is related to self-determination but not equivalent to it.[189] Instead, self-determination is better conceived as non-domination. An agent dominates another where they have the ability to affect the other arbitrarily; that is, without considering their interests and opinions.[190] Understanding self-determination as non-domination means that a people can be self-determining as long as their interests and opinions are considered, and where they need to consider the interests of other agents.[191] Self-determination as non-domination is therefore similar to relational autonomy in that it recognises the importance of social relations, rather than rejecting them. Because peoples and other agents are so embedded in relationships, they effect and are affected by each other, even where they do not intend. This interdependence creates scope for domination. Achieving non-domination is therefore a matter of social design.[192] Peoples can be self-determining

185 See for example J Nedelsky "Relational Autonomy" *Yale Women's Law Journal* 1 (1989) 7.
186 Young, above n 182, at 183.
187 At 184.
188 At 184.
189 P Pettit *Republicanism*, (OUP, Oxford, 1997).
190 Young, above n 182, at 184.
191 At 185.
192 Pettit, above n 189, at 67.

where their relations are regulated so that their interests and aspirations are considered and domination accordingly avoided, rather than only where they command a private sphere free of relationships or influence other than that to which the agent agrees.[193] Thus self-determination is achieved through relationships, rather than by their absence.

A relational understanding of self-determination is appropriate for the international legal system. The importance of relationships in the system is evident in how the rights and obligations attributed to a given entity depends on how they are perceived by states, because a nascent state is not a state until recognised as one by other states.[194] Moreover, recognition of the importance of relationships is implicit in the *Wimbledon* principle that a state voluntarily incurring obligations is deemed not to have surrendered sovereignty, but to have exercised it.[195] Globalization has reduced the ability of states to act alone without being arbitrarily affected by other entities, thus increasing the interdependence of states and other actors and the salience of relationships. An understanding of freedom that accepts that peoples can be self-determining notwithstanding relationships is therefore both appropriate and necessary.

Through this understanding, self-determination can be appreciated as a relationship and connection rather than a divisive force mandating separation. Self-determination is a right for peoples to determine their status and pursue their interests, but not without consideration of the rights of peoples they are connected with, and whom they will continue to relate to. [196] Self-determination inherently involves relationships between the people seeking to self-determine, the state or states the people resides within, other states and other sub-state groups. It should therefore be understood in the context of these relationships. Insofar as the people's and states' activities may adversely affect each other, the people and other actors should negotiate toward mutually adjusting the effects of their relationship.[197] Self-determination accordingly involves peoples both recognizing and regulating their connections with others.[198] In contrast to the zero-sum game approach to relationships implicit in the individualistic conception of self-determination as statehood, this perspective encourages the merging of interests of state and people, and thus creates potential for positive-sum outcomes.

Statehood is not a necessary condition of self-determination conceived in this manner, because peoples do not need to be able to claim they are entirely independent of others to be self-determining. This conception recognises that complete independence of others is largely illusory. Just as having relationships does not mean a people lacks autonomy, autonomy does not entitle a people

193 Young, above n 182, at 185.
194 See the discussion on recognition above.
195 *SS Wimbledon* (Judgments) (1923) PCIJ Series A, No. 1, at 25.
196 C Scott, "Indigenous Self-Determination and Decolonization of the International Imagination: A Plea" Human Rights Quarterly 18 (1996) at 819.
197 Young, above n 182, at 187.
198 At 188.

to ignore their relationships with other agents. In the words of Mandela: "For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."[199] Instead, self-determination can occur within existing states, if within that framework arrangements are made which enable peoples to pursue their interests in a way that does not undermine those of the existing state and other related actors, including other peoples, within it.

D. Assessment

Statehood is therefore demonstrably not necessary for self-determination. Despite having been largely equated with self-determination in hitherto prevailing doctrine, statehood is best understood as merely a means facilitating realization of the right, rather than the end of the right in itself. Moreover, it is inappropriate to treat statehood as a legal entitlement guaranteed by the right because the attainability of statehood is determined by politics more than law. Finally, equating self-determination with statehood is inappropriate from a theoretical perspective because such a conception of the right fails to recognize the importance of relationships between the self-determining people and the state they are connected to. Rather than mandating separation, self-determination should be understood in a manner that appreciates the importance of these connections and which seeks to merge the interests of each actor.

IV. Appraisal

The above analysis of the relationship between self-determination and statehood offers several lessons for a new assessment of what self-determination can and should guarantee for peoples seeking to rely upon it. First, the attainability of statehood is subject to the whims of what is politically acceptable. Accordingly, statehood should not be treated as a legal entitlement for self-determining peoples. The exercise of self-determination may sometimes involve the creation of a new state, but political factors will bear on that question. Certainly, statehood will not be available in every case. Secondly, self-determination should be understood and applied in a manner that appreciates the importance of relationships between self-determining peoples and the states they are connected to, and should seek to merge the interests of each. In this sense, self-determination can be a positive sum game. Thirdly, statehood is not a necessary end of self-determination, but merely a means of facilitating it. Self-determination can be effected where the people is accommodated within an existing state through political arrangements facilitating the peoples' pursuit of their own interests.

199 N Mandela, *Long Walk to Freedom: Autobiography of Nelson Mandela* (Little, Brown & Co, 1995).

This third lesson is the most crucial because it encompasses both of the others. It provides that self-determination is achievable in a form where the interests of self-determining peoples, populations and states are merged and accommodated. Those relationships are accordingly promoted rather than treated as restraints. Moreover, it allows for a more sophisticated appreciation of what the essence of self-determination actually is. Because statehood merely facilitates self-determination, the essence of self-determination is not necessarily just the fact being independent or autonomous. Rather, it is about what autonomy and independence provide: that being the opportunity for the maximisation of peoples' development. This invites a broader approach to self-determination where the choice of political status is but one aspect of the right. The other is the free pursuit of economic, social and cultural development,[200] which can broadly be understood as the peoples' pursuit of their own interests. This is the end of the right, which the choice of political status facilitates.

The right to self-determination should therefore be understood as a right of peoples to *pursue their interests*. This approach places less of a premium on the attainment of any particular political status, instead encouraging a more nuanced approach to political arrangements. Just as peoples may differ dramatically in terms of their populations, cultures, geographic concentration and relationships with states, the political arrangements they require and desire may similarly vary.[201] The peoples' choice of political status should therefore be approached flexibly and adapted to the needs and conditions of each people. This is not to say the peoples' choice of political status is unimportant; indeed, the effectiveness of a right of peoples to pursue their own interests will rest in no small part on the political arrangements through which those interests are protected and advanced. Moreover, it implies that peoples are entitled to be recognised by states as groups qualified to take on a particular political status, who may have differentiated rights accorded to them by virtue of that status.[202] But the essence of self-determination is what that status facilitates; namely, the peoples' pursuit of their own interests. What the right guarantees however, is the ability of peoples to seek political arrangements that facilitate their self-determination.

A right of peoples to pursue their own interests may entail insular elements, whereby peoples govern their own distinct institutions or are accorded some degree of regional autonomy, and relational elements whereby peoples are involved in governance at the level of the central state, such as through designated representation in particular central institutions.[203] Regional self-government would be one means of delivering self-determination, but

200 See ICCPR and ICESCR, Article 1.

201 Oommen, above n 9, at 133.

202 For an informative discussion of the political theory of recognition and multiculturalism, see W Kymlicka, *Contemporary Political Philosophy*, (2nd ed, OUP, Oxford, 2002).

203 Thurer, Burri, above n 25, at 38.

would not be necessary for it. Autonomy need not be linked to territory.[204] Notwithstanding Kymlicka's reservations, peoples can have their historically informed claims to areas of land recognized without full political autonomy within that area. Mechanisms such as the doctrine of aboriginal title recognize indigenous customary rights to particular practices and economic activities within particular areas without full local self-governance.[205] Moreover, the peoples' autonomy could be limited to particular issues, as envisaged by the Declaration on the Rights of Indigenous Peoples.[206] Requiring the peoples' consent and royalty sharing arrangements for particular activities in areas traditionally or largely populated by peoples are further alternatives. Further development of non-territorial forms of autonomy may also protect peoples' interests through offsetting the securitisation of self-determination claims.[207]

Alongside these substantive outcomes, the right should also involve procedural entitlements such as rights for peoples to be consulted on particular issues, and perhaps even veto powers in situations where the group is especially affected.[208] Indeed, Klabbers has argued self-determination should be understood as a procedural right to be taken seriously.[209] This is because approaching international human rights as procedural rights gives them an effectiveness (and enforceability) belying the indeterminacy they often suffer from when conceived as substantive goals.[210]For the same reason, procedural rights are also better suited to the report, review and recommendation procedures such as the Universal Periodic Review, which are some of the international legal system's primary mechanisms for assessing observance of rights.[211]

This understanding of the right has clear democratic overtones. A right of peoples to pursue their political, economic, social and cultural interests refers implicitly to the principle of people's sovereignty; meaning governance must proceed from the will of the people.[212] According to Franck, this means self-determination is a means of securing democratic governance; and in fact is the root from which an international legal right to democratic governance has grown.[213] From this perspective, self-determination is a right of inclusion: the

204 Gurr, above n 14, at 209; Klabbers, above n 1, at 202.

205 See for example, *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1, [1992] HCA 23.

206 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), Article 4.

207 A Osipov "Non-territorial Autonomy and International Law" *International Community Law Review* 13 (2011) 292–411, at 393.

208 Klabbers, above n 1, at 203.

209 At 199–202.

210 At 200–202.

211 See for example, E Dominiguez-Redondo, "The Universal Periodic Review – Is There Life Beyond Naming and Shaming in Human Rights Implementation?" [2012] *NZ L Rev* 637.

212 Salmon, above n 136, at 266.

213 Franck, above n 22, at 52.

right to participate in the processes of democratic government.[214] To this end, self-determination can be understood as a collective version of the individual right to political participation found in Article 25 of the ICCPR.[215]

To return to the language of internal and external self-determination, the understanding of self-determination advanced is clearly internal. Yet this understanding is not strictly confined by that dichotomy. A right of peoples to pursue their own interests does not directly imply a right to secession, but secession may re-emerge as an acceptable means of self-determination where the peoples' pursuit or even protection of their interests is clearly not attainable within the existing state.[216] The reservations expressed above regarding the influence of politics on the attainability of statehood stand.

Self-determination as the peoples' pursuit of their interests should not be allowed to suffer from the same problems that have previously beset the development of internal self-determination. While the content of the right needs to remain flexible in order to meet the diverse needs of different peoples and different states, this should not come at the cost of a lack of guidance as to what the right entails. The discussion above suggests this understanding of the right may entail insular, relational, substantive and procedural elements. The international community should develop and articulate a range of options to contribute to a more coherent picture of self-determination. This would enhance the ability of peoples to pursue the right while reducing the indeterminacy that has allowed for internal self-determination to be treated as an individual right.

Averting the securitization of self-determination claims that previously beset the development of internal self-determination will likely prove crucial to the future success of the right. States must appreciate that claims for autonomy do not necessarily imply disloyalty, just as recognition of diversity by the central government need not engender disunity or fragmentation.[217] Ultimately, that attitude would be best avoided by states approaching self-determination as a positive-sum game in which interests are merged, rather than a zero-sum game where concessions are losses.

To this end, a departure from equating self-determination with statehood in favour of understanding self-determination as the peoples' right to pursue their interests is useful because this latter conception does not involve the state severing its own boundaries. Moreover, accommodating substate groups tends to contribute to stability, whereas empirical evidence indicates refusing or rescinding autonomy arrangements tends to lead to conflict and exacerbate disloyalty.[218] Finding political arrangements to accommodate peoples is therefore consistent with states' interests because it promotes stability and

214 At 59.
215 See Dilk, above n 50, at 308.
216 Franck, above n 22, at 59.
217 Hannum, above n 179, at 454.
218 Gurr, above n 14, at 208.

loyalty of peoples to political and legal processes and institutions.[219] By keeping the state intact and protecting substate peoples' interests, states and peoples interests are merged and both sides win.[220] Collective rights to governance have been subordinated in the international system because they challenge states in a field states monopolise. Modifying the understanding of the right in this manner reduces the extent to which states are threatened by increasing the compatibility of collective rights and state interests.

Moreover, the potential for effective self-determination through political arrangements within states changes the calculus for substate peoples. Resorting to conflict becomes less advantageous than pursuing autonomy arrangements within existing state structures if the peoples' interests can be adequately protected and advanced under those arrangements.[221] This is not to say a change in the international legal position on self-determination alone can end ethnopolitical conflict. Solving wars of secession requires a multidisciplinary approach and cannot be achieved through legal means alone.[222] But if the international legal position on self-determination creates incentives for states to accommodate the claims of peoples, and for peoples to work with the state rather than resorting to conflict, this can only be a step in the right direction.

219 At 176.
220 Dilk, above n 50, at 309.
221 Duursma, above n 58, at 365.
222 At 371.