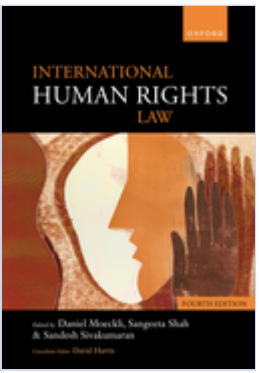

International Human Rights Law (4th edn)
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p. 359

18. Group Rights

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Abstract

This chapter discusses the definition, exercise, and limitations of certain group rights, including peoples with the right to self-determination, minorities, and indigenous peoples. The right to self-determination protects a group as a group entity with regard to their political participation, as well as their control over their economic, social, and cultural activity as a group. Rights of minorities can be seen as both an individual and a group right. Finally, the growing recognition of the rights of indigenous peoples is considered.

Keywords: international human rights, self-determination, minorities, indigenous peoples, group rights

Summary

This chapter concerns the human rights of three particular groups: peoples with the right to self-determination, minorities, and indigenous peoples. It explains that human rights apply to groups and not only to individuals, and how group rights and individual rights fit together. The right to self-determination is a right that protects a group as a group entity in regard to their political participation, as well as their control over their economic, social, and cultural activities as a group. Rights of minorities can be seen as both an individual and a group right, and have been the subject of international human rights protection over many years. There has been an increasing understanding and clarification of the application and content of the rights of indigenous peoples in recent years.

1 Introduction

1.1 Group Rights

Most of the discussion in this book, and the focus of many of its chapters, is about the human rights of individual human beings. This is not surprising, as the historical and conceptual bases of human rights generally developed from considerations concerning the dignity and oppression of individuals, and almost all national constitutional and legislative protections of human rights have been drafted to protect the rights of individuals. Similarly, the vast majority of human rights protected in international and regional treaties, such as the right to life, the right to an adequate standard of living, the right to education, and the right to freedom of thought, protect the rights of individual human beings.

However, human rights are not limited to those of individual human beings. As long as each individual is a part of one or many groups, an individual's identities, histories, and engagements are affected by belonging to groups and by the communities within which they live. Human rights can be understood in terms of the need to protect the dignity and physical integrity of a group (or a 'people'), as well as its civil, cultural, economic, political, and social engagement. As human rights should reflect lived realities, it is necessary to see them as more than about individuals. After all, most societies accord an importance to communities, collectives, and families, and humans possess a general communal quality. ↵ International human rights law is conceived and exercised within the context of communities, with rights being limited (in all except a few instances) by the rights of others and the general interests of the relevant community.[1]

p. 360

Yet in a number of situations it is a group of individuals who are discriminated against or oppressed because of the fact that they belong to a group or they have a group identity and sense of human dignity that is dependent on them belonging to a group. There does need to be a self-consciousness, or self-identity, of being part of a group. An objective definition is impossible to determine and cannot be imposed by external bodies, as was attempted in the colonial era. For example, the prohibition on genocide is a human right premised on the need to protect a group as a group from actions against its physical integrity and not only to protect the individual's right to life. Similarly, many indigenous communities have an identity that is dependent on them being a group rather than being a selection of individuals. Group rights protect a group from discrimination and oppression *as a group*, so it is the group alone which has the human right independently of its individual members, such as with the right to self-determination. Alternatively, group rights can be held by a collection of individuals who are connected in such a way that the right is held collectively, and might, in some circumstances, also be held as individuals, such as with the rights of minorities.

1.2 Group Rights v Rights of Individuals

Many individual human rights do have the effect of protecting a group. For example, the right of freedom of assembly, the right to join a trade union, and the right of freedom of religion all enable groups to gather, have protection, and express their thoughts. Yet each of these rights is an individual right under international human rights law. It is an individual right exercised in concert with other individual human rights but it can

only be held and claimed by an individual human being. While there is now some case law that enables legal entities, such as religious institutions and corporations, to bring claims on behalf of individuals (and perhaps even in their own right),[2] these remain individual rights that may lead indirectly to the protection of a group. They are not rights that directly protect a group as a group.

The UN Human Rights Committee considered the difference between group rights and individual rights when considering the right to self-determination (which is a group right), stating that:

> The right of self-determination is of particular importance because its realization is *an essential condition* for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants [the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights] and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.[3]

p. 361 ↵ In making this statement, the Human Rights Committee both recognized the difference between group rights and individual rights, and acknowledged that when groups are subject to oppression as a group and their rights are not able to be exercised, then the individuals within those groups are also not able to exercise their individual rights. The Committee made the difference even clearer when it took the view that a group who brought a complaint under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1) alleging a breach of the right to self-determination could not do so because the specific terms of the ICCPR-OP1 only enabled complaints by 'individuals'.[4] While there is some criticism of the Committee taking this stance, other international human rights treaties do not tend to contain the restriction that only individuals are able to bring a complaint. For example, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights allows for complaints by groups concerning the rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes the right to self-determination. The African Commission on Human and Peoples' Rights considered the link between individual and group rights (which are called "peoples' rights" in the African Charter) when it held:

> The Commission deduces … that peoples' rights are equally important as are individual rights. They deserve, and must be given protection. The minimum that can be said of peoples' rights is that, each member of the group carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity, i.e. common rights which benefit the community such as the right to development, peace, security, a healthy environment, self-determination, and the right to equitable share of their resources.[5]

1.3 Relevance of Group Rights

While there are a range of group rights, such as the prohibition on genocide, the right to development, and the right to a clean environment, a specific focus of this chapter is on the right to self-determination (sometimes called the right *of* self-determination). This is because the right to self-determination is

protected under the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, it has been considered in case law and other jurisprudence, and it has wide and significant impacts across the international community, as will be shown.

The rights of minorities have similar wide and significant impacts, as there are minorities in every state. While these rights have often been seen as within the compass of individual rights, it will be shown that they are also now considered as group rights. One type of collective that has been especially affected by the development of peoples and minorities rights is indigenous peoples, and so they are also considered in this chapter.

The acknowledgement that peoples, minorities, and indigenous groups have human rights, and that their rights should be protected in international law, has taken a long time. They are important human rights that affect the whole of the international community. With the reality that almost every state in the world has some current or potential issue connected with group rights, it is important that these rights are understood, respected, and applied appropriately.

p. 362

2 The Right to Self-Determination

2.1 Definition

Claims have been made for centuries about matters that could now be seen in terms of self-determination, with some writers tracing it as far back as the early stages of the institution of government. However, the use of self-determination in an international legal context primarily developed during the immediate post-First World War period, with both Marxist thought on national liberation in the USSR and the views of US President Wilson supporting it. In 1945, the UN Charter proclaimed that one of the purposes of the UN was 'respect for the principle of equal rights and self-determination of peoples'.[6]

Despite the general acceptance that self-determination is part of international law, it was not until the conclusion of the two international human rights Covenants that a legal definition was provided. Article 1 ICCPR and Article 1 ICESCR are identical, providing:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, 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.

The definition in Article 1(1) is largely repeated in all the subsequent international and regional human rights treaties and documents that contain a right to self-determination, although the African Charter on Human and Peoples' Rights (ACHPR) elaborates on it slightly.[7]

Yet this definition does not clarify all aspects of the right. While it is evident that it is a right that is relevant in political contexts, it is also applicable in economic, social, and cultural contexts, with, for example, Article 1(2) of the Covenants dealing with a particular economic manifestation of the right and Article 55 UN Charter referring to economic and social aspects of the right.

There have been many attempts to establish a definition of 'peoples'. The definition often referred to is that of an influential group of UNESCO experts:

> A people for the [purposes of the] rights of people in international law, including the right to self-determination, has the following characteristics:
>
> (a) A group of individual human beings who enjoy some or all of the following common features:
>
> (i) A common historical tradition;
>
> (ii) Racial or ethnic identity;
>
> p. 363 (iii) ↵ Cultural homogeneity;
>
> (iv) Linguistic unity;
>
> (v) Religious or ideological affinity;
>
> (vi) Territorial connection;
>
> (vii) Common economic life.
>
> (b) The group must be of a certain number who need not be large (eg the people of micro States) but must be more than a mere association of individuals within a State.
>
> (c) The group as a whole must have the will to be identified as a people or the consciousness of being a people—allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.
>
> (d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.[8]

This definition appears to be an 'objective' one that can be applied to all relevant groups around the world, by providing some criteria that should be met for a 'people' to be established. However, an objective definition is impossible—and is likely to reinforce a developed-world, colonial, male construct of a 'people'[9]—and there would be few groups that have been universally accepted as peoples having the right to self-determination (including some of those who are in former colonies) who would meet all these criteria. This impossibility is acknowledged in paragraph (c) of the definition given here, where a 'subjective' criterion is included. This is because a key aspect of 'self' is self-identification, where the group identifies themselves consciously as a

'people'. This is an essential part of the definition of a 'people', not least because 'nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history',[10] often due to the oppression that they have received or to attain certain ends.[11]

In fact, in many situations, it is evident who are the 'peoples' with the right to self-determination. This can be because the relevant national constitution, legislation, or practice indicates this. Consistent oppressive action by those in power over another group may also indicate an acceptance of the group as a 'people', such as in colonial territories, not least because it may be a catalyst for the self-identification of the group as a people with the right to self-determination. External recognition by a state or group of states can be very useful for the group (such as the recognition by many states of the Palestinian people) but it is not conclusive of the group being a people for the purposes of the right to self-determination.

Indeed, if such external state recognition were conclusive it would allow the possibility of the existence of a human right (as distinct from the ability of a human right to be exercised) being dependent on the whims of governments. Dependence on the government for the existence of a group right would undermine the concept of a human right as being, for example, inherent in human dignity.[12]

p. 364 ↵ Therefore, it is necessary to adopt a very flexible definition as to who are a 'people'. A definition is required that is broad and inclusive, not decided by states alone or imposed on a group, and is adaptable to the many circumstances that exist worldwide. The definition must respect the self-identification of a group as a people. There would need to be some territorial nexus for a 'people' with a right to self-determination. Yet a 'people' can include just a part of a population in a state and it can include groups that live across state territorial boundaries (which reflect the fact that in reality there is no 'nation-state'). It would include all those who are subject to 'alien subjugation, domination and exploitation'.[13]

If a broad and adaptable definition is adopted, then the focus on the right to self-determination under international human rights law is in relation to how and when the right can be exercised. Further, a broad definition of the possessors of this human right is consistent with the need to protect as many people as possible from violations of human rights by a state (and others), considering both the inequality of power between a state and its inhabitants and the non-reciprocal nature of human rights treaties. Such a broad definition would then be consistent with the approach to other human rights in this book.

3 The Application of the Right to Self-Determination

3.1 Colonial Context

From the earliest time that the UN focused on self-determination as part of international law, it applied it to colonial territories. In 1960, in the UN Declaration of Independence for Colonial Countries and Peoples, the content and scope of the right to self-determination in relation to colonial territories was clarified. In 2019, in its *Chagos Advisory Opinion*, the International Court of Justice (ICJ) confirmed that this declaration was declaratory of customary international law when it was adopted.[14] Therefore, by 1960, a mere 15 years after the UN Charter, self-determination as a human right was a matter of customary international law binding on all states, at least in regard to colonial territories.

The ICJ has consistently held that the right to self-determination applies to all peoples in all colonial territories. In its *Namibia Opinion*, concerning the illegal presence of South Africa in Namibia, the Court's view was:

> [T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. ... The ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.[15]

This position was confirmed by the ICJ in the *Western Sahara Case*, with Judge Dillard stating that '[t]he pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations'.[16]

State practice confirms that the right to self-determination applies to all peoples in colonial territories. This is evident not only from the vast number of colonial territories that ↵ have exercised their right to self-determination to become new states, but also because of the acceptance by the colonial powers that they have a legal obligation to allow this exercise. Some writers have concluded from this consistent state practice, *opinio juris*, and lack of any denial by states that the right to self-determination of colonial peoples is now a matter of *jus cogens.*[17]

p. 365

3.2 Outside the Colonial Context

State practice shows that the right to self-determination has definitely been applied outside the colonial context. For example, when East and West Germany were united into one state in 1990, it was expressly stated in a treaty signed by four of the five permanent members of the UN Security Council that this was done as part of the exercise of the right to self-determination by the German people.[18] The right to self-determination was also referred to in the context of the dissolution of the USSR and Yugoslavia,[19] internally within states, and the ICJ confirmed that it applies to the Palestinian people in its *Advisory Opinion on the Wall.*[20]

The ICJ has gone further and has declared that the right to self-determination is 'one of the essential principles of contemporary international law' and has 'an *erga omnes* character'.[21] By having an *erga omnes* character, it means that there is an obligation on *all states* to protect and respect the right to self-determination. This makes clear that it is not only an obligation on colonial powers and that the right applies to peoples beyond the colonial context.

Indeed, since 1960 the right to self-determination has been expressed as a right of 'all peoples'. This is seen in the Declaration on Principles of International Law 1970 (which is often considered as being an internationally agreed clarification of the principles of the UN Charter), which provides:

> [All States should bear] in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.[22]

In fact, even the Declaration on Independence of Colonial Countries and Peoples 1960 dealt with colonialism 'in all its forms and manifestations'. This highlighted the oppressive *nature* of the administrative power over a people and not simply the physical distance of the administering colonial power from the colonial territory. Hence, where a group or groups in a state administer power in such a way that there is 'subjugation, domination and exploitation' (as stated in the Declaration on Principles of International Law) of another group that oppresses, demeans, and undermines the dignity of that group, then ↵ the right to self-determination may apply to the latter group. Therefore, the right to self-determination applies to any peoples in any territory (including non-colonial territories) who are subjected to 'alien subjugation, domination and exploitation'. Indeed, it would be contrary to the concept of a human right if the right to self-determination could only be exercised once (such as by a colonial territory) and then not again. All peoples in all states have the right to self-determination.

p. 366

4 The Exercise of the Right to Self-Determination

4.1 External and Internal Self-Determination

Under international human rights law, there is a concentrated focus on the *exercise* of a human right. This is usually because a particular issue has arisen due to an alleged restriction on the exercise of a right by a state. Similarly, the exercise of the right to self-determination is a crucial aspect in understanding the right.

The Declaration on Principles of International Law sets out the principal methods as to how the right to self-determination can be exercised. It provides that:

> 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.

While the vast majority of peoples in colonial territories exercised their right to self-determination by independence, this was not the only method of exercise that was either available or used. For example, the British and the Italian Somaliland colonies joined into one state of Somalia, part of the British colony of Cameroon merged with the French colony of Cameroun to form the new state of Cameroon and the remaining part joined with the existing state of Nigeria, and Palau and a number of other Pacific Ocean islands formed a free association with the US (that is, they had general self-government but their foreign affairs and defence were controlled by the US).

In non-colonial situations, a range of exercises of the right to self-determination have occurred. While many have been by independence, such as Bangladesh from Pakistan and Montenegro from its union with Serbia, others have been by merger (for example, the two Yemens), or by free association (for example, Bougainville with Papua New Guinea). Some have occurred after prolonged armed conflict, such as Eritrea's independence from Ethiopia in 1993, or a period of international territorial administration, such as in Kosovo. In the latter instance, the Kosovo Assembly issued, on 17 February 2008, a unilateral declaration of independence from Serbia. A large number of states, including the UK and US, recognized Kosovo as an independent state, while other states, including Serbia and Russia, rejected this independence on the grounds that it was contrary to international law. The ICJ was asked by the UN General Assembly to give its opinion. In the *Advisory Opinion on Kosovo*, the majority of the ICJ held:

> Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed … Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances … The Court considers that it is not necessary to resolve ↵ these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law … [T]he Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.[23]

p. 367

This avoidance by the Court in deciding these issues concerning the right to self-determination has been, rightly, strongly criticized.[24]

In these types of situation, there has been a change in the international relationships between the peoples exercising their right to self-determination and the original state/colonial power, as well as with other states and international actors. So these are considered exercises of *external* self-determination.

Yet, self-determination can also be exercised by *internal* means, where there is a change in the internal relationships and administrations within a state but no change in the external relationships. The Declaration on Principles of International Law expresses internal self-determination as being where 'a government [is] representing the whole people belonging to the territory without distinction as to race, creed or colour'. The Canadian Supreme Court considered that internal self-determination in relation to the peoples of the province of Québec enabled the 'residents of the province freely [to] make political choices and pursue economic, social and cultural development within Québec, across Canada, and throughout the world. The population of Québec is [and should be] equitably represented in legislative, executive and judicial institutions.'[25]

Accordingly, there are a range of internal exercises of the right to self-determination. For example, outside the colonial context there has been devolution of some legislative powers to Scotland and Wales in the UK, control over cultural, linguistic, and other matters within the Swiss cantons, and a form of federalism in

Bosnia-Herzegovina and in Iraq. These methods are often called forms of autonomy or governance. In many instances, the method of exercise has been by agreement with the central government to enable significant autonomy within a state, such as Mindanao in the Philippines, and the northern regions of Mali.[26]

What is shown by all these examples is that there are many possible exercises by peoples of their right to self-determination. While independence—called 'secession' when it is from an existing independent state—is often seen as the only option in non-colonial contexts, it is but *one option* of very many forms of exercise, and not normally the first option lawfully able to be exercised under international law. The Supreme Court of Canada made this clear when it stated that:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[27]

p. 368 ↵ What the Court is indicating is that, in most instances outside the colonial context, independence will not be considered to be a legitimate first step in the exercise of the right to self-determination. However, should other methods of exercise, such as internal self-determination, be made impossible due to the actions of the state, and if there is increased oppression of the group as a group, then it may be argued that, in those limited circumstances, the people could exercise their right to self-determination by seeking independence as a last resort.[28]

In any event, there must be flexibility in the forms of exercise of the right to self-determination (and there are also limitations on the exercise—see Section 5). In many instances, the exercise will be dependent on the particular context and the resolution of a dispute. For example, the Badinter Commission which was established by the European Community (now European Union) to clarify the legal position during the dissolution of Yugoslavia, held that:

> In the Committee's view one possible consequence of [the right to self-determination] might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the states concerned.[29]

This suggestion of different nationalities and sovereign powers within one state is a possibility that should be explored. It could also operate across states, as has happened to some extent with the peace agreements concerning Northern Ireland, where both the British and Irish governments were involved in the key negotiations and both signed the various agreements, even though Northern Ireland is entirely within the UK. While such solutions challenge traditional notions of sovereignty, they acknowledge the breadth of impact of the right to self-determination and seek to provide effective means to exercise the right as fully as possible.

4.2 Procedures for Exercising the Right to Self-Determination

The exercise of the right to self-determination must be by the people themselves. The ICJ confirmed this when it emphasized 'that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[30] In most instances, the will of the people can be determined by a popular consultation, such as by referendum or elections. For example, the Badinter Commission decided that the will of the peoples in Bosnia-Herzegovina had to be ascertained, such as by a referendum carried out under international supervision.[31]

However, there may be exceptional circumstances where there is no consultation, such as where the position is clear in all the circumstances. For example, during the dissolution of the USSR few referenda were held. Yet consultations can be manipulated, as was determined in the *Chagos Advisory Opinion* concerning the UK, Mauritius, and the Chagossian people. There are other examples, such as when Indonesia sought to integrate West Papua which had been under a separate Dutch colonial administration from the rest of Indonesia, when just a few indigenous leaders were asked their views as to whether they would accept Indonesian control and, probably under military threats, agreed to accept this control. Similarly, the people of Hong Kong were not fully consulted about the transfer of sovereignty of that separate, distinctive region to China. Even if the geopolitical situation is one where the choices of the people may be limited, they must be able to make a free and genuine decision on a clear question, which is their own decision and is not imposed by governments or others. In ensuring that the genuine will of the people is clear, it is important that the views of all within the group, including those of women, people with disabilities, and minorities, are heard and listened to equally.

p. 369

The decision on the necessary majority and form of public consultation is important, especially as the numbers voting can be affected by a boycott (for example, by smaller groups who may seek a different exercise of their right to self-determination) or other circumstances. The practice during the dissolution of Yugoslavia varied considerably. In Bosnia-Herzegovina, it was assumed that 50 per cent plus one was sufficient and a boycott by the Serbian population (which comprised over 30 per cent of the overall population) did not affect the result, with over 60 per cent of all those eligible to vote casting their votes in favour of independence. In Montenegro, the EU stated that there had to be a majority of 55 per cent of votes cast and there had to be a participation of at least 50 per cent plus 1 of those eligible to vote.[32] When there was a referendum in 2011 as to whether South Sudan should secede, the relevant national law required three steps: at least 60 per cent of registered voters casting their votes; if this 60 per cent was not achieved, then the referendum was to be repeated; and the result had to be one that secured 50 per cent plus 1 of the total number of votes cast. In the end, there were significantly more than 60 per cent of voters casting their vote, with over 95 per cent in favour of independence.

The actual voters in the referendum may not always be easy to decide. This is seen in the debate over which people to include in a referendum on Western Sahara, being primarily whether those who could vote were limited to those who were living in Western Sahara at the time of the ICJ's Opinion or if the referendum could include those (mainly Moroccans) who have moved there since.[33] Further, even if a majority of the people choose to exercise their right to self-determination by seeking secession from a state, this will not automatically lead to that result (though it may give a strong mandate to a people in their consultations with the relevant government), as there can be limitations on the exercise of the right to self-determination.

5 Limitations on the Exercise of the Right to Self-Determination

5.1 Rights of Others

Almost all human rights (with the exception of absolute rights such as the prohibition on torture) have limitations on their exercise. These limitations are to protect the rights of others or the general interests of the society (such as public order and public health). The right to self-determination is a human right and, because it is not an absolute right, it has limitations on its exercise. These are limitations on the ability of the peoples with the right to exercise that right fully and legitimately under international law.

p. 370 ↵ Therefore, where there is another people with the right to self-determination within the state or region or a people who are few in number with the right to self-determination within a larger population (as with most colonial territories), then the right is limited in its exercise in order to take into account the right of the other people. As shown in other chapters, this right is limited only to the extent to which it enables all human rights to be exercised as fully as possible in the circumstances.[34]

An example of the operation of this limitation is found in the decision of the Canadian Supreme Court concerning the potential secession (through the exercise of the right to self-determination) of the people of the province of Québec. The Court noted that the rights of the indigenous ('aboriginal') peoples in the province were also affected:

> We … acknowledg[e] the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Québec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Québec to unilateral secession. In light of our finding that there is no such right applicable to the population of Québec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.[35]

The Court not only acknowledged the rights of the indigenous peoples in this passage but also the human rights and constitutional rights of people in all parts of Canada. It determined that, even if there had been a clear majority of the people of Québec who wished to secede, they could not do so without negotiations with the other parts of Canada. However, this does not necessarily give a permanent veto power to the other parts of Canada, as the internal right to self-determination of the people of Québec must not be so restricted.

5.2 Territorial Integrity

The limitation on the exercise of the external right to self-determination that is most often asserted by governments is 'territorial integrity'. This is a claim that asserts that the state itself should not be divided up and is broadly based on the general interests of international peace and security. This limitation on the right to self-determination was expressed in the Declaration on Principles of International Law:

> Nothing in the foregoing paragraph [recognizing the right to self-determination] 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.

This is an important potential limitation on the exercise of the right. However, it is only a justifiable limitation in certain situations, namely when an exercise of external self-determination (such as independence) is being sought and when a state is 'possessed of a ↵ government representing the whole people belonging to the territory without distinction as to race, creed or colour'. In other words, it can only be a legally justifiable limitation on the exercise of external self-determination when a state is *already* enabling full internal self-determination for those people.

p. 371

A particular aspect of this limitation on the exercise of the right to self-determination is the international legal principle of *uti possidetis juris*. This principle provides that states emerging from colonial administrative control must accept the pre-existing colonial boundaries. Its purpose is to achieve stability of territorial boundaries and to maintain international peace and security. This was made clear by a Chamber of the ICJ:

> The maintenance of the territorial *status quo* in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, induced African states judiciously to consent to the respecting of colonial frontiers.[36]

This is generally accepted as a principle applicable solely to colonial territories. There is, though, some scope for considering that historically established boundaries (as was the case in much of the former Yugoslavia and the USSR) may be accepted as prima facie the appropriate territorial boundaries on independence even in non-colonial contexts, unless there are agreements to the contrary.

The principle of *uti possidetis juris* may appear to be a sound one in terms of preserving international peace and security at the time of independence. However, it has not prevented many boundary disputes.[37] This is mainly because many of these boundaries were created to preserve the interests of the colonial states and were not related to natural or cultural boundaries understood by the peoples on the ground. As one of the architects of these boundary determinations said at the time:

> We have been engaged ... in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.[38]

The ICJ recognized these problems when it stated that '*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes'.[39] It could be argued that adoption of the principle today gives legitimacy to political or diplomatic actions purely on the basis that those actions occurred during the colonial era and were made without taking the views of the people on the territory into account.[40]

p. 372 ↵ Therefore, the principle of *uti possidetis juris* is of questionable legitimacy as a limitation on the right to self-determination. It should only apply, if at all, in (the now very few) situations of decolonization or, perhaps, where the states involved in a dispute expressly choose to use a colonial boundary as relevant evidence for a boundary delimitation.[41]

5.3 Other Limitations

There are two other potential limitations on the exercise of the right to self-determination that are often raised: competing claims over the relevant territory by states; and the use of force. It is not uncommon for there to be a situation where more than one state asserts sovereignty over a territory where there are people with a right to self-determination. The ICJ recognized this situation in the *East Timor Case*, where it accepted that Portugal, as the colonial power, and Indonesia, as the occupying power, had forms of jurisdiction over the same territory, as did the people of East Timor, who had the right to self-determination.[42] In many instances, a state will assert that an early treaty enables it to gain sovereignty (as did China in relation to Hong Kong and as Spain does in relation to Gibraltar), notwithstanding the wishes of the people of that territory. This situation was considered in the *Western Sahara Case*:

> [T]he consultation of the people of a territory awaiting decolonization is an inescapable imperative. … Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization.[43]

Therefore, even where there may be a lawful competing claim by another state over a particular territory, the peoples on that territory still have a right to self-determination that they must be able to exercise.

In relation to the use of force, the peoples seeking to exercise their right to self-determination often use force and have force used against them. The general position appears to be that set out in the Declaration on Principles of International Law:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.

This makes clear that a state cannot use force (arguably at least not disproportionate force) to prevent the exercise of the right to self-determination. The people themselves are entitled to support from other states when forcible action occurs against them as a people. That support must be in accordance with the purpose and principles of the UN Charter, so occupation by one state to 'support' a people's right to self-determination in another state would not be lawful. This was one of the criticisms of the Russian actions to support Abkhazia and South Ossetia in Georgia, as well as of Russia's role in the Crimea and parts of Ukraine in 2014.[44] Significantly, when Additional Protocol I to the Geneva Conventions ↵ 1949 was agreed in 1977, its protection extended to wars of national liberation, being 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[45] The restrictions on the use of force against peoples seeking to exercise the right to self-determination do not seem to restrict the peoples themselves using force to assert their right to self-determination, such as the people of Eritrea, though other human rights issues may then arise as their force cannot infringe the human rights of others, such as minorities.

p. 373

6 Minorities

6.1 Defining 'Minorities'

Article 27 ICCPR and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 (Declaration on Minority Rights) provide protections for those who are 'ethnic, religious or linguistic' minorities. The Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities determined that:

> [Minorities are groups who are] numerically inferior to the rest of the population of a State, in a nondominant position, whose members—being nationals of the State—possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[46]

However, there are other minorities who may be excluded from this definition, and it is not clear how minorities are determined.[47] Indeed:

> [T]he difficulty in arriving at a widely acceptable definition lies in the variety of situations in which minorities live. Some live together in well-defined areas, separated from the dominant part of the population. Others are scattered throughout the country. Some minorities have a strong sense of collective identity and recorded history; others retain only a fragmented notion of their common heritage.[48]

Therefore, any determination as to the existence of a minority must take into account objective elements, such as shared ethnicity, language, or religion, as well as subjective considerations, such as the self-identification by individuals as members of a minority. Despite the lack of a clear definition, human rights supervisory bodies continue to try to protect effectively the rights of minorities.[49]

While the Declaration on Minority Rights is devoted to national, ethnic, religious, and linguistic minorities, it is also important to combat multiple discrimination and to address situations where a person belonging to a national, ethnic, religious, or linguistic minority is also discriminated against on other grounds such as gender, disability, or sexual ↵ orientation. Similarly, it is important to keep in mind that, in many states, minorities are often found to be among the most marginalized groups in society and severely affected by, for example, pandemic diseases, and in general have limited access to health services. Undoubtedly, the state-focused nature of the international human rights legal system means that it is largely minorities within a state as a whole who are protected by this right.

p. 374

6.2 Rights of Minorities

At the Paris Peace Conference in 1919 after the First World War, a number of treaties were drafted to protect minorities in the new states being created, as a condition for settlement of territorial boundaries.[50] The obligations to protect minorities under these treaties largely related to giving minorities some autonomy.

However, significant development of minority rights did not occur until the adoption of Article 27 ICCPR, which provides:

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

The subsequent Declaration on Minority Rights provides guidance about the development of law in this area —as do some regional treaties in this field.[51] There is now probably a customary international law obligation on all states to protect the rights of minorities.[52] Indeed, the Human Rights Committee has asserted that 'provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to … deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language'.[53]

6.3 Exercise of Minority Rights

The types of rights for which minorities have protection are, as Article 27 ICCPR provides, 'to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The Declaration on Minority Rights adds to these with the following: the rights to participate in cultural, religious, social, economic, and public life; to participate in decisions on the national and, where appropriate, regional level; and to associate with other members of their group and with persons belonging to other minorities.

p. 375

↵ In some instances, the exercise of minority rights does raise issues of conflict between the individual and the group. In the case of *Lovelace*,[54] the claim by a divorced indigenous Canadian to return to the indigenous land was upheld by the Human Rights Committee despite Canadian law (intending to protect the indigenous minority) precluding her from so doing. However, a Swedish law that protected the identity of the Sami minority as a whole by revoking the reindeer husbandry rights of those who pursued more lucrative

work was held to be valid despite the consequent restriction imposed on the individual Sami.[55] The Human Rights Committee's view was that 'a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole'.[56] Therefore, there are times when the minority rights protection of an individual will be limited by the broader interest of the group as a whole. These examples also show that indigenous peoples may be able to assert their human rights through the use of minority rights protections.[57] Note that the Organization for Security and Co-operation in Europe (OSCE) has a High Commissioner on National Minorities, whose aim is to identify and address causes of tension relating to minorities.

6.4 Individual v Group Rights of Minorities

The concept of human rights of minorities embodies both the protection of the rights of individuals who are part of a minority group and of the minority group as a group, according minorities a collective right to enjoy the common traits of their group. There are two views as to how these rights should be approached. The individual rights approach to minority rights argues that such rights must be vested in, and be exercised by, the individual members claiming affiliation with the minority group rather than the minority group itself. In contrast, the group rights approach recognizes that the collective qualities that the minority possess, such as their group culture and their group language (being an inherent part of their human dignity), distinguish them from the majority and so require them to be protected as a group. However, it should be noted that, under both approaches, who is a minority may change over time and location, and this makes the right somewhat contingent on historical circumstances, which is unusual for a human right.[58]

It is clear that Article 27 ICCPR is solely an individual right for those who are part of a minority. For example, the Human Rights Committee has rejected group claims based on Article 1 (right to self-determination), as discussed already, but accepted the same claim under Article 27 as long as it was argued as an individual right.[59]

However, there is a good argument that where 'national' minorities are concerned then treating the right as a group right is the appropriate approach. Indeed, it is strongly argued that minorities can form a 'people' for the purposes of the right to self-determination, especially as the definitions for each group are very similar, internal self-determination can apply to minorities within a state, and many minorities use the

p. 376 ↵ language of self-determination.[60] For example, the Badinter Commission considered that the shared ethnic, religious, and linguistic background of Serbians from Bosnia-Herzegovina and Croatia with Serbians in Serbia did not prevent them from being a 'people' for the purposes of the right to self-determination even though they had specific minority rights protection as well.[61] While the exercise by a minority of their right to self-determination may be limited to internal self-determination, in that minority groups would usually seek to exercise their right by enabling some degree of autonomy over matters of relevance to their culture, language, religion, or ethnic identity, it does not mean that they do not possess a right to self-determination.

7 Indigenous Peoples

7.1 Defining ‘Indigenous Peoples’

There are significant similarities between minorities and indigenous peoples. Indigenous peoples have also been in a non-dominant position, and their cultures, languages, and religious traditions are normally different from the majority in the societies in which they live. International law has tended to recognize and protect indigenous rights separately. For example, the International Labour Organization (ILO) adopted in 1957 and 1989 two treaties, ILO Convention No 107 concerning Indigenous and Tribal Populations and ILO Convention No 169 concerning Indigenous and Tribal Peoples, which apply to members of ‘semi-tribal or tribal populations’, ‘tribal peoples’, and ‘groups regarded as indigenous’, with specific characteristics.

However, no definition of ‘indigenous peoples’ has unanimously been adopted by the international community. Since the importance of maintaining their distinct identities and characteristics under the self-identification principle was accepted, the idea of a formal definition has deliberately been rejected.[62] Nevertheless, the recognition and protection of the rights of indigenous peoples under international law has not depended on a formal definition, and their main characteristics have been outlined widely in different instruments. The UN Working Group on Indigenous Populations listed the relevant factors to the understanding of the concept of ‘indigenous’, which have also been taken into account by international organizations and legal experts:

> (a) Priority in time, with respect to the occupation and use of a specific territory;
>
> (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
>
> (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
>
> (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[63]

These still remain the main elements of definitions of indigenous peoples.

7.2 The Rights of Indigenous Peoples

p. 377

The main concern in relation to indigenous peoples has been the preservation of their views and traditions as a group:

> Under the basic principles of universality, equality and non-discrimination, indigenous peoples are entitled to the full range of rights established under international law. However, indigenous peoples, as collectivities, have distinct and unique cultures and world views, and their current needs may differ from those of the mainstream population. Their equal worth and dignity can only be assured through the recognition and protection of not only their individual rights, but also their collective rights as distinct groups. It is when these rights are asserted collectively that they can be realized in a meaningful way. This has led to the development of a separate body of international instruments for the recognition and protection of the rights of indigenous peoples.[64]

Thus, indigenous peoples are entitled to the full range of individual human rights, including protection from discrimination, rights in relation to children, and cultural rights, as well as the rights of the indigenous peoples as a group.

The ILO Conventions remain the only international binding instruments that specifically provide a detailed list of rights and obligations of states in respect of indigenous peoples. ILO Convention No 107 covered a wide range of issues, such as traditionally occupied lands; social, economic, and cultural development; recruitment and conditions of employment; and social security and health. However, it had an integrationist approach (that is, to bring (often forcibly) indigenous people into the majority society) that was gradually seen as outdated. It was modified by ILO Convention No 169, on the basis of the recognition of, and respect for, ethnic and cultural diversity of indigenous peoples as permanent societies. ILO Convention No 169 acknowledges the rights of indigenous peoples to identity (in relation to the recognition of their legal capacity or juridical status), territory, autonomy, participation in the political and social national life, physical welfare, and cultural integrity.

The UN Declaration on the Rights of Indigenous Peoples 2007 represents the most comprehensive response to the issue of indigenous peoples at the universal level. The Declaration proclaims:

> *Article 1*
>
> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
>
> *Article 3*
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> *Article 4*
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

p. 378 ↵ Its provisions are compatible with ILO Convention No 169, although it does not provide a mechanism to monitor its implementation and does not have a legally binding character. Nonetheless, the Declaration has been influential and its provisions have been reflected in some national laws[65] and in the decisions of the Inter-American Court of Human Rights.[66] It is, therefore, clear that there is a general consensus, based on acceptance of the UN Declaration and other state practice, that indigenous peoples have a range of human rights, including the right to self-determination.[67]

In relation to other group rights of indigenous peoples, the Inter-American Court of Human Rights has accepted a right to collective property, noting the existence of a special relationship between the indigenous peoples and their traditional lands and resources:

> Among indigenous peoples there exists a communitarian tradition related to a form of collective land tenure, inasmuch as land is not owned by individuals but by the group and the community … [T]he protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle … This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the Convention so that they can continue living their traditional lifestyle, and so that their cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.[68]

The Court has also developed a system of reparations that are applicable in cases of violations of indigenous peoples' rights.[69]

7.3 Exercise of Indigenous Peoples' Rights

The exercise of indigenous peoples' rights follows similar patterns to those seen with regard to the right to self-determination and minority rights, with the same diversity of means of exercise. In addition, there is a specific right of consultation that is considered to be essential for protecting indigenous peoples, which finds its origins in the right to self-determination and has been recognized as a general international law obligation. This right of consultation of indigenous peoples about decisions affecting their land arises because of their particular economic and social characteristics, such as their practices, culture, traditions, and capacity to sustain themselves in their vulnerable situation, in relation to development of land. This understanding has consolidated into a right of indigenous peoples of free, prior, and informed consent (FPIC) in matters related to land and their activities. 'Free' means that there is no coercion, intimidation, or
p. 379 manipulation; 'prior' ↵ means that consent is sought sufficiently in advance of any authorization or commencement of development projects; 'informed' means that all relevant information is provided in a culturally appropriate manner, language, and form; and 'consent' should be clear from all the relevant indigenous peoples affected, preferably written and verified.

The UN Working Group on Indigenous Populations has provided a clarification of this definition of FPIC:

> The right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources—a complex of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.[70]

This definition links FPIC to the right to self-determination of indigenous peoples. In addition, the Inter-American Court of Human Rights has clarified the purpose of FPIC:

> The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.[71]

This is a broad obligation on states and is reflective of the breadth of impact on indigenous peoples of the activities of states and of other actors, such as corporations.[72]

The importance of the obligation on states to consult indigenous peoples prior to engaging in development, extraction, or investment plans is highlighted by its codification in the national laws of various states, such as Bolivia, Chile, Malaysia, Norway, Peru, the Philippines, Venezuela, and, to some extent, Australia and Canada.[73] There is also an array of industry guidance and standards, such as OECD-FAO Guidance for Responsible Agricultural Supply Chains, FAO Voluntary Guidelines on the Responsible Governance of Tenure, and the World Bank's Environmental and Social Framework. These provisions are ↵ normally intended to protect indigenous peoples from the actions of states and corporations, as well as reducing the risk of, for example, deforestation or desertification. Some writers have argued that FPIC represents customary international law and so is binding on all states,[74] and may enable indigenous peoples to refuse consent to a development project. However, in practice, the negotiation powers of indigenous peoples with a state or corporation, even with FPIC, may be weak and the risks to themselves can be quite high, especially where

p. 380

their land has been so reduced that their options are very limited. In addition, the broader lack of recognition of consultation with indigenous peoples in other states continues to constitute a barrier to the effective protection of indigenous rights.

8 Conclusion

Human rights are not only in relation to individual human beings; they can also protect a group as a group. One of these group rights is the right to self-determination. This right applies to a wide range of peoples, not just those in colonial territories and not just those recognized by some states as having the right. It is a right of all peoples in all territories. This right can be limited in its exercise due to others' rights (such as others' right to self-determination) and where the general interests of the relevant society is legitimately applied. In the exercise of this right, there are many alternatives, such as internal control over the people's own cultural affairs, with independence now being difficult to justify legally in the first instance in most contexts. Both indigenous groups and minorities can assert a right to self-determination. There are also individual minority rights protected under international human rights law which encompass cultural, ethnic, linguistic, religious, and national minorities, and indigenous peoples have both individual and group rights. In exercising these individual rights, the collective rights of the group as a group will need to be taken into account.

With the right to self-determination, minority rights, and the rights of indigenous peoples, the intention is to enable the rights-holders to determine their political, economic, social, and cultural destiny as they wish, while not overriding the legitimate interests of others affected. These rights developed once it was generally accepted that the traditional approach to international law and to the determination of boundaries had a severe consequence on some groups. However, group rights are not human rights which are to be left to be considered only after individual rights have been considered.

These group rights are, therefore, a reflection of the changing values in the international community away from a state-based, and solely state-interested, system towards a more flexible system. Indeed, the reason behind many of the claims relating to the right to self-determination, and those in relation to minority and indigenous rights, is that the state-based international legal order has failed to respond appropriately and justly to the legitimate aspirations of peoples.

Further Reading

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Questions for Reflection

1. Are group rights really human rights or are they just individual rights exercised by members of a group?
2. To what extent has the right to self-determination extended beyond its initial focus on colonial territories and peoples?
3. Are indigenous rights and minority rights distinct or do they overlap?
4. How might national and international law processes and procedures be improved to enable group rights to be protected better?

Notes

[1] Limitations on human rights are discussed in Chapter 7.

[2] eg *Autronic AG v Switzerland* (1990) 12 EHRR 485; *Singer v Canada*, CCPR/C/51/D/455/1991 (8 April 1993); and 155/96, *Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria*, 15th Activity Report of the ACommHPR (2001).

[3] HRC, General Comment 12, HRI/GEN/1/Rev.9 (Vol I) 183, para 1 (emphasis added).

[4] *Ominayak and the Lubicon Lake Band v Canada*, A/45/40 (Vol II) Annex IX, 1, para 32.1.

[5] 266/03, *Gunme et al v Cameroon*, 26th Activity Report of the ACommHPR (2008–2009) paras 171, 176.

[6] UN Charter, Art 1(2).

[7] ACHPR, Art 20 provides:

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
> 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

[8] Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS-89/CONF.602/7 (22 February 1990). For a similar definition, see International Commission of Jurists, *Events in East Pakistan* (International Commission of Jurists, 1972) 49.

[9] See Charlesworth, Chinkin, and Wright, 'Feminist Approaches to International Law' (1991) 85 *AJIL* 613; Gaete, 'Postmodernism and Human Rights: Some Insidious Questions' [1991] *Law and Critique* 149.

[10] Kamenka, 'Human Rights, Peoples' Rights' in Crawford (ed), *The Rights of Peoples* (Clarendon Press, 1988) 127 at 133. See also Allott, 'The Nation as Mind Politic' (1992) 24 *NYUJILP* 1361.

[11] Chinkin and Wright, 'Hunger Trap: Women, Food and Self-Determination' (1993) 14 *Michigan JIL* 262, 306, propose that 'food, shelter, clean water, a healthy environment, peace and a stable existence must be the first priorities in how we define or "determine" the "self" of both individuals and groups, instead of the present definitions, which are based on masculinist goals of political and economic aggrandizement and aggressive territoriality'.

[12] See Chapter 2.

[13] Declaration on Independence for Colonial Countries and Peoples, GA Res 1514 (XV) (14 December 1960).

[14] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, paras 150–3.

[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, para 52.

[16] *Western Sahara Case* [1975] ICJ Rep 12, per Judge Dillard at 121, and see Majority Opinion, paras 54–5.

[17] eg Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP, 1995) 140; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) in relation to Art 41; Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *HRLR* 609. See Chapter 4 for an explanation of *jus cogens*.

[18] Treaty on the Final Settlement With Respect to Germany (1990) 29 ILM 1186.

[19] eg the terms of the European Community's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991), (1992) 31 *ILM* 1486.

[20] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 118 and 122.

[21] *East Timor Case (Portugal v Australia)* [1995] ICJ Rep 90, para 29. The HRC also requires all states parties to the ICCPR to report on their protection of the right to self-determination: General Comment 12, para 3.

[22] GA Res 2625(XXV) (1970), Annex.

[23] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports, paras 82–4.

[24] *Kosovo Advisory Opinion*, Declaration of Judge Simma, para 7. See also Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24 *LJIL* 155.

[25] *Reference Re Secession of Québec* [1998] 2 SCR 217, (1998) 37 ILM 1342, para 136.

[26] For details of these and other exercises, see Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 *EJIL* 111.

[27] *Reference Re Secession of Québec*, para 126.

[28] See *Aaland Islands Opinion*, International Committee of Jurists (1920) LNOJ Spec Supp 3; *Loizidou v Turkey* (1997) 23 EHRR 513, per Judges Wildhaber and Ryssdal.

[29] Badinter Commission, Opinion 2, (1992) 31 ILM 1495, para 3.

[30] *Western Sahara*, para 55; see also *Chagos Advisory Opinion*, paras 157, 160.

[31] Badinter Commission, Opinion 4 (1992) 31 ILM 1495, para 4.

[32] See Vidmar, *Democratic Statehood in International Law* (Hart, 2013).

[33] *Western Sahara*.

[34] See Chapter 7.

[35] *Reference Re Secession of Québec*, para 139.

[36] *Frontier Dispute Case (Burkina Faso v Mali)* [1986] ICJ Rep 554 (Chamber of the ICJ), para 25.

[37] See Craven, *The Decolonization of International Law* (OUP, 2007). While Sudan accepted the secession of South Sudan, there were still disputes over the territorial boundary. See Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2012) 47 *Texas ILJ* 541; and Derso, 'International Law and the Self-Determination of South Sudan' (2012) Institute for Security Studies Paper No 231.

[38] Lord Salisbury, speaking in 1890, as quoted in the Separate Opinion of Judge Ajibola, in *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, 53.

[39] *Land, Island and Maritime Dispute (El Salvador v Honduras)* [1992] ICJ Rep 355, 388.

[40] See *Frontier Dispute (Burkina Faso v Niger)* [2013] ICJ Rep 44, Declaration of Judge Bennouna.

[41] *Frontier Dispute (Burkina Faso v Niger)*, Judgment, para 63.

[42] *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 32.

[43] *Western Sahara Case*, per Judge Nagendra Singh, 81.

[44] Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (30 September 2009); see *Georgia v Russia* (2012) 54 EHRR SE10, Annex 1.

[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art 1(4).

[46] Capotorti, UN Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1 (1979) para 242.

[47] eg the ECtHR has noted that, as a result of their turbulent history and constant uprooting, the Roma people have become a specific type of disadvantaged and vulnerable minority, and require special protection: see *Koky and Others v Romania*, App no 13642/03, Judgment of 12 June 2012.

[48] OHCHR, *Minority Rights: International Standards and Guidance for Implementation* (2010) 2.

[49] See *Koky and others*.

[50] See Macklem, 'Minority Rights in International Law' (2008) 6 *ICON* 531; Berman, 'But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law' (1992–3) 106 *Harvard LR* 1792.

[51] European Charter for Regional and Minority Languages; Framework Convention for the Protection of National Minorities; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference (now Organization) for Security and Co-operation in Europe, para 35; and Establishment of the OSCE High Commissioner on National Minorities, Helsinki Summit of Heads of State, 9–10 July 1992. In addition, protections of the rights of minorities were contained in the EC documents regarding the dissolution of the former Yugoslavia and the former USSR and were applied by the Badinter Commission: EC's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991).

[52] Badinter Commission, Opinion 2, para 2.

[53] HRC General Comment 24, HRI/GEN/1/Rev.9 (Vol 1) 210, para 8. See Chapter 14.

[54] *Sandra Lovelace v Canada*, A/36/40 at 166 (1981).

[55] *Ivan Kitok v Sweden*, CCPR/C/33/D/197/1985 (27 July 1988); *Handölsdalen Sami Village and others v Sweden*, App no 39013/04, Judgment of 30 March 2010; Report of the UN Special Rapporteur James Anaya, The situation of the Sami peoples in the Sápmi region of Norway, Sweden and Finland, A/HRC/18/35/Add.2 (6 June 2011).

[56] *Ivan Kitok*, para 15.

[57] It has been argued that the UN approach has been to accommodate the rights of indigenous peoples but to seek assimilation of minorities more generally: Kymlicka, 'The Internationalization of Minority Rights' (2008) 6 *ICON* 5.

[58] See Macklem (2008).

[59] *Ominayak and the Lubicon Lake Band*, 27.

[60] Thornberry, *International Law and the Rights of Minorities* (OUP, 1991).

[61] Badinter Commission, Opinion 2.

[62] See Workshop on data collection and disaggregation for Indigenous Peoples, 'The Concept of Indigenous Peoples, Background prepared by the Secretariat of the Permanent Forum on Indigenous Issues', PFII/2004/WS.1/3 (2004).

[63] Working Group on Indigenous Populations, Working paper by the Chairperson-Rapporteur, Mrs Erica-Irene A Daes, on the concept of 'indigenous people', E/CN.4/Sub.2/AC.4/1996/2 (1996).

[64] UN Development Group, Guidelines on Indigenous Peoples Issues (2008) at 6.

[65] Impacts on national law include Bolivia incorporating the Declaration into its Constitution on 7 November 2007 (adopted as Bolivian National Law 3760 on the Rights of Indigenous Peoples) and the Belize Supreme Court deciding that the property provisions of the Declaration embodied 'general principles of international law' that had the same force as a treaty: *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (Consolidated) Claim Nos 171 and 17 (18 October 2007).

[66] *Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) para 217.

[67] See Shrinkhal, '"Indigenous Sovereignty" and Right to Self-Determination in International Law: A Critical Appraisal' (2021) 17 *AlterNative* 71.

[68] *Kichwa Indigenous People of Sarayaku*, paras 145–6.

[69] eg *Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007). See also Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 *Duke J Intl & Comp L* 2.

[70] Working Group on Indigenous Populations, Legal Commentary on FPIC, E/CN.4/Sub.2/AC.4/2005/WP.1 (14 July 2005).

[71] *Kichwa Indigenous People of Sarayaku*, para 177. This is also recognized in ILO Convention No 169, Art 6.

[72] See Chapter 28.

[73] See eg Johnstone, 'What is Required for Free, Prior and Informed Consent and Where does it Apply?' in Johnstone and Hansen (eds), *Regulation of Extractive Industries* (Taylor & Francis, 2020) ch 3.

[74] See Anaya, *Indigenous Peoples in International Law* (OUP, 2005).

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