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Taking Self-Determination Seriously: When Can Cultural and Political Minorities Control Their Own Fate?

Paul A. Clark*

I. INTRODUCTION

In the late 1980s, Iraqi warplanes dropped chemical weapons on Kurdish villages, causing thousands of civilian deaths. The international community took no significant steps to punish this action; in fact, countries continued to supply Iraq with weapons. This inaction stands in stark contrast to the international response to Iraq's invasion of Kuwait a few years later. The international community took no action against Iraq for gassing Kurds because most countries regarded the action as an "internal matter" rather than a violation of international law.

Whether international law could prevent or punish mass murder of minorities is the question that this Development seeks to answer.

One possible way to bring mass murder under international law is to abandon the principle of territorial sovereignty, that is, the idea that the "internal matters" of a state are subject only to the national laws of that state. This idea is commonly traced back to the Treaty of Westphalia of 1648, which ended the Thirty Years War. Alleged mistreatment of religious minorities had been put forth as sufficient justification for one country to invade another, but the Treaty of Westphalia decreed that how governments treat their own subjects would be regarded under international law as an internal matter.¹ The doctrine of national

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¹ Charles W. Kegley, Jr. and Gregory A. Raymond, *Exorcising the Ghost of Westphalia: Building World Order in the New Millennium* 129–32 (Prentice Hall 2002). It should be noted that the Treaty—signed by virtually every major country in continental Europe—affirmed the fact that "religious liberty" was not guaranteed under international law. *Id.* at 129–30. Freedom of religion was regarded as a subversive and destabilizing doctrine that would lead to conflict and undermine the integrity of the State.

sovereignty remains a cornerstone of international law. The UN Charter Chapter 1 (Purposes and Principles) declares: “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”² Regardless of the practical arguments in favor of abandoning the Westphalian principle of national sovereignty, it is safe to say that such a change would be a radical departure from existing and long-standing precedents of international law. This Development seeks to demonstrate that existing provisions of international law regarding self-determination (especially as that concept has developed just in the last few years) already contain a framework for preventing the mass murder of minority groups.

II. SELF-DETERMINATION IN INTERNATIONAL LAW

The United Nations Charter declares that one of the fundamental purposes 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.”³ Moreover, the International Covenant on Civil and Political Rights (“ICCPR”) begins with the declaration, “[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.”⁴ The ICCPR goes on to declare that the “[s]tates Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”⁵ Thus, the idea of “self-determination of peoples” is a fundamental principle of international law.⁶

Despite the fact that self-determination has been a basic concept of international law for decades, until recently, preserving the territorial integrity of existing states took precedence. In the last decade, however, the international community has sanctioned the independence of minority groups within previously existing states as a method of resolving conflict and oppression. A weakness, however, is that a minority group’s right to self-determination appears

² United Nations Charter, art 2, ¶ 7.

³ *Id.*, art 1, ¶ 2.

⁴ International Covenant on Civil and Political Rights (1976), art 1, 6 ILM 368, 369 (1967) (hereinafter ICCPR).

⁵ *Id.*

⁶ For a more complete list of international agreements establishing the principle of self-determination, see Wolfgang Danspeckgruber, ed, *The Self-Determination of Peoples* 407–12 (Lynne Rienner 2002) (Appendix D: Principal Treaties and Agreements Relating to Self-Determination).

to receive little or no support from the international community until a genocide or ethnic cleansing is well under way. This Development concludes that if the right to self-determination is going to serve its purpose of preventing conflict, it must be an inherent right of cultural and political minorities before persecution begins, not after.

III. WHAT IS “SELF-DETERMINATION OF PEOPLES”?

To say that under international law every “people” is entitled to “self-determination” leaves unanswered two problems still very much in flux, namely, what is “a people” and what does “self-determination” mean?⁷ The ICCPR states that peoples “freely determine their political status.” This language strongly suggests the ability to determine political dependence or independence, and in fact, General Assembly Resolution 1514 declares that self-determination includes the right to complete independence, at least in the colonial setting.⁸ Nevertheless, self-determination is not limited to a simple alternative between independence or dependence. General Assembly Resolution 2625 speaks of several different modes of exercising self-determination: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”⁹

Aside from the meaning of self-determination, the more difficult and controversial question is how to determine when a group qualifies as “a people” under international law. Prince Hans Adam II of Liechtenstein, one of the world’s leading authorities on self-determination, has recently suggested that international law move away from “the rather theoretical concept of ‘peoples’” to self-determination for local communities down “to the smallest community,” because a community is easier to define than “a people.”¹⁰ While Hans Adam’s suggestion may provide a simpler theoretical framework, it is safe to say that his suggestions do not reflect the present state of international law as to what constitutes “a people.” At the same time, there is no reason to deny a group status as “a people” simply because they are too small. For example, an island

⁷ As Lloyd Cutler has written, “‘Self-determination’ is one of those unexceptional goals that can be neither defined nor opposed.” This suggests that while self-determination is now accepted as basic, how one defines it remains problematic. *Forward*, in Morton H. Halperin and David J. Scheffer, *Self-Determination in the New World Order* xi, xi (Carnegie 1992).

⁸ General Assembly Res No 15/1514, UN Doc A/RES/15/1514 (1960).

⁹ General Assembly Res No 25/2625, UN Doc A/RES/25/2625 (1970).

¹⁰ Prince Hans Adam II of Liechtenstein, *Forward*, in Danspeckgruber, ed, *The Self-Determination of Peoples* ix, xii–xiii (cited in note 6).

may have no more than a few dozen inhabitants, but still have a unique language, culture, and traditions that clearly entitle it to self-determination under international law. City-states such as Vatican City and Monaco are not unknown in the international community. There is no reason that the remote South Pacific island Pitcairn should be denied self-determination just because there are fewer than one hundred residents.

Unfortunately there is not now, and there never has been any widespread agreement on what makes a group seeking self-determination a people. Most commentators will agree that distinct “racial groups” are generally entitled to qualify as a people.¹¹ Some authors suggest that a people, or “nation,” be regarded as any group “having a common and distinctive history, language, culture, and/or religion.”¹² For example, in the last few years, the international community has decided that Bosnians,¹³ Kosovars,¹⁴ and the East Timorese¹⁵ are entitled to self-determination and presumably qualify as “peoples,” at least partially on the ground that their religions set them apart from majority groups.¹⁶ This religious distinctiveness is also true of Northern Ireland, the resolution of which has been another notable achievement for the principle of self-determination as a tool to halt violence. Since the British Parliament in the Good Friday Agreements consented to permit a greater level of autonomy to Northern Ireland, and acknowledged their right of self-determination, there has been a dramatic reduction of violence in that war torn corner of Ireland.¹⁷ The world is full of groups pressing similar claims for status as “a people.”¹⁸

¹¹ See, for example, Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 147 (Cambridge 1995).

¹² See, for example, Paul H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, in Robert McCorquodale, ed, *Self-Determination in International Law* 77, 78 (Ashgate Dartmouth 2000).

¹³ In 1995, under strong international pressure, Yugoslavia recognized the independence of Bosnia by signing the Dayton Accords.

¹⁴ In 1999, following 78 days of NATO bombing, Yugoslavia agreed to recognize the autonomy, but not the independence, of Kosovo.

¹⁵ In 1999, again under strong international pressure, Indonesia recognized the independence of East Timor.

¹⁶ The Bosnians and Kosovars, who sought to separate from Orthodox Christians, are largely Muslims, while the East Timorese, who sought to separate from a predominantly Muslim Indonesia, are largely Catholics.

¹⁷ *Whatever Happens, the Good Friday Agreement Has Achieved Its Purpose*, *The Independent* (London) 24 (Nov 29, 2003). Northern Ireland is also a good example of the fact that although self-determination does not necessarily mean independence, self-government coupled with the comforting knowledge that the people are entitled to independence whenever they so wish can result in both the protection of minorities and political stability.

¹⁸ Appendix C in Danspeckgruber, ed, *The Self-Determination of Peoples* at 393–405 (cited in note 6), lists some 170 groups vying for self-determination since 1990, about two dozen of which have

Another criterion for qualification as “a people” is usually an established claim and link to a particular territory. However, there are sovereign tribes that issue license plates, operate courts, and perform similar state functions that exercise no territorial sovereignty, but nonetheless exercise authority over members of the tribe.¹⁹ Finally, more ambiguous than groups distinguished by culture are differences which can best be described as political. The differences between Taiwan and mainland China, for example, are more political than cultural.

Historically, of course, international recognition as “a people” depended on the ability of the group seeking recognition to achieve military success. When thirteen of England’s colonies in North America declared their independence in July of 1776, no European country recognized them as independent until they managed to defeat the British army at Saratoga more than a year later.²⁰ Britain refused to recognize its colonies’ independence for another four years until the defeat and capture of another British army at Yorktown.²¹ Similarly, when Texas declared its independence from Mexico, no country in the world recognized it until it managed to defeat a Mexican army and capture its leader.²² Self-determination has been achieved in practice by the sword or the bayonet.

Clearly, appeal to the sword is unacceptable under modern international law. If international law could determine when a group is entitled to self-determination, then wars of independence (or “national liberation”) would be a thing of the past. This was the laudable goal of the international provisions on self-determination. While the provisions for self-determination are often expressed in terms of universal human rights, one ought not lose sight of the

gained international recognition as independent nations, such as East Timor. Brietzke argues that there are as many as 5,000 distinct peoples, or “nations,” in the world. Brietzke, *Self-Determination, or Jurisprudential Confusion* at 78 (cited in note 12). By another author’s estimation “[t]here are some 5,000 indigenous peoples in the world today.” Ward Churchill, *Perversions of Justice: Indigenous Peoples and Angloamerican Law* 51 (City Lights 2003).

¹⁹ One such example is the Cherokee Nation in Oklahoma, which does not have a reservation but instead has what is called a “Tribal Jurisdictional Service Area,” stretching over 14 counties of northeastern Oklahoma. In effect, Cherokee living within this area can apply for membership to the tribe and qualify for various government benefits and services, such as license plates. See the Cherokee website, available online at <<http://www.cherokee.org>> (visited Oct 24, 2004), which includes a map of their Nation available online at <http://www.cherokee.org/Extras/Maps/14county_tjsa.gif> (visited Oct 24, 2004).

²⁰ Samuel Flagg Bemis, *The Diplomacy of the American Revolution* 58–61 (D. Appleton-Century 1935).

²¹ *Id.* at 190–92.

²² For information on Texas’s efforts to gain international recognition, see *Diplomatic Relations of the Republic of Texas*, The Handbook of Texas Online, available online at <<http://www.tsha.utexas.edu/handbook/online/articles/view/DD/mgd1.html>> (visited Oct 24, 2004).

very concrete reason that self-determination is part of international law: prevention of armed conflict.²³

Looking back at the original understanding of the self-determination provisions of the UN Charter and Covenants, it seems that despite the expansive language used in the documents, many countries had sought to limit the application of “self-determination.” Although expressed as an absolute principle of international law, in the 1940s self-determination of peoples tended to be viewed more as a “goal to be attained at some indefinite date in the future.”²⁴

Countries with large indigenous populations were obviously hesitant to accept a strong interpretation of self-determination because they feared that their own indigenous minorities might assert claims of independence. In this group we can include the United States, which remains fearful of the demand of some Native American nations for independence.²⁵

A second reason for trying to read the meaning of self-determination of peoples narrowly was the fear that a liberal reading would lead to “political instability” and spawn new “national liberation movements.” Some might view this as a legitimate concern; others might think it was merely a case of national leaders thinking it more important to defend their power base than to protect the rights of disenfranchised minority groups. Put another way, if only sitting rulers get to “vote” on international law, wouldn’t we expect them to value political stability?²⁶ Guyora Binder, in fact, traces this obviously self-interested policy back to the Vienna Conference of 1815, where the major powers at Vienna expressed membership in the community of nations as a privilege to be handed out to existing national governments—that is, there was no “right to

²³ The Universal Declaration of Human Rights, General Assembly Res No 217 A (III), UN Doc A/810 at 71 (1948), suggests that all “human rights” should be viewed in this way, declaring in the Preamble that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” Not all of the rights listed, however, seem to fall into this category, such as the right to “holidays with pay” declared in Article 24.

²⁴ Guyora Binder, *The Case for Self-Determination*, 29 *Stan J Intl L* 223, 231 (1993), citing Yehuda Z. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 *Israel L Rev* 509, 511 (1975) (internal citations omitted).

²⁵ One United Nations representative from a tribe in Canada wrote: “[t]he United States repeatedly has opposed funding for United Nations programs aimed at indigenous communities . . . [including] opposing the launching of a United Nations study of indigenous treaties on the grounds that it was anti-American . . .” Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, in John R. Wunder, ed, *Native American Sovereignty* 143, 156 (Garland 1999).

²⁶ The “political instability” argument could also be used against any of the human rights listed in the international canon. Might not a group’s demand for religious freedom or “holidays with pay” lead to violence? Should the fact that legitimate or illegitimate demands for greater religious liberty can lead to violence be an argument against them?

self-determination.”²⁷ Thus, in the nineteenth century, the major powers ensured there was no legal basis for a claim to independence.

We should also remember that not all political instability is bad. Political instability is bad when it leads to violence. If political instability is merely the peaceful transition from one government to another, then there is nothing inherently wrong with that kind of political instability. Elections, after all, are a form of political instability. If international norms on self-determination can lead to the peaceful and orderly transition from disgruntled province to independent state—such as the peaceful split of Slovakia and the Czech Republic, for example—then so much the better.

IV. SELF-DETERMINATION COMES OF AGE

Despite the attempt by leaders of many existing states to limit the idea of self-determination (say, for example, to limit its application to colonialism²⁸), most commentators have concluded that that attempt has failed, as more and more groups seek recognition as “a people,” and the international community repeatedly finds that the best way to end a civil war, or oppression of a minority, is the separation of the warring groups into separate states. Morton H. Halperin and David J. Scheffer, for example, observed in 1992 that while the international consensus during the Cold War seemed to be that disaffected minorities within states were not entitled to self-determination, “developments in international law . . . are beginning to chip away at . . . [that] interpretation.”²⁹ More recently, another scholar has noted, “[s]ince 1995, the practice of states, the transnational assertiveness of indigenous peoples, and the moral force of groups’ rights in various situations have expanded the scope of the legal right of self-determination.”³⁰

Powerful forces have pushed to expand the application of the right of self-determination. The most pressing of these forces has been the need to halt war, genocide, or ethnic cleansing. The international community has found it hard to stand by and permit slaughter (if not outright genocide) in places such as Bosnia, Kosovo, East Timor, and, to a lesser extent, Northern Ireland. Invariably countries such as Indonesia and the former Yugoslavia protested that these were internal matters that had no basis for international action. For example, during

²⁷ Binder, 29 *Stan J Intl L* at 227 (cited in note 24).

²⁸ One such attempt was “to legally restrict application of the term ‘colony’ to countries or peoples separated from their colonizers by at least thirty miles of open ocean.” Churchill, *Perversions of Justice* at 51 (cited in note 18).

²⁹ Halperin and Scheffer, *Self-Determination in the New World Order* at 24 (cited in note 7).

³⁰ Richard Falk, *Self-Determination under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in Danspeckgruber, ed., *The Self-Determination of Peoples* 31, 49 (cited in note 6).

the Security Council debates on the situation in Kosovo on September 23, 1998, China—a supporter of Serbia/Yugoslavia—declared that “the question of Kosovo is an internal matter of the Federal Republic of Yugoslavia.”³¹

When the “internal matter” argument fails, the next line of defense is invariably “maintaining territorial integrity.” Interestingly, the draft resolution—put forth by the Russian delegation as a compromise—spoke only of “autonomy” for Kosovo, avoiding the more powerful term “self-determination,” and also guaranteed the “territorial integrity” of Yugoslavia.³² The American representative also noticeably avoided use of the word “self-determination,” preferring to use the term “self-government.”³³ As a result of the UN agreement with Yugoslavia, Kosovo effectively became independent under the protection of the UN, even though it remained nominally a part of Yugoslavia.

As the president of Kosovo, Ibrahim Rugova, declared on his election in 2001, “[d]e facto we are independent,” but “the independence of Kosovo [must] be recognized formally, as soon as possible.”³⁴ Serbia continues to oppose outright independence for Kosovo (which is widely supported by Kosovars), even though Serbia has not exercised sovereignty in Kosovo for several years.³⁵

V. THE FUTURE OF SELF-DETERMINATION

The ongoing example of Kosovo raises several important points about self-determination. The first point is that the very term “self-determination” appears to be avoided by diplomats, even when it is *de facto* imposed. Given its apparent centrality in international law, one would think it would be front and center. While it is given emphasis by those seeking self-determination, it still seems to be downplayed by others in the international community. As one diplomat put it recently, “self-determination was often treated as something like an ‘ugly duckling’ in the pool of human rights.”³⁶ Indeed, as the cases of Bosnia, East Timor and Kosovo show, unless there are violations of individual human rights such as murder, rape, and torture, the violation of the collective right of self-determination will receive little attention. Simply consider what the international reaction would be if the French-speaking citizens of Quebec were subject to systematic rape and murder by the English-speaking inhabitants that

³¹ UN SCOR 53d Sess, 3930th mtg at 3, UN Doc S/PV.3930 (1998). For many years this was also the British position with regard to Northern Ireland.

³² *Id.* In February 2003, Yugoslavia was renamed Republic of Serbia and Montenegro.

³³ *Id.* at 4.

³⁴ Melinda Henneberger, *Kosovo Winner Wants Independence*, NY Times A3 (Nov 19, 2001).

³⁵ *Proposal for Kosovo Autonomy Offered Instead of Independence*, NY Times A4 (Aug 13, 2003).

³⁶ Press Release, UN GAOR 3d Comm, 57th Sess, 29th mtg, UN Doc GA/SHC/3708 (2002) (statement of Pio Schurti of Liechtenstein).

were supported by Canadians in other provinces and tacitly approved by the government in Ottawa. Can there be any doubt that in such a circumstance the Québécois claims to self-determination would be taken more seriously by the international community, which at present seems to consider the matter an internal Canadian problem?

If it is true that the right to self-determination cannot stand alone but requires an associated campaign of violence, that would seem to defeat the whole purpose for “self-determination” in international law, namely, preventing violence and conflict. If “a people” cannot obtain standing under international law until thousands (or more realistically, hundreds of thousands, if not millions) of their members have been raped, tortured, or killed, then self-determination cannot prevent the very thing it is intended to prevent. Shouldn’t a cultural or political minority—which is obviously more sensitive to its own precarious plight than outsiders—be able to go to the international community and demand its right to self-determination *before* ethnic cleansing begins, rather than afterward?

When viewed as a “human right,” self-determination also demands that a group not be persecuted before it can invoke that right. Would we ever say that the right to emigrate depends on a person being able to show persecution in his home country? Obviously the right to travel can be invoked for any reason or no reason at all, and does not depend on a showing of oppression. One would think that the right to self-determination would be treated the same way; “a people” is entitled to self-determination for any reason or no reason at all—it need not show prior persecution.³⁷

This is not to deny that a group’s sense of identity as “a people” is often solidified by persecution,³⁸ but if it is “a people,” then its right to self-determination already exists and cannot be contingent upon such persecution. Such a rule in effect would make it illegal to close the barn door until after the cow has left.

³⁷ It may safely be assumed, of course, that large groups of people do not simply wake up one morning and think “I’ll declare my independence today.” Getting a large group of people to agree on pursuing self-determination is not easy, and will inevitably require some strong showing of benefit. The assumption here is that the people comprising a minority group in the existing society are in the best position to sense potential threats long before those threats reach the level of persecution that will attract international attention.

³⁸ As Halperin and Scheffer comment: “[t]he real mistake occurs when a government is so fearful of self-determination—even when it is not aimed at secession—that it denies the minority groups the protections of their traditional rights. Such negativist actions can easily trigger minority discontent and upheaval and create the surge toward self-determination that the government so fears.” Halperin and Scheffer, *Self-Determination in the New World Order* at 60 (cited in note 7).

VI. BROADENING THE CONCEPT OF “A PEOPLE”

The same considerations that suggest a liberal reading of the circumstances that entitle a people to self-determination imply an equally liberal reading for which groups qualify as “a people.” Hans Adam has suggested that “[t]o grant the right of self-determination exclusively to those people who have a distinct ethnic, religious, or cultural background” actually increases “the danger of ethnic or religious cleansing.”³⁹ If only those groups that have a distinct language and culture are entitled to self-determination, then leaders fearful of such claims may go out of their way to destroy the traditions and languages that make the people unique. This is a recurrent theme in world history, from Turkey’s ban on the Kurdish language and names, to the Soviets’ attempts to stamp out non-Russian languages and traditions, to the British attempts at destroying the distinct religion and culture of the Irish. Distinct cultures and languages might seem threatening if such groups possessed a right to self-determination not possessed by other minority groups. It is easy to imagine governments taking “soft” measures to curb such distinctions, such as refusing to teach native languages in government schools.⁴⁰

The above argument can be seen as a reason to have less autonomy rather than more. If the threat of secession will cause rulers to persecute minorities, then why not simply abandon the whole idea of self-determination? The answer is that denying self-determination does not work. There was no international law accepting self-determination decades ago when the British tried to destroy Irish culture, or when the Soviets tried to destroy Ukrainian culture, or any of the thousands of historical examples of majorities persecuting minorities. This Development concludes that in the last fifty years the world has learned that in such circumstances self-determination is often the best solution. The point about a broad right of self-determination is that a weak or ambiguous right to self-determination might actually make circumstances worse for minorities. It might make minorities seem more threatening to majorities but not provide any real protection against persecution. A little self-determination, like a little learning, is a dangerous thing.⁴¹

Limiting the right of self-determination to distinct cultural or racial minorities would also make it impossible for minority groups to make alliances

³⁹ Adam, *Forward* at xii (cited in note 10).

⁴⁰ In some American states it was illegal to teach children foreign languages in either public or private schools. See the famous case of *Meyer v Nebraska*, 262 US 390 (1923) (holding that states could not prohibit the teaching of foreign languages).

⁴¹ “A little *Learning* is a dang’rous Thing; Drink deep, or taste not the *Pierian* Spring : There *shallow Draughts* intoxicate the Brain, And drinking *largely* sobers us again.” Alexander Pope, *An Essay on Criticism* 92 (Sidhartha 1988) (S. L. Paul, ed).

with each other, or even with supportive individuals of the majority group. Take Quebec as an example. Suppose, counterfactually, that French speaking Quebec is 45 percent of the population, widely distributed throughout Quebec, and suppose that 25 percent of the population is Native American, also for the sake of argument widely distributed and in favor of independence from Canada.⁴² Would it make any sense to deny the 70 percent of the population that wants independence their self-determination because together the groups form a majority? Or suppose that 45 percent of Quebec is French speaking and another 25 percent of the English speaking population also want independence for one reason or another. Do these English speakers not count because they are not culturally distinct from the rest of Canada? Would they count if they learned French or became Catholic? Put more simply, if a large majority of a province wants independence, why should the self-determination of those people depend on being able to show some sort of distinct cultural identity from the rest of the country?⁴³

Giving a unique right to certain minority groups and not others might also cause friction between various groups in society. We have already witnessed resentment of Quebec's status as a special society by other provinces. The best way to prevent this sort of friction is to recognize that any distinct minority group, which is a majority in its region, is entitled to the same right of self-determination as any other minority group.⁴⁴ If Quebec may leave Canada, why shouldn't the maritime provinces be allowed to join Quebec or the United States?

If self-determination is a tool designed to prevent conflict, it can best do its job the more widely it is applied. This suggests that the concept of "a people" under international law ought to be applied not simply to religious or cultural

⁴² Actually, the vast majority of Quebec is French speaking and the Native American tribes are a tiny minority; the point of the hypothetical is simply to illustrate how a multicultural state could be created.

⁴³ Needless to say, territorial integrity of existing provinces is no more sacrosanct than territorial integrity of nations; so if Native American tribes in northern Quebec wished to remain part of Canada, they would be entitled to self-determination and should not be forced to be part of the independent nation of Quebec—just as the people of northwestern Virginia in 1861 determined to remain part of the United States, and Virginia acquiesced by creating West Virginia. This is another example of how the widest application of self-determination can help prevent conflict: if Quebec could force Native American tribes to be part of Quebec, a potential minority/majority conflict could arise.

⁴⁴ I have used the rather ambiguous term "minority group" rather than simply repeat the term "a people" to suggest the need to broaden the concept of a people to groups associated by unique political, geographical, and economic ties (such as the people of the maritime provinces, or the people of New England). Needless to say, not every group of individuals nor every political unit would begin to count as "a people."

minorities, but even to “political minorities.” The most obvious example of this would be Taiwan, which is distinct from mainland China more by politics than by culture. As was suggested above, the “people of Nova Scotia” are a distinct political entity, as much as “the people of Quebec” or “the people of Hawaii.”

Yet one objection remains. Might a strong and quickly invocable standard of self-determination for all distinct “peoples” lead to instability in existing states?⁴⁵ Might cultural minorities demand their own country each time there is a slight disagreement, like some religious groups which seem to fracture and start new sects over what seem to outsiders to be fairly trivial doctrinal disputes?⁴⁶ Such concerns seem misplaced in the political context. History and economic analysis of human behavior show that people do not break their political bonds and form new ones without serious reasons.

For example, behavioral economists have noted the existence of an “endowment effect”: “Surveys and experiments reveal that people sometimes demand much more to give up something that they have than they would be willing to pay to acquire it.”⁴⁷ People also tend to be “risk adverse” so they will put up with a lot in order to avoid the unknown—hence the expression, “Better the devil you know.” For example, most people will not change jobs for only a marginal improvement. Because people tend to value what is familiar over the unknown, it is hard to convince people to try something new and perhaps risky.

History suggests that endowment effects and risk aversion operate particularly strongly in attempting to organize new political units. The Declaration of Independence noted that “all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms [of government] to which they are accustomed.” There are hundreds of Native American nations within the borders of the United States, yet it seems likely that if the United States offered to recognize their independence, no more than a handful would actually accept.⁴⁸

⁴⁵ Instability can simply mean any change in the status quo; there is no reason for assuming that the status quo represents a perfect world which allows for no improvement. Alternatively, instability can mean chaos which leads to violence and oppression. Self-determination by definition causes instability in the first sense, but (this Development argues) prevents it in the second sense by providing a peaceful and lawful framework for the demands of minorities for greater self-government or independence.

⁴⁶ Oxford’s Christian Encyclopedia estimates there are 33,820 “distinct Christian denominations across the world.” David B. Barrett, George T. Kurian, and Todd M. Johnson, eds, *World Christian Encyclopedia: A Comparative Survey of Churches and Religions in the Modern World 3* (Oxford 2d ed 2001).

⁴⁷ Robert Cooter and Thomas Ulen, *Law and Economics* 91 (Pearson 4th ed 2004).

⁴⁸ Barsh points out that few Native American tribes currently show any inclination to assert their sovereignty in any serious way, and writes that “it seems that Indians today *like* being ‘number one’ in the world as part of the United States.” Barsh, *Challenge of Indigenous Self-Determination at*

Even within existing systems, which permit regional majorities to form new cities and counties, it is very difficult to actually get people to agree on forming a new city or county. In California, for example, there have been many plans in recent years to form new counties but all have failed.⁴⁹ Even though forming a new county is a kind of self-determination allowed in most states, it does not happen very often. In 2001, rural residents of Colorado formed Broomfield County out of the rural part of three other counties believing they would be better represented and that the old county governments had not given enough attention to these rural folks. But such successes are exceedingly rare. Broomfield was the first new county in Colorado in almost 100 years, and the first new county in the United States since the creation of La Paz County, Arizona more than 20 years ago. Despite the fact that forming a new city or county may mean significantly lower taxes (for example, when a rich area is subsidizing a poor area) and a greater level of self-government, it is simply not easy to convince people to support it.

The US Constitution explicitly provides for new states to be formed out of old ones,⁵⁰ and while Maine broke away from Massachusetts in 1820 and West Virginia separated from Virginia in 1861, it has been nearly a century and a half since part of a state has seceded. If it is hard to get people to agree to form a new county, and even harder to convince people to form a new state, it is reasonable to conclude that it will be very hard to convince people to start a new nation.

We should also remember that self-determination does not necessarily mean independence. The concept of self-determination includes both independence and the lesser step of self-government or autonomy in varying degrees. In many instances, such as in Quebec, Northern Ireland, Scotland, Wales, and Hong Kong, the granting of a greater degree of autonomy or self-government has been sufficient to convince the minorities involved that complete independence is not necessary. Once the international community recognizes a particular group as “a people” entitled to self-determination under international law, the existing government is put on notice that persecution of

154 (cited in note 25). In a good illustration of the endowment effect and risk aversion noted above Barsh also points out that tribes “prefer to remain safely within familiar orbits” when it comes to political action. Part of this may be the “sour grapes” effect, where people tend not to demand things they do not think they can get. Still, there is no evidence that if given the opportunity Indian tribes would be very likely to demand independence without major incentives.

⁴⁹ “Since the state legislature liberalized the law in 1974, there have been eight efforts to form new counties. All have failed.” Jeff Gottlieb, *Corona Wants to Go It Alone*, LA Times B1 (Dec 22, 2001).

⁵⁰ US Const, art IV, § 3.

that group is not simply an “internal matter.” The threat of invoking the right to independence is a bargaining chip for the minority and an incentive for the majority to compromise. If the right to independence did not exist, it would be much easier for majorities to ignore the claims of minorities, and this might lead to violence as the only perceived alternative of the oppressed minority. In any case, it seems likely that the practical outcome of a widespread right to self-determination for cultural minorities will not be a lot of brand new nations, but rather an increase in federalized systems in which cultural minorities are given greater autonomy within the existing state structure. So long as the level of autonomy ensures that minorities feel they can protect themselves (for example, by having their own local court system and law enforcement), autonomy may be enough. This is one possibility for dealing with the Kurdish problem in Iraq, for example.

Finally, the truly destabilizing influence is an ambiguous standard that allows both sides to invoke international law or precedent convincingly. In other words, minority groups can demand self-determination pointing to the various elements of international law cited above. Existing governments can try to deny self-determination by arguing that precedents show that these documents do not really mean what they seem to say. It is this ambiguity which leads to conflict. Clear laws and clear rules reduce conflict and argument. When laws and precedents are clear, suits will tend to be settled out of court or not challenged. When laws are more ambiguous, and each side believes it has the law on its side, there is greater threat of trial (or conflict).⁵¹ If international law *and practice* were clear that any attempt to deny self-determination for any community whatsoever was illegal and unacceptable, then the effect would be to reduce uncertainty and thus avoid conflict. At the first hint of oppression a minority group could petition the international community for recognition of the group as simply a people *entitled* to self-determination. This would end any doubt about the oppression of the group being a purely “internal matter” regardless of whether the group was actually demanding independence or some lesser form of self-determination.

⁵¹ The objection that some countries might not accept international law is no objection. It is always the case that some people will not accept a law and will fight against it. One could just as well argue that some people will not accept the law of adverse possession and will still fight to keep their property regardless of what the law says. This is no doubt true, but in general we still think that clear laws about property ownership do more to avoid conflict than to create it. Just so with international law.

VII. CONCLUSION

If the international community took more seriously the claims of minority groups that desire independence or self-government, then perhaps peaceable solutions, such as the separation of the Czech Republic and Slovakia, could be the international norm. So long as dominant majorities think there will not be serious international sanctions,⁵² they can continue to deny self-determination for minority groups—often with tragic results.

⁵² The question of what form international sanctions would take is beyond the scope of this Development; one would hope that international pressure without military action would be enough, as it was in the case of East Timor. It would probably be the case that military action would not, and should not, be taken by the international community unless there is violence directed at the minority asserting self-determination. One would expect that once the world community has recognized that a particular group is entitled to self-determination and said that any attempt to move against that group will be regarded as a violation of international law, rulers of the preexisting state will be far less likely to use violence, and actual military intervention will not be necessary.



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