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The Making of Difference in International Law:
Interpretation, Identity and Participation
in the Discourse of Self-Determination

by

Karen C. Knop

A thesis submitted in conformity with the requirements
for the degree of S.J.D.
Graduate Faculty of Law, University of Toronto

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The Making of Difference in International Law: Interpretation, Identity and Participation in the Discourse of Self-Determination

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Abstract

This thesis takes a narrow question - whether the right of self-determination of peoples in international law includes a right of secession - and uses it to open a window onto the broader problem posed by cultural and gender difference for the interpretation of international law. The thesis does not seek to determine whether a right of secession exists. Rather, it investigates the importance of this question as a place, perhaps without equal, where international law has had to contend with the challenge of diversity for interpretation.

To illuminate this importance of self-determination, the thesis analyses its interpretation as the expression of a changing relationship between interpretation, identity and participation in international law.

By approaching the international legal literature in this way, Part I of the thesis offers a richer and more precise understanding of the current scholarly controversy over a right to secede.

In similarly enhancing the understanding of the precedents that figure in the controversy, Parts II and III enrich the history of the interpretation of self-determination. The judgments, arbitral decisions and other authoritative texts of self-determination assume importance less as stepping stones in the development of the right and more as successive encounters with marginalized groups, from nomadic desert peoples to indigenous women. In presenting an alternative account of self-determination as a series of challenges from the margins, Parts II and III introduce and develop the critiques of cultural and gender biases, respectively, that emerged in these challenges.

At the same time, Parts II and III suggest that international law and international institutions have responded to these cultural and gender critiques, if in ad hoc and partial fashion. The response is most visible in the interpretation of the "self" and the right of self-determination. But Parts II and III also explore the possibility of a deeper change in interpretation, one shaped by the values of identity and participation.
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Introduction

This thesis takes a narrow question - whether the right\(^1\) of self-determination of peoples in international law includes a right of secession - and uses it to open a window onto the broader problem posed by cultural and gender difference for the interpretation of international law. The thesis does not seek to determine whether a right of secession exists.\(^2\) Rather, it investigates the importance of this question as a place, perhaps without equal, where international law has had to contend with the challenge of diversity for interpretation.

To illuminate this significance of self-determination, the thesis analyzes its interpretation as the expression of a changing relationship between interpretation, identity and participation in international law. "Interpretation" signifies the theory of international law, the model of law and legal reasoning, applied to determine what self-determination means. "Identity" and "participation" are used, in one sense, to describe interpretation. "Identity" refers to international law's construction of the identity of a group and to challenges to the dominant construction. "Participation" is shorthand for the inclusion of affected groups in the interpretation of self-determination, whether signifying their actual participation in the process or the interpreter's imagined engagement with their perspectives. In another sense, "identity" and "participation" allude to values that may alter interpretation: interpretation may change so as to reconstruct a group's identity in international law on a basis more responsive to that group's self-understanding, or so as to read the importance of participation into key international legal concepts.

\(^1\) As will be seen, some authors analyse self-determination as a legal right and others as a legal principle. The terms "right" and "principle" are used somewhat loosely in the introduction, and this usage should not be seen as prejudging the issue of norm-type.

\(^2\) The Supreme Court of Canada judgement in Reference re Secession of Quebec was handed down just as this thesis was completed and is therefore not included in the analysis. Reference re Secession of Quebec, S.C.C. No.25506, 20 August 1998, <http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/renvoi.en.html>.
I Self-Determination as a Relationship between Interpretation, Identity and Participation: The Approach Explained

A Making Difference

My point of departure is that the interpretation of self-determination makes difference in international law. Its texts, like all legal texts, assume and create a world. And our recognition or acceptance of the world created in a particular reading of self-determination is part of what convinces us about that reading. The universe defined by the discourse of self-determination looks quite different, however, from the community of formally equal sovereign states posited by other international legal norms. In order to establish a discourse where all states are equal, public international law overwrites everything with the narrative of sovereign sameness. Since the right of self-determination is generally understood as the right to become a state, its subjects are by definition not states, but communities and even cultures. By creating an image of non-state groups, including Islamic communities, nomadic tribes, the colonized, ethnic nations and indigenous peoples, and of women within these groups, the interpretation of self-determination introduces a diversity and particularity into international law. At the same time, it also brings to the surface assumptions about culture and gender made in international law.

In the vast United Nations documentation on colonies and their readiness for self-determination, for instance, the colonial world was constructed - exoticised and domesticated, marvelled at and pitied, recorded and reformed - in post-World War II international law. While

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5 As I have already indicated (above, p.1) and explain later in the introduction (below, pp.25-27), the thesis focuses on the right of external self-determination. Self-determination is, of course, not only about the right to become a state.
dispatches from states administering colonies often took the tone of the sage imperialist, the UN visiting missions were latter-day explorers for the international legal system, their reports sometimes sprinkled with their excitement about the voyage or allusions to children’s stories of adventures and faraway places. Whatever the authorial voice, the central narrative of these texts was progress. The UN Charter envisaged the exercise of self-determination by colonial populations, but only when they were judged sufficiently politically, economically, socially and educationally advanced. Until then, the colonies were to be administered by Western states as trust or non-self-governing territories under UN supervision. Because the Charter made the encouragement of respect for human rights without distinction as to sex a basic objective of the international trusteeship system, the status of women in the trust territories was treated as a measure of a territory’s readiness for self-determination. In this way, the characterization of women became part of the story of progress told by the international law of self-determination.

For example, the discussion of the Mututsi women in a report from the early 1950s by Belgium, which administered Ruanda-Urundi as a trust territory, illustrates a keen eye for (if not also a hint of irritation at) the respect and authority some Mututsi women enjoyed in their own society, and a blind faith that European gender relations epitomized the goal of equality.

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6 E.g. “It was an exciting moment when, after flying for a day and part of the next day, at last the island appeared looking like a small ball of green and brown in the vast blue ocean,” wrote a UN visiting mission to the trust territory of Nauru in 1962. UN Visiting Mission to the Trust Territories of Nauru and New Guinea, 1962, Report on Nauru, UN TCOR, 29th Sess., Supp. No.2, UN Doc. T/1603 (1962) para.20.

7 I. Parghi, “Beyond Colonialism? Voice and Power in the UN Trusteeship System” (research paper, Faculty of Law, University of Toronto, 1997) 31 [unpublished]. Parghi cites references to the Arabian Nights and the famous story of the British explorer Stanley’s remarkable sang-froid when he came upon Dr. Livingstone lost in deepest Africa.


9 Ibid. at art. 76(c).

10 See Chapter 7 below.

11 The trust territory of Ruanda-Urundi became Rwanda and Burundi in 1962.
The proud and haughty Mututsi women as a general rule never left the family compound; they did no manual work except for a little basket-making. They supervised the work of others. Then [sic] they travelled with their husbands, they were borne in litters. The mother of the Mwami played an important political role; a number of Batutsi women have governed chefferies and sous-chefferies with undisputed authority.

... Women, and especially mothers, are held in high esteem. Whereas in some parts of Central Africa, they are treated as beasts of burden, in Ruanda-Urundi they are almost on an equality with their husbands...

Up to the present, the indigenous women have shown little desire to give up their customary role of wife and mother. This apathy would not, however, have justified neglect of the question by the Administration... The status of women will be raised chiefly by means of slow and persevering action.

Visits to hospitals and dispensaries and attendance at religious services have liberated the Mututsi women from the seclusion in which they lived. School education has sharpened the young girls’ minds and awakened their intelligence. The presence of a number of European families, especially those of colonists, has given the Africans the example of real partnership between men and women and shown them what an important part women can play.12

In discovering those outside international law, like the Mututsi women, the interpretation of self-determination constructs them inside international law.

The right of self-determination also differs from most classical international legal norms because it reaches beyond the community of states. Whereas international law traditionally speaks to states, the right of self-determination also regulates groups that it identifies or that identify themselves as subjects of the right.13 It seems in part the prospect of controlling the excitable races that so alarmed Robert Lansing, Secretary of State to President Wilson, about any


13 This is true whether or not, as some writers have argued, the right of self-determination in international law is “the right of State A to claim from State B that the latter State respect any peoples’ self-determination” and whether or not a particular rule of self-determination is addressed to states. G. Arangio-Ruiz, “Human Rights and Non-Intervention in the Helsinki Final Act” (1977-IV) Rec. des Cours 195 at 230. See the discussion in A. Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge: Cambridge University Press, 1995) at 141-144, 146-147 and in R. Ranjeva, “Peoples and National Liberation Movements” in M. Bedjaoui, ed., International Law: Achievements and Prospects (Paris; UNESCO/Dordrecht: Martinus Nijhoff, 1991) 101.
recognition of a right of self-determination. Before the peace conference ending World War I, Lansing wrote:

The more I think about the President's declaration as to the right of "self-determination", the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and to create trouble in many lands.

What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder, and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli not rely on it?...

The phrase is simply loaded with dynamite.¹⁴

Through the interpretation of self-determination, international law rhetorically creates an image of the world beyond sovereign states, using its own fears, hopes and desires to construct and control the inhabitants of this terra incognita.

While the interpretation of self-determination speaks about and to nations, peoples and minorities, it has rarely involved speaking with them. States are the paradigmatic subjects of international law. The jumping-off point for most definitions of international law is that it is law made by states to govern relations between them. While other entities have been recognized as limited subjects of international law, this has not led to a role for them in constructing international law. Hence, although peoples may have a right of self-determination, they have in fact been largely excluded from the interpretation and development of the right.

Historically, the depiction of minorities and peoples as irrational, inferior or backward has made it seem natural that they not participate in international law. Chris Tennant demonstrates generally how from 1945 to 1993, the representation of indigenous peoples in the international legal literature changes from ignoble to noble primitive and how this change in representational practices parallels a change in the engagement of international institutions with

indigenous peoples.\textsuperscript{15} Even when various individual and collective entitlements to petition international institutions did exist, the characterization of the petitioners influenced the effectiveness of this participation. During the period of decolonization after World War II, for example, much use was made of a broad right to petition the United Nations concerning trust territories.\textsuperscript{16} However, native petitioners tended to be regarded as objects of paternalism and benevolent curiosity. A 1953 UN pamphlet on the United Nations' work for dependent peoples, as the inhabitants of trust and non-self-governing territories were termed, opens with a "you are there" account of a petitioner from the French-administered Cameroons addressing the General Assembly. Having placed the reader in "the public gallery of one of the great committee rooms" of the General Assembly, above the tiers of attentive delegates seated at "curved and polished tables," the description, \textit{mirabile dictu}, of the petitioner proceeds:

\begin{quote}
It is an eloquent voice, expressing thoughts and ideas as fluently as might those who listen. It is also the voice of a practical mind...
It is a man - a humble and modest man - who has made a long and costly journey from his native land to tell of the desire of his people to rise above their present low level of development and their political dependence.\textsuperscript{17}
\end{quote}

The interpretation of self-determination may exclude peoples, minorities and their members from participation in another way. In resolving the issue of what self-determination means, an author also validates or authorizes a theory of the interpretation of international law. The choice of an interpretive theory determines how to talk about the meaning of self-determination: it endorses one kind of reasoning and invites one kind of response to argument. In defining the sort of conversation we can have in international law about self-determination, an


\textsuperscript{16} \textit{Charter of the United Nations}, supra note 8 at art.87(b).

\textsuperscript{17} \textit{A Sacred Trust. The Work of the United Nations for Dependent People} (United Nations, 1953) 1.
interpretive theory also contemplates and advantages a certain sort of speaker.\(^{18}\) Consider, for example, the seemingly innocuous classification of self-determination as a legal rule or a legal principle.\(^{19}\) This analytical first step may have a profound effect on interpretation by establishing how and how far the meaning of self-determination can be developed and who can speak effectively about its meaning. Michel Virally\(^{20}\) argues that reasoning with rules is essentially conservative: this painstaking induction keeps time with a homogeneous and stable international society, such as the vanished world of European diplomacy prior to World War I. Principles, which add a deductive dimension to the interpretation of international law, respond to the imperatives of a diverse and changing international society. The elaboration of a rule tends to be a narrower and more technical exercise than the interpretation of a principle. The extensive knowledge of precedents, mastery of traditional methods of interpretation, and professional reputation required to build an effective argument for the evolution of a rule privilege the opinions of recognized experts in international law - in the quaint words of the *International Court of Justice Statute*, "the teachings of the most highly qualified publicists of the various nations."\(^{21}\) In contrast, principles may, to quote Virally's warning, "constitute an idea-force, accessible to all, largely escaping, as a consequence, the control of jurists and dynamically affecting the functioning of the ways of creating law."\(^{22}\)

Thus, international institutions historically made little room for groups claiming self-determination to participate in, challenge or vindicate the construction of themselves and their


\(^{19}\) See Chapter 1 below.

\(^{20}\) M. Virally, "Le rôle des 'principes' dans le développement du droit international" in *Recueil d'études de droit international: En hommage à Paul Guggenheim* (Geneva: Faculté de droit de l'Université de Genève & Institut universitaire de hautes études internationales, 1968) 531 at 539-545.


\(^{22}\) [translation and emphasis mine] Virally, *supra* note 20 at 543. Virally is referring to principles that generalise from existing rules, as opposed to innovate, but the effect he described is a more general one.
right to choose their place in the international legal order. This practice of exclusion was consistent with the characterization of these groups and their members in the discourse of self-determination, a characterization that also undermined the possibility of their participation on the basis of equality. Related to the issue of participation in concrete institutional settings is that of membership in the imagined community generated by texts on self-determination. By applying one idea of interpretation or another to self-determination, international legal authors and adjudicators define the community and its culture of argument so as to include or exclude peoples and their ways of seeing the world.

B Making a Difference

But what about the petitioner from the French-administered Cameroons addressing the General Assembly? Did his participation make any difference? By depicting him as an anthropological curiosity under the delegates’ attentive gaze, the UN pamphlet tells us little of his own sense of self and reasons for being there. The petitioner is Guillaume Bissek, and he represents the political party Evolution sociale camerounaise. For him and Um Nyobé, the petitioner heard as a representative of the Union des Populations du Cameroun, the issues are independence and unification with the British-administered Cameroons. Bissek speaks mainly about the programme of reforms needed to prepare the French-administered Cameroons for independence, reforms that include the reorganization of traditional indigenous society to produce a hybrid of the French state apparatus and the traditional system of chiefdoms. In fact, the hearing of Bissek and Nyobé leads to a General Assembly resolution recommending that

the Trusteeship Council give priority to the matter of the French-administered Cameroons, take
the petitioners' positions into consideration and conduct a special study of the matter.26

In the context of self-determination, there are increasingly such opportunities for
participation. The most striking example is the hammering out within the United Nations system
of the right of self-determination for indigenous peoples.27 For the last twenty years, indigenous
peoples have been involved in the interpretation of the *International Covenant on Civil and
Political Rights*.28 Where a state has ratified the *Optional Protocol to the Covenant*, the UN
Human Rights Committee can consider communications from individuals who claim to be victims
of a violation by that state of any of the rights set forth in the *Covenant*. The Committee has
considered a number of communications from indigenous peoples. The new trend has been the
greater openness of international bodies drafting treaties and other documents to participation by
the groups affected. For indigenous peoples, the two key bodies have been the International Labour
Organisation which in 1989 produced *Convention (No. 169) concerning Indigenous and Tribal
Populations which in 1993 completed a draft declaration on indigenous rights.30 Indigenous
participation was a part of both processes, although much more integrated into the UN Working
Group's credo and methods. The number of participants in the 1993 session of the Working Group,
including observer governments, UN organizations, indigenous nations, organizations and

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26 *Hearing of petitioners from the Trust Territory of the Cameroons under French administration*, G.A.
27 See Chapter 5 below.
U.N.T.S. 171.
29 *Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June
Native L. Reporter 40.
communities, non-governmental organizations, individual experts and scholars, totalled over six hundred.\textsuperscript{31} In addition to the dozen or so indigenous NGOs having consultative status with the UN Economic and Social Council, more than one hundred indigenous nations and organizations were represented at the session.\textsuperscript{32}

How might this broader and more diverse participation, actual or notional, \textit{make a difference} in international law? Might the fact or image of social complexity affect the ways in which international law interprets self-determination, altering the norm as interpreted, the activity of interpretation or both?\textsuperscript{33}

The extended encounter of capitalist states with socialist\textsuperscript{34} states tells us something about the possible influence of a changed international society on the determination of international law.\textsuperscript{35} After the Bolshevik Revolution, Pashukanis, Korovin, Grabar' and other Soviet legal scholars wrestled with whether an international law common to capitalist and socialist states could even exist.\textsuperscript{36} Different theories of international law were proposed only to be denounced, from international law as a temporary compromise between two antagonistic systems to the impossibility of international law without a community of values and kinship of economic

\textsuperscript{31} \textit{Ibid.} at 14, para.36.
\textsuperscript{32} \textit{Ibid.} at 5-7, paras.8-11.
\textsuperscript{33} See generally H.J. Steiner, "International Legal Doctrine and Schools of Thought in the Twentieth Century" in \textit{Encyclopedia of Public International Law}, vol. 7 (Amsterdam: North-Holland, 1985) 297 at 303-308.
\textsuperscript{34} The discussion here is confined to Soviet-style socialism. On the People's Republic of China and international law, see e.g. C. Chaumont, "Cours général de droit international public" (1970-1) 129 Rec. des Cours 333 at c.3.
\textsuperscript{35} On the question of whether socialism had an impact on international law, compare e.g. J.N. Hazard, "Socialism and International Public Law" (1985) 23 Colum. J. Transnat'l L. 251 at 261-263 (refuting Wolfgang Friedmann's conclusion that socialism has introduced nothing new into international law, but finding a more modest impact than claimed by Soviet scholars) with G.I. Tunkin, ed., \textit{Mezhdunarodnoe Pravo} (Moscow: Iuridicheskaia Literatura, 1982) at c.2-3 (a standard textbook from the same period).
systems. After the hairpin turns in international legal theory of the interwar years and the shift to consideration of the practical problems presented by the Soviet Union’s participation in World War II, Grigorii Tunkin developed the theory of “peaceful coexistence” that paved the way for Soviet approaches to international law throughout the Cold War. Tunkin maintained that the essence of norm-creation in international law is bringing the wills of states into concordance. The concordance of wills makes possible an international law common to states with different, even opposed, social systems.37 In stressing consent as central to international law, Soviet doctrine allied itself with the positivist tradition in international law.38 For example, socialist international lawyers generally resisted Western attempts to interpret the UN Charter as an emerging world constitution, as opposed to a contract.39 Soviet doctrine also emphasized that the formation of international custom, the importance of UN General Assembly resolutions and the creation of jus cogens depended on sufficient support from capitalist, socialist and developing states.40 The decolonization of much of Africa and Asia offers a study of the impact of further diversification on ideas of international law.41

However, in a number of respects, the challenge of diversity for interpreting the right of self-determination of peoples is even greater than that of the socialist states or Third World for

38 But see Mullerson, supra note 36 at 340 (Soviet doctrine diverges from positivism in other respects.).
international law. First, the community that is identified or identifies itself with the right of self-determination is more marginal than the socialist bloc or Third World because it includes non-state groups, which are often vulnerable and powerless within the state; and women within these groups, who are, in Gayatri Spivak’s words, “even more deeply in shadow.”\footnote{G.C. Spivak, “Can the Subaltern Speak?” in C. Nelson & L. Grossberg, eds., Marxism and the Interpretation of Culture (Urbana: University of Illinois Press, 1988) 271 at 287.} This community is also more diverse: whereas international law makes all states formally equal and in this way the same, the potential subjects of self-determination are not states and their differences are therefore not erased by the sameness of formal equality. As a more diverse community, the community that is identified and identifies with self-determination is a more problematic one for international law. In a case concerning the right of self-determination of the Western Sahara, for example, the International Court of Justice grappled with the status of nomadic groups in international law.\footnote{Western Sahara, Advisory Opinion, [1975] I.C.J. Rep. 12, discussed in Chapter 4, below.} Arguing that the Bilad Shinguitti, the precursor of the modern state of Mauritania, should be treated as a “nation” or “people,” counsel for Mauritania asked rhetorically how international law could recognize a nomadic group when it had presented nomads as anarchic and ephemeral, and the negation of the paradigm of the strongly structured and centralized state.\footnote{Western Sahara, Vol. IV, “Oral Argument of J. Salmon [representing Mauritania]” (10 July 1975), I.C.J. Pleadings 425 at 432-433.} Finally, as the earlier quotation from Lansing illustrates,\footnote{Supra note 14 and accompanying text.} groups claiming self-determination are often perceived to be beyond reason and therefore more threatening to international law.

Let us now return to the spectrum of possible responses to this greater challenge of diversity posed by self-determination. At one end of the spectrum is no response. Those charged with interpreting international law, whether as authors or adjudicators, might for theoretical or
practical reasons be immune to the fact that the right of self-determination resonates beyond the community of states. If a theory of international law is understood as independent of the convictions and understandings of any community, then a change in the composition of the community is irrelevant to the way international lawyers interpret international law. Or, disregard of a non-state audience might be a pragmatic decision based on the observation that states continue to be the central actors in international law. Given the central function of states in the international system, some international lawyers might conclude that what matters is that states subscribe to the rules on self-determination because states will then obey and enforce the rules. A recent example of this thinking is Thomas Franck’s *The Power of Legitimacy Among Nations*, which focuses on why powerful states obey powerless rules.\(^46\) If international law lacks the enforcement mechanisms found in domestic law, why, to use Louis Henkin’s aphorism,\(^47\) do most states follow most of the rules most of the time? Franck’s analysis of self-determination in *The Power of Legitimacy Among Nations* is, accordingly, directed to a formulation of self-determination that will attract the compliance of states.\(^48\)

Then again, the broader audience that international lawyers imagine for self-determination might be a reason to stick to the traditional craft of interpretation in international law. For Sir Robert Jennings, public opinion is an added reason to maintain the clear distinction between international law as it is (*lex lata*) and as it should be (*proposals de lege ferenda*) recommended to Jennings by his teacher, McNair, as the mark of the professional lawyer.\(^49\)

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recent address on problems of self-determination, Jennings invokes an imagined person in the
street to defend a positivist theory of international law. His argument is that if international lawyers are not always clear on the difference between what the law is and what they would like it to be, who can blame the man or woman in the street if they collect the idea that virtually all international law is just a proposal and that accordingly it may be taken with a pinch of salt?50

While Jennings turns to the image of the perplexed ordinary citizen to fortify an old idea of interpretation in international law,51 it is possible that other scholars and judges might register and respond to the challenge of diversity differently: by applying new norms of interpretation to the question of what self-determination means in post-Cold War international law. Such a response might alter the cultural foundations, process or other rules of interpretation in international law.

Consider, as a precedent, the 1962 and 1966 judgments of the International Court of Justice in the South West Africa case.52 In the two decisions, dealing with the self-determination of Namibia, a technical issue of jurisdiction divided the Court according to different ideas of international law and interpretation.53 In the 1962 judgment, favourable to the Court's

50 Ibid. at 344.
jurisdiction, the minority judges adhered to the strict separation of international law and politics, and the construction of treaties according to original intent. The majority considered a rigid division between law and politics impossible to sustain and was prepared to read treaty commitments in light of the progressive development of international law, as necessary to give full effect to their purpose. The 1966 decision became a cause célèbre when chance transformed the 1962 minority judges into the majority. Based on their theory of international law, the new majority declined jurisdiction and thereby effectively reversed the earlier decision. The 1966 decision was greeted with outrage by many states, particularly in the Third World, and has been credited with the sea-change in judicial approach that James Crawford archly titled "decolonizing the Court."

II  The Value of the Approach

What I am proposing, then, is that we approach the question of self-determination as the expression of a changing relationship between interpretation, identity and participation. In the thesis, I present this approach as a way of analyzing the current controversy over self-determination, enriching the history of its interpretation and thinking about the shape of new norms of interpretation suggested by this history.

54 Not only had the composition and presidency of the Court changed, but Judge Zafrulla Khan did not sit (it was suspected that South Africa had objected to his participation); Judge Bustamente fell ill; Judge Badawi died while the case was being heard; and the casting vote was exercised by the new President, Sir Percy Spender, who had been in the minority in 1962. L.C. Green, "South West Africa and the World Court" (1966-67) 22 Int'l J. 39 at 58-59. For new information indicating that Sir Percy Spender actively engineered the disqualification of Judge Zafrulla Khan, see A.O. Adede, "Judicial Settlement in Perspective" in Muller et al., eds., supra note 51 at 47, 52-53.


Part I of the thesis treats the current debate in the international legal literature over whether the right of self-determination of peoples in international law includes a right of secession, while Parts II and III examine cases where an international legal authority has been squarely confronted with some aspect of the debate. Part II examines anew those instances relied on by most authors of the post-Cold War period in their interpretation of self-determination: the 1975 International Court of Justice advisory opinion in *Western Sahara*, the 1992 European Union (Badinter) Arbitration Commission Opinion No.2 on Yugoslavia, the 1995 International Court of Justice judgment in the *East Timor* case between Portugal and Australia, the adoption of ILO *Convention (No.169)* concerning Indigenous and Tribal Peoples in Independent Countries and the preparation by the United Nations Working Group on Indigenous Populations of a draft declaration on the rights of indigenous peoples. Whereas the cases treated in Part II involve cultural difference, the series of cases in Part III are chosen to develop women’s relationship to self-determination. Part III looks at women in the post-World War I plebiscites in Europe, women in trust territories administered under the UN *Charter* and indigenous women in the 1981 views of the UN Human Rights Committee in *Lovelace v. Canada*.

A Better Understanding

By approaching the literature on self-determination as the expression of a relationship between interpretation, identity and participation, Part I offers a richer and more precise understanding of the current scholarly controversy over a right to secede. Two celebrated articles by Thomas Franck on the interpretation of self-determination, “The Emerging Right to Democratic Governance” and “Postmodern Tribalism and the Right of Secession,” may serve

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to illustrate. In "Democratic Governance," Franck argues that we are witnessing the transformation of self-determination in international law from the right of overseas colonies to independence into a right of all to participate in democratic governance, while in "Postmodern Tribalism" he staunches the interpretation of self-determination so as to preclude a right of secession. Our attention is now directed to, among other things, the two different worlds he creates and the part these worlds play in persuading us of his interpretation. Both pieces begin with the sweep of historical events. In the opening pages of "Democratic Governance," there are two large, operatic historical events: the failed August 1992 coup in Moscow, and the decisive international action taken in immediate response to the overthrow of President Aristide of Haiti in September 1991. While Franck concedes that these events represent political, as opposed to legal, progress for democracy, he implies that the distinction is unimportant because political principle will march triumphantly - in the space of three pages the word "triumph" is applied to both President Yeltsin's victory and the ideas of Hume, Locke, Jefferson and Madison - into international law. In "Postmodern Tribalism," the prose of the early paragraphs crowds together the manifestations of nationalism that Franck chooses to call "postmodern tribalism." Postmodern tribalism is presented as "everywhere," the examples ranging across the age (old, nineteenth century and new) and place (Europe, the Americas and the Third World) of nations to reinforce this impression. Omnipresent, it is also uniform, "manifest[ing] itself in efforts to break up, equally, ...," and undifferentiated in its lack of apology and open flaunting "with zealously raised arms and firearms." No distinction is made between nationalist movements that generally work within the political and legal system, such as Scottish and Quebecois nationalists, and those that have

59 See further Chapter 3(I).
60 "Democratic Governance" supra note 57 at 47.
61 Ibid. at 47-49.
62 "Postmodern Tribalism" supra note 58 at 3.
degenerated into unrest, violence or war. Whereas political principle flowed smoothly into international law in “Democratic Governance,” a scrupulous separation is observed in “Postmodern Tribalism,” and a thicket of policy obstacles planted between the “undeniable political trend towards secessionist post-colonial ‘tribal’ states” and an international legal right to secede. If “Democratic Governance” creates an enlightened universe of *demos* that helps persuade us to recognize a right to democratic governance originating in self-determination, “Postmodern Tribalism” summons a dark underworld of *ethnos* that plays to our fears of interpreting self-determination to include a right of secession.

**B A New History**

In similarly enhancing the understanding of the precedents that figure in the current scholarly controversy over a right to secede, Parts II and III enrich the history of the interpretation of self-determination. By looking at self-determination as the expression of a relationship between interpretation, identity and participation, we start to notice places that are usually passed over in summarizing the development of the right in international law. In Parts II and III, the judgments, arbitral decisions and other authoritative texts of self-determination assume importance less as stepping stones in the development of the right and more as successive encounters with marginalized groups, from nomadic desert peoples to indigenous women.

A landmark in the history of self-determination such as the plebiscites in Europe between the wars thus becomes significant as the first time that women had the right to participate in an

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64 On the antecedents of this distinction between good *demos* and bad *ethnos* in international legal thought, see N. Berman, “Nationalism ‘Good’ and ‘Bad’: The Vicissitudes of an Obsession” (1996) 90 Proc. A.S.I.L. 214.
international expression of popular sovereignty. On a standard account, the significance of these plebiscites, provided for in the peace treaties ending World War I, lies in the departure from the traditional international law on transfer of territory by giving the population of certain border areas the opportunity to choose between the two states disputing the territory. "Peoples ... are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game," declared President Wilson in 1918. For women, this exercise in self-determination of peoples or "selves" was also about whether women were included in the determining "self." As such, the plebiscites introduced into international law the most important women's issues of the time: the vote for women. Women's groups were present at the 1919 Paris Peace Conference: international women's organizations already existed, several international conferences of women were held around this time with the goal of influencing the peace process, and women lobbied the delegations to the Peace Conference on women's rights and other issues concerning the peace treaties and proposed league of nations. Given that the treaties were negotiated when the tide had just begun to turn for women's suffrage, however, it is remarkable that women were given the vote in all the plebiscites held. Only two of the five powers that composed the Supreme Council at the Peace Conference, the United States and Britain, were even close to enfranchising women fully. The other three, France, Italy and Japan, did not extend the franchise to women for over two decades. Of the states involved in the plebiscites, five had given women the vote, but two would not do so for some time. Telling the history of self-determination in this way,

65 See Chapter 6, below.
67 The distinction between self and determining self is illustrated by the position of children: children belong to the self whose future is decided by the exercise of self-determination, but do not participate in that exercise.
as a story of participation, is, I suggest, of value in and of itself and because it destabilizes familiar accounts of international law.

The practice of self-determination thus becomes a struggle for inclusion, not only a people's struggle to become part of the world of sovereign states, but their struggle to incorporate their own story into international law. Self-determination has always been seen as revolutionary. Whether or not it has actually become the acid test for the legitimacy of international law, as István Bibó maintains, self-determination appears to give peoples a right to participate in the international legal order, an issue previously decided by the fact of power alone. Its revolutionary potential may now also be seen in the place it provides for non-state groups and their members to contest the images of identity and exercise of participation involved in the interpretation of self-determination. Self-determination serves, in John and Jean Comaroff's terms, to transform hegemony into ideology, where

[h]egemony consists of constructs and conventional practices that have come to permeate a political community; ideology originates in the assertions of a particular social group. Hegemony is beyond direct argument; ideology is more likely to be perceived as a matter of inimical opinion and interest and hence is more open to contestation. Hegemony, at its most effective, is mute; ideology invites argument.69

C New Possibilities

In presenting an alternative account of self-determination as a series of challenges from the margins, Parts II and III introduce and develop the critiques of cultural and gender biases respectively that emerged in this practice. At the same time, they suggest that international law

and international institutions have responded to these critiques, if in ad hoc and partial fashion. The response is most visible in the interpretation of the "self" and the right of self-determination. But there may also be hints of a deeper change in the methods and processes of interpretation, aimed at developing a broader-based legitimacy for the meaning of self-determination or at persuading a more diverse community.

Parts II and III explore the possibility of a deeper change in interpretation shaped by the values of identity and participation. I will only illustrate here how either value might modify the interpretive practice of self-determination, since arguments from identity and participation and the relationship between them vary with the conceptual and institutional context.

In the UN Working Group on Indigenous Peoples, the growing expectation that indigenous peoples have the right to participate with states on an equal basis in the elaboration of a right of self-determination for indigenous peoples moved the process closer to what Iris Marion Young calls an ideal of communicative democracy, which recognizes a plurality of perspectives and speaking styles as well as the general application of principles. What it might mean for international legal concepts to become valid across differences of identity, whether culture or gender, is powerfully demonstrated by Judge Dillard's separate opinion in the Western Sahara case. One of the questions in Western Sahara is what the legal ties were between the territory

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70 Compare J. Anaya, Indigenous Peoples in International Law (New York: Oxford, 1996) at 4 (identifying as his "central contention" that "international law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples' demands").

71 In current international law, the subject of the right of self-determination is a "people." However, since I consider a longer and broader line of cases, I will often use the term "self" instead of "people."


73 Western Sahara, supra note 43 at 116. See Chapter 4, below.
of the Western Sahara and the Kingdom of Morocco and the Mauritanian entity in the late nineteenth century; what was, in Dillard’s words, “the nature of legal ties in a time long past and in an area with its own peculiar attributes.”\textsuperscript{74} How should international law treat a tie between the Sultan of Morocco and the marabout Ma ul-‘Aineen or between the Emir of the Adrar and the chiefs of nomadic tribes?\textsuperscript{75} Dillard develops two approaches to the concept of “law” and “legal” ties, using the second to expose the cultural specificity of the first. On his first approach, a tie is legal “if it expresses a relationship in which there is a sense of obligation of a special kind.”\textsuperscript{76} While this sense of obligation need not be inspired by the fear of sanctions, it must be “pervasively felt as part of the way of life of the people.”\textsuperscript{77} It is not sufficient for the inhabitants of the territory to obey the wishes of the Sultan or the Emir out of a feeling of religious affiliation or courtesy; they must do so out of a sense of deferential obligation. The qualitative difference is between their sense that they must obey and that they merely ought to obey. Dillard’s second approach to the nature of legal ties criticizes the first approach as premised on a post-Reformation western oriented society, and as inappropriate to a society such as existed in the Sahara. In societies influenced by the Reformation, the sense of obligation to the sovereign is “focused on his secular authority which is not only paramount but permits a dissociation between obligations owed to the State and those owed to religious authority.”\textsuperscript{78} This sharp distinction between modes of authority was not characteristic of the society and popular consciousness that prevailed in the Sahara. In a society that understood power as neither secular nor religious, Dillard argues, it would be artificial to reject a tie as legal because it does not reflect a sense of

\textsuperscript{74} Ibid. at 125.
\textsuperscript{75} Ibid.
\textsuperscript{76} [emphasis in original] ibid.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
obligation "owed vertically to the secular power of someone in authority." Dillard's alternative approach considers legal ties to be those that are experienced as belonging to a larger collectivity: "The important thing is that the tribes criss-crossing the Western Sahara felt themselves to be part of a larger whole, while also claiming rights in the territory focused on the intermittent possession of water-holes, burial grounds and grazing pastures." Dillard's self-criticism illuminates both how deeply claims of difference and diversity challenge core concepts in the international law of self-determination and how judges may have the imagination needed to contend seriously with these claims.

Understood as the expression of a changing relationship between interpretation, identity and participation, the historical practice of self-determination emerges in Parts II and III as more complex than the stands taken by international lawyers in the current debate over the meaning of self-determination and seen in Part I. Indeed, if we abandon the rigid optic of the scholarship on self-determination, we can see the fluidity of interpretive practice and in it the shape of future possibilities.

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79 Ibid. at 126.
80 Ibid.
82 Compare A. Bunting, Particularity of Rights, Diversity of Contents: Women in International Human Rights (S.J.D. thesis in progress, University of Toronto) (In contrast to the universalism/relativism impasse in the international human rights literature, variance and "particularisation" of rights already exist in practice.).
83 Compare D. Kennedy, "A New Stream of International Law Scholarship" (1988) 7 Wisc. Int'l L.J. 1 at 47-49 (on imagining "a more thorough turn to the margins"); Otto, "Subalternity and International Law," supra note 41 (developing a similar approach to the processes by which international law is formulated, as opposed to interpreted).
III Methodology

Throughout the thesis, I consider an argument to be about self-determination if it is presented as such. To do otherwise would limit our perspective on whether and how the right of self-determination has been used in international law. I also discuss certain decisions that are not framed in terms of self-determination, where the decision involves an issue normatively similar to one raised by self-determination and sheds new light on the issue in the framework of self-determination.

A Choice of Literature

Part I discusses the question of self-determination in the international legal literature of the post-Cold War period. Authors from the expert to the relatively untutored in international law have produced a steady stream of work on its definition and application, with torrents of writing flowing from the breakup of empires from the Hapsburg and Ottoman empires after World War I to the far-flung colonial empires after World War II to the Soviet Union in 1991. While these torrents follow the contours of the preceding scholarship, each is shaped by the

84 It is noteworthy that one of these decisions, Lovelace, discussed in Chapter 8, would have been inadmissible if framed in terms of a right of self-determination under article 1 of the International Covenant on Civil and Political Rights. See below at pp.30-32. Moreover, it is unclear whether in making an argument under article 27 on the rights of “minorities,” Sandra Lovelace understood herself to be foreclosing the possibility of also identifying her community as a “people.”


For an indication of the periodical literature, see D. Turp, “A Select Bibliography on the Right of Self-Determination of Peoples” in Clark & Williamson, supra this note at 397-406.
issues of its time. Certain issues that once structured the discussion of self-determination - for instance, whether the principle was even part of international law - are now largely beyond dispute, and other issues have come to define the debate.

In the international legal literature of the post-Cold War period, the issue of self-determination, broadly stated, is whether the right has been spent by decolonization. It is commonly accepted that positive international law recognizes the population of an overseas colony as a “people” with an unqualified right to become an independent state. Controversy arises over who else is a “people,” whether other peoples have a right of self-determination and, if so, when they can exercise their right of self-determination in the form of statehood.

Discussion of these questions in positive international law tends to be organized around the notions of external and internal self-determination, where external self-determination refers to the choice of international status and internal self-determination to some - authors differ as to what - range of political entitlements within the state. From a factual or a normative perspective, however, the distinction between external and internal self-determination may seem unhelpful. In practice, a people with the right to choose independence might opt for self-government within the state, thereby exercising their right to external self-determination to establish a new internal political arrangement. Conversely, some forms of internal self-determination might amount to sovereignty in all but name. Normatively, internal and external self-determination might be analyzed as points on a continuum: for example, a group’s right to secede might be triggered

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86 See Cassese, supra note 13 at 126-128, nn.44-45. Whereas the references Cassese gives for the view that self-determination is a principle of international law date mainly from the late 1970s through the early 1990s, all but one of the citations he provides for the view that self-determination has not become a legal principle are from the 1960s and early 1970s.

87 The idea of a colonial population as a “people” is discussed critically in connection with the Western Sahara case in Chapter 4.

88 For an indication of the range of internal political arrangements, see Hannum, supra note 85 at c.16, 18.

only where some combination of democracy, minority rights and autonomy is insufficient to secure the well-being of the group. In fact, as we shall see, some international lawyers advocate this interpretation of the existing law on self-determination.\textsuperscript{90}

The bifurcation of the study of self-determination into external and internal self-determination is intelligible, however, as a response to the \textit{International Covenant on Civil and Political Rights},\textsuperscript{91} which distinguishes the right of all peoples to self-determination (article 1), the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their culture, practice their religion or use their language (article 27), and the right of citizens to take part in governance (article 25). The history and structure of the \textit{Covenant}, together with its interpretation by the UN Human Rights Committee, have led a number of authors to compartmentalize the treatment of self-determination.\textsuperscript{92} These authors reduce the right of external self-determination found in article 1 to a vestigial meaning by assuming that "peoples" and "minorities" are distinct categories, so that any group other than the population of an overseas colony must be a "minority" with cultural, religious or linguistic rights only. At the same time, they forge a right of internal self-determination from articles 1 and 25. On their reading, article 1 recognizes a right of internal self-determination of peoples, where a "people" denotes the entire citizenry of a state. Central to this right of internal self-determination is the right of all citizens to participate in governance found in article 25.

In the thesis, I set aside work on internal self-determination\textsuperscript{93} both in the sense of an empirical or normative treatment of a range of options less drastic than a change in sovereignty

\textsuperscript{90} See below, Chapter 2(II)(C).
\textsuperscript{91} \textit{Supra} note 28.
\textsuperscript{92} See \textit{e.g.} the discussion of Rosalyn Higgins's work in Chapter 3(II).
and in the sense of an argument in positive international law for a right of democratic governance. My focus is the right of external self-determination, which in the contemporary literature is essentially bound up with the question of a right to secede. It may be objected that in concentrating on the question of a right to secede, I am perpetuating an unhealthy or outmoded obsession with sovereignty. This is not my intention. The motivation for my focus on external self-determination was to choose the question of self-determination that has attracted the widest range of interpretation and best shows the nature and history of the debate. In addition to having a short recent history in international law, the theory and practice of internal self-determination tend to fall within the European liberal tradition.

A different objection to my topic might be that I implicitly privilege a masculine and European view of self-determination. Although the critiques of masculinity and Europeanness are related, each has its own complexity. Common to both feminist and Third World authors is the observation that the political expression of self-determination receives much greater attention


94 Compare *The [Toronto] Globe and Mail* (8 April 1997) A4, col.1 (Two teenagers hijack a school bus as part of a scheme to start their own country on Baffin Island.); “Group of Four Breaks Away from Canada” *The [Toronto] Globe and Mail* (18 June 1997) A2, col.3 (Four disenchanted Canadians on Baffin Island break away from Canada and create the state of Arctica.).


in international law than its economic, social or cultural expression. This observation is even more pertinent since the "liberal" revolutions in Eastern Europe have prompted international lawyers to concentrate on the development of a right of internal political self-determination, often synonymous with an entitlement to liberal democracy, while the concomitant disappearance of the communist bloc has subtracted from the voices arguing that economic, as well as political, self-determination is necessary for a people to realize independent statehood.97

Whereas Christine Chinkin and Shelley Wright criticize this hierarchy in the interpretation of self-determination as an international human right, arguing that "[f]ood, 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,"98 Third World scholars develop a thoroughgoing critique of self-determination in public international law. The elements of the Third World critique include the lasting violence done to pre-colonial selves by the use of colonial borders to define the self,99 the imposition of a Western idea of progress in the application of self-determination,100 and the travesty of self-determination where formal independence is accompanied by continued economic dependence on developed states.101 I discuss the first102 and second103 elements of this critique as they play out in the interpretive

100 E.g. S.N. Grovogui, Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-Determination in International Law (Minneapolis: University of Minnesota Press, 1996).
102 See Chapter 4, below.
practice of self-determination. However, I do not explore the feminist or Third World critiques based on the interdependence of political and economic self-determination for the same reason that I do not pursue work on internal self-determination: my interest is exploring critically the dominant discourse of self-determination. The thesis is not intended as an exhaustive treatment of the critiques or critical potential of self-determination, but as one contribution to what needs to be an ongoing questioning of the concept from many perspectives.

B Choice of Case-Studies

From the discussion in Part I of the debate over the interpretation of self-determination in the post-Cold War literature, Parts II and III turn to the practice of self-determination as it bears on that debate. The studies in Part II range from colonial to post-colonial and deal with Islamic communities, nomadic desert peoples, colonial populations, ethnic minorities and indigenous peoples. They revolve around the interpretation of the subject-or self-of self-determination and the interpretation of the right, the two issues being distinct because not all interpreters seek a consistent treatment of them. The studies in Part III complicate the interpretation of the self by examining how women are included in the self and whether they are included in the determining self. I look at women in the post-World War I plebiscites in Europe, women in colonial territories administered under the UN Charter pending independence and indigenous women-three cases that trace the increasing tension between women's concerns and the agenda of self-determination.

103 See Chapter 7, below.
1 Criteria

The case-studies in Parts II and III are moments in the progressive interpretation of self-determination when an international legal authority is confronted with an issue of self-determination that relates to the current debate over meaning and tells us something about the underlying contest between different schools of interpretation and normative visions of self-determination. I do not include cases that antedate the recognition of self-determination in international law (Aaland Islands\(^{104}\)) or that are remarkable chiefly for that recognition (Namibia\(^{105}\)) because they are not about the working out of these tensions in the international legal norm, although a case like the Aaland Islands will often enter into interpretations of self-determination that seek to recover a lost strand of meaning. While the study of women and the interwar European plebiscites in Part III also antedates the recognition of self-determination in international law, it treats an instance where self-determination was, in fact, given concrete legal effect.

Although most writers on self-determination are attentive to the UN Human Rights Committee's interpretation of the right of self-determination in article 1(1) of the International Covenant on Civil and Political Rights,\(^{106}\) I have not devoted a case-study to it because, in my judgment, the Committee has not gone beyond the most general indication of what self-determination means in the Covenant. The Committee has had the opportunity to interpret article 1 in the course of its two main functions: considering reports from and complaints against state


parties. States parties are obliged to report periodically to the Committee. In addition, they have the option of recognising the Committee's competence to hear interstate "communications" under the Covenant and individual "communications" under the Optional Protocol. The Committee's 1984 General Comment on self-determination, issued under its consideration of state reports, has been diplomatically described by former Committee member Torkel Opsahl as "perhaps somewhat less helpful in providing guidance for practice" than the Committee's comments on less politically sensitive areas. At the same time, the Human Rights Committee has excluded article 1 from consideration under the Optional Protocol, with the result that the right of self-determination is effectively beyond adjudication. In a line of cases over the last decade, the

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107 Ibid. at art.40.
108 Ibid. at arts.41-42.
110 International Covenant on Civil and Political Rights, supra note 106 at art.40(4).

At most, the Committee's views on individual communications may shed indirect light on article 1 and its relationship to other articles in indicating that an article 1 argument would be admissible if framed in terms of another article of the Covenant or deciding the merits of the argument as re-framed. In Mikmaq People v. Canada, the substance of the Mikmaq argument was inadmissible under article 1, but admissible under article 25 (Mikmaq v Canada, Communication No.205/1986, supra this note (Admissibility)), which sets out a general and specific right of political participation (H.J. Steiner, "Political Participation as a Human Right" (1988) 1 Harv. Hum. Rts. Y.B. 77). In other cases, indigenous peoples have used the minority rights
Committee has made clear that article 1 cannot be invoked under the *Optional Protocol* because the right of self-determination is a right of peoples, and the *Optional Protocol* mechanism is limited to claims by individuals concerning the violation of individual rights.\(^\text{113}\) Although there is no such restriction on the Committee's competence to hear interstate communications regarding the right of self-determination,\(^\text{114}\) an interstate communication has never been brought.

The persuasiveness of the story told in Parts II and III about the interpretation of self-determination in practice admittedly depends on the persuasiveness of the definition of interpretation used to choose the case-studies that form the basis for the story.\(^\text{115}\) It is uncontroversial that the International Court of Justice (*Western Sahara* and *East Timor* cases discussed in Chapter 4) is an institution that interprets international law, as are the UN Trusteeship Council (Chapter 7) and the UN Human Rights Committee (*Lovelace* case in Chapter 8) when they adjudicate individual petitions. But not all international lawyers would agree on the nature of international arbitrations (*Dubai-Sharjah* border arbitration and the decisions of the Yugoslavia arbitration committee in Chapter 4) and even fewer would consider the drafting of a treaty to involve the interpretation of international law (*ILO Convention No.169* in Chapter 5 and the peace guarantee in article 27 as an alternative to article 1 (e.g. *Lubicon Lake Band* v. Canada, *Kitok* v. Sweden, *supra* this note).

My contention is that the Committee has left open a number of readings of the right of self-determination. The trend in the literature is toward rationalising articles 1, 25 and sometimes 27 in terms of internal self-determination, where internal self-determination, depending on the writer, can encompass structures of collective representation, even autonomy and self-government, as well as individual rights of political participation. However, while the text of the *Covenant* together with Committee's public utterances on self-determination are indeed consistent with this reading, they are equally consistent with other readings of articles 1, 25 and 27. I do not argue this point in the thesis, but make a preliminary case for it in my discussion of Rosalyn Higgins's work on self-determination in Chapter 3(I).

\(^{113}\) To date, the possibility of reading those individual rights in light of the right of self-determination does not seem to have been explored before the Committee.


\(^{115}\) This is not true of Part I. Part I is designed to draw out an author's view of interpretation from her position on the meaning of self-determination and to show the implications of that view for identity and participation. The discussion therefore proceeds straightforwardly from the author's own idea of interpretation.
settlement after World War I in Chapter 6). A loose notion of interpretation may produce a history of self-determination that is partly or wholly unconvincing to the majority of international lawyers because it is based on a number of case-studies that they would not recognise as instances of interpretation. Then again, to organize this history on a mainstream idea of interpretation risks missing what is happening at the margins of international legal interpretation; in particular, it risks systematically excluding challenges by outsiders. Of these risks, I consider the former less important, and this for two reasons. First, as Peter Mason puts it, "writing about otherness is ... writing otherwise." To see what is happening at the margins, we must go somewhat beyond them. Second, as a number of the case-studies fit comfortably into the category of interpretation, a critic can discount or modify my conclusions in Parts II and III by accordingly dismissing the remaining case-studies or recharacterising them as evidence of emerging international law.

It is nevertheless hard to find an idea of interpretation that can be used simply to organize the practice of self-determination; specifically, to determine which episodes in this practice form the history of the interpretation of the right. A fixed, objective definition of interpretation is problematic if only because the nature of international institutions and processes can be vague and even mutable. Among other things, the semi-improvised expansion of the UN human rights system complicates efforts to classify and analyse the functions of these and other bodies. Thus Philip Alston dismisses "[a]ny depiction of this growth as being systematic, gradual, or even rational" as "largely unwarranted." Moreover, the loose mandates of most UN human rights bodies and the UN's predilection for ad hoc responses mean that there is a capacity, if not also a tendency, to shift from one function to another over the course of any process. Nor do participants' subjective

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116 Peter Mason, Deconstructing America: Representation of the Other (London: Routledge, 1990) at 4, quoted in Grovogui, supra note 100 at 10.
117 See P. Alston, "Appraising the UN Human Rights Regime" in Alston, ed., supra note 111 at 1, 3-5.
118 Ibid. at 2.
understandings suffice as a means of choosing case-studies since participants may disagree on the line between interpretation and legislation generally or on the objective of a particular international institution or process. Even if interpretation were defined as the broadest subjective understanding among the participants in a situation, for the reason that this affords the fullest consideration of self-determination as a contested relationship between interpretation, identity and participation, there would still be cases where the participants have no views or their views are unknown, which would leave no basis for deciding whether to include that case in the study of the interpretation of self-determination.

In this light, the most satisfactory notion of international legal interpretation for the purpose of choosing the case-studies in Parts II and III is one that allows for some variation in the usual identification of interpretation with the application of existing norms to a controversy by a third party. Drawing on Friedrich Kratochwil's work, I use the variables of strict/loose norm guidance, explicit/implicit third party and disinterested/interested third party to determine what contexts are part of the interpretive practice of self-determination.\(^\text{119}\) To be included as a case-study, a situation must exhibit a sufficient combination of these three variables. By norm guidance, I mean the extent to which resort is had to norms of international law,\(^\text{120}\) as opposed to factors such as power and rough justice that tend to play a role in bargaining. Like normativity, the existence of a third party is a matter of degree. A judge is an obvious third party, but others may be or become third parties in certain institutional and procedural contexts. The difference between an explicit and implicit third party is that the former is an actual identifiable actor, whereas the latter is a set of constraining ideas or identifications. Kratochwil points to Michael Barkun's argument concerning norms as

\(^\text{119}\) F.V. Kratochwil, Rules, norms and decisions. On the conditions of practical and legal reasoning in international relations and domestic affairs (Cambridge: Cambridge University Press, 1989) c.7. Kratochwil argues for this concept of "law."

\(^\text{120}\) I read normativity as encompassing a diversity of normative styles, including narration.
implicit third parties, but he might equally have recalled Georges Scelle’s famous concept of dédoublement fonctionnel, whereby the individual identity and interests of states in the international system are tempered by their functional duality as advocate in their own cause and judge, in lieu of a flourishing international judiciary, of other states’ actions. Kratochwil’s variable of disinterested/interested third party relates to the presence of a third party’s own agenda. Thus, normativity, the existence of a third party and the type of third party are all continua.

2 Limitations

I have expanded on the assertion that the case-studies in Parts II and III are moments when the interpretation of self-determination involves the underlying contest between different schools of interpretation and normative visions of self-determination. The case-studies are also episodes where groups traditionally marginalized in international law - non-Western states, peoples, minorities, women - have used self-determination to oppose dominant representations of them and their rights in international law. Whereas in the first part of the thesis, identity and participation are discussed mainly as consequences of interpretation, they emerge in the latter two parts as challenges to interpretation. Since Part I seeks to show how an author’s understanding of interpretation implicates an image of identity and participation, no judgment about the authenticity of identity and participation is involved. In contrast, Parts II and III may seem to set up the “real” identity of the group, communicated through its participation, against the myths of international law. But this story is too simple and it is not the one I seek to tell.

The order of the case-studies is intended to demonstrate that identities are shifting and often contradictory. Part II documents how marginalized groups commonly invoke the authenticity of the community with its own cultural traditions against the notions of equality and individual rights entrenched in international law, while Part III uses the example of women to show that identity is more complex and contingent than either of these representations. By examining, in so far as possible, women’s own representations of their collective identity at different stages of self-determination, Part III problematises the treatment of the self described in Part II. Within Part III, the movement, from European women in the plebiscites after World War I to Third World women during decolonization under the United Nations after World War II to indigenous women in connection with indigenous self-government, replicates the evolution of feminism\(^{124}\) in response to critiques by Third World women\(^{125}\) and women of colour.\(^{126}\)

Despite this dialectical movement of the case-studies, they cannot hope to map identity in all its complexity. On any approach to self-determination in international law, there will be identities that remain invisible. International law, despite the greater openness of international fora, increased savvy of international activists and growth of international civil society, remains predominantly an elite discourse and its institutions the precinct of state elites. This is even more true of the case-studies here, which focus on the discourse of self-determination at the most elite

\(^{124}\) Similarly, the structure of my "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 Transnat’l L. & Contemp. Probs. 293 echoes the movement from liberal to cultural to post-modern feminism.


and statist level. The reason for this focus, rather than the life that self-determination takes on at the grassroots level, the manifestos on self-determination by intellectuals in international civil society such as the 1976 Algiers Declaration of the Rights of Peoples,\footnote{\textit{Universal Declaration of the Rights of Peoples}, Algiers, 4 July 1976, International Lelio Basso Foundation for the Rights and Liberation of Peoples, \textit{Universal Declaration of the Rights of Peoples} (Paris: François Maspero, 1977); J. Crawford, ed., \textit{The Rights of Peoples} (Oxford: Clarendon Press, 1988) 187. Crawford glosses the Declaration as an "[u]nofficial declaration of scholars and publicists; basis for activities of Permanent Peoples' Tribunal, a private foundation." \textit{Ibid.} See generally F. Rigaux, \textit{Pour une déclaration universelle des droits des peuples. Identité nationale et coopération internationale} (Lyons: Chronique Sociale, 1990). Other efforts include the Saskatoon Statement and Recommendations on Self-Determination, adopted on March 6, 1993 at the Martin Ennals Memorial Symposium on Self-Determination held in Saskatoon, Saskatchewan, published in Clark & Williamson, eds., \textit{supra} note 85 at App. 1-2; and the draft \textit{Convention on Self-Determination Through Self-Administration}, which began as a Liechtenstein initiative in the UN General Assembly in the early 1990s (Prince Hans-Adam II, 26 September 1991, UN Doc. A/46/PV.10 (1991) 5-10; 23 September 1992, UN Doc. A/47/PV.9 (1992); Statement in the Third Committee, 8 October 1992) and later became part of the Liechtenstein Research Program on Self-Determination, Woodrow Wilson School of Public and International Affairs, Princeton University, circulated at the Second International LRPSPD Panel Conference on Self-Determination on Self-Determination and Communities, 9-10 June 1995, Princeton.} or some other wider lens, is that the central processes and institutions of international law has been heavily, and usually rightly, criticised, but often without much attention to whether they are actually impervious to change.

The case-studies value participation, like identity, against the elite discourse and statist structures that dominate the interpretation of self-determination in international law. While sporadic access to the international legal system has enabled some traditionally marginalized groups to assert their self-understanding in opposition to the images of them created by international law, this participation is not unproblematic. If it improves on the practice of exclusion, it also raises issues of representation and voice relative to the groups themselves. Given the relative value I place on participation, I do not address all these issues in the thesis. It will sometimes be obvious that a participant's interests may differ from those of the group he or she claims to represent, but I do not pursue this problem of representation. In a number of places, however, I examine who actually participates because this tells us something about the space for participation opened by self-determination. In Part III, for instance, the arrival on the 1920s'
international legal scene of white women who shared the European culture, social background and education of the publicists of the day differs from the participation evidenced by local women's petitions to the UN Trusteeship Council at the height of UN-supervised decolonization. The hidden prerequisites for participation, ranging from savoir-faire in international diplomacy to literacy or the cost of sending a written petition to the United Nations, are also reminders of barriers to access.

The case-studies address issues of voice generally by privileging participants' own voices, through pleadings, petitions, statements, and sometimes interviews and other writings. The chapters on indigenous peoples (Chapter 5), colonial women (Chapter 7) and indigenous women (Chapter 8) also touch on problems of communication and communicability: what speaking styles and modes of expression are required, and can they do justice to participants' experiences? In particular, the chapter on indigenous women, which deals with the Lovelace case, discusses both the difficulty of whether or not to bring the case before the UN Human Rights Committee (and earlier to bring an analogous case before the Canadian courts), and the reductionism involved in the Committee's views and subsequent interpretations of them.
Part I: Self-Determination in Post-Cold War International Legal Literature

Chapter 1
Rules, Principles and the International Community

In these first three chapters, I draw a picture of the contemporary international legal literature on self-determination. To demonstrate the technique used, Chapter 1 concentrates on a single detail of this picture. Chapter 2 completes the picture in broad outline, and Chapter 3 fills in the outline. This picture of the current debate among international lawyers over whether the right of self-determination includes a right of secession is somewhat different from the pictures that are usually drawn, both in outline and in detail. I am interested less in what international lawyers say self-determination is or should be, and more in how they say what they do and how we, as readers and potential speakers, are implicated in it.

As the start of thinking about the debate over the meaning of self-determination in this way, I use the distinction between self-determination as a rule and self-determination as a principle, taking as its framework the treatment of self-determination as a legal principle in Antonio Cassese’s *Self-Determination of peoples: A legal reappraisal* and James Crawford’s response in his review of the book. If the rule/principle distinction seems an oddly technical place to start, this is precisely my reason. Because most authors who attempt to explain what is “really” going on in the international legal debate on self-determination grapple only with the normative, they overlook much of what is implicated in the analytical.

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1 It should be underscored that this is not the threadbare debate over whether self-determination is political principle or legal norm, but the lesser noticed question of legal norm-type. Nor are we in the realm of the “general principles of law” recognised as a source of international law in article 38(1)(c) of the International Court of Justice statute. *Statute of the International Court of Justice, 26 June 1945*, Can. T.S. 1945 No.7.


The rule/principle distinction allows us to see what kinds of arguments might enter into the interpretation of self-determination, where and how (Parts I and II). At the same time, I seek to show that the rule/principle distinction is not just an interpretive move, but is also a practice of exclusion (Part III) and a narration of international society (Part IV).

I Rules and Principles

In his review of Antonio Cassese's *Self-determination of peoples*, James Crawford notes that Cassese "sees self-determination as consisting both of general principle and of particular rules," thereby avoiding the common mistake of searching for a single, self-sufficient norm on self-determination.5

As Crawford's tart praise indicates, the tendency in the literature on self-determination is to proceed as if self-determination could only be a rule. The result is either the formulation of a clear-cut rule, most often that only overseas colonies have the right of self-determination;6 or hand-wringing because no precise rule capable of guiding states and nationalists alike can be derived from practice, and international law is therefore sidelined in nationalist conflicts.7

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6 See Chapter 2, below, for a discussion of this position.
For Crawford, the search for a single norm on self-determination is as nonsensical as would be the assumption that the law relating to the use of force in international relations could be captured in a single norm.\(^8\) His compliment to Cassese is based on the conviction that the categories of "rule" and "principle" are more accurate descriptors for the practice of interpretation. My interest here is not in putting this conviction to the test, but in showing how these categories are themselves arguments about interpretation; in other words, how analytical models of the interpretation of self-determination are, in fact, prescriptions for its interpretation.

Whether self-determination is categorised as a rule or a principle determines the transformative potential of its interpretation or, in Audre Lorde's imagery,\(^9\) how far the master's tools will dismantle the master's house from within. If self-determination is seen as a hard-edged rule that tells states and nationalists exactly where they stand or as unworkable due to the lack of a discernible legal rule, then any change in its interpretation is more realistically pursued in the law-making arenas. If self-determination is also or instead seen to be a principle, then there is room for change in its interpretation.\(^10\) And the approach taken to principles in international law\(^11\) will control how much room and how it may be used. In particular, where is there space for arguments about the meaning of self-determination, what kinds of argument may be made, and what authority do they have?

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\(^8\) Book Review, supra note 3 at 331.
\(^10\) Compare C. Scott, "Indigenous Self-Determination and Decolonization of the International Imagination: A Plea" (1996) 18 Hum. Rts. Q. 814 at 815-816 (example of evolution of human rights as "a kind of constant dialogue between this freedom question [interests worthy of protection] and this equality question [whose interests]") [hereinafter "A Plea"].
This effect of the rule/principle distinction and the approach to principles on the openness of interpreting self-determination may be demonstrated by comparing two of the main jurisprudential treatments of self-determination as a principle in international law: James Crawford's own in *The Creation of States in International Law* and Oscar Schachter's, most recently in "Sovereignty - Then and Now."

Whereas James Crawford is close in style and substance to the positivist tradition in international law, Oscar Schachter, not unlike Rosalyn Higgins, has gradually distanced himself from the policy-oriented jurisprudence of Myres McDougal and Harold Lasswell.

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14 See below Chapter 3(II).


16 The McDougal-Lasswell approach to international law is known by its academic site (e.g. New Haven school or Yale school of international law), as well as by its features (e.g. world public order or policy science). See generally M.S. McDougal & W.M. Reisman, "International Law in Policy-Oriented Perspective" in R. St.J. Macdonald & D. M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Dordrecht: Martinus Nijhoff, 1983) 1031; M.S. McDougal, H.D. Lasswell & W.M. Reisman, "Theories About International Law: Prologue to a
Crawford and Schachter, however, share the conviction that international law is "open-textured," consisting of general principles as well as specific rules. Schachter has noted that "the application of all general propositions - whether legal or not - to diverse facts and events has necessarily a substantial degree of uncertainty or ambiguity." Crawford too accepts that "lawyering is an interpretive process," though he is inclined to make less of this fact. Referring to Cassese's ambition in *Self-determination of peoples* to study "self-determination as it exists in international law," the *lex lata*, and also to go "beyond the realm of law" and adopt a contextual approach "in which history, politics and jurisprudence are all employed in the service of legal elucidation," Crawford queries "[w]hy such a contextual approach takes one beyond the realm of law."20

Crawford distinguishes political principle, legal principle and legal right in terms of generality, and argues that self-determination is all three.21 While the political principle of self-determination has contributed to the international legal practice, "this general ideal is too vague and ill-defined to constitute a legal principle, much less a positive legal rule."22 But uncertainty of application in specific cases does not prevent the existence of a guiding legal principle; "so long as there exists a 'hard core' of reasonably clear cases, the status of the principle in question need not be doubted."23 The legal principle of self-determination has a core of clear meaning, which is coterminous with the legal right.

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18 1963 Lectures, *supra* note 13 at 189. See also 1982 Lectures, *supra* note 13 at 41; *Theory and Practice, supra* note 13 at 19.
21 *The Creation of States, supra* note 12 at 85-102.
The distinction between the legal principle and the legal right of self-determination is not the content of self-determination, which Crawford takes to be a people's right to choose its own political organisation, to be exercised without coercion on the basis of equality (one person, one vote). The exercise of self-determination may result in independence, or incorporation into or association with another state on a basis of political equality for that people. The difference between the principle and the right of self-determination in international law is the determinacy of the subject; that is, the definition of a "people." "[T]he notion of a right presupposes identification of the subject of the right."^{24} Thus the subject of the right of self-determination, unlike the subject of the principle, is fully determined: trust and mandated territories, and territories treated as non-self-governing under chapter XI of the UN Charter are entitled to self-determination.^{25} The principle applies to cases in which the subject does not come within the subject of the right; that is, within one of these definite categories. In such cases, an interpreter necessarily exercises discretion with regard to the subject - Crawford considers the question "as much a matter of politics as law."

- and may choose to accept, for example, the additional category that Crawford terms carence de souveraineté:^{26} "territories forming distinct political-geographical areas, whose inhabitants do not share in the government either of the region or of the State to which the region belongs, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing."^{27}

For Crawford, then, the legal principle of self-determination plays a residual role. In the absence of a right, the principle acts as a template for the translation of moral or political arguments.

\[^{24}\] Ibid. at 88.
\[^{25}\] Crawford also includes states and all other territories to which the parties agree to apply self-determination, but these categories do not concern us here. Ibid. at 101.
\[^{26}\] Ibid. at 89.
\[^{27}\] Ibid. at 86, 100.
\[^{28}\] Ibid. at 101.
into international law. The undefined subject, "peoples," creates an opening through which certain of these arguments enter the interpretation of the principle.

Schachter's general treatment of rules and principles in international law is broadly similar to that reflected in Crawford's analysis of self-determination. Where a rule is clear and clearly applicable to the case at hand, there is no place for principles in its interpretation. Where a rule is ambiguous, there is a choice of applicable rules or indeed no applicable rule, then principles govern the case.29

Schachter distinguishes principles from rules30 in terms of their generality and the nature of the choices they require.31 Principles are much more general than rules, with more abstract key terms. In addition, they are usually treated as higher than rules in the hierarchy of legal norms. Finally, principles are not dispositive: they carry weight rather than apply in an all-or-nothing fashion. Being general and fundamental, principles tend to clash with one another in concrete cases. An interpreter may therefore be faced with competing principles of equal legal status: "abstractions, arrayed in intransigent hostility like robot sentinels facing each other across a border."32 A solution is reached by weighing and balancing these competing principles in light of the factual context and policies33 of international law,34 thereby making them "useful guardians on

29 1982 Lectures, supra note 13 at 44-51; Theory and Practice, supra note 13 at 21-27.
30 While Schachter's account of principles and rules has remained constant, his use of other categories of legal norms has varied with the discussion. Compare 1963 Lectures, supra note 13 at 188-198 (rules, principles, standards and doctrines) with 1982 Lectures, supra note 13 at c.2; Theory and Practice, supra note 13 at c.2 (rules, principles and policies).
31 1963 Lectures, supra note 13 at 189. See also 1982 Lectures, supra note 13 at 43; Theory and Practice, supra note 13 at 20-21.
33 Schachter discusses self-determination as a policy as well as a principle in his recent writing. 1982 Lectures, supra note 13 at 48, 51; Theory and Practice, supra note 13 at 25, 31.

As types of propositions used in legal reasoning, principles and policies differ in that principles give rise to claims of entitlement and policies do not. Policies are instead concerned with collective goals. 1982 Lectures, supra note 13 at 44; Theory and Practice, supra note 13 at 21. Compare Taking Rights
either hand in the climb to truth." Writing about the interpretation of the UN Charter, Schachter explains that the emphasis in interpretation necessarily shifts from "dictionary" and "ordinary" meaning to "an assessment of a complex factual situation and a consideration of the consequences of a decision in light of more basic values that are regarded as implicit in the Charter."

Like Crawford, Schachter has consistently maintained, following H.L.A. Hart, that principles are "applicable to an indeterminate series of events, which may be viewed as extending outward from a 'core meaning';" principles have a core of certain application and a penumbra in which there are good reasons both to apply and not to apply them. Schachter is, earlier on, less true

Seriously, supra note 11 at 90. As stated above, for Schachter, policies become relevant only when there is a choice to be made among opposing principle or rules.

In positive international law, policies may sometimes be expressed as principles. The principle of self-determination in an international treaty, such as the UN Charter, may act as a principle (claim of entitlement) or a policy (claim of a different distributional character) depending on the context.

Schachter does not spell out how the principle of self-determination might function as a policy, but two examples come to mind. First, if the international community aims at a distribution of sovereignty so that no racial or ethnic group is much worse off than any other group (see e.g. P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan. L. Rev. 1311), then self-determination is a collective goal. The fact that some ethnic groups now have less territory can be justified by showing that this will lead to a greater benefit overall. Compare Taking Rights Seriously, supra note 11 at 91. A second, less utopian way that the principle of self-determination might serve as policy is against the background assumption of a hierarchy of rules and principles. If two contradictory rules are equally applicable in a particular situation and self-determination is used to choose between them, then the principle may be seen as assuming the status of policy relative to these rules. See Schachter's example of self-determination overriding the right of a state to conduct its own domestic affairs. 1982 Lectures, supra note 13 at 56; Theory and Practice, supra note 13 at 31.

1963 Lectures, supra note 13 at 191-193; 1982 Lectures, supra note 13 at 43-44; Theory and Practice, supra note 13 at 20-21.

34 "Dag Hammarskjold," supra note 32.

35 1963 Lectures, supra note 13 at 193. For an account of why an argument that one principle is preferable to another because it better advances a Charter purpose is nevertheless an argument of principle, see Taking Rights Seriously, supra note 11 at 297.


to Hart’s distinction between core and penumbra, stating squarely in a 1968 piece that the issue of policy “is not an issue that arises only in the penumbral case as H.L.A. Hart seems to suggest; it is far more central and common, at least on the international level, than that.” Nevertheless, in important recent work, he carefully distances himself from the pervasive policy-orientation of McDougal and Lasswell by emphasising the areas of certainty in the interpretation of international law.

If Crawford and Schachter both give the impression of an obvious borderline between easy and hard cases, interpretation being straightforward in the easy cases, they differ on the nature of interpretation in the hard cases. Crawford seems to contemplate the exercise of relatively unstructured discretion in cases requiring a hard decision about the subject of the principle of sovereignty or self-determination, whereas Schachter foresees the weighing and balancing of opposite principles with regard to the facts and the policies of international law.

The difference between Crawford and Schachter is more marked in their interpretation of self-determination. Unlike Crawford, Schachter considers self-determination one of several major areas of international law in which rules are relatively thin on the ground and general principles dominate. The interpretation of self-determination therefore proceeds from the opposition of two major principles of international law: the right of each people to self-determination as a choice of independence or autonomy and the territorial integrity of states. Schachter reconciles these principles by interpreting self-determination as a human right, but prohibiting foreign States from forcibly intervening to support such action against the territorial sovereign.

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40 1982 Lectures, supra note 13 at c.2; Theory and Practice, supra note 13 at c.2.
41 See note 16.
42 The Creation of States, supra note 12 at 88-89.
43 1982 Lectures, supra note 13 at 44; Theory and Practice, supra note 13 at 21.
44 “Sovereignty - Then and Now,” supra note 13 at 683-684.
Moreover, Schachter maintains that the term "people" is incapable of a core meaning. In his view, the determination of the subject of self-determination is so dependent on the individual and contingent facts of the cases that it can only be governed by a standard of reasonableness or appropriateness. By "standard," Schachter means generally "highly general prescriptions which involve evaluating the individual features of events." Relative to standards, rules and even to some degree principles "assume a relatively uniform application, irrespective of individual characteristics." Schachter's recently formulated standards for determining the peoples entitled to independence are:

1. The claimant community should have an identity distinct from the result of the country and inhabit a region that largely supports separation in the given circumstances.
2. The community has been subjected to a pattern of systemative political or economic discrimination.
3. The central regime has rejected reasonable proposals for autonomy and minority rights of the claimant community.

In substance, Crawford and Schachter are not far apart on self-determination: both propose an interpretation that makes the systematic denial of political rights to a community with an identity distinct from the rest of the state a condition for secession. The difference between the two lies in their picture of the interpretation of self-determination, and the place and authority of this proposal in it. For Crawford, there is an obvious difference between cases to which a right of self-determination applies and cases governed by the principle of self-determination. It is clear that the peoples of trust and mandated territories, and non-self-governing territories are "peoples" and beyond this, unclear who else qualifies. In these hard cases, interpretation involves a politico-legal choice, and his category of carence de souveraineté is offered simply as one possible politico-legal choice that might be made. Schachter does not apply the notion of core and penumbra to the

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45 1963 Lectures, supra note 13 at 193-194.
46 Ibid. at 193.
47 Sovereignty - Then and Now," supra note 13 at 684.
principle of self-determination; he does not separate the interpretation of the principle into easy and hard cases. The interpretation of self-determination in all cases is bounded by opposing principles and structured by the application of his tripartite reasonableness standard to the subject of self-determination, necessarily requiring consideration of basic values and the "felt necessities of time and place."  

II The Role of Principles

Antonio Cassese's treatment of self-determination as a legal principle in *Self-determination of peoples*, in particular, his reliance on Michel Virally's discussion of the two faces of principles, draws our attention as well to the role of the principle in the development of self-determination in international law.

Looking back at the wreckage of classical international law, which knew only rules, Virally reflects that the generality and plurality of principles in contemporary international law introduce uncertainty, plasticity and contradiction into the law. Facing toward the future, "principles have great normative potential and dynamic force: among other things, one can deduce from them specific rules, to the extent that these rules are not at variance with State practice."  

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49 Cassese, *supra* note 2 at 129, n.49, citing M. Virally, "Panorama du droit international contemporain" (1983-V) 183 Rec. des Cours 9 at 174-175 [hereinafter "Panorama"].

50 David Kennedy characterises the traditional intellectual history of international law from 1648 to 1918 as the expulsion of principle: the "narrative of authority's triumph over principle is repeated - in the shift from natural law to principle, from naturalism to positivism, and finally from law to institutions in the post-World War One era." D. Kennedy, "Images of Religion in International Legal History" in M.W. Janis, *The Influence of Religion on the Development of International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991) 137 at 141.

51 Cassese, *supra* note 2 at 129.
law that is imprecise, or even marked by contradiction," maintains Virally in the 1983 Hague lectures referred to by Cassese, "is also a law that is eminently evolutive."

In the 1960s, the role of principles in international law figured prominently in the debate over international law's ability to keep pace with a world community that now included a rapidly growing number of Third World states. Virally argued then that that reasoning with rules is essentially conservative: this painstaking induction keeps time with a homogeneous and stable international society, such as the vanished world of European diplomacy prior to World War I. Principles, which add a deductive dimension to the interpretation of international law, respond to the imperatives of a diverse and changing international society. In an exchange typical of the period, Georg Schwarzenberger, inured to the slow tempo of the judicial development of international law, argued that new rules could not be deduced from principles without being inductively verified by reference to the sources of international law, namely, treaty, custom and general principles of law, against Wilfred Jenks, who encouraged acceptance of such judicial boldness as a normal feature of "the judicial practice of an age of political, economic and social change unprecedented in scale and rate." For Schwarzenberger, Jenks was a woolly-thinking "representative par excellence of the eclectic and liberal-reformist treatment of international law" who failed to appreciate the rigour and prudence of the inductive approach to

52 [translation mine] "Panorama," supra note 49 at 175.

53 See C.W. Jenks, The Prospects of International Adjudication (London: Stevens & Sons Ltd., 1964) c.11 (taking issue with the inductive approach formulated primarily by Schwarzenberger in, inter alia, two articles collected in Schwarzenberger, supra note 5 at c.1-2); Schwarzenberger, supra note 5 at 115-164 (refuting Jenks point by point).

54 See e.g. A. Cassese, International Law in a Divided World (Oxford: Clarendon Press, 1986) at c.5.

55 Schwarzenberger, supra note 5 at 5, 50-51, c.3-4, 129-130. Besides furnishing hypotheses about rules, to be tested against the raw material of international law, principles could contribute convenient labels, Ordnungsbe griffe, for classifying, teaching and memorising related rules that had been inductively verified. Schwarzenberger cautioned, though, that "such classificatory concepts must not be abused for the purpose of deducing from them new rules." Ibid. at 129.

56 Jenks, supra note 53 at 621.

57 Schwarzenberger, supra note 5 at 115.
international law. For Jenks, Schwarzenberger was not only hopelessly conservative, but positively dangerous to the already flimsy prospects of international adjudication.

On Cassese’s analysis of the relationship between the principle and rules of self-determination, the power of the principle is as the ground for interpreting a rule or the sole ground for action in cases not covered by rules.\(^{58}\) For an example of the former, consider Andres Rigo Sureda’s account of the General Assembly’s use of the principle of self-determination in article 1(2) of the United Nations Charter to interpret its jurisdiction as extending beyond the determination of which territories are non-self-governing under chapter XI of the Charter, a status treated as a precondition and preparation for the exercise of self-determination, to the more general determination of which territories are entitled to self-determination.\(^{59}\) The latter role for the principle may be illustrated by Gaetano Arangio-Ruiz’s position that being a treaty principle of universal scope, self-determination in the UN Charter has not been circumscribed by the practice of applying it to colonial peoples only and remains a wellspring for the external and internal self-determination of any people, whether metropolitan or colonial.\(^{60}\)

### III Participation

The analytical step of classifying self-determination as a legal rule or a legal principle may have a profound effect on its interpretation by helping to establish not only how and how far the

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meaning of self-determination can be developed, but also who can speak effectively about its meaning.

In the previous parts, we began to see how norm-type affects the way that we talk about the meaning of self-determination in international law: to label self-determination a "principle" endorses a different kind of reasoning and invites a different kind of response than labelling it a "rule." In this part, I use points made by a number of the authors already mentioned in order to highlight how, in helping define the sort of conversation we can have in international law about self-determination, the classification of self-determination as rule or principle contemplates and advantages a certain sort of speaker.61

In an essay on the role of principles in the development of international law, not included in Antonio Cassese's reference to Michel Virally in Self-determination of peoples, Virally identifies the relevance of the rule/principle distinction to the ability to participate in interpretation. The elaboration of a rule tends to be a narrower and more technical exercise than the interpretation of a principle. An effective argument for the evolution of a rule depends on an extensive knowledge of precedents and mastery of traditional methods of interpretation, whereas, observes Virally, "many actors in international life are deprived of any legal training and do not have at their disposal a department with sufficient information and experience in the domain of international law to advise them usefully on this point."62

In this connection, Georg Schwarzenberger and Wilfred Jenks both emphasise that an inductive, empirically-based approach to international law was only made possible by, as

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62 [translation mine] "Le rôle des 'principes'," supra note 5 at 541.
Schwarzenberger describes the transition from monastic toilers to master builders to compulsive documentalists, the self-denying work of the eighteenth-century compilers, the monumental collections of Martens and Hertslet, the flow of State and parliamentary papers which, since the nineteenth century, grew to an unprecedented extent, the proceedings of numerous international conferences, and the paper-spilling organisations modelled on the League of Nations - not to speak of the multitude of decisions on international law by international and national courts.\textsuperscript{63}

It follows that unequal access to and ability to mobilise these resources is a greater disadvantage in the marshalling of an inductive argument about the existence or meaning of a rule than in constructing an argument about the interpretation of a principle.

Even if there were no disparity in access to the organised evidence or in the possession of the proficiency needed to turn it to one's legal advantage, the bias of these compilations and collections and their impact on the determination of the rules of international law would impose a considerable empirical burden on anyone seeking to establish a new rule or reinterpret an existing one. Schachter describes how, given the difficulty of determining the state practice and therefore the customary rule on a particular point, practitioners of the inductive method of international law have long relied heavily on the national digests of state practice prepared by, or in close association with, the government of the state concerned. Since only a few states produced such digests, reliance on them gives a potentially biased and unrepresentative picture of state practice.\textsuperscript{64} To dislodge this picture, however, would require extensive independent collection of data on state practice.\textsuperscript{65} In comparison, the interpretation of a principle could be

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\textsuperscript{63} Schwarzenberger, \textit{supra} note 5 at 13. See also Jenks, \textit{supra} note 53 at 623-624.

\textsuperscript{64} 1982 Lectures, \textit{supra} note 13 at 61; \textit{Theory and Practice}, \textit{supra} note 13 at 36. Cassese, \textit{supra} note 2 at 93.

\textsuperscript{65} Schwarzenberger, \textit{supra} note 5 at 18.
less dependent on evidence of state practice. For example, in a case where it is accepted that there is an applicable principle, but no applicable rule, the interpretation of the principle may turn on the types of political, moral, factual and policy considerations that Crawford and Schachter mention.

In the context of self-determination, if self-determination is understood as an “overseas colonies only” rule, then any alternative interpretation of the rule must account for all cases of independence or attempted independence world-wide over the last fifty years or so and states’ reactions to them. If the interpretation of self-determination is instead seen to engage the balancing of the principles of self-determination and territorial integrity, then interpretation is not grounded in the exhaustive consideration of state practice.

The extensive reliance on collections and digests of state practice in determining the rules of international law is paralleled by the pride of place given to what publicists have written, despite the fact that the writings of even the most highly qualified publicists are, according to article 38 of the International Court of Justice Statute, no more than a “subsidiary means for the determination of rules of law.” Since traditional international law is based on rules and developed by the more technical and empirical methods of induction and analogy, it is first of all, according to Virally, “un droit de juristes” or lawyers’ law. It privileges international lawyers, and states with a strong diplomatic tradition and experienced diplomatic corps, more than an international law that is also built on principles does. This structural advantage magnifies the

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66 This would not always be true; for example, the deduction of a new rule from an existing principle might require the demonstration that the new rule is not contrary to state practice. See text accompanying note 51.
67 See Part I above.
68 See note 13.
69 See above p.44, pp.45-46.
70 Statute of the International Court of Justice, supra note 1.
71 “Le rôle des ‘principes’,” supra note 5 at 540.
stature of eminent authors in international law and thereby increases the likelihood that an
author's reputation may discourage any interrogation of his views and his name be enough for
his opinions to influence the interpretation of international law.\textsuperscript{72} In contrast, principles may, to
quote Virally's warning, "constitute an idea-force, accessible to all, largely escaping, as a
consequence, the control of jurists..."\textsuperscript{73} Principles, by their nature and broad appeal, resist the
control of international lawyers.

IV The International Community

The rule/principle distinction is bound up with stories about international society, as well as
with theories of interpretation and practices of participation. In this part, I introduce the
relationship between the rule/principle distinction and narratives of the international community via
Antonio Cassese's definition of principles in \textit{Self-determination of peoples}:

Principles do not differ from treaty or customary rules simply in that they are more
general and less precise...Rather, principles differ from legal rules in that they are
the expression and result of conflicting views of States on matters of crucial
importance...In this respect, principles are a typical expression of the present world
community, whereas in the old community - relatively homogenous and less
conflictual - specific and precise rules prevailed.\textsuperscript{74}

Cassese's definition of principles is perplexing in several ways. First, as a matter of legal
theory, why are principles \textit{by definition} "the expression and result of conflicting views of States"? Without criticising Cassese's definition outright, James Crawford comments in his review of \textit{Self-
determination of peoples} that "[p]resumably, if views did not conflict, the principle would soon

\textsuperscript{72} Compare the implacable Schwarzenberger, \textit{supra} note 5 at 13-19 (mutual quotation clubs and
"ipsedixitism" rampant in the treatment of international law), cited by Schachter in 1982 Lectures, \textit{supra}
note 13 at 63, n.58.

\textsuperscript{73} [emphasis and translation mine] Virally, \textit{supra} note 5 at 543. Virally is referring to principles that
generalise from existing rules, as opposed to innovate, but the effect he described is a more general one.

\textsuperscript{74} Cassese, \textit{supra} note 2 at 128. See also A. Cassese, "The International Court of Justice and the Right of
crystallize into a 'specific and precise' rule." I take the implicit criticism to be that as legal norm-types, principles and rules have a distinct existence and function, and one is not reducible to the other. Principles are not rules manquées nor vice versa. Principles differ from rules in their generality and application as "directive principles" having weight rather than applying in an all-or-nothing fashion. Logically, rules may elaborate, but not replace, principles; just as principles may summarise, but not replace, a body of rules.

Second, according to the usual intellectual history of international law, the view of international law entrenched in the nineteenth century was the positivist one that international law consisted of empirically verifiable rules. In this light, Cassese's observation that rules prevailed in the old international community has a tautological flavour. International law was rules because only rules could be international law.

These two difficulties with Cassese's definition of principles may be attributed to his conflation of principles as norm-type, an analytical category; and principles as a set of assumptions about the world we live in, a sociological construct. That is, his rhetoric of rules and principles is traceable to a story of the world community. Cassese emphasises rules as a reflection of unity of values and harmony. In a fractured, conflictual world, principles become placeholders for rules;

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75 Book Review, supra note 3 at 331.
76 Ibid.
they come to represent the possibility of reaching agreement on rules, the hope of shared values in the future. A procedural version of this story may be found in the international legal literature that sees particularly the principles of sovereignty and self-determination as a meeting place, a language for speaking across difference. The promise of principles there is as an ongoing process, the dream of communication that leads to understanding, rather than a stand-in for substance.  

Approaching the rule/principle distinction as a story of the international community offers a context for Cassese’s definition of principles. It also leads us to think about how different stories of the international community would support different analyses of rules and principles, in particular, as applied to self-determination. For Cassese, principles must be the “expression and result” of deadlock among states over fundamentals. He assumes that states opposed in ideology and interests are more inclined to reach agreement on general principles than on specific rules. Such agreement seems plausible to John Rawls, who constructs a law of peoples from the idea of an overlapping consensus on basic principles among diverse societies. On this assumption, the principle of self-determination in international law should be highly abstract and quicksilver, sliding away like mercury to the touch, when attempts are made to formulate rules. Yet one can just as easily imagine that in a politically diverse world, rules are a more likely outcome than principles. Indeed, Cass Sunstein argues that the law’s strategy for dealing with the fact of pluralism domestically is to seek “incompletely theorized agreements”: rather than applying controversial moral and political theories to legal problems, legal reasoners rely on rules and low-level principles of law to settle them. This would suggest that international law has developed

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83 Sunstein, supra note 11.
self-determination as an "overseas colonies only" rule, because this rule is one on which states can agree for different moral and political reasons.

Even if we accept Cassese's position that "principles are a typical expression of the present world community," the nature of the agreement among states on principles is questionable. With the greater specificity of rules, the likelihood increases that agreement on them will be substantive, whereas agreement on principles might be anything including genuine agreement in the abstract, tacit agreement to reach a common meaning progressively or to a process of dialogue over meaning, disagreement veiled for reasons of entente\textsuperscript{84} or the cynical creation of agitprop.

More important than premises about the typical level of generality of agreement between states and the typical nature of that agreement is the basic narrative of the international community in the rule/principle distinction. As we have seen, Cassese associates rules with the relatively homogeneous and stable old international community and principles with the fragmented and conflict-prone modern international community. Rules are equated with unity and harmony;\textsuperscript{85} principles with diversity and tension, but with the potential to give way to rules reflecting a new unity and harmony. In contrast to this narrative of redemption,\textsuperscript{86} a narrative of the fallen world

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\textsuperscript{84} See F.C. Iklé, How Nations Negotiate (N.Y.: Harper & Row, 1964) at 15. Iklé takes as an example the following passage from L.B. Pearson, Diplomacy in the Nuclear Age (Cambridge, Mass.: Harvard University Press, 1949) at 47-48:

I know that there have been occasions, and I have been concerned with one or two, when, as the lesser of two evils, words were used in recording the results of negotiations or discussion whose value lay precisely in the fact that they were imprecise, that they could be interpreted somewhat freely and therefore could be used not so much to record agreement as to conceal a disagreement which it was desired to play down and which, it was hoped, would disappear in time. It is a practice, however, which is only rarely justified.


\textsuperscript{86} Compare Kennedy, supra note 50 (tracing the structural similarities among stories told by international law and religion). Like Kennedy, I am referring to narrative homologies and not, more literally, to the use of the Bible in international relations. On the latter, see M.G. Cartwright, "Biblical Argument in International Ethics" in Nardin, supra note 85 at 270.
can be identified in the work of some authors who identify self-determination as a rule. On their Hobbesian account, rules are the last bastion of certainty that protects international society from chaos, whereas the vagueness of principles invites argument, dissimulation, demagoguery and, ultimately, violence.

As this chapter illustrates, my interest has not been so much in what international lawyers argue that self-determination means. Rather, it has been in how they argue for a given meaning: what types of arguments they make and the implications of these arguments for interpretation, identity and participation. Through the issue of whether self-determination is rule, principle or both, I have begun to describe the contemporary international legal literature on self-determination from this perspective and to identify particular aspects of the relationships between interpretation, participation and narratives of the international community. I have not attempted to identify every possible aspect of these relationships, but to introduce those aspects that help to determine the transformative possibilities of the current debate on self-determination. Is there room for a conversation about the interpretation of self-determination in international law? If so, what sort of conversation can we have? Who can participate? What does the conversation say about us as an international community?

By looking at whether and how political and moral arguments enter into international legal interpretation, these questions highlight self-determination as a problem of interpretation in a way that existing explanations of the debate over self-determination have not. The "conventional diagnosis," Ralph Steinhardt tells us, is that the controversy derives from disagreement over the definition of "peoples" entitled to autonomy or over the preferred institutional outcome of self-determination, whether independent statehood, some form of association or autonomy, federalism,

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87 See Chapter 3, below.
system of human rights protection or other outcome. But this conventional diagnosis does no more than localise the disagreement. The "alternative" explanations given by Steinhardt trace the stand-off over the meaning of self-determination to such fundamental oppositions in international law as statism/globalism and law/politics. These explanations, however, go respectively to the value of self-determination as measured against different ideals of international society, and to its function as either a basic legal norm or a political smoke-screen for state interests. Neither attends to the debate over what self-determination means in international law. More promising are the taxonomies of the underlying normative models of self-determination and their interplay in the development of self-determination in international law because these taxonomies connect the debate in international law to its counterparts in political and moral theory. The limitation of these taxonomies is that they do not examine the structures of interpretation that foreclose or translate these arguments in international law, the function of these structures as mechanisms of exclusion or inclusion, and the vision they contain of international society.

90 Quite apart from the usefulness of the statism/globalism and law/politics dichotomies as explanations, Steinhardt invokes both dichotomies in non-obvious fashion. On the statism/globalism dichotomy, he writes:

From the statist perspective, self-determination - especially if construed as a minority population's right to secede from an existing state - must appear retrograde. On the other hand, abandoning the notion of self-determination of peoples will itself appear retrograde in an era in which the concept of the nation-state is under sustained attack.

One would think that from a statist perspective, in which states are the unquestioned subjects of international law, the aspiration to statehood would be only too natural. The problem for statism would instead be its conceptual inability to recognise groups within states. Then again, abandoning the right of peoples to choose nation-statehood would seem quite consistent with contemporary challenges to the centrality of the nation-state.

Steinhardt's description of the law/politics dichotomy as an explanation for the debate on self-determination is equally surprising: "a utopian camp defending the norm as law that is basic and a realist camp dismissing it as politics that is base." It would be odd, however, for a realist to dismiss something as base politics. For a realist, politics explains all of international law, not just self-determination, and the politics that accounts for the debate over self-determination is no more base than the politics that underlies any other difference of opinion in international law. Steinhardt, supra note 89 at 832.

Chapter 2
Coherence and Identity

Every prescription is insistent in its demand to be located in a discourse - to be supplied with history and destiny, beginning and end, explanation and purpose. Robert Cover, “Nomos and Narrative”

In Chapter 1, we saw how self-determination demands a narrative more strongly if classified as a legal principle than if classified as a legal rule. With the interpretation of the principle comes a greater role for a story of the identity of a people and the history that entitles them to self-determination. Chapter 2 examines the relationship between interpretation and identity more generally in the post-Cold War international legal literature on self-determination.

Chapter 2 is organised by the two standard questions in the literature. Part I discusses the question who is a “people,” and Part II discusses when the right of self-determination entitles a people to choose their external political status. The easy answer to both questions is decolonisation. International lawyers agree that “peoples” includes colonial populations, technically the populations of trust territories and non-self-governing territories under the United Nations Charter, and that the right of self-determination entitles these colonial populations to choose independent statehood, association or integration with another state, or any other political status. Harder to answer is whether the right of self-determination of peoples extends beyond decolonisation. It is the settling of this thornier point, either in the abstract or in concrete cases, which has generated much of the recent literature on self-determination. Parts I and II each begin

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2 See Chapter 1(I) above.
by presenting the traditional answer that the right of self-determination does not extend beyond decolonisation and then proceed to examine the range of answers that say it does.

The object of this chapter is not to determine the correct interpretation of the right of self-determination of peoples. Rather, its basic object is to introduce the different interpretations of self-determination found in the post-Cold War international legal literature. In so doing, this chapter sets the stage for Chapter 3, which analyses how an author might persuade us to adopt one interpretation over another; and for Chapters 4 and 5, which analyse how international courts, tribunals and other authorities have dealt with conflicting or overlapping interpretations.

Beyond the basic object of outlining the different interpretations of self-determination, the chapter reveals the diversity of ideas about identity generated by these interpretations. Antonio Cassese’s interpretation of the principle of self-determination, for example, projects an image of a “people” as a collection of liberal monads inhabiting a territory, interchangeable exercisers of free will.\(^4\) In contrast, Daniel Turp’s interpretation of “people” relies on Charles Chaumont, who, writing during the Third World national liberation of the 1970s, assumed that violence would testify to the existence of a people. For Chaumont, the strongest affirmation of a people was “the stakes of death.”\(^5\)

Finally, the chapter broadens the examination of the relationship between interpretation and identity begun in Chapter 1. It shows that how authors go about expanding the right of self-determination of peoples beyond decolonization has implications for the construction of identity in international law. Whereas some authors broaden the interpretation of self-determination by establishing the independent existence of new categories and rules, there are increasingly others who do so by imposing coherence through, for example, global definitions, consistent rationales and overarching principles. With coherence tend to come simple powerful stories of identity.

\(^4\) See below at note 93 and accompanying text.
\(^5\) See below at note 110 and accompanying text.
But since different authors create coherence differently, the result is an emerging rivalry between grand narratives of self-determination.

I Who is a “People”?

A Colonies

1 Colonial Categories

International lawyers virtually all agree that whatever else the term “peoples” may mean, it means the colonial categories of trust territories and non-self-governing territories established by the United Nations Charter. Trust territories, covered by chapter XIII of the Charter, were primarily territories previously held under the League of Nations mandate system. At the end of World War I, territories were taken from Germany and the Ottoman Empire, now Turkey, and administered as mandated territories by one of the victorious states on conditions agreed with the League of Nations. By the early days of the UN Charter, some of the mandated territories - Iraq, Jordan, Lebanon and Syria - had become independent. The remaining mandated territories, apart from the British mandate of Palestine and the South African mandate of South West Africa, were brought under the UN trusteeship system. Additional territories could be placed under the trusteeship system, but the only such trust territory was Italian Somaliland, present-day Somalia. In the case of each trust territory, an authority, which could be one or more states or the United Nations itself, administered the territory pursuant to an individual trusteeship agreement. The

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United Nations supervised the administration of trust territories through a system of reporting by administering authorities, examination of petitions and periodic visits by UN missions.9

The other category of territory the population of which was recognised as a "people," or subject of self-determination, was non-self-governing territories, which are dealt with in chapter XI of the Charter.10 In the words of chapter XI, non-self-governing territories are "territories whose people have not yet attained a full measure of self-government." Initially, these territories were identified by the states responsible for them. Australia, Belgium, Denmark, France, the Netherlands, New Zealand, the United Kingdom and the United States all voluntarily listed certain of their territories as non-self-governing. However, Portugal’s and Spain’s refusal to declare any of their colonies as non-self-governing territories and thereby bring them within the reporting system of chapter XI led the General Assembly to specify criteria for non-self-governing territories.11 Using these criteria, the General Assembly has found Southern Rhodesia and certain French territories, as well as certain overseas territories of Portugal and Spain, to be non-self-governing.12

While the UN Charter envisaged progress toward self-government for trust territories and non-self-governing territories, it made no mention of self-determination. It is generally accepted, however, that the subsequent development of international law gave these territories a right of self-determination13 which they were free to exercise by the establishment of an independent

9 Charter, supra note 6 at c.XIII.
10 For a summary of non-self-governing territories from 1946 to 1977, see The Creation of States, supra note 7 at app.3.
12 The Creation of States, supra note 7 at 360-361.
state, their association or integration with another state or the transition to any other freely chosen political status. All trust territories have now exercised their right of self-determination. Except for a number of small island territories and a few larger territories which are the subjects of dispute notably, Western Sahara and East Timor - all non-self-governing territories have also achieved self-determination. The exercise of self-determination has most often resulted in independence, creating almost one hundred new states.\(^\text{14}\)

Both generally accepted categories of “peoples,” trust territories and non-self-governing territories, were colonies in the sense of being dependent on and subordinate to a geographically separate state. The current controversy in international law is whether “peoples”\(^\text{15}\) means more than just the population of colonies in this particular historical sense. As is evident from the expert opinions solicited in the debate over Quebec’s right to secede from Canada, the established view continues to be that it does not.\(^\text{16}\) At its narrowest and most positivist,\(^\text{17}\) the

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\(^\text{15}\) It should be remembered that the discussion is limited to “peoples” having the right to *external* self-determination.

argument is that self-determination entered international law only as a rule of decolonization, and its formulation and application in international law rule out any definition of "peoples" broader than colonies.

The first step of this argument shows that self-determination was not recognised in international law prior to the development of a right of self-determination for colonies. This step often relies on the Aaland Islands case for the proposition that self-determination had not yet become an international legal norm in the inter-war period. The Aaland Islands had been Finnish territory when Finland was under the Russian Empire. During the process of Finland's independence from Russia, the Aaland Islands' population, which was Swedish-speaking, claimed the right to join the islands to Sweden. The League of Nations appointed two commissions to investigate the dispute. An International Committee of Jurists, charged with the issue of jurisdiction, found that the League of Nations had jurisdiction because Finland at the

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17 Although there are authors that subscribe to this form of the argument, the following is a synthetic version and is not intended to reflect the position of all authors who adopt a "colonies only" interpretation of "peoples."


time was not yet definitively constituted as a state and therefore could not assert domestic jurisdiction. According to the Jurists’ report, the principle of self-determination was not part of ordinary international law, which was based on the existence of state sovereignty. However, where sovereignty was disrupted, as in the political turmoil of revolutionary Finland, the basis for the normal rules of positive international law was lacking, and the principle of self-determination might be “called into play.” A Commission of Rapporteurs, assigned to the merits, disagreed with the Jurists’ finding of a gap in sovereignty, concluding that the newly independent Finland continued an autonomous state of Finland that had existed under the Russian Empire and had included the Aaland Islands. Since Finnish sovereignty over the islands had been continuous, the principle of self-determination did not apply to them. The Rapporteurs’ report also stated that the principle of self-determination “is not, properly speaking, a rule of international law and the League of Nations, has not entered it into its Covenant.”

Although the “principle of equal rights and self-determination of peoples” appears in articles 1(2) and 55 of the 1945 Charter of the United Nations, conservative scholars do not regard this as international legal recognition of self-determination. They reason either that the

22 Ibid. at 5-6.
24 Ibid. at 27.
principle is merely political, even found in an international treaty, or that it means the equal right of the people of one state to be free from interference by other states and not the right of a people to choose independence. If, instead, the principle in article 1(2) is legally binding on UN members and does refer to peoples as distinct from states, then the principle is confined by equating it to the system of trust territories and non-self-governing territories in chapters XI and XII of the Charter.\textsuperscript{26}

The second step in the argument that the definition of "peoples" is limited to colonies is to show that when the right of self-determination for peoples did enter international law, it was formulated in such as way as to deny the right to any peoples other than colonial peoples. The Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 adopted by the UN General Assembly in 1960,\textsuperscript{27} gives all peoples the right to self-determination,\textsuperscript{28} but prohibits the disruption of a state’s territorial integrity.\textsuperscript{29} At the same time, the Declaration requires that immediate steps be taken to transfer all powers unconditionally to the peoples of trust and non-self-governing territories and all other territories not yet independent in accordance with their freely expressed will and desire, thereby clarifying that decolonization is consistent with the principle of territorial integrity.\textsuperscript{30} The self-determination of colonies does not violate the state’s territorial integrity because international law gives colonies a status separate and distinct from the state. General Assembly Resolution 1541, passed shortly after the Declaration on the Independence of Colonial Peoples, defines a non-self-governing territory

\textsuperscript{26} For an overview of this debate, see D. Turp, "Le droit de sécession en droit international public" (1982) 20 Can. Y.B. Int’l L. 24 at 35-39 [hereinafter “Le droit de sécession”].


\textsuperscript{28} Ibid. at para.2.

\textsuperscript{29} Ibid. at para.6.

\textsuperscript{30} Declaration on the Independence of Colonial Peoples, supra note 27 at para.5.
prima facie as "a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." In practice, geographical separation has meant by an ocean, the international lawyers' shorthand being "blue water" or "salt water" colonialism. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations reproduces the opposition of the right of all peoples to self-determination and the safeguard on territorial integrity, in addition to confirming the separate and distinct status of the territory of a colony or other non-self-governing territory.

The principle of uti possidetis, which preserves existing boundaries upon independence, reinforces the principle of territorial integrity for newly independent states by prohibiting any exercise of self-determination by groups within the state. The principle was first used in the decolonization of Spanish America to preserve the Spanish administrative divisions as the boundaries of the new states and later adopted in African decolonization to transform the international borders between the colonies of the various imperial powers into the boundaries of the new African states. There is some scholarly debate as to whether the adoption of the

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31 GA Res. 1541, supra note 11 at principle IV.
34 See also Conference on Security and Cooperation in Europe: Final Act, 1 August 1975, 14 I.L.M. 1292, Principles III, IV & VIII. On this and subsequent OSCE documents referring to the principle of self-determination, see generally Salo, supra note 3.
35 Declaration on Friendly Relations, supra note 33 at principle 5 [the principle of equal rights and self-determination of peoples], para.1.
36 Ibid. at principle 5, para.8.
37 Ibid. at principle 5, para.6.
39 Some international legal scholars argue that the principle applied in African decolonization, strictly
principle in Africa should be seen as the application to Africa of a rule of general scope or merely as practice contributing to the emergence of a principle of customary international law, limited to Africa as it had been previously to Spanish America. A 1992 opinion on Yugoslavia by a European Union Arbitration Commission lends support to the view that *uti possidetis* is "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs." The final step in the argument "peoples" means colonies only is to demonstrate that this definition is consistent with practice. Since the Second World War, twenty new states have resulted from processes other than decolonization in technical sense of chapters XI and XII of the UN Charter. Only one of them - Bangladesh - was created by unilateral secession. The creation of the remaining nineteen states can be accounted for either as consensual breakup, in the cases of Senegal, Singapore, the former Soviet republics, the Czech Republic and Slovakia, and Eritrea; or violent dissolution, in the case of the former Yugoslav republics. The independence of the three Baltic states - Estonia, Latvia and Lithuania - may also be explained in terms of the restoration of independence, since the three were separate states in 1940 when the


46 See R. Yakmetchouk, "Les républiques baltes en droit international. Échec d'une annexation opérée en
Soviet Union illegally annexed them through a combination of force and duress, and were treated as occupied states throughout by much of the international community.

In addition, the single successful secession in a non-colonial context, Bangladesh, is far outweighed by the lack of international support for attempts at secession by other non-colonial groups and territories\textsuperscript{47} including actual UN involvement in the Congo with the goal of promoting the territorial integrity of the Congo following the secession of Katanga;\textsuperscript{48} the non-recognition by the vast majority of states of Biafra’s secession from Nigeria despite Biafra’s three-year existence as a \textit{de facto} state;\textsuperscript{49} the opinion of a European Union Arbitration Commission that the Bosnian Serbs, who proclaimed an independent Republika Srpska, did not have the right to independence at international law;\textsuperscript{50} the respect of states for Russia’s territorial integrity in response to Chechnya’s declaration of independence and military defeat of Russian troops;\textsuperscript{51} and the lack of international support for other attempts at secession\textsuperscript{52} ranging from Kashmir’s and East Punjab’s failed secessions from India to Bougainville’s secession from Papua-New Guinea.\textsuperscript{53}

\textsuperscript{47} Crawford report, \textit{supra} note 14 at paras 49-59; Hannum, \textit{supra} note 19 at 498; Quoc Dinh, \textit{supra} note 16 at 502.


\textsuperscript{52} For a survey of other cases of attempts at unilateral secession and support for unilateral secession short of an actual declaration of independence, see Crawford report, \textit{supra} note 14 at paras. 50-59. See also Halperin, \textit{supra} note 16 at app.

2 Colonial Identity

While the colonial categories of trust territories and non-self-governing territories give a technical legal meaning to the term "peoples," it is unclear what idea of identity they represent. The idea of the colonial identity in international law is important not only as such, but also as the basis for the interpretive argument that other groups are "peoples" because they are analogous to colonies.

Colonies corresponded to neither demos nor ethnos, the two ideas of the nation current European political thought since the eighteenth century.\(^{54}\) In the 1882 essay, "Qu’est-ce qu’une nation?," Ernest Renan expresses the idea of demos, the political nation, as summarised by the tangible fact of "consent, the clearly expressed desire to continue a common life."\(^{55}\) On this view, the nation embodies a common consciousness derived primarily from shared lives and shared ideals. United by the historical fact of imperial conquest, however, the population of the colonies had never consented to an existence in common, and did not possess a collective consciousness or hold shared ideals. For the German Romantic thinkers, the nation was an ethnos, a cultural community based on a common language. Johann Gottfried von Herder, who is often regarded as the intellectual father of ethnic nationalism,\(^{56}\) wrote that providence "has wonderfully separated nationalities not only by woods and mountains, seas and deserts, rivers and climates, but more particularly by languages, inclinations and characters."\(^{57}\) But since the

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\(^{56}\) See e.g. R.R. Ergang, *Herder and the Foundations of German Nationalism* (N.Y.: Columbia University Press, 1931) at c.8.

\(^{57}\) Quoted in *ibid.* at 244.
colonies were often patchwork quilts of different tribes, colonial populations did not necessarily have a common ethnicity or language.

While colonies were neither _demos_ nor _ethnos_ in origin, their international legal recognition as "peoples" might nevertheless have registered an identity forged in the fires of colonialism. Charles Chaumont postulates that a colonial population became a people through its development of a collective awareness of oppression and exploitation by the imperial power and its common fight for liberation. Tribal rivalries inside the generally artificial colonial borders of Africa, according to Chaumont, sometimes masked this awareness until it arose from the unifying force of combat.\(^58\) Other international legal scholars maintain that cultural devices - ranging from the European production of knowledge about the colonies\(^59\) in such forms as census, map and museum\(^60\) to the creation of a fictional common history or ethnicity by African writers\(^61\) - could lead colonial populations to imagine themselves as "peoples." However, the complex and contradictory relationship between colonialism and nationalism\(^62\) makes any sociological generalisation about colonial identity problematic.\(^63\) Even setting aside the question whether colonial nationalism is authentic,\(^64\) we are left with the extensive variations in its form,


\(^{62}\) P. Chatterjee, _Nationalist Thought and the Colonial World: A Derivative Discourse_ (Minneapolis, University of Minnesota Press, 1993).


\(^{64}\) See the debate of the 1960s and 1970s in the African and Asian context between "primordialists," who
expression and power.

Rather than as corresponding to sociological fact, we might justify the colonial categories of “peoples” as normatively designating a collective victim. Whether or not a trust territory or non-self-governing territory had some identity apart from the purely administrative, its population was normatively joined together as a “people” by virtue of suffering the collective injury of colonialism. On this approach, the question remains which of the many wrongs instantiated by colonialism is definitive of a “people.” Karl Doehring lists the principles violated by colonialism as “the protection of human rights, the equality of states, the prohibition of discrimination on account of race, language, and religion, freedom from oppression by foreign powers, protection against exploitation and the preservation of peace among peoples.”

A different way of looking at colonial identity normatively is to see the notion of “peoples” as flowing from the principle that whenever the future of a territory falls to be determined regardless of the reason - it is for the population of the territory to make that determination. In President Wilson’s famous words, “[p]eoples ... are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game.” From this perspective, a “people” need have no fellow feeling. A “people” is au fond a community of fate, the inhabitants of a territory defined by forces beyond their control. Their identity is as a collection of individuals each entitled to vote on the future of the territory, and their collective stress the resistance of natural groupings of kinship, religion, language and custom to the civic identity necessary to the newly independent colonial states, and “instrumentalists,” who argue that identity is created by interested leaders, elite groups or the political system. The debate is usefully excerpted in J. Hutchinson & A.D. Smith, eds., Nationalism (Oxford: Oxford University Press, 1994) at 29-34 (Clifford Geertz) and 83-89 (Paul R. Brass). More recent scholarship on nationalism argues that any national identity is a cultural construction. Anderson, supra note 60; H.K. Bhabha, “Introduction” in Bhabha, supra note 55 at 1.

65 Doehring, supra note 25 at 61, para.17.

66 Woodrow Wilson, “Four Points” speech to Congress, 11 February 1918, quoted in S. Wambaugh, Plebiscites Since the World War, vol.1 (Washington: Carnegie Endowment for International Peace, 1933) at 11. See also his earlier address to the Senate, 22 January 1917, quoted in ibid. at 5 (“no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.”).
will is the majority of their individual wills. In the case of border territories, for example, the identity of the "people" may be exhausted by the redrawing of the border in response to the democratically determined will of the majority.

B Categories and Coherence

Broadly speaking, the definition of "peoples" has been expanded beyond the colonial categories of trust territories and non-self-governing territories in two ways: by demonstrating that international law has recognised other categories of "peoples" and by establishing a general definition of "peoples" that makes sense of the colonial identity. As will be seen in this section, the different approaches, which I will call "categories" and "coherence," have different implications for identity in international law. Those authors who widen the definition of "peoples" through new categories tend to treat the old colonial categories as legal artefact. Rather than deriving the new categories of "peoples" from some idea of identity in the old categories, they establish a new category independently. By leaving unexamined the narratives of identity in the technical definition of colonial peoples as trust territories and non-self-governing territories, this group of authors preserves the ambiguity of the colonial identity in international law. In contrast, those authors who impart consistency to the definition of "peoples" tend to reduce a people, including a colonial people, to a single idea of identity.

In addition to the colonial categories of trust territories and non-self-governing territories, some authors posit a category of peoples subject to alien domination or foreign occupation. Support for such a category comes from the 1960 Declaration on the Independence of Colonial Peoples, which states that "the subjection of peoples to alien subjugation, domination and exploitation" constitutes a denial of human rights, violation of the UN Charter and impediment
to peace;\textsuperscript{67} and the 1970 \textit{Declaration on Friendly Relations}, which spells out that such subjugation contravenes the principle of self-determination.\textsuperscript{68} Further support is found in UN resolutions invoking the right of self-determination in the case of apartheid South Africa, an independent state where a white formerly colonial minority dominated a black majority; and the case of occupied territories, including Afghanistan and Palestine.\textsuperscript{69}

Authors divide in their interpretation of peoples subject to alien domination or foreign occupation, with some organising the definition of “peoples” into colonial (trust territories and non-self-governing territories) and non-colonial (peoples subject to alien domination or foreign occupation) categories and others formulating a single definition of “peoples.” Rosalyn Higgins\textsuperscript{70} and Anna Michalska,\textsuperscript{71} for example,\textsuperscript{72} simply document the existence of a separate category of peoples subject to alien domination or foreign occupation, while W. Ofuatey-Kodjoe\textsuperscript{73} develops unified definition of the peoples entitled to self-determination as subjugated, by which he means “those non-self-governing, those occupied, those under foreign rule and those deprived of a previous independent condition.”\textsuperscript{74} Ofuatey-Kodjoe’s view that a people is

\begin{itemize}
\item \textsuperscript{67} \textit{Declaration on the Independence of Colonial Peoples}, supra note 27 at para. 1.
\item \textsuperscript{68} \textit{Declaration on Friendly Relations}, supra note 33 at principle 5, para.2.
\item \textsuperscript{70} \textit{Ibid.}
\item \textsuperscript{73} See also F. Przetacznik, “The Basic Collective Human Right to Self-Determination of Peoples and Nations as Prerequisite for Peace” (1990) 8 N.Y.L. Sch. J. Hum. Rts 49.
defined in terms of alien domination or foreign occupation also seems to inform the 1974 UN *Definition of Aggression* resolution ("peoples under colonial and racist regimes or other forms of alien domination"), the International Law Commission’s drafting of the provision on colonialism in the *Code of Crimes Against the Peace and Security of Mankind* and the *Vienna Declaration and Programme of Action* produced by the 1993 UN World Conference on Human Rights ("peoples under colonial and other forms of alien domination or foreign occupation").

The difference between the categories approach to "peoples" taken by Higgins and Michalska and the coherence approach taken by Ofuatey-Kodjoe is relevant not so much to the practical result as to the construction of identity. Higgins and Michalska do not go behind the colonial and non-colonial categories because they are satisfied that each category can be established independently in positive international law. In defining colonial peoples only in the technical sense of trust territories and non-self-governing territories, they leave the colonial categories as political fiat made law and thereby open to multiple narratives of colonial identity. In contrast, Ofuatey-Kodjoe, by lending consistency to the definition of "peoples," reduces the colonial identity to collective victim of subjugation by a foreign power.

The correspondence between categories and the possibility of multiple, ambiguous or contradictory identities, on the one hand, and between coherence and a single identity, on the other, is even more apparent if we compare Karl Doehring’s and Antonio Cassese’s coherent community that is currently under the political subjugation and domination of another community separate and distinct from itself.” *Ibid.* at 376. For his earlier work on self-determination, see W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen Publishers, 1977).

75 *Definition of Aggression* Resolution, GA Res. 3314, UN GAOR, 29th Sess., UN Doc. A/Res/3314 (XXIX), (1975) art.7.


77 If Higgins and Michalska’s category of alien domination and foreign occupation is the same as Ofuatey-Kodjoe’s non-colonial forms of subjugation, then there is no practical difference.

78 Doehring, *supra* note 25.
approaches to the interpretation of "peoples." Doehring's three categories of peoples register the different historical traditions of self-determination in international law, while Cassese's general principle of self-determination overlays the subjects of the various rules with the same significance.

For Doehring, the historical development of self-determination in international law yields three distinct meanings for "peoples." To the generally accepted category of colonial populations, Doehring adds a second category, the population of sovereign states, which he associates with the right of self-determination as a defence against foreign domination.

Doehring's third category, ethnic minorities, stems from the end of World War I, when the peace treaties were influenced by the Romantic conception of national self-determination as the right of ethnic nations to choose their political status. Although the principle of self-determination was not then part of ordinary international law, the idea that ethnicity was nature's blueprint for political organisation played a role in the hubristic redesign of Europe after the War and in the establishment of an ambitious inter-war international legal regime for the protection of ethnic minorities in a number of European states. Doehring takes this third definition of "peoples" from the advisory opinion of the Permanent Court of International Justice in the Greco-Bulgarian "Communities" case, a case concerning the interpretation of the word

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80 Doehring's starting position is that international legal interpretation must be objective, by which he means that the original historical meaning must be rejected in favour of a meaning that respects subsequent developments and changing circumstances. He argues, however, that since attempts to clarify the meaning of "peoples" in international law have yielded poor results, resort may be had to its historical interpretation. Doehring, supra note 25 at 57.

81 Ibid. at 64.

82 D. Thürer, "Self-Determination" in Encyclopedia of Public International Law, vol. 8 (Amsterdam: North Holland, 1985) 470, 470-471. But see e.g. Cobban, supra note 54 at c.4 (arguing that it passed virtually without notice that the peace negotiations substituted for self-determination a belief in small states as a justifiable part of the international order, the equality of states, and the right of absolute national sovereignty).

83 Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration.
“communities” in a 1919 convention on the reciprocal voluntary emigration of racial, religious and linguistic minorities in Greece and Bulgaria. The Court described a community as

a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.\(^4\)

Contemporary evidence of such a category may be found in the *Declaration on Friendly Relations*.\(^5\) Although the final paragraph of the principle of equal rights and self-determination of peoples in the *Declaration* prohibits the disruption of the territorial integrity of a state, the preceding paragraph has been read, including by Doehring,\(^6\) as making an exception for the secession of racial and religious minorities in cases of extreme discrimination. That paragraph reads:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.\(^7\)

Doehring thus categorises different ideas of identity reflected in the term “peoples”: the colonial identity, the population of a sovereign state (which amounts to a statist version of Ofuatey-Kodjoe’s collective victim of foreign domination) and the cultural community of

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\(^5\) *Declaration on Friendly Relations, supra* note 33.

\(^6\) Doehring, *supra* note 25 at 66.

\(^7\) See also *Vienna Declaration and Programme of Action, supra* note 76 at part I.2, para.3.
ethnicity, language or religion. Moreover, he is clear that no general definition of “peoples” is possible because these ideas of identity are inconsistent with one another.88

In contrast, Cassese posits a general principle of self-determination, which unifies conceptually the specific rules on colonial peoples and peoples under foreign domination or occupation. The principle also has a direct role to play in interpretation because the rules, taken together, do not fully cover the situations to which the principle applies and, moreover, are not in themselves complete.89 Cassese formulates the principle as the “need to pay regard to the freely expressed will of peoples” each time the fate of peoples is at issue.90 The phrase is that of the International Court of Justice in the Western Sahara case,91 in which the Court found that Morocco’s and Mauritania’s pre-colonial ties to the Western Sahara were not of a nature that would qualify the right of the population of the Spanish colony to determine their future political status. While Cassese maintains that the principle does not define the units of self-determination,92 it does project an image of a “people” as a collection of liberal monads inhabiting a territory, interchangeable exercisers of free will whose aggregate choice will determine the fate of the territory.93 One has only to consider the situation of different tribes in the former colonies, minorities in the former Yugoslav republics or indigenous peoples in Quebec to grasp the generic constituency constructed by Cassese’s plebicitization of identity.

88 Doerhing, supra note 25 at 64.
90 Cassese, supra note 79 at 128, 319-320.
91 Western Sahara, supra note 13.
92 Cassese, supra note 79 at 128.
93 See A. Cassese, “The International Court of Justice and the Right of Peoples to Self-Determination” in V. Lowe & M. Fitzmaurice, eds., Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Cambridge: Grotius Publications, 1996) 351 at 361 (“conglomerates of individuals whose wishes and aspirations must be taken into account and given legal force as much as possible”).
C General Definitions

As opposed to the categories approach discussed in the previous section, the coherence approach to the interpretation of “peoples” develops a general definition. The general definitions of “peoples” found in the recent international legal literature on self-determination usually revolve around the ideas of demos and ethnos.

For Daniel Turp, a “people” is a democratically constituted community: a “group of individuals who choose to determine their own future ... A common language, culture and religion play a determining role in the process of self-definition, but the collective desire to live together better defines a people.”94 Turp begins by arguing that a general right of self-determination in international treaty law95 is created by the right of self-determination of all peoples in common article 1 of the 1966 International Covenants on Human Rights.96 Article 1(1) reads:

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.


95 “Le droit de sécession,” supra note 26 at 45-54. In this article, Turp takes the position that there is neither a right of nor prohibition on secession in international customary law. Ibid. at 54-76. More recently, he has argued that state practice shows a new openness toward a right of self-determination. See e.g. D. Turp, “L’Emergence de nouveaux états et le droit des peuples à disposer d’eux-mêmes” (1992) 21 Can. Council Int’l L. Proc. 25.

According to the next step of his argument, the ordinary meaning of article 1(1), the contexts of article 1 and the Covenants, and the travaux préparatoires all show that the right of self-determination in article 1(1) includes a right of secession and belongs to "all peoples."

While the Covenants do not actually define "peoples," so Turp's argument proceeds, they also "contain no provision that would permit the notion of peoples to be circumscribed and interpreted restrictively; the wording of this first article tends on the contrary to confer an extensive definition on the term peoples."97 Writing in 1982,98 Turp anticipates that the Human Rights Committee, the body of experts established under the International Covenant on Civil and Political Rights, will give meaning to the term "peoples" in the course of its consideration of the reports required of state parties by the Covenant and of complaints brought against state parties under the Optional Protocol to the Covenant.99 In a line of cases over the last decade,100 however, the Committee has made clear that article 1 cannot be invoked under the individual complaint mechanism of Optional Protocol101 because that mechanism only permits claims by

97 [translation mine] "Le droit de sécession," supra note 26 at 52.
98 Ibid. at 52, 54.
101 The Optional Protocol also provides a mechanism for complaints by one state party against another state party, but this mechanism has never been used.
individuals concerning the violation of individual rights protected by the Covenant, whereas the right of self-determination is a right of peoples. In the absence of guidance from the Human Rights Committee, Turp now asserts that silence as to the definition of "peoples" in international law "tends to suggest that peoples must bear witness to themselves and that that quality of a people results from the moment of a process of self-description."\textsuperscript{102} For him, this subjective definition of a "people" is the "more plausible" one.\textsuperscript{103}

Given Turp's original assertion that the \textit{International Covenant on Civil and Political Rights} provides no definition of "peoples," some argument is needed to support his current contention that "the collective desire to live together better defines a people." While such an argument is difficult to extract from his recent writing and testimony, three seem possible. First, Turp's reference to the object and purpose of the \textit{International Covenant on Civil and Political Rights} may suggest that he derives his definition from the liberal democratic values of the Covenant; for example, the right to freedom of association in article 22 and the right of political participation in article 25.\textsuperscript{104} Second, he might see the definition from liberal democracy as a political choice justified by the silence of international law.

Turp's citation to Charles Chaumont's 1976 article "Le droit des peuples à témoigner d'eux-mêmes"\textsuperscript{105} provides a third argument for Turp's definition of a people. For Chaumont, just as international law is based on the realities of international life, the right of peoples rests on the reality of those peoples,\textsuperscript{106} where that reality is proved by the people itself in action.\textsuperscript{107} To

\textsuperscript{102} [translation mine] "Exposé - réponse," \textit{supra} note 94 at 660.
\textsuperscript{103} "Quebec's Democratic Right," \textit{supra} note 94 at 110.
\textsuperscript{104} "L'expression du principe démocratique," \textit{supra} note 94 at 55. See also "Quebec's Democratic Right," \textit{supra} note 94 at 110. [The English-language article refers to "subject and purpose."]
\textsuperscript{105} "L'expression du principe démocratique," \textit{supra} note 94 at 55, n.80; "Exposé-réponse" \textit{supra} note 94 at 660, n.13; "Quebec's Democratic Right" \textit{supra} note 94 at 110, n.29, citing Chaumont, \textit{supra} note 58.
\textsuperscript{106} Chaumont, \textit{supra} note 58 at paras. 4, 24, 30.
\textsuperscript{107} \textit{Ibid.} at paras.7-18.
adopt a different definition of peoples - whether pre-established abstract criteria, such as race, language or religion, or the recognition of a people by states - would be both to risk obscuring reality by others’ refusal to recognise it or fabrication of a convenient pseudo-reality, and to deny the act of liberty inherent in self-identification through collective action.\textsuperscript{108}

Chaumont’s argument, though, is out of step with Turp’s for two reasons. First, Turp’s evidence of a people differs from Chaumont’s. Turp’s discussion of a Quebec people indicates what he considers sufficient evidence of the existence of a people. Among the acts of Quebec self-assertion identified by Turp are Quebec legislation establishing various commissions on Quebec’s political future, the provincial \textit{Chartre de la langue française}, a speech by Quebec premier Robert Bourassa referring to the “intérêt supérieur du peuple québécois” and a series of motions and resolutions passed by the Quebec legislature.\textsuperscript{109} This evidence indicates that, for Turp, the laws and public statements of a democratically elected majority government are enough to demonstrate the self-affirmation of a people. In contrast, Chaumont, writing at the height of national liberation movements in the Third World, assumes that violence will testify to the existence of a people:

And just as the history of a man, by the completion of death, assumes its total signification, having been entirely accomplished, even if its dominant characteristics remain in part mysterious, so the death of persons as part of a people constitutes the supreme historical affirmation. The stakes of death are thus the most determinative probative element for a people as for a person.\textsuperscript{110}

When Chaumont argues that the right of peoples in international law rests on the reality of those peoples, he has in mind the material reality of armed resistance. Indeed, Chaumont would likely

\textsuperscript{108} \textit{Ibid.} at paras.2-3. 
\textsuperscript{110} [translation mine] Chaumont, \textit{supra} note 58 at para.5.
classify the legal and political acts that evidence a Québécois people for Turp as part of the ideological superstructure rather than the material base. To rely on Chaumont’s argument, Turp must explain why his own assumptions about the reality of a people play the same role in the argument as Chaumont’s.

A second, related limitation of Chaumont’s interpretation of “peoples” is that as Chaumont himself observes, it presupposes a theory of international law that sees international law as based on social reality.\textsuperscript{111} Such a theory need not be dialectical, although Chaumont’s would seem to be. He has written elsewhere that:

... International law is not destined to hover above realities, by the same to camouflage them, and, in the end, to permit states to act freely in the shelter of a facade of generalities. It is a continuous attempt of transformation of real contradictions, and it accomplishes the double task of translating these contradictions and at the same time surmounting them.\textsuperscript{112}

Nothing in Turp’s interpretation of “peoples” indicates that he takes this or a similar approach to international law.

Other general definitions of “peoples”\textsuperscript{113} found in the recent international legal literature on self-determination tend to combine objective elements, such as language, religion or ethnicity, with the subjective element of a common will to live together.\textsuperscript{114} Whereas most of these general definitions rely on the interpretation of international customary law and the writings of

\textsuperscript{111} Ibid. at para.4.
\textsuperscript{113} Unlike Turp, other authors who define “peoples” in general terms do not subscribe to an absolute right of secession of peoples.
publicists, Ian Brownlie’s definition differs in that it explicitly involves a notion of the coherence of international law.

For Brownlie, the principle of self-determination of peoples has a core meaning, which is “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.” The distinct character of a community does not hinge on a single criterion, but depends on a sufficient cluster of criteria being present. Brownlie considers one of the more important to be race or nationality, which he disaggregates into culture, language, religion and group psychology. At the same time, he notes that the physical indicia of race or nationality are not essential to national identity. In this context, Brownlie observes that the categories of “nationalities,” “peoples,” “minorities” and “indigenous populations” all involve essentially the same idea.

While acknowledging that his cross-cutting definition is not generally accepted, Brownlie nevertheless seems to present it as descriptive of the actual coherence of international law. This rejection of the usual international legal typology of groups for a more perspicacious description recalls his acerbic dismissal of the standard international legal theories of recognition as obscurantist, akin to “a bank of fog on a still day [standing] between the observer and the contours of the ground which calls for investigation.” But Brownlie’s coherence argument

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also seems to slip from the descriptive into the prescriptive:

the issues of self-determination, the treatment of minorities, and the status of indigenous populations, are the same, and the segregation of topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same - they must be.\footnote{8}

As well, Brownlie advocates a coherent approach to groups and group rights in international law in order to minimise conflict and tension between the various principles and programmes. The same reason is given by Benedict Kingsbury for the development of a general normative framework in international law for claims by non-state groups. In Kingsbury's words, "a unified analysis would help in resolving some of the problems of commensurability or reconciliation where the different domains appear to conflict, and ought to open the way to better balancing of competing rights and interests."\footnote{9} Kingsbury additionally invokes Thomas Franck's expediency thesis that coherence is one of the properties of an international legal norm that increases states' compliance with the norm.\footnote{10}

II When Does the Right of Self-Determination Entitle a People to Choose Independence?

While the tendency in both the definition of a "people" and the determination of when international law entitles a people to secede is away from the apparent arbitrariness of equating self-determination with decolonization, the interpretive and normative\footnote{11} moves may differ from one to the other. Interpretively, an author might define "peoples" by unrelated, even

\footnote{8} "The Rights of Peoples," supra note 115 at 16. Compare B. Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 Cornell Int'l L.J. 481 at 481 ("The separate structure of each of these domains has obscured the overlap (if not the identity) of underlying justificatory purposes among these different domains.").

\footnote{9} Kingsbury, supra note 118 at 482.


inconsistent, categories, yet take a unified approach to the meaning of the right of self-determination, just as another author might, conversely, take a coherence approach to the definition of “peoples” and a categories approach to the meaning of the right. Normatively, for example, many ethnic nationalists would put the subject and the content of the right to secede on the same footing: every ethnic nation is entitled to its own nation-state. Here, ethnicity both defines a people and justifies their right to independence. Then again, we may define a people ethnically without considering separate statehood necessary to protect what is valuable about ethnicity. An ethnic group’s right to secede may depend instead on showing that the group cannot flourish as an ethnic community within the state because the state is unwilling or unable to guarantee the necessary combination of individual and group rights. In this way, secession is made coherent within a rights framework.

Because the interpretation of “people” and the interpretation of the right of self-determination together create the image of a people and their history in international law, the identity constructed in international law by the definition of “people” may be altered by the history remembered or forgotten in the definition of the right. To base the right on corrective justice, for instance, is to tell a story about a past wrong. Whatever form the solidarity of a people may already have been given by the definition of “people,” corrective justice projects onto that people the normative identity of collective victim. In reality, recognition of that history may be an intimate part of the identity of the people. “One loves in proportion to the

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122 To my knowledge, no international lawyer interprets the right of self-determination purely along the lines of ethnic nationalism, although an ethnic definition of “people” is sometimes asserted. See, e.g., O. Mercredi, testimony before the Commission d’étude des questions afférentes à l’accession du Québec à la souveraineté, Assemblée Nationale, Journal des débats, No. 27 (11 Feb. 1992) 815 (arguing, in the Quebec context, that the province of Quebec cannot be a people, but only the “French-Canadian nation, centred in Quebec”). See also R. Falk, ibid. at No. 24 (4 Feb. 1991) 705 (Professor of International Law at Princeton University testifying on behalf of the Algonquin people); M.E. Turpel, “Does the Road to Québec Sovereignty Run Through Aboriginal Territory?” in D. Drache & R. Perin, eds., Negotiating with a Sovereign Quebec (Toronto: James Lorimer & Co., 1992) 93 at 101.
sacrifices to which one has consented, and in proportion to the ills that one has suffered,” Renan observed of nations. A nation depends on remembering certain events and forgetting others. To justify the right to secede as freedom of choice, instead of as the correction of a historical injustice, superimposes a generic liberal identity - out of time and place - onto a “people.” The effect may be to wipe the historical slate clean and thereby to forget events that the nation needs remembered.

A Colonialism and Freely Expressed Will

On the traditional equation of “peoples” with colonies, all peoples have the right of self-determination. The right of self-determination is to be exercised by the establishment of an independent state, the free association or integration with another state or the emergence into any other political status freely chosen by the people. Its essence, as expressed by the International Court of Justice in the Western Sahara case, is the “need to pay regard to the freely expressed will of peoples.”

In Western Sahara, the Court traces the rhetoric of free choice in the key UN resolutions on self-determination. General Assembly Resolution 1541, which lists the modes of self-government as independence, free association or integration, spells out that “free association should be the free and voluntary choice by the peoples of the territory concerned expressed

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123 Renan, supra note 55 at 19.
124 Declaration on Friendly Relations, supra note 33 at principle 5, para.4.
125 Western Sahara, supra note 13 at 33, para.59. See Cassese, supra note 92, and accompanying text.
126 Ibid. at 32-33, paras.57-58.
127 The notion of self-government, which summarises the various possible choices for a people, sometimes obscures the fact that the right of self-determination is about free choice and not about the particular choices. Ofuatey-Kodjo, for example, defines the right of self-determination as the right to attain full self-government, but analyses it in terms of free choice. Ofuatey-Kodjo, supra note 74 at 372-373, 377. Compare S.J. Anaya, Indigenous Peoples in International Law (New York: Oxford University Press, 1996) 80 (distinguishing remedies from substance).
through informed and democratic processes."128 The resolution further specifies that integration constitutes an exercise of self-determination only where it is "the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."129 In providing that a people may also opt for some political status other than statehood, association or integration, the later Declaration on Friendly Relations requires that such status be "freely determined by a people." More generally, the Declaration places a duty on states to promote self-determination in order to "bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."130

The explanation of free choice tends to be supplied for the traditional interpretation of self-determination as decolonization, where "people" is narrowly defined. The most notable exception is Daniel Turp,131 who interprets both the right of self-determination and the peoples entitled to that right in consensual terms. As seen in Part I,132 Turp defines a "people" as "a group of individuals who choose to determine their own future."133 He likewise maintains that the right of self-determination gives any such people the democratic choice of independence.

In contrast to the narratives discussed in the sections that follow, the narrative of freely expressed will is non-historical, if not anti-historical. The exercise of free choice under current

128 GA Res. 1541, supra note 11 at principle VII(a).
129 Ibid. at principle IX(b).
130 Declaration on Friendly Relations, supra note 33.
132 See Part I(B)(2), above.
133 Québec’s Democratic Right," supra note 94 at 110.
conditions does not depend directly on how these conditions came about or even what they are. In this sense, this story of freely expressed will is one of international legal forgetting.

B Corrective Justice and History

If the essence of the right of self-determination is the "need to pay regard to the freely expressed will of peoples," then how can we defend international law's traditional limitation of the right to colonial peoples? Why should the populations of overseas colonies be the only groups entitled to choose their political status? While the line drawn at colonies is widely thought to be normatively arbitrary, a few authors argue that it can be explained coherently in terms of corrective justice.

Private law, which is informed by corrective justice, has traditionally been a jurisprudential wellspring for international law. By substituting the state in international law for the individual in private law, the international law of territory can proceed by analogy with the law of property, international treaty law can borrow from contract law, and so on. On an analogy between the collective subject of international law - not necessarily the state - and the individual in private law, the right of self-determination can be seen as restoring territory to the rightful sovereign, just as private law requires the restoration of wrongfully taken property to its owner. The justificatory structure here is corrective justice, which, in Aristotelian terms, is

the pattern of rationality immanent in the immediate interaction of one party with another. It directs transactions in conformity to the inherent structure that constitutes transactions as such and that differentiates them from distributions. In corrective justice the parties are linked solely as doer and sufferer of the same injury. The transaction binds them in a relationship of action and passion, and the

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134 D.P. O'Connell maintains that the property conception of territory dominates Anglo-American thinking and is also found in French and Italian doctrine. D.P. O'Connell, *State Succession in Municipal and International Law*, vol.1 (Cambridge: Cambridge University Press, 1967) at 22. For an account of this and other schools of thought, see E. Szlechter, *Les options conventionnelles de nationalité à la suite de cessions de territoires* (Paris: Recueil Sirey, 1948) at c.1, s.1; W. Schoenborn, "La nature juridique du territoire" (1929-V) 30 Rec. des Cours 85.
function of law is preserve the parties' equality in the context of the occurrence that links them as doer and sufferer.\textsuperscript{135}

In international law, the working out of corrective justice is complicated by the collective subject. In the case of two individuals, corrective justice refers only to the structure of the relationship between them. With the right of self-determination, as we saw in the previous part, corrective justice can define the subject as well as the structure of the right. Ofuatey-Kodjoe's definition of the peoples entitled to self-determination as subjugated, "those non-self-governing, those occupied, those under foreign rule and those deprived of a previous independent condition,"\textsuperscript{136} and the category of peoples subject to alien domination or foreign occupation recognised by some authors\textsuperscript{137} define the subject by the wrong collectively suffered. But it does not follow from such a definition of "peoples" that the right of self-determination must be equated with the restoration of the pre-occupation situation, as is required by corrective justice. Instead, self-determination might give a people the right to choose the political status for the territory. Conversely, the right of self-determination might mean the redress of a historical wrong through the restoration of territory, even if a people is defined more broadly; for example, in terms of ethnicity.

The corrective justice paradigm is further complicated in international law by the fact that the collective victim of a wrongful taking will continue to exist legally even if it no longer


\textsuperscript{136} Ofuatey-Kodjoe, \textit{supra} note 74 at 375.

\textsuperscript{137} See above pp.75-77.
corresponds to a collective consciousness. For instance, where part of a state’s territory is occupied by force over a long period, the restoration of the territory will not necessarily coincide with the wishes of the occupied population, which may have or have developed a separate identity.  

Positive international law potentially recognises two different collective subjects - states and peoples - as victims of a wrongful taking. As between states, the acquisition of territory by conquest, or forcible taking of territory, is prohibited independent of any right of self-determination. For these principles on acquisition of territory and use of force to apply, the victim must be a sovereign state. Moreover, title acquired by conquest before the mid-twentieth century is shielded by the doctrine of inter-temporal law, the first branch of which requires that title’s validity be judged by the law contemporaneous with its acquisition. The prohibition on the use of force dates from the 1928 Kellogg-Briand Pact, with more conservative opinion tracing it to article 2(4) of the United Nations Charter. Finally, even if a state or some part of its territory is forcibly annexed in violation of article 2(4), the international community may elect to recognise the wrongful taking; that is, to treat it as a fait accompli.  

On a wrongful taking argument sheltered under the legal roof of self-determination, it does not matter whether the people were a state or whether the taking was legal at the time. The

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Compare E. Benvenisti, The International Law of Occupation (Princeton: Princeton University Press, 1993) at 6, c.8 (While the international law of occupation traditionally conceives of the occupying power as trustee for the ousted state, the contemporary trend is to shift the beneficiary of the trust from the ousted state to the indigenous community under occupation.).

139 Island of Palmas Case (Netherlands, USA) Max Huber, Award: April 1923, (1928), 2 R. Int’l Arbitral Awards 829 at 845. While such title may be challenged under the second branch of intertemporal law, which subjects it to developments in international law, it cannot be challenged in this first sense. On the operation of the intertemporal law doctrine, see infra Chapter 4.

right of self-determination restores territory to people on the grounds that the taking was wrongful in the normative sense. Indeed, viewed as atonement for the sins of empire, the right of self-determination of peoples undoes the depredations of a formalist international law manipulated by the imperial powers.

The Iraqi invasion of Kuwait is often given as a textbook example of an incident treated as a wrongful taking in the formal, inter-state sense, while the case of the Baltic states has been analysed as a wrongful taking in both senses. Some scholarly commentary bases the Baltics' right to independence on the conclusion that the 1940 Soviet annexation was wrongful under the international legal principles of the time on acquisition of territory and use of force, while other work regards the wrongful taking instead as underlying the Baltic peoples' international legal right of self-determination.

141 The initial UN Security Council resolution failed to condemn the invasion as a violation of article 2(4). SC Res. 660 (1990) reprinted in E. Lauterpacht et al., eds., The Kuwait Crisis: Basic Documents, vol.1 (Cambridge: Grotius Publications Ltd., 1991) at 88. However, statements made in the Security Council indicate that the invasion was considered in those terms. UN SCOR, 45th Year, 2932d Mtg., UN Doc. S/PV.2932 (1990) 12-27, reprinted in ibid. at 99, 100-102. This impression is reinforced by subsequent resolutions' preambles, which mention the need to restore sovereignty, independence and territorial integrity to Kuwait. SC Res. 661 (1990), SC Res. 662 (1990), SC Res. 665 (1990), SC Res. 674 (1990), all reprinted in ibid. Although there is no overt reference to article 2(4), Oscar Schachter regards this as merely a strategic omission. O. Schachter, “United Nations Law in the Gulf Crisis” (1991) 85 AJIL 452 at 453.


143 The discussion here is limited to interpretations of Baltic independence based on wrongful taking. For an overview of different frameworks applied to the Baltics, see W.C. Allison, V., “Self-Determination and Recent Developments in the Baltic States” (1991) 19 Denver J. Int’l L. & Pol’y 625 at 627-630.

144 Supra note 46.

R.S. Bhalla’s\textsuperscript{146} and Lea Brilmayer’s\textsuperscript{147} work offer two well-developed interpretations of the right of self-determination as wrongful taking. Both authors argue that this interpretation makes sense of international law’s limitation of the right to colonies. Bhalla and Brilmayer differ, though, in their characterisation of what is taken. For Bhalla, the loss is the population’s control over their own political, social and economic structures.\textsuperscript{148} Brilmayer makes territory the object of the wrongful taking.

Bhalla interprets self-determination as the simple restoration of the power of determination that has been taken from the self\textsuperscript{149} and belongs naturally to it.\textsuperscript{150} He writes:

Colonization is an exercise of brute force. Its illegality lies in the very denial of civilized behaviour which both socially and morally implies that people are left to exercise their own free will in their own affairs. Therefore, colonisation is a trespass ... Until the trespass is vacated, it continues by analogy with the very simple principle of the tort of trespass.\textsuperscript{151}

If we see the right of self-determination as corrective justice, Bhalla argues, we discover a defensible line between colonial populations, which have a right to independence, and national groups in established states, which do not. Namely, national groups, unlike colonial populations, are demanding a new right.\textsuperscript{152}

\textsuperscript{146} R.S. Bhalla, “The Right of Self-determination in International Law,” in Issues of Self-Determination, \textit{supra} note 71 at 91.


\textsuperscript{148} Bhalla, \textit{supra} note 146, at 91-92.

\textsuperscript{149} \textit{Ibid.} at 92.

\textsuperscript{150} \textit{Ibid.} at 95.

\textsuperscript{151} \textit{Ibid.} at 99. Bhalla extends the trespass analogy to define as a people “the people trespassed upon ... the indigenous people and not the later transplants, the selves who came after colonisation.” \textit{Ibid.} Precisely because the “colonial power’s obligation [is] towards those from whom the colony was seized,” the right of self-determination should not be exercised jointly by natives and newcomers. \textit{Ibid.} at 99-100.

\textsuperscript{152} \textit{Ibid.} at 92. But see note 144 (Baltic states’ right to secede from the USSR based on corrective justice).
Brilmayer’s interpretive argument is that corrective justice better explains the right of self-determination in international law. She argues that the standard interpretation of self-determination, which focuses on peoples rather than places, has obscured the coherence of how international law actually deals with secessionist claims. If we reverse Judge Dillard’s nostrum in the *Western Sahara* case - “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people" - we can see that international community has, in fact, recognised a right of self-determination in the form of secession only where the secessionists have had the better territorial claim.

To demonstrate the descriptive superiority of her territorial interpretation of self-determination, Brilmayer points out how the “colonies only” practice of self-determination is anomalous on the standard account, but consistent with her account. The usual interpretation of self-determination, predicated on the status and rights of peoples, cannot explain the distinction made in international law between colonial and non-colonial situations: if the nature of the group or its mistreatment at the hands of the state is the same, how can international law

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153 As the subject of the current work is interpretation, I do not present the political theory portions of Brilmayer’s argument.

154 Brilmayer, *supra* note 147 at 193.

155 Brilmayer describes the standard account of secession as pitting the principle of self-determination, whereby a nation or people has a right to determine its own destiny, against the principle of territorial integrity. Brilmayer, *supra* note 147 at 177-184. It is not entirely clear of what Brilmayer considers this to be a standard account. See *ibid.* at 177-178:

> the principle of self-determination of peoples suggests that every "people" has a right to its own nation-state. While the positive law status of this norm and its applicability to the secessionist context are debatable, on a rhetorical level few deny the principle’s appeal.

See also *ibid.* at 183-184. Since the “standard” account simply serves as a foil for Brilmayer’s own account, what it purports to describe and its accuracy are not relevant for the purposes of the present discussion. Compare M. Koskenniemi, Book Review of *Justifying International Acts* by Lea Brilmayer (1991) 85 AJIL 385 at 385-388 (Brilmayer “develops her theme largely in abstraction from the way that international lawyers have argued about the problems discussed.”).

156 *Western Sahara*, *supra* note 13 at 122 (separate opinion of Judge Dillard).

157 Brilmayer, *supra* note 147 at 195-197.
draw a defensible line at colonies? On Brilmayer’s account, the answer is that the historical grievance is particularly clear in colonial situations:

Colonialism represents a special case because the colonial powers were particularly lacking in justification for their original territorial conquest. Colonial powers possessed no colorable claims to the territories they conquered. Once conquered, the colonies were not incorporated into the nation but were retained as overseas possessions.\(^\text{158}\)

Apart from a few cases, such as the Baltic states where a right to secede was recognised based on the Soviet annexation, the majority of non-colonial claims to secede do not attract international support because the historical grievance is different. Brilmayer observes that African and Asian states most often acquired sovereignty over minorities through decolonization, with the minorities sometimes even participating in the anti-colonial movement, as opposed to through territorial conquest.

C Rights, Demos and Ethnos

In *Loizidou v. Turkey*, a 1996 judgment of the European Court of Human Rights, Judge Wildhaber identifies an emerging consensus that the right of self-determination, more specifically secession, should be interpreted as remedial for certain human rights abuses:

Until recently in international practice the right of self-determination was in practical terms identical to, and indeed restricted to, a right of decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right of self-determination is a tool which may be used to reestablish international standards of human rights and democracy.\(^\text{159}\)


As Judge Wildhaber attests, there is increasing agreement among authors that the right of self-determination provides the remedy of secession for a group whose rights have been consistently and severely abused by the state. In this section, we examine the range of international legal arguments for a rights-based interpretation of secession. We will see that while some authors rely narrowly on the 1970 UN Declaration on Friendly Relations to establish this qualified right to secede, other authors trace the right further back in international law. Moreover, as with the definition of “peoples,” authors either treat this type of interpretation as a new non-colonial category or anchor it with decolonization in a theory of the coherence of international law. We will also see that despite the emerging consensus that secession is instrumental to human rights, authors continue to differ over which human rights: civil or political, individual or collective, guarantors of demos or protectors of ethos.

The penultimate paragraph of the principle of equal rights and self-determination of peoples in the Declaration on Friendly Relations has become the interpretive touchstone for the narrower positivist argument that international law gives a racial or religious group the right to secede as a last resort where the group is, in Judge Wildhaber’s words, without representation at all or massively under-represented in an undemocratic and discriminatory way, or is subject to consistent and flagrant human rights violations. Although strictly speaking only a UN resolution and therefore not legally binding, the Declaration on Friendly Relations tends to be

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160 E.g. Doehring, supra note 25 at 64-69 (decolonization, defence by people of state against foreign domination, right of secession of minority subject to oppression); Eide, Possible Ways and Means, supra note 72 at paras.73-88 (colonial territories; alien, illegal occupation; minority without representation in government); S. Williams, International Legal Effects of Secession by Quebec (Background Studies of the York University Constitutional Reform Project Study No. 3) (North York, Ont.: York University Centre for Public Law and Public Policy, 1992) at pt.III (colonial or alien domination, carence de souveraineté).

161 Supra notes 33 and 87.

162 E.g. Iglar, supra note 114 at 228-229 (non-representation in government or unequal treatment); An-Na' im, supra note 116 at 110 (deprivation of basic human rights).
treated as more authoritative than ordinary UN resolutions because it interprets the principles of the UN Charter.\textsuperscript{163}

The penultimate paragraph on self-determination reads:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The wording of this paragraph seems to create an exception to the principle of territorial integrity, the principle that otherwise stands in the way of secession by non-colonial groups. In the international law of decolonization, the prohibition on the disruption of a state's territorial integrity was finessed by giving colonies a separate and distinct status.\textsuperscript{164} Since colonies were not part of the metropolitan state, their right of self-determination did not violate the state's territorial integrity. Outside the context of decolonization, secession is ordinarily barred by the principle of territorial integrity. The penultimate paragraph on self-determination in the Declaration on Friendly Relations seems to give a racial or religious group the right to secede where the state is not "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."

The phrasing "and thus possessed of a government representing the whole people" indicates that compliance with the principle of self-determination involves representative


\textsuperscript{164} See above at pp.68-69.
government. Left unclear are what constitutes representative government and whether the principle of self-determination requires more than just representative government.

The general difficulty with making lack of representative government the condition for secession is, of course, what is meant by representative government. The tendency in international law is to equate representative government with democracy, particularly constitutional parliamentary democracy, but the Declaration on Friendly Relations does not make this equation. Even if it did, some authors criticize the insistence on a traditional Western-style parliamentary system on the grounds that it is an ineffective guarantee of representation for minorities and amounts to democratic imperialism.\textsuperscript{165}

The Declaration on Friendly Relations may, in fact, suggest a thicker notion of representative government than the familiar Western-style parliamentary democracy. The phrasing "as described above and thus possessed of a government representing the whole people" may indicate that the preceding paragraphs of the principle of self-determination should be read into the penultimate paragraph. As modes of implementing self-determination, the fifth paragraph lists independent statehood, free association or integration with an independent state or any other political status freely determined by the people. On the one hand, it could be argued that this paragraph should not be read in because the fifth paragraph clearly refers to

decolonization and the penultimate paragraph governs non-colonial secession. On the other hand, nothing in the wording of either paragraph requires that they be read as unrelated.

If the penultimate paragraph does contemplate that compliance with the principle of self-determination encompasses the modes mentioned in the earlier paragraphs, then, in conjunction with the fifth paragraph, it obliges a state to recognise more than a group’s equal right of representation in government. In the non-colonial context of the penultimate paragraph, the reference to “integration with an independent State or the emergence into any other political status” in the fifth paragraph could be interpreted as giving a group the right to autonomy within the state. On the same logic, however, compliance in the non-colonial context with the choice of a “sovereign and independent State” recognised in the fifth paragraph would require a state to recognise a group’s right to independence, thereby eliminating any protection for the state’s territorial integrity.

José Woehrling attempts to rescue the penultimate paragraph from circularity by reading in a concept of internal self-determination that includes varying degrees of governmental autonomy for groups within the state. He interprets the Declaration on Friendly Relations as granting a right of secession where there is an absence of representative government, unequal and discriminatory treatment and the violation of human rights, or denial of internal self-determination in his sense.

166 L’éventuelle sécession,” supra note 163 at 316; “Le redéfinition,” supra note 163 at 90.
As opposed to some notion of representative government, compliance with the principle of self-determination in the Declaration on Friendly Relations is sometimes thought to require the observance of certain human rights, hence Judge Wildhaber’s description of self-determination as “a tool which may be used to re-establish international standards of human rights and democracy.”

The penultimate paragraph on self-determination in the Declaration on Friendly Relations uses the expression “without distinction as to race, creed or colour,” and the third paragraph, which may be read into the penultimate paragraph through the words “as described above,” places a duty on states to promote “universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.” In this connection, it should be noted that the duty to observe human rights, contained in the third paragraph, is broader than non-discrimination, the benchmark set by the penultimate paragraph.

The interpretation of self-determination as remedial for the abuse of a racial or religious minority’s rights has thus far relied exclusively on the Declaration on Friendly Relations. Writers have also traced this interpretation of self-determination in international law from the Aaland Islands case through the UN Charter concept of non-self-governing territories to the contemporary cases of secession. In the Aaland Islands case, a League of Nations Commission of Rapporteurs found on the merits that the Swedish-speaking population of the Aaland Islands did not have the right to detach the Islands from Finland and join them to Sweden. However, the Commission also stated that

The separation of a minority from the State of which it forms a parts and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.170

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169 Loizidou, supra note 159.
This passage is often cited for a right of secession in the situation James Crawford terms *carence de souveraineté*:\(^{171}\) misgovernment of a territory so extreme that the territory is effectively alienated from the state. Language to a similar effect is found in the *Aaland Islands* decision on jurisdiction. An earlier League of Nations commission determined that the League of Nations had jurisdiction because Finland at the time the dispute arose was not definitively constituted as a state and therefore could not assert domestic jurisdiction against the League. Nevertheless, the earlier commission explicitly reserved the question of whether a fully constituted state could claim domestic jurisdiction in circumstances where it had engaged in “a manifest and continued abuse of sovereign power, as to the detriment of a section of the population of a State.”\(^{172}\)

By characterising the hypothetical situations mentioned by the League of Nations commissioners in the *Aaland Islands* as misgovernance, international lawyers\(^{173}\) are able to find a common thread from this post-World War I case dealing with minorities to the post-World War II system of non-self-governing territories. At the time James Crawford identified this thread, Bangladesh was the only possible instance of a right of secession recognised on the basis of *carence de souveraineté*.\(^{174}\) In Crawford’s view, Bangladesh continues to be the only instance,\(^{175}\) but other international lawyers also cite the cases of the Baltic states, and Croatia, Slovenia and Bosnia-Herzegovina.\(^{176}\)

As with the *Declaration on Friendly Relations*, international legal practice is open to different rights-based interpretations of self-determination. The *Aaland Islands* case may stand...

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\(^{171}\) *The Creation of States, supra* note 7 at 86.

\(^{172}\) *Report of the International Committee of Jurists, supra* note 21 at 5.

\(^{173}\) *The Creation of States, supra* note 7 at 85-87, 99-101. See also Williams, *supra* note 160 at 13-14, 19-20 (citing Crawford); Thürer, *supra* note 82 at 473.

\(^{174}\) *The Creation of States, supra* note 7 at 100.


\(^{176}\) Finkelstein, Vegh & Joly, *supra* note 16 at 245-247 (arguing that these cases are analogous to colonialism because the group seeking self-determination is politically disempowered and discriminated against).
for the proposition that self-determination is instrumental not to equal representation in government, but to protection for minority identity. That is, a right of secession acts as the ultimate guarantee not of the individual rights of political participation associated with a democratic polity, but of a complex of rights recognising *ethnos* and ranging from linguistic, cultural and religious rights of minorities to a right of autonomy or self-government. In the *Aaland Islands* case, the Commission of Rapporteurs was prepared to consider incorporation of the Aaland Islands with Sweden as a solution had Finland been unready to grant the guarantees necessary to preserve the Aalanders' ethnic heritage:

... the Aaland population, by reason of its insular position and its strong tradition, forms a group apart in Finland, not only distinct from the Finnish population, but also in certain respects distinct from the Swedish-speaking population. They deserve all the more protection and support in that they are, because of their great remoteness from the Finnish mainland, left to themselves, so to speak, in their struggle for the preservation of their ethnical heritage. We admit also that the fear fostered by the Aalanders of being little by little submerged by the Finnish invasion has good grounds,177 and that effective measures should be taken with a view to eliminating this danger. If it were true that incorporation with Sweden was the only means of preserving its Swedish language for Aaland, we should not have hesitated to consider this solution. But such is not the case. There is no need for a separation. The Finnish State is ready to grant the inhabitants satisfactory guarantees and faithfully to observe the engagement which it will enter into with them: of this we have no doubt.178

The guarantees required of Finland by the Rapporteurs were linguistic (obligatory Swedish language education), territorial (a right of pre-emption in the native inhabitants with respect to offers to purchase property by those foreign to the Islands) and political (the grant of the franchise to newcomers only after a five year period and the requirement that the governor of the Aaland Islands be chosen from a list of three candidates presented by the General Council of the Aaland Islands).179 The Rapporteurs conclude:

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177 The Commission of Rapporteurs notes that the threat to the Aalanders' language and culture is not the result of a policy of oppression, but of "quite exceptional conditions." *Report of the Commission of Rapporteurs, supra* note 23 at 28.


However, in the event that Finland, contrary to our expectations and to what we have been given to understand, refused to grant the Aaland population the guarantees which we have just detailed, there would be another possible solution, and it is exactly the one which we wish to eliminate. The interest of the Aalanders, the interests of a durable peace in the Baltic, would then force us to advise the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite.\textsuperscript{180}

Scholars like Ian Brownlie and Oscar Schachter synthesise a similar approach to secession from contemporary international law. Brownlie and Schachter each describe the international legal standards governing self-determination as a synthesis of the principle of self-determination and the rights of groups in international human rights law. The recognition of group rights usually takes the form of a basic standard of equality or nondiscrimination (as in the \textit{International Covenants on Human Rights}) and the form of the guarantee of the maintenance of group identity (as in article 27 of the \textit{International Covenant on Civil and Political Rights}). For Brownlie, the core of the principle of self-determination is "the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives,"\textsuperscript{181} where that reflection may take a variety of forms. The recognition of group rights, especially rights relating to territory and regional autonomy are "the practical and internal working out of the concept of self-determination."\textsuperscript{182} Brownlie does not go so far as to present secession as the last resort where a government does not and will not reflect the distinct character of a community within the state, although it would seem to flow from his analysis. In comparison, Schachter explicitly rationalises the UN declarations along these lines, identifying three standards for secession:

(1) The claimant community should have an identity distinct from the rest of the country and inhabit a region that largely supports separation in the given circumstances.

\textsuperscript{180} \textit{Ibid.} at 34.

\textsuperscript{181} Brownlie, "The Rights of Peoples," \textit{supra} note 115.

\textsuperscript{182} \textit{Ibid.} at 6.
(2) The community has been subjected to a pattern of systematic political or
economic discrimination.
(3) The central regime has rejected reasonable proposals for autonomy and
minority rights of the claimant community.\textsuperscript{183}

Brownlie's and Schachter's interpretation of self-determination as instrumental to the
protection of minority identity synthesises at the normative level the public international law
principle of self-determination with the gamut of international human rights relevant to minority
identity. With the same effect, Robert McCorquodale argues that the right of self-determination
must be interpreted within the positive law framework of international human rights.\textsuperscript{184} McCorquodale provides three reasons why the right of self-determination belongs properly to
international human rights law. First, the purpose of the right of self-determination - to protect
communities and groups from oppression and thus to empower them - is similar to that of the
international human rights law framework. International human rights seek to protect the
individual from oppression and thereby protect the communities and groups to which the
individual belongs. The rights to freedom of religion, freedom of assembly and freedom of
association are all exercised by individuals together with other individuals. Coupled with the
right to freedom from discrimination and the rights of minorities, these rights protect the
conditions for the existence of groups.\textsuperscript{185} Second, as the UN Human Rights Committee states in
its \textit{General Comment} on the right of self-determination,\textsuperscript{186} the right of self-determination is an
essential condition for the protection of individual rights because without freedom from

\textsuperscript{183} O. Schachter, "Sovereignty - Then and Now" in \textit{Wang Tieya}, \textit{supra} note 89 at 671, 684. For further
discussion of Schachter's position, see Chapter 1(I), above. See also D. Murswiek, "The Issue of a Right
of Secession - Reconsidered" in Tomuschat, \textit{supra} note 72 at 21.

\textsuperscript{184} McCorquodale, \textit{supra} note 165. See also R. McCorquodale, "Human Rights and Self-Determination"
in M. Sellers, ed., \textit{The New World Order: Sovereignty, Human Rights and Self-Determination of Peoples}

\textsuperscript{185} \textit{Ibid.} at 872.

\textsuperscript{186} General Comment No.12 (Article 1), \textit{Report of the Human Rights Committee}, UN Doc. A/39/40, Annex
oppression, individual rights cannot be effectively guaranteed. Third, international human rights law has proved able to adjudicate group rights in the economic, social and cultural context; for example, rights protecting employees and families. The EU Arbitration Commission on Yugoslavia has also demonstrated that the minority’s entitlement to self-determination can be judged within a human rights framework. For these three reasons, argues McCorquodale, the right of self-determination can be explained wholly within international human rights law.

Within the positive law framework of international human rights, the right of self-determination must be interpreted as justifying secession only where there is no less drastic means to free a people from oppression by others. International human rights law generally incorporates limitations on rights to protect other rights and to protect the general interests of society. In particular, the right of self-determination of peoples in common article 1(1) of the International Covenants on Human Rights, while couched in absolute terms, is subject to common article 5(1), which provides that “[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.” As well, common article 1(3) requires states to respect the right of self-determination “in conformity with the provisions of the Charter of the United Nations,” which are designed to maintain international peace and security. Since secession involves major structural and institutional change to a state and to the international community of states, it makes sense that the costs of transition and the potentially lasting effects on individuals and groups within the original and the breakaway states be created only if no less drastic, means is available.

187 McCorquodale, supra note 165 at 872.
188 Ibid. at 873.
189 Ibid. at 873-875.
190 Ibid. at 875-883.
Thomas Franck’s rights-based interpretation of self-determination in *The Power of Legitimacy Among Nations*¹⁹¹ and “The Emerging Right of Democratic Governance”¹⁹² is particularly illuminating for two reasons.¹⁹³ First, while authors such as Brownlie, Schachter and McCorquodale appeal to the coherence of international law in their interpretations of self-determination, Franck develops and applies a larger theory of the legitimacy of international legal norms,¹⁹⁴ in which coherence interacts with three other indicators of legitimacy. For this reason, among those authors who interpret self-determination within a matrix of rights, Franck gives the strongest example of the trend toward coherence and meta-narrative. Second, Franck’s different analyses of self-determination in *The Power of Legitimacy Among Nations* and “The Emerging Right of Democratic Governance” show how the same rights-based model can be narrated as either the vestige of *ethnos* or the emergence of *demos*.

Franck’s analysis of coherence is part of his larger project on the power of legitimacy in international law. The problem he sets for himself is why powerful states obey powerless rules.¹⁹⁵ If international law lacks the enforcement mechanisms found in domestic law, why, to use Louis Henkin’s aphorism,¹⁹⁶ do most states follow most of the rules most of the time? Franck finds an explanation in the properties of the rules themselves. His hypothesis, based on

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¹⁹¹ *Power of Legitimacy*, supra note 120.

¹⁹² “Democratic Governance,” *supra* note 120.

¹⁹³ Frank has written extensively on the right of self-determination, especially in recent years, and has progressively refined his interpretation. While not far removed from Franck’s current thinking on self-determination, the two accounts of self-determination discussed here have been chosen more as illustrations of a trend toward coherence analysis than as most representative of Franck’s present position on self-determination. For the latter, see T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) at c.4-5.

¹⁹⁴ *Power of Legitimacy*, supra note 120; T.M. Franck, “Legitimacy in the International System” (1988) 82 AJIL 705; T.M. Franck, “Fairness in the International Legal and Institutional System” (1993-III) 240 Rec. des Cours 9 at c.2; *Fairness*, *supra* note 193 at 25-46. For Franck’s newer theory on fairness in international law and institutions, which analyses legitimacy as procedural fairness, see *Fairness*, *supra* note 193; “Fairness in the International Legal and Institutional System,” *supra* this note.

¹⁹⁵ *Power of Legitimacy*, supra note 120 at 3.

empirical observation, is that the pull toward compliance exerted by a rule, which he deems its "legitimacy," is a function of how states perceive four properties of that rule. The first property is "determinacy," by which Franck means the rule's clarity of meaning. The second is the rule's "coherence," or its internal consistency and connectedness to the principles underlying other rules. The third indicator of rule-legitimacy is "pedigree," which Franck uses to designate "the depth of a rule's rootedness in a historical process." The more general property is "symbolic validation," which encompasses ritual as well as pedigree. The fourth indicator is "adherence," referring to "the rule's vertical connectedness to a normative hierarchy, culminating in an ultimate rule of recognition, which embodies the principled purposes and values that define the community of states." Franck maintains that the highest-compliance rules are those that maximise all four properties, but that some less optimal combinations of the four properties will still yield high-compliance rules. For instance, a rule that is formulated relatively indeterminately might nevertheless exert considerable influence on states due to its coherence and pedigree. Conversely, Franck considers it likely that a determinate but incoherent rule would be either ignored or reinterpreted because determinacy would not compensate for incoherence.

In The Power of Legitimacy Among Nations, Franck uses self-determination as a case-study of the relationship between coherence and legitimacy. Told from the perspective of coherence, the story of self-determination in international law is one of "gradual descent ... into

197 "Democratic Governance," supra note 120 at 51. See also Power of Legitimacy, supra note 120 at 94.
198 "Democratic Governance," supra note 120 at 51.
199 Fernando Teson objects that pedigree is not necessary for a high-compliance rule; for example, a custom created by the rapid and widespread defection of states from the old rule to the new. Fernando Teson, Book Review (The Power of Legitimacy Among Nations) (1992) 37 McGill L.J. 666 at 667. Presumably, since legitimacy is a matter of degree, Franck's hypothesis does not deny new custom great legitimacy, but only the greatest possible legitimacy. See Power of Legitimacy, supra note 120 at 107 ("A new rule simply, and quite aside from its merits, cannot instantly claim quite the same degree of legitimacy as an old one.").
200 Power of Legitimacy, supra note 120 at 84.
201 Ibid. at 153-176. See also "Legitimacy in the International System," supra note 194 at 743-749.
unprincipled incoherence."²⁰² Franck’s narration is based on the Romantic conception of national self-determination as the right of all ethnic nations to choose their political status. His description of the victories, compromises and failures for self-determination in the negotiations on new borders in Europe at the World War I peace conference assumes that ethnicity was central to the enterprise. Franck highlights President Wilson’s inclusion of historians, geographers and ethnologists in the American delegation to the peace conference, and the delegation’s extensive use of data on demographics and the ethnic sentiments of the various populations.²⁰³ As applications of the principle of self-determination, Franck cites the creation of Czechoslovakia - characterised as “a dramatic victory” - and the resurrection of an independent Poland. Secretary of State Lansing is quoted on America’s desire to free all branches of the Slav race from German and Austrian rule, as is President Wilson on his public commitment in the Fourteen Points to an independent Polish state encompassing indisputably Polish-populated territories.²⁰⁴ Nevertheless, as Franck shows, the principle of self-determination was imperfectly applied in the inter-war period. Article 1(2) of the 1945 United Nations Charter is therefore significant for its casting of the principle as universal and its recognition of the importance of ethnicity by its use of the term “peoples.” The monumental process of decolonization under United Nations auspices confirms how seriously the obligation of self-determination was taken by the international community.²⁰⁵ In this story of self-determination, the decline of self-determination into unprincipled conceptual incoherence begins with the betrayal of the universal principle in General Assembly Resolution 1514, which constructively limits secession to overseas colonies. The subsequent state practice - self-

²⁰² Ibid. at 163.
²⁰³ Ibid. at 154.
²⁰⁴ Ibid. at 156-157.
²⁰⁵ Ibid. at 160-161.
determination for Algeria, for example, but not Biafra - can only be made coherent by refining the universal principle of self-determination. Accordingly, Franck now grounds the right to secede on unequal treatment: \(^{206}\) a distinct group in a specific region has the right to independence if they are a minority in the larger political unit from which they seek independence, are politically disempowered and can separate without unduly depriving the remaining inhabitants of their economic prospects or national security. \(^{207}\)

\(^{206}\) Ibid. at 170.

\(^{207}\) Ibid. at 171.
The pedigree story of self-determination, part of an article by Franck on the emerging right to democratic governance, traces not the Romantic concept of the ethnic nation, but the Enlightenment concept of the nation as a political community. Whereas Romantic philosophers such as Herder considered it natural that every ethnic nation desire and form its own nation-state, Enlightenment thinking centred on the democratic process by which a group determines its political destiny. The events narrated as *ethnos* in the coherence story of self-determination in *The Power of Legitimacy Among Nations* are re-narrated as *demos* in the pedigree story of self-determination in "The Emerging Right to Democratic Governance." Franck begins with a formulation of the principle that makes no reference to nation or ethnic group: "Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion." The presence of historians, geographers and ethnologists on the American delegation to the World War I peace conference permitted the Americans to draw on demographic and ethnic data "in advocating free choice by peoples." It is the seeds of internationally validated political consultation - the wishes of the Danes of Schleswig, full consultation with Slavic representatives in the creation of Czechoslovakia, the will of the Rheinish Germans - that took root in the boundary settlements. While the United Nations Charter universalised the principle of self-determination, what it universalised was a duty owed by all governments to their peoples; that is, Franck implies, a duty of democratic governance. Decolonization recorded the steady ascent of self-determination as the requirement of "democratic consultation with colonial peoples, legitimated by an international presence at elections immediately preceding the creative moment of

208 "Democratic Governance," *supra* note 120 at 52-56. See also T.M. Franck, "The Democratic Entitlement" (1994) 29 U. Richmond L. Rev. 1 at 9-12.
209 "Democratic Governance," *supra* note 120 at 52.
independence."211 GA Resolution 1514 marked the *extension* of self-determination from the conquered lands of post-World War I Europe to colonies, not the end of its halcyon days. If the coherence story of self-determination in *The Power of Legitimacy Among Nations* told of the principle's spectacular rise and ignominious fall, the pedigree story is one of its slow and gruelling rise.

Tracing the determinacy of self-determination, Franck concludes that with the coming into force of the *International Covenant on Civil and Political Rights*,

the right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies) and became a right of everyone. It also, at least for now, stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state.212

An international legal entitlement to secession may only re-emerge where a people satisfying the GA Resolution 1541 requirements of geographical separateness and ethnic or cultural distinctness has been subordinated by the denial of political participation.

D  Peace and Violence

In determining whether the Aaland Islanders had a right of self-determination, the League of Nations Commission of Rapporteurs examined the consequences of its determination for the security of the two states involved, Sweden and Finland, and for political stability and peace in the region. Describing their journey by steamer to the Aaland Archipelago, "a continuous succession of islands, islets and skerries of a reddish colour, very close to one another, most of which are covered with a hardy vegetation of pines and firs growing amongst the rocks,"213 the

Rapporteurs observed that “it is impossible to visit the Aaland Islands without being struck by their strategic importance” for both Sweden and Finland. Given the immediate proximity to the Swedish capital, Stockholm, the Aaland Archipelago is “a dagger which is always raised ... against the heart of Sweden.” The Islands are key to Finland’s security as well because Finland in winter is joined to the Aaland Islands by ice, thereby providing an invader with easy access.\(^{214}\)

In support of their legal conclusion that Finland’s sovereignty over the Aaland Islands must prevail, the Rapporteurs argue that from a strategic point of view, the position of Finland and Sweden is about the same.\(^{215}\) Politically, though, the Rapporteurs were anxious to reward Finland for resisting the Russian Bolshevik attack and thereby preventing the expansion of Communism into Scandinavia.\(^{216}\)

it is in the general interest to hasten the consolidation of the States which have freed themselves from the Empire of the Czars to live an independent existence, and to help them to live and to prosper. Finland, in particular, is one of these bulwarks of peace in Northern Europe. We can only wish that she will grow strong ... and that she will enter into the constellation of the Scandinavian States ... It will have been an honourable task for us to have contributed to this restoration of peace and at the same time to win still more sympathy for a State which has made such noble endeavours to rank among the most energetic, the most hard-working and the most cultivated of nations.\(^{217}\)

The Rapporteurs caution, however, that if Finland does not grant the Aaland population the necessary minority rights guarantees, then the interest of the Aalanders and those of “a durable peace in the Baltic” would force the Rapporteurs to recommend a plebiscite on the separation of the islands from Finland.\(^{218}\)

\(^{214}\) Ibid. at 3.
\(^{215}\) Ibid. at 30.
\(^{216}\) Ibid.
\(^{217}\) Ibid. at 31. The disarmament and neutralisation of the Aaland Islands are treated as separate issues. Ibid. at 34-37.
\(^{218}\) Ibid. at 34.
The UN Charter can also be interpreted as incorporating the considerations of good relations among states and peace into the principle of self-determination. Article 1(2) reads:

The Purposes of the United Nations are:

... 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.²¹⁹

On the one hand, the article may mean that friendly relations among nations must respect the principle of self-determination of peoples; that is, friendly relations cannot be achieved at the expense of the principle of self-determination.²²⁰ If so, then the principle of self-determination is relevant in the development of friendly relations, but the impact on friendly relations is not relevant in the interpretation and application of self-determination. On the other hand, the phrase "other appropriate measures to strengthen universal peace" may suggest that friendly relations among nations based on respect for the principle of self-determination, or simply the principle of self-determination, is a measure to strengthen universal peace.²²¹ Even granting this reading, article 1(2) may simply reflect an empirical assumption that respect for the principle of self-

²¹⁹ The following discussion assumes that the self-determination of peoples means something other than non-interference in the internal affairs of states. See note 26 and accompanying text.
²²⁰ See e.g. Bedjaoui in Cot & Pellet, supra note 25 at 26 (Article 1(2) reflects the ambition of the architects of San Francisco to found peace on justice.); East Timor, supra note 13 at 43 (of Judge Weeramantry's dissenting opinion).
²²¹ During the drafting of the UN Charter, the Rapporteur of Subcommittee I/1/A stated

That the respect of that norm [equal rights and self-determination of peoples] is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace.

Doc. 723, I/1/A/19, 6 U.N.C.I.O. Docs. 703-704 (1945). The Rapporteur of Technical Committee I/1 rephrased the statement of the Subcommittee's Rapporteur as

That the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace.


At a meeting of the Coordination Committee, a statement from the report of the Rapporteur of Technical Committee I/1 was read to the effect that the Committee understood that respect for the principle was a basis for the development of free relations and one of the measures to strengthen universal peace. WD 410, CO/170 (20 June 1945) 3.
determination promotes peace. If the assumption does not hold, then the principle of self-
determination would be paramount. In the alternative, the conception of self-determination in
article 1(2) may be instrumental: while respect for the principle of self-determination ordinarily
furthers peace, the principle is only a tool for peace-building and may therefore be disregarded
where compliance would cause or exacerbate conflict. Similarly, article 55 can be read as
making self-determination instrumental to friendly relations among states and international
peace.

Support for such an interpretation of self-determination is also found in the Declaration
on Friendly Relations. As enunciated in the Declaration, the principle of self-determination
requires states to promote realisation of the principle in order “to promote friendly relations and
co-operation among states.” The preamble to the Declaration states that “the subjection of
peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the
promotion of international peace and security” and that the effective application of the principle
of self-determination is of “paramount importance for the promotion of friendly relations among
States, based on respect for the principle of sovereign equality.”

During and after the Cold War, a few influential authors advocated the adoption of this
approach to self-determination, building in the pull of power against normativity, minimum
against optimum world order,223 violence against identity,224 or stability against representative

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222 See e.g. Cassese, “Article 1, Paragraphe 2,” supra note 25 at 43 (The principle can legitimately not be
observed if it creates friction.); H. Thierry, “L’Evolution de droit international” (1990-III) 222 Rec. des
Cours 9 at 159.

223 L. Chen, “Self-Determination as a Human Right” in W.M. Reisman & B.H. Weston, eds., Toward
Canada Fail? (Montreal: McGill-Queen’s University Press, 1977) 259 at 280, n.1 (citing Chen); Islam,
supra note 53 at 468-472; R. Mullerson, International Law, Rights and Politics: Developments in Eastern
Europe and the CIS (London: Routledge, 1994) 86, but see 3-4 (limitations of the policy science
approach to international law) [hereinafter Law, Rights and Politics]; R. Mullerson, “Self-Determination
of Peoples and the Dissolution of the USSR” in Wang Tieya, supra note 89 at 567, 580-581 [hereinafter
democracy. In the post-Cold War international legal literature on self-determination, there are those who argue that contemporary state practice already evidences this type of approach. Using the two key variables he identifies in the Declaration on Friendly Relations and the Vienna Declaration, Frederic Kirgis asserts that for a claim to secession (or any type of self-determination claim), "the relationship is inverse between the degree of representative government, on the one hand, and the extent of destabilisation that the international community will tolerate in a self-determination claim, on the other." This means that if a government is highly democratic, a claim to secede will only be given international credence if it has a very minimal destabilising effect, where destabilisation depends on factors including the plausibility of the historical claim to territory and the presence of dissident minority groups within the territory. Conversely, the international community may well recognise a claim to secede from a repressive dictatorship even if the secession would cause serious destabilisation.

In a similar vein, Rein Müller sees emerging

a guideline which establishes that secession is tolerated or at certain stages even supported by the world community of states when it leads, or there are reasonable grounds to believe that it may lead, to considerably greater protection of human rights and fundamental freedoms without constituting unreasonable risk for regional or even for world stability.


Halperin, supra note 16 at c.5

F.L. Kirgis, "The Degrees of Self-Determination in the United Nations Era" (1994) 88 AJIL 304 at 308. See also Tappe, supra note 51.

Law, Rights and Politics, supra note 223 at 72; "Dissolution of the USSR," supra note 223 at 575.
Among the factors for a successful secession that Gregory Marchildon and Edward Maxwell derive from state practice are "minimal disruption of national unity and international harmony; occurrences of violence; and denial of human rights or democratic process."228

III Conclusion

Broadly speaking, this chapter sought to show that as authors go about expanding the right of self-determination of peoples beyond decolonization, they cannot escape, in Robert Cover's words, "its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations."229 Whereas some authors add to the confusion of identities by establishing new categories, there are increasingly others who situate the colonial identity within a larger coherent narrative. As we shall see in Part II, the rigidity of these approaches to interpretation and identity in the literature contrasts with the more fluid resolution of conflicts and overlaps between them in the practical interpretation of self-determination.

The next chapter rounds out the discussion of the contemporary international legal scholarship on self-determination by bringing together in its analysis of the persuasiveness of two particular interpretations of self-determination the aspects of the relationship between interpretation and images of identity developed in this chapter and the insights of Chapter 1 into the relationship between interpretation, participation and images of the international community.

228 G. Marchildon & E. Maxwell, "Quebec's Right of Secession under Canadian and International Law" (1992) 32 Va J. Int'l L. 583 at 608.
229 Cover, supra note 1.
Chapter 3

Pandemonium, Interpretation and Participation

The last chapter introduced the different interpretations of self-determination found in the current international legal literature on self-determination and related them to different stories of identity. This chapter suggests that one interpretation of self-determination is more convincing to us than another in part because of the world it creates.

The chapter uses the interpretation of self-determination by two well-known authors, Thomas Franck and Rosalyn Higgins, to develop this suggestion. It shows how the image each author creates of a world on the verge of pandemonium\(^1\) may blind us to the internal inconsistencies in their analysis of secession. That is, our recognition or acceptance of the imminence of pandemonium helps persuade us of the rightness of their interpretation and the propriety of their analysis.

_Pandaemonium_ - the capital of Satan in Milton’s “Paradise Lost” - is the title of Daniel Patrick Moynihan’s recent study of ethnicity in international politics.\(^2\) In “Paradise Lost,” _pandaemonium_ is a place of both darkness and demagoguery. Having raised impious war in heaven, Satan and his host of rebel angels are hurled by the Almighty from the ethereal sky down into bottomless perdition, where, although a great furnace burns, “yet from those flames/No light, but rather darkness visible.”\(^3\) In his account of the dismantling of the Hapsburg and Romanov empires after World War I, and with them the modest village structures of tolerance and coexistence between their many ethnic groups, Moynihan evokes the long fall from heaven into

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\(^1\) Compare D. Kennedy, “A New Stream of International Law Scholarship” (1988) 7 Wisc. Int’l L.J. 1 at 12 (The entire rhetorical apparatus of international law and society exists within and against a margin composed of such things as chaos and war.)


chaos. He also calls up the image of *pandaemonium* as the setting for Satan's consultation with his followers on how to regain heaven. Among Satan and his infernal peers, argument is intemperate and recklessly ambitious. Alluding to the dangerousness of debate, Moynihan writes of ethnic conflict: "For the moment the more pressing matter is simply to contain the risk, to restrain the tendency to hope for too much, either of altruism or of common sense. Pandemonium was inhabited by creatures quite convinced that the great Satan had their best interests at heart." Satan exemplifies too the treachery of certain interlocutors, vowing to Beëlzebub:

... If then his Providence  
    Out of our evil seek to bring forth good,  
    Our labour must be to pervert that end,  
    And out of good still to find means of evil.  

Part I of the chapter compares Thomas Franck's interpretation of self-determination in two influential articles: "The Emerging Right to Democratic Governance" and "Postmodern Tribalism and the Right of Secession." It contrasts the construction of *demos* as enlightenment in "The Emerging Right to Democratic Governance" with that of *ethnos* as pandemonium in "Postmodern Tribalism and the Right of Secession." The contention of Part I is that these opposite worlds play a part in persuading us of Franck's composite interpretation of self-determination and in obscuring the inconsistency of the line he draws between politics and law.

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4 *Pandaemonium*, supra note 2 at 24, 140. See also the titles of c.4 ("Before the Fall") and c.5 ("Order in an Age of Chaos").
5 *Ibid.* at 174. See also A. Roberts, "Foreward" in *ibid.* at vii, viii-ix (on nationalism as Satan, raised "to that bad eminence").
6 "Paradise Lost," supra note 3 at Book I, l.162-165.
7 T.M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 AJIL 46 [hereinafter Franck, "Democratic Governance"].
Apart from their impact, one reason for focusing on these particular articles by Franck is that the two belong to the same historical moment, a few years after the end of the Cold War, and may therefore fairly be compared. The other is that since these articles were penned before the victory of liberal democracy and escalation of ethnic conflict had coalesced in the international legal imagination, they provide the clearest example of the rhetoric.

Part II discusses Rosalyn Higgins’s recent writing on self-determination. It demonstrates that her interpretation of self-determination is based on a shift from her general theory of international law as policy oriented and broadly participatory to a theory of international law as rigid rules and international legal interpretation as the province of experts. The relevance of this shift from policy to rules is not so much Higgins’s narrow interpretation of the right to

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11 Franck’s most recent account of self-determination synthesises the phenomena of modernism and postmodern tribalism. Fairness in International Law and Institutions, supra note 10 at c.5. On the antecedents of this distinction between good demos and bad ethnos in international legal thought, see N. Berman, “Nationalism ‘Good’ and ‘Bad’: The Vicissitudes of an Obsession” (1996) 90 ASIL Proc. 214.


13 Higgins, 1991 Hague Lectures, supra note 12 at c.7; Problems and Process, supra note 12 at c.7; R. Higgins, “Postmodern Tribalism and the Right to Secession, Comments” in Bröllmann, Lefeber & Zieck, supra note 8 at 29.
secede - a similarly restrictive interpretation might be justified on policy grounds - but the implications for the transformative potential of interpretation. Higgins effectively seeks to end any conversation that we might have in international law about the meaning of self-determination or, at least, to exclude from the conversation those who do not accept its formalism.\textsuperscript{14} Part III suggests how Higgins's insistence on rules corresponds to the fear of pandemonium as both chaos and debased discussion.

I Darkness Visible\textsuperscript{15}

Thomas Franck's "The Emerging Right to Democratic Governance"\textsuperscript{16} argues that we are witnessing the transformation of self-determination in international law from the right of overseas colonies to independence into a right of all to participate in democratic governance, while his "Postmodern Tribalism and the Right of Secession"\textsuperscript{17} staunches the interpretation of self-determination so as to preclude a right of secession.

Both pieces begin with the sweep of historical events. In the opening pages of "Democratic Governance," there are two large, magnificent historical events: the failed August 1992 coup in Moscow, and the decisive international action taken in immediate response to the overthrow of President Aristide of Haiti in September 1991. While Franck concedes that these events represent political, as opposed to legal, progress for democracy,\textsuperscript{18} he implies that the distinction is unimportant because political principle will march triumphantly - in the space of three pages the

\textsuperscript{15} Supra note 3.
\textsuperscript{16} Franck, "Democratic Governance," supra note 7.
\textsuperscript{17} Franck, "Postmodern Tribalism," supra note 8.
\textsuperscript{18} Franck, "Democratic Governance," supra note 7 at 47.
word "triumph" is applied to both President Yeltsin's victory and the ideas of Hume, Locke, Jefferson and Madison\(^\text{19}\) - into international law.

In "Postmodern Tribalism," the prose of the early paragraphs crowds together the manifestations of nationalism that Franck chooses to call "postmodern tribalism."\(^\text{20}\) However, neutral Franck's definition of postmodern tribalism as the promotion of a political and legal environment conducive to the break-up of a multinational or multicultural state in order to form a new state composed of a single nationality or culture,\(^\text{21}\) his use of the term "tribalism" strongly implies the primitiveness of such designs.\(^\text{22}\)

Postmodern tribalism is presented as "everywhere," the examples ranging across the age (old, nineteenth century and new) and place (Europe, the Americas and the Third World) of nations to reinforce this impression. Omnipresent, it is also uniform, "manifest[ing] itself in efforts to break up, equally, ..." and undifferentiated in its lack of apology and open flaunting "with zealously raised arms and firearms."\(^\text{23}\) No distinction is made between nationalist movements that generally work within the political and legal system, such as Scottish and Quebecois nationalists, and those that have degenerated into unrest, violence or war. Whereas political principle flowed smoothly into international law in "Democratic Governance," a scrupulous separation is observed in

\(^{19}\) *Ibid.* at 47-49.

\(^{20}\) For the argument that the analogy between nationalism and tribalism is at best unenlightening and at worst misleading, see E. Kedourie, *Nationalism*, 4th ed. (Oxford: Blackwell, 1993) at 69.

\(^{21}\) Franck, "Postmodern Tribalism," *supra* note 8 at 4.

\(^{22}\) Consider further Michael Reisman's characterisation in the course of a roundtable discussion of *uti possidetis*:

In practice, this would mean that when groups elites come forward, whether in former Czechoslovakia, former Yugoslavia, or some other state that is about to become a former state, beat the tom-toms of ethnicism, tribalism or subnationalism, the international community's response may be: "Sorry, the boundaries here are not subject to change ... [emphasis mine] Panel Discussion, "Communities in Transition: Autonomy, Self-Governance and Independence" (1993) 87 ASIL Proc. 248 at 258.

\(^{23}\) Franck, "Postmodern Tribalism," *supra* note 8 at 3.
"Postmodern Tribalism," and a thicket of policy obstacles planted between the "undeniable political trend towards secessionist post-colonial ‘tribal’ states"24 and an international legal right to secede.

If "Democratic Governance" creates an enlightened universe of demos that helps persuade us to recognise a right to democratic governance originating in self-determination, "Postmodern Tribalism" summons a dark underworld of ethos that plays to our fears of interpreting self-determination to include a right of secession.

II A Mind Not to Be Chang’d by Place or Time25

In the abstract, Rosalyn Higgins is unequivocal in choosing a policy-oriented approach to international law as process over a more formalist approach to international law as rules, and dismissive of those who attempt to reconcile the two.26 In this part, I show that Higgins’s formulation of the right of self-determination relies on an approach very much like the rules-based approach she criticises, and examine how, compared to the processual approach, this restricts the kinds of arguments that can be made about the meaning of self-determination and who can make them.

In the first lecture of her general course on public international law given at the Hague Academy of International Law in 1991, Higgins firmly declares her approach to international law as "process" and not "just rules."27 Rather than regarding international law as the impartial application of rules, she states, quoting from an article that she wrote some twenty years earlier, the process approach conceives of international law as

the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules." There inevitably flows from this definition a

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24 Ibid. at 13.
26 Higgins, 1991 Hague Lectures, supra note 12 at 31-32; Problems and Process, supra note 12 at 8.
concern, especially where the trend of past decisions is not overwhelmingly clear, with policy alternatives for the future.  

In an argument familiar from American legal realism, Higgins maintains that judges do not "find the rule," but actually determine what the relevant rule is. Adjudication involves choice, and choice requires a consideration of the humanitarian, moral and social purposes of the law. Since reference to rules can neither eliminate the need for choice nor guide a consideration of policy, Higgins concludes that policy factors should be dealt with systematically and openly by the decision-maker.

One consequence of analysing international law as process is that the distinction between international law as it is (lex lata) and as it ought to be (lex ferenda) becomes less important. Higgins states:

If law as rules requires the application of outdated and inappropriate norms, then law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve.

Another consequence is that the focus of inquiry into what international law is widens to include such varied phenomena as claims and counterclaims, state practice and decisions by a variety of authorised decision-makers. International law is no longer identified with what the


32 Higgins, 1991 Hague Lectures, supra note 12 at 34; Problems and Process, supra note 12 at 10. See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) 35 I.L.M. 934 at 938, para.41 (Dissenting Opinion of Judge Higgins) ("The judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect.")
International Court of Justice would say on a given matter, but reflects the entire range of claimants and decision-makers in the international system.

In theme, method and lexicon, Higgins's approach to international law strongly resembles the policy science approach developed by Myres McDougal and Harold Lasswell. However, the contrast between rules and process, stasis and dynamism, past and future, fixity and fluidity, noun and gerund that structures Higgins's introductory lecture detracts attention from the ways in which she narrows its ambit. The first lecture makes explicit that Higgins considers her process approach appropriate to cases where an ambiguous rule falls to be interpreted or no rule covers the situation at hand (non liquet). Her treatment of self-determination and the use of force in the later lectures indicates that she sees the process approach as applicable also where a more expansive interpretation of a clear rule is contemplated, but not as justifying a new interpretation that would contradict that rule - in such cases non-compliance is the only route.

To differentiate cases in which policy directed choices can properly be made from those in which they have no role to play, Higgins must assume that clear rules can be separated from ambiguous rules; and that deviations from the written text that develop and elaborate rather limited

33 See Falk, supra note 29 at 2006, n. 66.
35 Higgins, 1991 Hague Lectures, supra note 12 at 30 (“Where there is ambiguity or uncertainty, the policy directed choice can properly be made.”). See also ibid. at 323 (“facts must be looked at, and legal views applied in context. But I also believe such policy choices are appropriate when the legal norms open alternative possibilities.”). Problems and Process, supra note 12 at 7, 253.
statements of principle - such as self-determination - can be distinguished from deviant practices that are prohibited by the written text and must therefore be beyond justification by it.\textsuperscript{39} This necessarily commits her to a strongly determinate view of language and law. She has written elsewhere, "I believe that legal ideas develop and that is proper. But that is not to say that they can mean simply whatever those using them want them to mean."\textsuperscript{40} Meaning is one thing and development is another.

It is not apparent how Higgins reconciles this view of determinacy with the premises of the process approach. If there is, as she states, no "'real' international law that all men of good faith can recognize, that is rules that can be neutrally applied, regardless of circumstance and context,"\textsuperscript{41} then how can we distinguish between clear and ambiguous rules and between deviations that expand the written text and those that contradict it? In modelling law as process, Higgins retains from the rules model the notion that international law has a core predictability.\textsuperscript{42} How extensive is this core and how does it differ from "rules that can be neutrally applied"?

In distancing her own process approach from the charge of apologism levelled at those who used a policy science approach to justify the Reagan administration's foreign policy,\textsuperscript{43} Higgins introduces a tension between process and rules. Policy is still there, but it is relegated to the ambiguities, the interstices and the margins of interpretation. Yet in her Hague lecture on self-determination - perhaps the most controversial and most dynamic norm in international law - policy

\textsuperscript{39} Higgins, 1991 Hague Lectures, supra note 12 at 156; Problems and Process, supra note 12 at 10.

\textsuperscript{40} Higgins, "Postmodern Tribalism," supra note 13 at 30.

\textsuperscript{41} Higgins, 1991 Hague Lectures, supra note 12 at 30-31; Problems and Process, supra note 12 at 7.

\textsuperscript{42} Higgins, 1991 Hague Lectures, supra note 12 at 32; Problems and Process, supra note 12 at 8.

is largely excluded. As we shall see, Higgins retreats to a walled city of interpretation whose bastions are rules and categories. Whether in defending the existing rule against attack by infidels or advancing a new interpretation, she relies on rules rather than policy or principle.

In Higgins’s view, it is clear that what the UN Charter says about self-determination refers to the right of the people of one state to be protected from interference by other states, and that the chapters on dependent territories use neither the term “self-determination” nor the concept as we now know it. "Popular mythology" is simply wrong in tracing the origins of self-determination to the Charter.45

More generally, Higgins assumes that each successive stage in the development of self-determination corresponds to a rule with a single meaning so that it makes sense to speak, as she does in her commentary on Franck’s “Postmodern Tribalism,” of the “misapplication of legal terms.”46 This assumption permits her to criticize as wrong and irresponsible those who appeal to a different interpretation of the rule. In that commentary, she dwells on “the importance of using concepts with some care ... I am of course very aware that there are those who use the armoury of words in full knowledge of what they do.”47 Her Hague lecture dismisses as confused rhetoric the fashion among political leaders to invoke self-determination as the right of minorities to secede and ends with the admonition that self-determination cannot be all things to all men.48 Even if Higgins’s discussion of the original meaning of self-determination in the UN Charter and her scrupulous separation of political vogue from legal meaning now is a prelude to a policy analysis of

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44 Higgins, 1991 Hague Lectures, supra note 12 at 154; Problems and Process, supra note 12 at 111.
45 On the interpretation of the UN Charter, see also Higgins, “Postmodern Tribalism,” supra note 13 at 29-30.
46 Ibid. at 35.
47 Ibid. at 34-35.
the directions that the rule should take - which turns out not to be the case - it is at odds with the rapprochement between *lex lata* and *lex ferenda* that follows from viewing international law as process.

If rules have a clear meaning and it is wrongheaded and irresponsible to use them in a different sense, then how can Higgins account for changes in meaning? Part of the answer that emerges from her lecture on self-determination is that international law is a high priesthood and the interpretation of texts is the province of high priests and ecclesiastical scholars. "Popular" mythology and "all" men are just that, and the claims of political leaders fickle and unsound. This may explain in part why the Human Rights Committee's interpretation of the right of self-determination in the *International Covenant on Civil and Political Rights* is presented as, rather than shown to be, preferable to rival interpretations, even by other publicists. The mission of international lawyers is to safeguard the purity of the rule, eschewing "current fashion when it is intellectually unsound."50 Here again, the dynamic of claims and counterclaims by a broad range of participants in the international legal system seems to have shifted to one of authoritative and expert interpretation.

Apart from its authority, why is the Human Rights Committee's development of the right of self-determination right and the interpretation of the right advanced by politicians, nations and minorities wrong? The justification that Higgins provides for the Committee's interpretation relies on a chain of reasoning with rules and categories. Nevertheless, without a larger normative context, she is hard pressed to prove why each link is the only one that can be made.

The Human Rights Committee, according to Higgins, considers that the right of self-determination gives the population of a territory still subject to colonialism, alien domination or occupation the right to choose its external status, be it independent statehood, free association or

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integration with an independent state, or any other political status freely determined by that population (external self-determination). Under any other circumstances, the right requires only that the population of a state be given the continuing opportunity to choose their system of government within the state in order that they can determine their economic, social and cultural development (internal self-determination). The alternative interpretations that Higgins seeks to refute take the general form that even beyond colonialism, alien domination and occupation, certain subgroups of a population have the right to choose their political status under certain conditions.

Higgins begins by arguing that the right of self-determination in international law has never simply meant independence, but has always meant the free choice of peoples as to political status. That it also means the free choice of government follows from the wording of article 1(1) of the Covenant "and freely pursue their economic, social and cultural development." But it would seem equally plausible to read this phrase as no more than the right of a newly independent population or indeed - consistent with her interpretation of article 1(2) of the UN Charter - any population to be free of outside interference.

Higgins argues next that her interpretation of self-determination in article 1 is not inconsistent with article 25, which provides that every citizen shall have the right to take part in the conduct of public affairs, to vote and to be elected at periodic elections on the basis of universal suffrage, and to have access to public service in his country. The overlap between the internal self-determination envisaged by article 1 and the rights of political participation guaranteed by article 25, she maintains, is not fatal to such an interpretation of article 1 because the two articles are complementary. Article 25 provides more detail on how free choice is to be implemented as well.

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51 Higgins, 1991 Hague Lectures. supra note 12 at 165; Problems and Process, supra note 12 at 120.
52 Compare e.g. Tomuschat, Summary Records of 2060th Meeting, [1988] I Y.B. Int'l L. Comm. 110, para. 56. Tomuschat's view on self-determination is of particular relevance because both he and Higgins have been members of the UN Human Rights Committee.
53 Contra. see e.g. ibid.
as covering matters beyond those covered by article 1. This overlap, though, seems to undermine the significance of states' acquiescence in the Committee's interpretation of article 1: if states have already made certain commitments under article 25, then little turns on whether these commitments are also exacted by article 1.

Without more, Higgins takes quite the opposite view of overlap between article 1 and article 27. In her commentary on Franck's "Postmodern Tribalism," she counters the interpretation that minorities could have some right of external self-determination under article 1, as well as the minority rights guaranteed by article 27, with the assertion that the Covenant provides for two discrete rights. This interpretation is also excluded, she argues in her Hague lecture, by the emphasis on the importance of territorial integrity in all the relevant instruments and in state practice. If, as it appears to be, this is simply a restatement of the "blue water" thesis found in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514) and UN General Assembly Resolution 1541, whereby colonies were defined as territorially distinct from the metropolitan state and therefore candidates for external self-determination, then Higgins has neglected to close the loophole in the penultimate paragraph of the UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (General Assembly Resolution 2625).

In summary, Higgins's lecture on self-determination comes remarkably close to the assumptions about international law with which she takes issue in the introductory lecture:

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56 See above Chapter 2(II)(C).
that "the correct legal view" is to be discerned by applying "rules" - the accumulated trend of past decisions, regardless of context or circumstance - and that "the correct legal view" has nothing to do with applying past decisions to current contexts by reference to objectives (values) that the law is designed to promote. 57

III The Apostate Angel

Rosalyn Higgins's treatment of self-determination thus departs in two important ways from her general statement that the

persuasive character of legal jurisprudence ... is the necessary stuff of our very existence in community with others. Everyone is entitled to participate in the identification and articulation as to what they perceive the values to be promoted. Many factors, including the responsive chords struck in those to whom the argument is made, will determine whether particular suggestions prevail. 58

First, her presentation of the right of self-determination as a set of clear-cut rules leaves no room for interpretation and, consequently, none for the consideration of values. Second, her reliance on authority and disparagement of popular claims about self-determination are hard to reconcile with a broad entitlement to participate in interpretation and even harder to reconcile with a dialogic understanding of interpretation, whereby the interpretation should be persuasive to the parties concerned.

It is significant that not only could Higgins's limitation of the right of self-determination to colonial peoples and peoples under alien domination or foreign occupation be justified on her general approach to international law as process, but that she herself has in the past taken this type of approach to self-determination. In an article written in 1993, 59 she argues that the contest between a state's claim to the reintegration of territory based on sovereignty and a claim to independence by the territory's inhabitants based on the right of self-determination is resolved by

contextual analysis, taking into consideration the variables of history, cultures, local wishes, human rights record and existence of a democratic government.  

Why, then, does Higgins ground her interpretation of self-determination in rules rather than process? And why might her analysis be persuasive? The glimpses she gives us of pandemonium, particularly at the end of her comment on Franck's "Postmodern Tribalism," offer two tentative answers. A first answer lies in pandemonium as the spectre of uncontrollable disintegration that Higgins summons in rejecting a right of secession for minorities: Yugoslavia; Bosnia-Herzegovina; the Bosnian Serbs; if the Serbian areas of Bosnia are forcibly integrated into a greater Serbia, then the Muslim and Croat populations of these areas; "[a]nd so on, ad infinitum."  

This answer is that the right of self-determination must be treated as a determinate rule because darkness is visible. If the content of self-determination were instead to depend on the conclusion of an argument of policy or principle, then international society would be inviting chaos. There are echoes here of Thomas Hobbes's command theory of law, which holds that positive law is always legitimate because it is imperative that the law be beyond challenge. According to Hobbes, the risk of making the content of the law dependent on moral argument is no less than civil war.

Implicit in Higgins's analysis of self-determination is another image of pandemonium: the debased rhetoric of Satan and his infernal peers. We have already seen that Higgins is strongly critical of those who, in her view, deliberately misappropriate the international legal language of

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61 Higgins, "Postmodern Tribalism," supra note 13 at 35.

self-determination. She writes of this linguistic mischief: "the move to uninal and unicultural states that constitutes postmodern tribalism is profoundly illiberal. The attempt to legitimate these tendencies by the misapplication of legal terms runs the risk of harming the very values that international law is meant to promote."\textsuperscript{63} The image of the apostate angel in pandemonium, arguing without regard for reason or morality, allows us to see Higgins's analysis of self-determination as correct on rhetorical, as opposed to Hobbesian, grounds. Granting that interpretation involves inter-subjective argument - as Higgins puts it, "the responsive chords struck in those to whom the argument is made" - a consensus may nevertheless be unavailable in reality. In this case, one of the rhetorical strategies advocated by Aristotle is to restrict the type of participants in the discussion. Friedrich Kratochwil quotes the following advice from Aristotle's \textit{Topica}:

\begin{quote}
You ought not to discuss with everybody ... for with some people argument is sure to deteriorate; for with a man who appears to try every means to escape from the right (conclusion) you are justified in trying everything to come to such a conclusion; however, this is not a seemly proceeding. You should, therefore, not readily join issue with casual persons; this can only result in a debased sort of discussion; for those who are practicing cannot forbear from disputing contentiously.\textsuperscript{64}
\end{quote}

Higgins implicitly makes the same argument by creating an opposition between the international legal establishment, with its cultures of formal legal reason and neutrality, and the demagogues, who flout these conventions. Seen through this image of pandemonium as debased discussion, Higgins's retreat to rules is not an attempt to deny any need for the interpretation of self-

\textsuperscript{63} Higgins, "Postmodern Tribalism," \textit{supra} note 13 at 35.

determination, as on the image of pandemonium as chaos, but an attempt to exclude irrationality and passion from its interpretation by narrowing the community of interpreters.\textsuperscript{65}

John Comaroff has written that from the perspective of Euro-nationalism, with its ideal of civic identity, "all ethno-nationalism appears primitive, irrational, magical and, above all, threatening; in the eyes of ethno-nationalism - which appears perfectly 'rational' from within - Euro-nationalism remains inherently colonizing, lacking in humanity or social conscience."\textsuperscript{66} In this chapter, I have suggested that while the Euro-nationalist perspective of Thomas Franck and Rosalyn Higgins does not find direct expression in their legal arguments about the meaning of self-determination, it translates into the underlying theme of pandemonium that helps to make their legal arguments seem internally consistent and therefore plausible. Without the narrative of a world plunged into violence and chaos by postmodern tribalism, Franck's anticipation of the passage of a right to democratic governance from politics into law might seem inconsistent with his reluctance to acknowledge an emerging right to secede. In Higgins's work, this narrative similarly supports the presentation of self-determination as a fixed rule, despite her general approach to international law as process. Alternatively, the narrative of inflamed discussion reinforces her implicit retreat from a broadly participatory interpretive process to a more traditional reliance on authority.

\textsuperscript{65} It is interesting that the term "barbarous nationalisms" recently coined by Carol A.L. Prager in "Barbarous Nationalism and the Liberal International Order: Reflections on the 'Is,' the 'Ought' and the 'Can'" in J. Couture, K. Nielsen & M. Seymour, eds., Rethinking Nationalism (Calgary, Alta.: University of Calgary Press, 1996) 441 also contains the idea of incommunicability, incomprehensible, non-Greek and inferior being among the earliest senses of "barbarous." J. Kristeva, Étrangers à nous-mêmes (France: Gallimard, 1988) at 74-77.

\textsuperscript{66} J.L. Comaroff, "Ethnicity, Nationalism and the Politics of Difference in an Age of Revolution" in J.L. Comaroff & P.C. Stern, eds., Perspectives on Nationalism and War (Gordon and Breach, 1995) 243 at 263.
Part II: Self-Determination Interpreted in Practice: The Challenge of Cultural Difference

Chapter 4
The Canon of Self-Determination

Europe fulfilled its silhouette in the nineteenth century with steaming train-stations, gas-lamps, encyclopedias, the expanding waists of empires, an appetite for inventory in the novel as a marketplace roaring with ideas.

Derek Walcott, "Signs"\(^1\)

The moment that any set of values, meanings, and material forms comes to be explicitly negotiable, its hegemony is threatened; at that moment it becomes the subject of ideology or counterideology.

John and Jean Comaroff, *Ethnography and the Historical Imagination*\(^2\)

Parts II and III of the thesis turn from the current debate in the international legal literature over when the right of self-determination justifies independence to the cases where an international tribunal, such as an international court, arbitration commission or body of experts, has been confronted with some aspect of this debate. By analysing the interpretation of self-determination in the cases as the expression of a relationship between interpretation, identity and participation, as Part I did with the literature, Parts II and III will show that the approaches taken to the interpretation of self-determination by contemporary writers fail to reflect the full significance and complexity of its interpretation in the cases.\(^3\)

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\(^3\) See N. Berman, "Sovereignty in Abeyance: Self-Determination in International Law" (1988) 7 Wis. Int'l L.J. 51 at 93-94 (arguing that "either alone or in combination, the abstract conceptual positions are inadequate to provide a determinative answer to the meaning of the ‘self’" and that we must instead look to the productive combination of these positions in complex legal texts such as the advisory opinions in *Namibia* and *Western Sahara*); J. Crawford, "The General Assembly, the International Court and self-determination" in V. Lowe & M. Fitzmaurice, eds., *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Grotius Publications, 1996) 585 at 586 (asserting that the work of the International Court of Justice in the field of self-determination is important both as a source of that law and as a "corrective to the programmatic treatments that characterize much of the literature.").
Part I identified two broad approaches to the interpretation of self-determination among contemporary writers. Based on the distinction between rules and principles, Chapter 1 introduced several models of interpretation applied to self-determination and drew attention to their assumptions about and implications for participation and identity. Chapter 2 presented the full range of interpretive models currently found in the international legal literature on self-determination, generalising the distinction as one between "categories" models, which treat self-determination as a set of definite rules or categories without more, and "coherence" models, which seek to unify the law through some larger story of principle or policy. By contrasting the general theory of international legal interpretation with the interpretation of self-determination in the work of two authors, Chapter 3 demonstrated that the images of identity and participation conjured up by self-determination may not be simply a by-product of the application of a general interpretive theory to self-determination, but may actually lead us to substitute one general theory for another in the interpretation of self-determination.

The effect of treating self-determination as a set of rules or categories, as seen in Part I, is to leave little room for interpretation. Although the different rules or categories reflect different ideas of identity, so that groups claiming self-determination are not all forced into the same mould, each rule or category tends to be narrowly construed. For many groups, the meaning of self-determination therefore falls to be contested through politics and practice rather than through interpretation. The authors who treat self-determination as a set of rules or categories tend to examine its current meaning by way of a prelude either to the prescription for what it ought to mean or to the exposition of the norms that govern when a group without a right of self-determination declares independence unilaterally. Because most of these authors accept the "colonies only" interpretation of self-determination, they are inclined to regard the positive law norm as arbitrary or, relatedly, as unpersuasive to non-state actors and therefore unlikely to deter unilateral declarations
of secession. For them, the norm of self-determination is unjust, irrelevant or both - at best, the soured promise of legitimacy in international law. In contrast, the more open-textured alternative, which grounds self-determination in principle or policy, makes room for interpretation, but often tells too simple a story of identity and history.

In this light, Part II (Chapters 4 and 5) revisits the cases cited by most authors in support of their particular interpretation. Chapter 4 analyses the 1975 International Court of Justice advisory opinion in the Western Sahara case, including the consideration of Western Sahara in the

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4 The argument of this chapter is not that the meaning of self-determination should be consistent or should persuade those claiming or likely to claim a right to secede (although such arguments could certainly be made), but that its interpretation by international judicial and quasi-judicial bodies may already reflect such ideas of legitimacy.

5 Two other recent ICJ cases might have turned on the right of self-determination. Certain Phosphate Lands in Nauru (Nauru v. Australia), [1992] I.C.J. Rep. 240, concerning the right of the people of Nauru against Australia as the former administering authority to the rehabilitation of certain phosphate lands mined out during the trusteeship period, was settled before it reached the merits stage. See A. Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case" (1993) 34 Harv. Int'l L.J. 445. For the settlement, see Australia-Republic of Nauru: Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, (1993) 32 ILM 1471. In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), one of Yugoslavia's preliminary objections was that Bosnia was not qualified to become a party to the Genocide Convention because it had acquired independent statehood by acts violating the principle of self-determination and that the Court consequently did not have jurisdiction under the Genocide Convention. Verbatim Record, CR 96/5 (29 April 1996) at 12-43. The Court dismissed this objection on the grounds that an independent Bosnia had become a UN member, article 11 of the Genocide Convention opens the Convention to any UN member and the circumstances of Bosnia's accession to independence were therefore of no consequence for its succession to the Convention. Preliminary Objections, [1996] I.C.J. Rep. (11 July 1996).

The analysis in this chapter cannot be extended to the series of ICJ cases characterised ab initio as territorial disputes, despite the potential relevance of self-determination to the issue of territory. Frontier Dispute (Burkina Faso v. Mali), [1986] I.C.J. Rep. 554; Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening), [1992] I.C.J. Rep. 351; Territorial Dispute (Libyan Arab Jamahiriya v. Chad), [1994] I.C.J. Rep. 6. Right of Passage (Second Phase), [1960] I.C.J. Rep. 6 might also be included among these cases. For an excellent critique of the international adjudication of territorial disputes as failing to recognise the rights of indigenous peoples, see W.M. Reisman, "Protecting Indigenous Rights in International Adjudication" (1995) 89 AJIL 350 (Reisman would include Western Sahara among these disputes). How a particular dispute comes to be characterised as a self-determination or a territorial dispute and why the judicial method varies with the initial characterisation are questions that require separate study.

Dubai/Sharjah boundary arbitration; the 1992 European Union Arbitration Commission Opinion No.2 on Yugoslavia; and the 1995 International Court of Justice judgment in the East Timor case between Portugal and Australia. The majority of the chapter is devoted to the Western Sahara case, not only because it stands as the most important judgment of the International Court of Justice on self-determination, but also because it best illustrates the broader significance of these cases on self-determination.

All these cases involved challenges to the liberal account of self-determination that dominated international legal thinking at the time. The Western Sahara case dates from the heyday of United Nations-supervised decolonization, when liberalism equated self-determination with a colonial population’s free choice of independent statehood or other political status. In Western Sahara, Morocco and Mauritania opposed the right of the Western Sahara population to choose their political status through a referendum on independence. Characterising the Spanish colonisation of Western Sahara as a wrongful taking of their territory by Spain and a disruption of the historical patterns of collective identity in the Sahara, Morocco and Mauritania argued that the restoration of the precolonial situation must take precedence.

By the time of the Yugoslavia opinion, the dominant liberal account of self-determination had shifted. As the paradigmatic claimant changed from a colony seeking freedom from a distant colonial master to an ethnic minority agitating to splinter territory from a state, independence was reconceived as an exceptional result of self-determination rather than a matter of course. The liberalism of self-determination now lay more in a citizen’s right to choose a government

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8 *Opinion No.2* (1992) 31 ILM 1497 [hereinafter *Opinion No.2*].
democratically than in a population's right to choose its state. In *Opinion No. 2*, the Republic of Serbia asked the EU Arbitration Commission whether the Serbian minorities in Bosnia-Herzegovina and Croatia had the right to self-determination, thereby invoking the ideal of the ethnic nation-state.

The liberal account of self-determination as the exercise of the free will of the colonial population also forms the background for the *East Timor* case. A former Portuguese colony, East Timor was administered as a non-self-governing territory by Portugal until 1975 when Portugal withdrew and Indonesia occupied the territory. In *East Timor*, Portugal argued that by concluding a treaty with Indonesia concerning deep sea mining off the coast of East Timor, Australia had violated the right of the East Timorese people to self-determination and the rights and duties of Portugal as administering power. The fact, however, that Portugal as administering power brought the case without the participation of the people of East Timor demonstrates the persistent cultural bias in the liberal account of self-determination. In his separate opinion in *East Timor*, Judge Vereshchetin challenges this classical conception of the administering power as trustee, rather than agent, for the people of the territory.

In terms of result, the international judgments and arbitral decisions treated in Chapter 4 do not disturb the dominant liberal accounts of self-determination. On the one hand, the International Court of Justice in *Western Sahara* affirms the right of a colonial people to independence. While dismissing the case for lack of jurisdiction, the Court in *East Timor* was careful to affirm this right and, indeed, accepted the parties' position that it is *erga omnes*, or opposable to all.¹⁰ On the other hand, the EU Arbitration Commission on Yugoslavia largely ruled out the right of an ethnic

minority to secede. These results may be consistent with either a "categories" or a "coherence" approach to self-determination.

Chapter 4 argues, however, that neither approach incorporates the broader significance of the cases. This significance lies first in the moment pinpointed by John and Jean Comaroff, when a set of values, meanings and material forms comes to be explicitly negotiable. Because self-determination has generally been contested by those outside the mainstream of international law, the history of its interpretation has been a history of challenges to the hegemony of international law. Whereas most authors focus on the outcome of the cases on self-determination, the fact that these cases involve actors and ideologies that are traditionally absent in international law gives them a significance independent of the outcome.

In each case discussed in Chapter 4, the challenge to the dominant liberal account of self-determination also contains a challenge to the world and the world-view the dominant account represents. At issue in the *Western Sahara* case and the *Dubai/Sharjah* boundary arbitration are the status of nomadic desert peoples and the place in international law for Arabo-Islamic perspectives on law and society. The question for the Arbitration Commission on Yugoslavia of the right of self-determination for the Serbian minorities in Bosnia-Herzegovina and Croatia reflects the nationalist desires of European minorities, which plebiscites, population transfers, minority treaties and other international legal techniques had failed to contain during the interwar period and which had been marginalized in post-World War II international human rights by the emphasis on the

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individual. In the *East Timor* case, it is Judge Vereshchetin who reminds us that the voice of the East Timorese people is absent from the case, silenced by Indonesia's denial of their right to self-determination and, as well, by casting them as the mute beneficiaries of the "sacred trust," institutionalised first in the League of Nations mandate system and later in the United Nations system of trust and non-self-governing territories.

The result of these fundamental challenges is, in the Comaroffs' terms, a transformation of hegemony into ideology, where

Hegemony consists of constructs and conventional practices that have come to permeate a political community; ideology originates in the assertions of a particular social group. Hegemony is beyond direct argument; ideology is more likely to be perceived as a matter of inimical opinion and interest and hence is more open to contestation. Hegemony, at its most effective, is mute; ideology invites argument.\(^\text{12}\)

By examining the critiques raised of self-determination and, more generally, of the cultural forms taken by international law, we can see the international judgments and arbitral decisions discussed in this chapter as significant in a second way, one not captured either by the categories or the coherence approaches. Although the outcome of the cases may be consistent with either of these approaches, the methods of interpretation used by the judges to arrive at this outcome are more complex and creative than either approach would lead us to believe. Unlike the categories or coherence approaches, they offer a partial response to the critiques made in argument of self-determination and of the cultural contingency of international law. This chapter suggests that the decisions are unified by the creative use or interpretation of legal concepts to produce more complex ideas of identity and participation in international law.

In particular, all three decisions make innovative use of intermediate legal concepts. In *Western Sahara*, the International Court of Justice's use of "legal ties" is an attempt to bridge the

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\(^{12}\) Comaroff, *supra* note 2 at 29.
gap between the prevailing liberal account of self-determination as the right of the Western Sahara population to choose their political status through a referendum on independence and Morocco and Mauritania’s claim to the restoration of their territory based on wrongful taking or a common ethnic, religious and cultural identity. By deriving a right of members of an ethnic minority to choose their nationality from the right of peoples to self-determination, the Arbitration Commission on Yugoslavia creates the possibility of a nationality divorced from territoriality, seemingly intended to surmount the choice between the prevailing interpretation of self-determination as belonging to the territorial population as a whole, with the rights of an ethnic minority limited to a set of guarantees within the territory of the state, and the claim of an ethnic minority to secede. In *East Timor*, Judge Vereshchetin’s interpretation of the sacred trust concept creates a notional role for the East Timorese people, which falls short of standing in the case, but improves on the idea that it is the administering power that determines their best interests. The decisions discussed in this chapter respond to the arguments from cultural difference in their interpretation, as well as their use, of relevant concepts. The interpretation of *terra nullius*, legal ties and legal entity in *Western Sahara* are variously responsive to these arguments, as is Judge Vereshchetin’s interpretation of the “sacred trust” in *East Timor*.

By innovating through the interpretation of international law, the decisions differ from the more mechanical categories approach to the interpretation of self-determination, which consigns innovation to *lex ferenda*. Because the decisions produce relatively complex ideas of identity in international law, they contrast with the simple story of identity found in many of the coherence approaches to the determination of the meaning of self-determination. In *Western Sahara*, existence is given in international law to independent tribes and to the ties of allegiance between some of these tribes and the Sultan of Morocco and rights, including some land rights, common to others and the Mauritanian entity. In the Yugoslavia opinion, ethnic minorities within a state,
ethnic identities potentially across states and membership in the population of the state all attract some degree of recognition. The relationship between the administering power of a non-self-governing territory and the inhabitants is reconceived in the *East Timor* case to reflect their vulnerability as non-self-governing and their autonomy as peoples.

A final significance of the decisions discussed in this chapter lies in the possibility of abstracting the values reflected in their interpretation of self-determination. Beyond the legal creativity and resulting narration of layered identities, might there be certain values of identity and participation embodied in these interpretations? There is a sense, particularly in *Western Sahara* and the Yugoslavia opinion, that the depiction of identity must correspond to lived experience. Relatedly, even though the communities whose right of self-determination is at issue in the cases - the Western Saharan population in *Western Sahara*, the *ethnicies* of the former Yugoslavia in the Arbitration Commission’s opinion and the East Timorese people in *East Timor* - are notably absent from the proceedings, the decisions may reflect their imagined participation in that the image of identity in the decisions seems designed to resonate with all the relevant communities. That actual participation is valued as legitimating international law is implicit in the account of self-determination and in Algeria’s presentation of intertemporal law in *Western Sahara*, and in Judge Vereshchetin’s concern for the East Timorese people in *East Timor*. The potential for contradiction between these values of identity and participation is explored principally in the discussion of intertemporal law in *Western Sahara*.

**I Western Sahara**

The General Assembly’s request for an advisory opinion on Western Sahara originated in objections by Morocco and Mauritania to the referendum on decolonization that Spain, the
administering power, planned to hold in Western Sahara.Both neighbouring states based their objections on the status of the Western Sahara at the time of its colonisation by Spain, Morocco claiming that the territory was then part of the Sherifan State and Mauritania that it formed part of the “Mauritanian entity” or Bilad Shinguitti.

Apart from Spain, the states that appeared before the International Court of Justice in Western Sahara were all African states that had been subject to colonialism. Part of Morocco had been controlled by Spain since the nineteenth century, and the rest had come under French rule in the twentieth century. Since becoming independent in the late 1950s, Morocco had acquired

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14 On the overlap between the two claims, as resolved in the course of the case, see Western Sahara, supra note 6 at paras.153-160.
sovereignty over the Spanish enclave of Ifni by cession. Mauritania had been a French protectorate from the turn of the century until its independence in 1960. Algeria had fought a war of independence against France, and Zaire was the former Belgian Congo. Morocco, Mauritania and Algeria, moreover, were Muslim states.\(^15\)

The General Assembly requested an advisory opinion on two questions:

I Was Western Sahara (Rio de Oro and Sakiet el Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?

If the answer to the first question is in the negative,

II What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?\(^16\)

By construing "legal ties" as those relevant to the decolonization of Western Sahara, the Court turns these otherwise historical questions about Western Sahara at the time of colonisation by Spain into a modern problem of self-determination. Since "legal ties" is not a technical term in international law,\(^17\) the Court looks for its meaning in the object and purpose of the General Assembly resolution that decided to request the advisory opinion. That resolution repeatedly situates the request in the context of the right of self-determination of the Western Saharan population in accordance with the UN Declaration on the Independence of Colonial Peoples (GA Resolution 1514),\(^18\) leading the Court to conclude that "legal ties" means legal ties.

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\(^{15}\) The appearance of these African states before the International Court of Justice was made more remarkable by the Third World's general disenchantment with the Court following its 1966 advisory opinion on South West Africa. See A.O. Adede, "Judicial Settlement in Perspective" in A.S. Muller, D. Raic & J.M. Thuránszky, eds., The International Court of Justice: Its Future Role After Fifty Years (The Hague: Martinus Nijhoff, 1997) 47 at 50-55; M. Shahabuddeen, "The World Court at the Turn of the Century" in *ibid.* at 3, 3-20. On the South West Africa cases, see Introduction, above, at Part I(B).


\(^{17}\) *ibid.* at para. 84.

\(^{18}\) *ibid.* That object and purpose are indicated by the following extracts from the resolution: *Reaffirming* the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV),...
of such a nature as might affect the application of resolution 1514 (XV) in the
decolonization of Western Sahara and, in particular, of the principle of self-
determination through the free and genuine expression of the will of the peoples of
the Territory.\footnote{19}

In this way, the Court establishes "the free and genuine expression of the will of the peoples
of the Territory" as the dominant narrative of self-determination\footnote{20} and "legal ties" as a source of
counter-narratives. Spain and Algeria cleave to the dominant narrative; they maintain that the
population of the Western Sahara is entitled to exercise its right of self-determination through a
referendum on independence, regardless of whether Morocco or Mauritania can establish a
precolonial claim to the territory. Through the counter-narrative of "legal ties," Morocco and
Mauritania argue that the wrongful taking of their territory by Spain\footnote{21} and the historical patterns of
cultural identity\footnote{22} in the Sahara justify the restoration of the precolonial situation.\footnote{23}

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1. **Decides** to request the International Court of Justice, without prejudice to
the application of the principles embodied in General Assembly resolution 1514
(XV), to give an advisory opinion ...

3. **Urges** the administering Power to postpone the referendum it contemplated
holding in Western Sahara until the General Assembly decides on the policy to be
followed in order to accelerate the decolonization process in the territory, in
accordance with resolution 1514 (XV), in the best possible conditions, in the light
of the advisory opinion to be given by the International Court of Justice;

\footnote{19} *Ibid.* at para.162. See also *ibid.* at para. 85.

\footnote{20} See Chapter 2(II)(A) above.

\footnote{21} See Chapter 2(II)(B) above.

\footnote{22} See Chapter 2(I)(C) above.

\footnote{23} For a discussion of other such conflicts, see e.g. Amankwah, *supra* note 13; Crawford, *The Creation of
States, supra* note 13 at 377-384; A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A
Study of United Nations Practice* (Leiden: A.W. Sijthoff, 1973) (Falklands, Gibraltar, Goa, West Irian);
L. & Pol. 441; T.M. Franck & P. Hoffman, "The Right of Self-Determination in Very Small Places"
Law Analysis of the Dispute Between Argentina and Great Britain" (1985) 107 Military L. Rev. 5; J.R.
c.10; V. Rudrakumaran, "The ‘Requirement’ of Plebiscite in Territorial Rapprochement" (1989) 12
Houston J. Int’l L. 23 at 41-45; M.A. Sánchez, "Self-Determination and the Falklands Islands Dispute"
(1983) 21 Colum. J. Transnat’l L. 557; A. Schwed, "Territorial Claims as a Limitation to the Right of
Beyond these competing narratives of self-determination, *Western Sahara* requires the Court to deal with the centrality of European colonialism in international law.\(^{24}\) In interpreting classical international law, how should the Court navigate the straits of Eurocentrism and imperial expediency? In using self-determination to dismantle the colonial apparatus in modern international law, should the Court provide a new way forward based on the free will of the colonised, taking colonialism as a fact, or should it look backwards to the precolonial situation, treating colonialism as an injustice done to the previous sovereigns? The African states that appear in *Western Sahara* answer these larger questions differently. Morocco and Mauritania take the position that the international law of the last century should be interpreted so as to recognise the patterns of identity in the Western Sahara and that these identities must be restored. For Algeria, the venality of nineteenth century international law must be openly admitted and remedied by a new international law based on the equal participation of old and new states alike and on the participation of peoples through the exercise of self-determination. Zaire makes a limited appearance in *Western Sahara*; it agrees with Algeria that the notion of *terra nullius* reflected a European perspective on the world, but argues that it should be reinterpreted in a way authentic to Africa rather than dismissed as a colonial relic in international law.

The Court finds it unnecessary to consider whether the Moroccan and Mauritanian accounts of a wrongful taking of territory or a historical cultural identity should modify the Spanish and Algerian accounts of self-determination as the free will of the population. The reason is that neither Mauritania nor Morocco had persuaded the Court of the underlying claim; that is, the sufficiency of its legal ties to the Western Sahara. On the first question, the Court found that according to the international law then in force, Western Sahara was not *terra nullius* because the territory was inhabited by tribes having a social and political organisation. Proceeding therefore to the second

\(^{24}\) See generally Chemillier-Gendreau, *supra* note 13.
question, the Court concluded that at the time of Spanish colonisation, both Morocco and the
Mauritanian entity had legal ties to the territory of Western Sahara. Ties of allegiance existed
between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara.
Likewise, legal ties between the Mauritanian entity and the territory existed in the form of rights,
including some rights relating to land. None of these legal ties, however, was of such a nature as to
affect the decolonization of Western Sahara.\footnote{25}

Although the Court, on the facts of Western Sahara, retains the dominant liberal account of
self-determination as the free will of the population, its interpretation and application of the
concepts involved in the determination of the historical legal ties (Section A) and its dicta regarding
the possible effect of legal ties on the exercise of free will (Section B) engaged both the specific
challenges to this account of self-determination, and the more general problems of the interpretation
of a historically Eurocentric international law and the appropriate international legal remedy for
colonialism.

A Identity Past

In Western Sahara, the International Court of Justice adopts the General Assembly's
characterisation of self-determination as "the right of the population of the Western Sahara to
determine their future political status by their own freely expressed will."\footnote{26} "It is for the people to
determine the destiny of the territory," Judge Dillard writes more plainly in his separate opinion,
"and not the territory the destiny of the people."\footnote{27}

By regarding the population of Western Sahara as the legal "self," the Court rejects
Morocco's appeal to the salience of an ethnic, cultural and religious self that unites Western Sahara

\footnote{25}{\textit{Western Sahara}, supra note 6 at paras. 162-163.}
\footnote{26}{\textit{Ibid.} at para. 70.}
\footnote{27}{\textit{Ibid.} at 122 (Separate Opinion of Judge Dillard).}
with Morocco. At the same time, the Court is silent on Spain’s contention that the Sahrawi, the inhabitants of Western Sahara, formed a coherent and distinct self at the time of colonisation;

that what is the present territory of Western Sahara was the foundation of a Saharan people with its own well-defined character, made up of autonomous tribes, independent of any external authority; and that this people lived in a fairly well-defined area and had developed an organization and a system of life in common, on the basis of collective self-awareness and mutual solidarity.

As far as the Court is concerned, the self effectively takes its identity from the referendum and not vice versa. The referendum constitutes the population within the colonial borders as a conglomerate of choosers, indistinguishable from any other conglomerate of choosers. Through the process of the referendum, international law imprints the uniformity of a democratic citizenry onto the particularity of whatever ethnic, cultural or religious communities may ultimately find expression through the process.

The General Assembly’s and the Court’s assumption in Western Sahara that the colonial population is the self and the referendum an exercise of their right to self-determination forces Morocco and Mauritania to base their arguments for the restoration of the precolonial situation on a claim to territory. To succeed, Morocco and Mauritania must show that they had precolonial legal

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28 Ibid. at para. 99. See also Mauritania at ibid., paras.131-132. On this type of claim generally, see Crawford, The Creation of States, supra note 13 at 382, no.5; Franck & Hoffman, supra note 13 at 369.


30 For an example of the complexity of what may actually happen, see H.G. West, “Creative Destruction and the Sorcery of Construction: Power, Hope and Suspicion in Post-War Mozambique” (1997) 20 Pol. & Legal Anthropology Rev. 13; R.J. Coombe, “Identifying and Engendering the Forms of Emergent Civil Societies: New Directions in Political Anthropology” (1997) 20 Pol. & Legal Anthropology Rev. 1 at 2-3 (giving an account of how Mozambique’s UN-supervised 1994 multi-party elections were used by one local populace to articulate performatively a new set of relationships between state and society in the idioms of a precolonial political cosmology).
ties to the territory\textsuperscript{31} and that these ties require the return of the territory regardless of the will of its population.

Rhetorically, an appeal to "territory" tends to lack the power of an appeal to "self."\textsuperscript{32} In addition, the self/territory dichotomy creates problems of proof for Morocco and Mauritania that it would not create for a European state because traditionally their political organisation was ethnically rather than territorially based. To this effect, Morocco quotes from a turn-of-the-century account of Morocco by a French writer who had made several expeditions to the Moroccan south:

Between us and the North African Muslims there is a radical difference in the way that the idea of empire is constructed in our mind and theirs. For us, the dominant element in this idea is the limit - and this is what is essentially Roman - and this notion of limit has prevented us from understanding what a Maghreb empire is. The North African Muslims do not have a territorial conception of their empire, but rather an ethnic conception. The principal element for them, in this conception, is not the idea of limits of a territory but the idea of the subjection of a population.

The Europeans, geographers or politicians, have always considered Morocco under the form of a European state; they are mistaken and as they did not find limits for it and needed limits all the same, they invented them.\textsuperscript{33}

The Court’s response to this and other differences in the imagined geography of community in the nineteenth century Sahara is found in its interpretation of three concepts: terra nullius (treated in Section 1), legal ties and legal entity (both treated in Section 2).

1 \textit{Terra Nullius}

In the manner of most private law systems and most civil codes, which provide that goods without an owner belong to the state, one proceeded by the secular application of the theory of \textit{terra nullius} to a reification or "thingification" of the people of the planet, as if the geographic determinism that placed them outside Europe had earned them their painful fall into nothingness for centuries.

Mohammed Bedjaoui, representing Algeria in \textit{Western Sahara}\textsuperscript{34}

\textsuperscript{31} \textit{Western Sahara}, supra note 6 at para.86 (burden of proof on Morocco and Mauritania).


It is clear that an aware Africa can no longer rally to the concept of *terra nullius* as elaborated by Western jurists ... thus, the International Court of Justice must not contemplate and interpret the notion of *terra nullius* according to a Western conception and a Western authenticity, rather it must approach and adapt it so as to take account of African reality.

Mr. Bayona-Ba-Meya, representing Zaire in *Western Sahara*  

Could one ask the Court to disregard [*terra nullius*] because, all things considered, it is a joke and a farce and, from that moment, to be content to recognize and give effect to the crude reality; that is, domination and zones of influence? This is nevertheless where one ends up with the legal notions of 1885 if one moves away from the humanist concepts of the need for consent and the recognition of the sovereignty of tribes which were paired with that of *terra nullius*.

Jean Salmon, representing Mauritania in *Western Sahara*

The first question put to the International Court of Justice in *Western Sahara* is whether *Western Sahara* (Rio de Oro and Sakiet el Hamra) was at the time of colonisation by Spain a territory belonging to no one (*terra nullius*). Since the doctrine of intertemporal law requires that a legal fact be judged in light of the law in force at the time that fact occurred, this question requires the Court to decide what the concept of *terra nullius* meant in 1884, when Spain colonised the *Western Sahara*.

Some of the judges considered the question of *terra nullius* irrelevant since none of the interested states had actually relied on the proposition that Western Sahara was *terra nullius* at the time of colonization. Whether strictly relevant or not, its significance was that it enabled the Court to determine whether the international law of the late nineteenth century had cognisance of

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37 See below at note 202 and accompanying text.
38 *Western Sahara*, supra note 6 at para.79.
39 Ibid. at 74-75 (Declaration of Judge Gros), 113 (Separate Opinion of Judge Petrén), 123 (Separate Opinion of Judge Dillard).
the tribes that inhabited the Western Sahara and to what extent the general practice of this period was "de nier sa personnalité pour mieux le conquérir"; that is, to deny international legal personality to non-European communities the better to conquer them.\textsuperscript{40} According to the classical modes of acquiring sovereignty over territory, only sovereignty over a \textit{terra nullius} could be acquired through acts of occupation. Sovereignty over other territory was acquired through cession, conquest or prescription.\textsuperscript{41} Hence, to the extent that international law relegated territories inhabited by non-Europeans to the status of \textit{terra nullius}, it erased the inhabitants from international law and opened the territory to acquisition through European settlement.

Mohammed Bedjaoui, the representative of Algeria, urges the Court to acknowledge that nineteenth century international law was a game played by European states and that Western Sahara would have been \textit{terra nullius} under these rules. At that time, any territory not belonging to a "civilised" state was \textit{terra nullius}, just as any territory not belonging to a Christian sovereign had been during the Age of Discovery and any non-Roman territory had been in ancient Rome.\textsuperscript{42} The secular civilising mission simply replaced the bringing of Christianity as the ideology of colonialism, thereby imparting a new ideological content to \textit{terra nullius}.\textsuperscript{43} Bedjaoui argues before the Court:

\begin{quote}
Every era ... produces its alibis and its instruments of camouflage. It is thus that one colonized to fight the infidels and to evangelize them, when it was actually to reduce them into slavery and to exploit their riches. One colonized later to bring the enlightenment of civilization and to dispense its benefits.

From this perspective, one is always the "savage" of another from the moment that one does not share his ethical, political, philosophical or religious system of reference. If one decrees that the territory must return to the candidate colonial
\end{quote}

\begin{footnotes}

\textsuperscript{41} \textit{Western Sahara}, supra note 6 at para.79.

\textsuperscript{42} Bedjaoui, \textit{supra} note 34 at 455-456, elaborated at 456-473.

\textsuperscript{43} To similar effect, see S.N. Grovogui, \textit{Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-Determination in International Law} (Minneapolis: University of Minnesota Press, 1996); R.A. Williams, \textit{The American Indian in Western Legal Thought: The Discourse of Conquest} (New York: Oxford University Press, 1990).
\end{footnotes}
power, one must effectively, in some manner, render its own inhabitants incapable of possessing it or having sovereignty over it. One must effectively decree them to be without the skills for its management. Supreme refinement - if the "savages" are inapt at the sovereign management of their public affairs, it is because they are even incapable of discerning their own good and their own salvation. They are reduced to the condition of minors that happily the colonial power will one day bring to the age of reason and to the quality of responsible adults.\footnote{Bedjaoui, supra note 34 at 475.}

Bedjaoui’s claim is not finally that the concept of \textit{terra nullius} was used to justify all European colonisations of the nineteenth century,\footnote{On treaties of cession, see \textit{ibid.} at 475-478.} but that lacking a rigorous definition and simultaneously animated by reference to the European system of states, it became an uncontrollable weapon in the hands of the colonial states, which they had the discretion to use according to their needs.\footnote{\textit{Western Sahara,} Vol. V, “Oral Statement of Mohammed Bedjaoui” (29 July 1975), I.C.J. Pleadings 302 at 308.} However scientific the application of \textit{terra nullius} might have been in theory, in practice the distinction between \textit{terra nullius} and \textit{terra non nullius} was made by states based not only on a European idea of the state but also on their own interests in the circumstances.\footnote{\textit{Ibid.}}

On Bedjaoui’s approach to the interpretation of \textit{terra nullius}, the Court must recognise that \textit{terra nullius} signified the exclusion of non-European peoples from classical international law. For Bedjaoui,\footnote{See pp. 194-196 below.} the remedy for this long injustice lies in the development and application of a new international law, which revises the exclusionary concept of \textit{terra nullius} through the inclusionary right of peoples to self-determination.

While the representative of Zaire, Mr. Bayona-Ba-Meya shares Bedjaoui’s view of \textit{terra nullius} as the subject of Western ideology, he maintained that the time has come for it to become the subject of an African counter-ideology. Africans cannot countenance the Western concept of \textit{terra nullius}, even as an artefact of international law’s venality at the time. To do so would, first of
all, be an insult to the memory of those Africans who had died in the ongoing struggle against colonialism and neo-colonialism. Second, the Western concept does not reflect an African world view:

The basic conception of Western man is purely utilitarian in the sense that economic exploitation is considered as the effective sign of occupation and utilization of the soil, the non-occupation of the land for a certain time being sanctioned by the loss of one's right of basic proprietorship. For us in Africa, in our authentic traditional mentality, the land is not a good that responds exclusively to an economic function, to know how to furnish man with what he needs for his subsistence; the land ... is one of the components of mother nature, it constitutes a mediating and protective setting by reason of the spiritual communion that exists between the living and the dead, which only goes to show that the dead are not dead for they are the breath of life, invisible but always present to assume their role of mediation and protection. So in this way, ancestors are for us Africans a factor of rootedness and attachment to the soil where they rest.

Given this fundamental difference between European and African world views, argues Bayona-Ba-Meya, the concept of *terra nullius* applied to Africa, especially in a case where two of the three interested parties are African states, should be one that corresponds to an African sensibility. Indeed, a relationship between Europe and Africa based on cultural equality depends on this revision of *terra nullius*.

Applying an African concept of *terra nullius*, Bayona-Ba-Meya concludes that Western Sahara was not *terra nullius* at the time of colonisation because "the ancestors of the Moroccan and Mauritanian peoples were born there, founded their own civilizations there and were buried there, thus creating an immemorial and inalienable spiritual community between the living and the dead which gave birth to a vital, basic and authentic establishment of these two peoples."

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49 Bayona-Ba-Meya, *supra* note 35 at 441.
50 Bayona-Ba-Meya, *supra* note 35 at 444.
51 Ibid. at 445.
52 Ibid. at 445-446.
Morocco\textsuperscript{53} and Mauritania\textsuperscript{54} disagree with Bedjaoui's account of \textit{terra nullius} as any territory not belonging to a European state or to a state that Europeans recognised because of its fundamental acceptance of the European philosophy of the state. This was true, Mauritania maintains, only of the later colonial period. And, even then, the purpose of \textit{terra nullius} was to settle disputes among the European powers over territory and not to negate as such the sovereignty or international legal personality of the inhabitants.\textsuperscript{55} According to Mauritania, the international legal doctrine and practice during the relevant period are best summed up as recognising the international legal personality of local tribes and therefore excluding their territories from the ambit of \textit{terra nullius}.\textsuperscript{56}

On the facts of the case, Morocco's position is that Western Sahara was not \textit{terra nullius} at the time of colonisation because Morocco had sovereignty over the territory. Since Morocco was a recognised state at the time, its sovereignty over the territory would equally have been recognised.\textsuperscript{57} Mauritania takes the position that Western Sahara was not \textit{terra nullius} because it was inhabited by tribes having a political organisation and political authority, as evidenced by the fact that Spain entered into agreements with them.\textsuperscript{58}

Whereas Bedjaoui's approach to the interpretation of \textit{terra nullius} was to entomb it as the subject of colonial ideology and Bayona-Ba-Meya's to make it the subject of a new African counter-ideology, Jean Salmon, on behalf of Mauritania, presents \textit{terra nullius} as the subject of a

\textsuperscript{54} Salmon, supra note 36 at 264-269.
\textsuperscript{56} \textit{Ibid.} at 425.
liberal ideology that can be turned to the advantage of the colonised. Salmon contends that at the relevant time, *terra nullius* embodied a contradiction between the territorial appetite of the European states and the humanist philosophy and liberal ideas of the European ruling classes. If the content of *terra nullius* fed and justified the appetite for empire, its humanist protection required the consent of the local population through their recognised leaders and under conditions that did not render that consent meaningless. While acknowledging that these requirements were sometimes no more than formalities masking a brutal reality, Salmon argues that to take Bedjaoui’s approach and reduce *terra nullius* to a cynical fiction does a disservice to peoples by dismissing these legal safeguards which, however slim, were a people’s only defence. Similarly, Bayona-Ba-Meya’s approach ignores the fact that these safeguards were already part of international law. The best approach to the interpretation of *terra nullius* is instead to actualise this humanist impulse: “if an important part of every legal notion is its ideological function, this weapon can be turned against its maker and the fiction made reality transforms itself into an instrument of struggle for the people who have been its victims.”

In accord with Mauritania, the International Court of Justice concludes that international law did not regard territories inhabited by tribes or peoples having a social or political organisation as *terra nullius*. As a result, Western Sahara is not *terra nullius* because the evidence showed that the territory was “inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.” Since this conclusion affords

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59 Salmon, *supra* note 36 at 264.
60 Ibid. at 266.
61 *Western Sahara, supra* note 6 at para.80.
62 Ibid. at para.81.
a complete answer to the first question, the Court does not deal with the proposition that Western Sahara was not *terra nullius* because it belonged to Morocco or Mauritania.\(^{63}\)

The Court's answer to the first question thus establishes that late nineteenth century international law regarded local tribes, in particular, those of the Western Sahara, as the occupants of their territory such that their territory was not a *terra nullius* which could be acquired through occupation. It remains an open question, however, whether the same international law also regarded them as sovereign. Some commentators argue that given the Court's findings that Western Sahara was not *terra nullius* (in answer to the first question) and that Morocco and Mauritania did not have sovereignty over the territory (in answer to the second question), it follows logically that the tribes of Western Sahara must themselves have been sovereign. But the Court leaves the possibility that there was simply no sovereign in the classical legal sense.\(^{64}\) Its references to "independent tribes"\(^{65}\) may be read as historical description rather than legal recognition of sovereignty. Nor can the sovereignty of local rulers be derived from the Court's treatment of the legal status of their agreements with European states. While the Court holds that such agreements were derivative roots of title, as opposed to original titles obtained by occupation of *terra nullius*, its qualification "whether or not considered as an actual 'cession' of the territory"\(^{66}\) prevents the blanket conclusion that local rulers had sovereignty to cede. The Court also explicitly

\(^{63}\) *Ibid.* at para 82. Some of the judges objected that the first question was "loaded," or improper, in that if the answer to the first question was that Western Sahara was not *terra nullius*, then the answer to the second question could only be that Morocco or Mauritania had sovereign ties to the territory. *Ibid.* at 74-75 (Declaration of Judge Gros), 78 (Declaration of Judge Ignacio-Pinto), 124 (Separate Opinion of Judge Dillard). As Malcolm Shaw observes, the Court's decision does not bear this objection out since its negative answer to the question of *terra nullius* does not lead to the answer that Morocco or Mauritania had sovereignty over Western Sahara. Shaw, *supra* note 13 at 132. See also Chappez, *supra* note 13 at 1163-1164.

\(^{64}\) See Crawford, *The Creation of States*, *supra* note 13 at 179 ("it is one thing to deny an entity statehood on grounds such as lack of independence or coherent organization, and another to determine that the territory on which the entity is established is *terra nullius*").

\(^{65}\) *Western Sahara*, *supra* note 6 at paras. 105, 149, 159; 75 (Declaration of Judge Gros), 124 (Separate Opinion of Judge Dillard), 171, 124 (Separate Opinion of Judge de Castro).

refrains from judging the legal character or the legality of the titles which led to Spain becoming the administering power of the Western Sahara.67 Later on in the advisory opinion, the Court is similarly circumspect about the configuration of Mauritanian sovereignty. Having found that the tribes, confederations and emirates of the Bilad Shinguitti, precursor to the modern state of Mauritania, did not constitute an international legal entity with some form of sovereignty, the Court does not proceed to determine where, if anywhere, sovereignty over Mauritanian territory lay.

In his separate opinion, Judge Ammoun concurs with the Court’s interpretation of terra nullius, but premised on cross-cultural revisionism68 rather than historical accuracy.69 Ammoun accepts Bedjaoui’s periodisation of terra nullius, whereby terra nullius was used successively by ancient Rome, Christian nations and European states to deny the existence of the Other and to legitimate the acquisition of the Other’s territory. He also accepts Bedjaoui and Bayona-Ba-Meya’s criticism that this conception of terra nullius is not universally valid. But he seems to regard Bayona-Ba-Meya’s new African conception of terra nullius as vulnerable to the same critique. Ammoun’s interpretation70 of terra nullius seems to rest on the generalisation of Bayona-Ba-Meya’s revisionist argument that terra nullius must take its meaning for Africa from Africa to the argument that terra nullius must be interpreted in a way that is authentic for all the communities implicated in its interpretation. In this vein, he begins by remarking on the similarity of the Greek philosophy of Zeno of Citium and his Stoic school to Bayona-Ba-Meya’s presentation of the link between human being and nature in African thought. Ammoun also finds Bayona-Ba-Meya’s views reminiscent of African Bantu spirituality, which Ammoun quotes Father Placide Tempels’s

67 Ibid. at para. 82.
68 See Chemillier-Gendreau, supra note 13 at 277-280.
69 Ibid. at 85-87 (Separate Opinion of Judge Ammoun).
70 For other readings of Ammoun, see Berman, supra note 3 at 96-103 (Namibia and Western Sahara); L.V. Prott, The Latent Power of Culture and the International Judge (Abingdon, Oxon.: Professional Books, 1979) 166-167 (Namibia).
Philosophie bantoue as analogising to Catholicism. By presenting Greek Stoicism, Bayona-Ba-Meya's account of the African spiritual tie to the land, African Bantu beliefs and Catholicism as fundamentally similar, Ammoun predisposes us to believe that a notion of terra nullius may be found which resonates with both Europe and Africa. Ammoun proposes Emmerich de Vattel's definition of terra nullius as a land empty of inhabitants. Traceable to this eighteenth century Swiss natural law thinker and earlier to the sixteenth century Spanish international legal scholar and theologian Francisco de Vitoria, this definition belongs to the Western international legal tradition. Being as narrow as, if not narrower than, Bayona-Ba-Meya's idea of terra nullius, it should, Ammoun seems to reason, also be acceptable to Africa. As such, the definition of terra nullius in the advisory opinion represents "a considerable step" along the common path marked out by Vitoria, Vattel, Bedjaoui and Bayona-Ba-Meya.

Whether historically correct or covertly revisionist, the International Court of Justice's narrow definition of terra nullius affirms that to some degree, classical international law recognised the subjectivity of the nomadic peoples of Western Sahara and of non-European peoples generally. The Court thus makes the tribes themselves central to its story of identity in the precolonial Sahara. Had the Court chosen instead to answer the question of terra nullius by way of the question of legal ties - finding that Western Sahara was not terra nullius because Morocco, Mauritania or both had legal ties to the territory - then the original status of the territory's inhabitants in classical international law might have remained uncertain and they in the half-light of international law past. Alternatively, had the Court adopted Bedjaoui's broad definition of terra

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71 Western Sahara, supra note 6 at 87 (Separate Opinion of Judge Ammoun).
72 In James Crawford's view, "the Court has been consistent in upholding the legal personality or, where relevant, the statehood of entities outside Europe in the eighteenth and nineteenth centuries, and thus indirectly the idea of the universality of international law." Crawford, supra note 3 at 597, n.52. In addition to Western Sahara, he cites as examples United States Nationals in Morocco, [1952] I.C.J. Rep. 176 at 185, 188; Right of Passage Case (Second Phase), [1960] I.C.J. Rep. 6 at 38.
nullius in the last century, the local population would have been entirely effaced. Moreover, on
Bedjaoui's definition, the absence of non-European communities from classical international law
would be remedied for a given community only if modern international law recognised that
community as a people with a right of self-determination. Where their right of self-determination is
controversial or non-existent in positive international law, his definition of terra nullius would
continue to exclude them from international law.

2 Sovereignty and Legality

Since the International Court of Justice finds that Western Sahara was not terra nullius at
the time of colonisation by Spain, it must proceed to the second question asked by the General
Assembly: the existence and nature of the legal ties between the territory of Western Sahara and the
Kingdom of Morocco and the Mauritanian entity respectively. In the case of the Kingdom of
Morocco, which was a state at the time, the Court need only give meaning to the concept of legal
ties (Section a). In the case of the Mauritanian entity, which all parties agreed was not then a state,
the Court must first define the notion of legal entity (Section b). 73

73 This chapter does not deal with the contest over the existence and significance of historical facts in
Western Sahara: for example, did Sultan Hassan I visit the southern area of the Souss in 1882 and 1886, and
if so, was the visit to maintain and strengthen his authority in the southern part of his realm? Western
Sahara, supra note 6 at para.99.

Such historical determinations raise problems of objectivity related to those encountered in the legal
determinations treated here. European maps, the descriptions of European scholars, explorers and travellers,
and the interpretation of treaties with European powers all raise problems of knowledge and perspective. In
a comment on the Dubai/Sharjah boundary arbitration, discussed below in Part I(A)(2)(a)(iv), D.W. Bowett
contrasts the Tribunal's stated preference for written documents over witnesses' statements with the "the
traditions of the Arab world [which] do not lean toward documentary records, but rely heavily on oral
103 at 111, n.21, referring to Dubai/Sharjah, supra note 7 at 590.

An instructive comparison is provided by Canadian case-law, which has developed different principles of
interpretation for agreements between colonial officials and indigenous peoples. For a brief overview, see P.
Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference (Vancouver:
University of British Columbia Press, 1997) 97 at 98-100. In the recent case of Delgamuukw v. British
Columbia, 37 I.L.M. 261, [1997] 3 S.C.R. 1010, the Supreme Court of Canada also expressed a different
attitude toward oral testimony by aboriginal witnesses in cases concerning the existence of aboriginal land
a Legal Ties

Unlike *terra nullius*, legal ties is not a term of art in international law. Its interpretation therefore involves the Court in mapping out the legal terrain of the precolonial Arab world and the legal landmarks that remain for contemporary self-determination, virtually without the compass points of positive international law. In interpreting legal ties as those that may affect the General Assembly’s decolonization policy in the Western Sahara, the Court relies on the object and purpose of the General Assembly resolution to request the advisory opinion. But it has few legal reference points for determining the scope of those legal ties and the legal significance of the various ties that it finds in the precolonial Sahara.

i Scope of Legal Ties

The Court interprets legal ties broadly to include more than just ties of territorial sovereignty, giving among its reasons that “to confine the question to ties of sovereignty would ... be to ignore the special characteristics of the Saharan region and peoples ... and also to disregard the possible relevance of other legal ties to the various procedures concerned in the decolonization process.”74 The Court also blurs the self/territory dichotomy by rejecting the view that legal ties

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74 *Western Sahara*, supra note 6 at para. 151. Paragraph 162 of the advisory opinion nevertheless implies that only ties of sovereignty would have affected self-determination. The paragraph reads in part:

> the Court’s conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the people of the Territory. [emphasis mine]

See Crawford, *The Creation of States*, supra note 13 at 382-383, nos.6,7(a).
should be limited to those “established directly with the territory and without reference to the people who may be found in it.”

The concept of legal ties thus becomes a way to recognise relationships other than sovereignty in international law and to tell a more complex legal story about identity in Western Sahara.

Within this greater range of legal ties, the Court must determine not only whether a tie is “sovereign,” the strongest underwriting of its power by international law, but also whether a tie is “legal,” the indicium of its existence in international law. In late nineteenth century international law, these fundamental concepts - sovereignty and legality - were based on the European state. Similarly, the rules on acquisition of sovereignty over territory were tailored to, if not predicated on, the subject being a European state and the object of acquisition a non-European territory.

Since international law abstracted from the European state and European forms of authority over territory, the local culture was only relevant insofar as it factored into the practicability of European control over the territory. In Max Huber’s musty paternalism from the Island of Palmas case: “the manifestations of sovereignty over small and distant islands, inhabited only by natives, cannot be expected to be frequent.”

This application of a sliding scale of control to the object of sovereignty in effect assimilated its population to the climate, geography and other physical features of the territory.

Although Western Sahara was colonised by Spain in 1884, it is Morocco’s and Mauritania’s prior sovereignty over the territory, not the sovereignty acquired by Spain, which must be determined in the case. The Court is therefore not dealing with the European colonial paradigm that informs the rules on the acquisition of sovereignty over territory. Morocco and Mauritania

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75 Western Sahara, supra note 6 at para. 85.
77 Island of Palmas Case (Netherlands, USA) Max Huber, Award: April 1923, (1928), 2 R. Int'l Arbitral Awards 829. See also the discussion of Eastern Greenland below at pp.166-168.
were non-European subjects and exercised non-European forms of authority over territory. Because the subject and object of sovereignty in Western Sahara are inscribed in a larger common culture, a culture outside the mind's eye and the conscience of fin-de-siècle international law, local culture potentially acquires a different relevance. To use Judge Dillard's example of the quandary, how should international law treat a tie between the Sultan of Morocco and the marabout Ma ul-'Aineen or between the Emir of the Adrar and the chiefs of nomadic tribes?  

Spain argues against any cultural particularisation of international law, warning that to depart from the idea of a unique international law would be to lose a common legal language without which states would be unable to reach true agreement. Perhaps more as a rhetorical device, to show that classical international law was the unique international law only among Europeans, Algeria proposes the application of nineteenth century Islamic public law.

While the Court applies international law, and not Islamic public law, to the question of legal ties, it also sees cultural difference as relevant to its analysis. The Court begins by explicitly situating its analysis in the context of the Western Sahara and the social and political organisation of its population. In the advisory opinion, the Western Sahara is depicted as an arid and sparsely populated part of the vast Sahara desert that stretches across North Africa. At the time of colonisation by Spain, its population consisted mostly of nomadic tribes, who pastured their animals or grew crops wherever the conditions were favourable. These tribes crossed the deserts along fairly regular routes determined by the seasons or the available water-holes. Particularly significant for the case is that the pattern of low rainfall and the scarcity of the resources forced the

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78 Western Sahara, supra note 6 at 125 (Separate Opinion of Judge Dillard).
81 Western Sahara, supra note 6 at para.89.
nomadic tribes to cover very wide areas of the desert. All of the routes crossed from the Western Sahara into some neighbouring area, whether southern Morocco, present-day Mauritania, Algeria or beyond. The right of pasture was generally held in common by these tribes, while areas that could be cultivated were governed to a greater extent by separate rights. Although perennial water-holes could be used by all tribes, they were in principle considered the property of the tribe that had made them functional. Many tribes were thought to have recognised burial grounds, to which they and their allies rallied. All the nomadic tribes were of the Islamic faith and the territory that they travelled lay wholly within Dar al-Islam. Within a tribe, authority was generally vested in a sheikh, subject to an assembly of the tribe’s leading members, and the law applied was a combination of Koranic law and the tribe’s own customary law. Tribes sometimes had ties of dependence or alliance with other tribes, which were not territorial so much as inter-tribal.  

In short, there were profound differences between a European state, which concentrates power territorially, and the society of the Western Sahara. Territorially, the population was nomadic, followed routes that took them beyond the Western Sahara, and acknowledged few exclusive rights or priorities over territory. Power respected both tribal and religious lines. The tribes were relatively autonomous with their own tribal law, there were certain inter-tribal laws, tribes might have various relationships with other tribes and yet they were all part of an even wider Islamic community and obeyed its law.

**Interpretation of Sovereign Ties**

If the object of sovereignty in Western Sahara differed from a European state, so too did the subjects. In the words of Morocco:

The Moroccan state comes close to the European state of the nineteenth century not because it is a nation-state, but because it is a national state. From the fact that

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82 Ibid. at paras. 87-88.
the governmental structure is indigenous, that is to say, born of the Moroccan soil, the infrastructure is popular and national. The solidarity is certainly religious, but it is also political for Morocco lived since the fifteenth century under permanent threat of foreign intervention.

But the Moroccan state distances itself from the European state because it is Muslim. From that moment, it will be constructed on two principles, the egalitarian principle at the base, the tribes always remaining administered by their natural authorities and their chief, who receives the investiture of the Sultan. The caid is thus at the same time the defender of local interests and the representative of the central power, but beside this egalitarian basic principle must figure the hierarchical principle that places, above the tribal organization, the spiritual and temporal chief with his administration, his Makhzen.83

Any exercise of sovereignty by Morocco inevitably reflected the non-European character of the Sherifan state. To the extent that Morocco was unable or unwilling to fashion its claim to Western Sahara to the European pattern of the rules on acquisition of sovereignty, it had to persuade the Court to interpret those rules in a way that contextualised both object and subject.84

Along “universal” lines, Morocco claims Western Sahara based on Morocco’s immemorial possession of the territory; in particular, its public display of sovereignty, uninterrupted and uncontested, for centuries.85 Insofar as Morocco relies on displays of authority that the Court judges to be of a “far-flung, spasmodic and often transitory character,”86 Morocco cites the sliding scale of control acknowledged by the Permanent Court of International Justice in the Legal Status of Eastern Greenland case.87 In Eastern Greenland, the Court recognises that in the case of claims.

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83 Isoart, supra note 33 at 262. As applied to the Western Sahara, many aspects of this description are contested by Spain. For example, Morocco points to evidence that the Sultan of Morocco appointed caids for the Western Sahara (Western Sahara, supra note 6 at para.99), whereas Spain maintains not only that these appointments did not relate to Western Sahara, but that they were conferred on sheikhs already elected by their own tribes and were merely honorary titles bestowed on existing and effectively independent local rulers (Ibid. at para.100). According to Judge Ammoun, the appointment as caid of an individual having local influence or family or tribal connections does not mean that the title tended to be an honorary one. He observes that “it is a practice current in quite a number of countries, in the absence of a centralized authority, to choose persons to govern whose qualifications enable them to make their authority felt and carry out their tasks” (Ibid. at 93 (Separate Opinion of Judge Ammoun)).

84 The claim of Mauritania, which had the additional difficulty of not having been a state in 1884. is treated in Part I(A)(2)(b) below.

85 Western Sahara, supra note 6 at para. 90.

86 Ibid. at para. 91.

to sovereignty over uninhabited or sparsely populated areas, "very little in the way of actual exercise of sovereign rights" might suffice in the absence of competing claims. Denmark, the colonial power in western Greenland, successfully claimed sovereignty over eastern Greenland, based upon a continued display of authority, despite being unable to show more than notional authority over the eastern part of the island. Morocco argues that given the desert character of Western Sahara, its geographical contiguity to Morocco and Morocco's having been for a long time the only independent state in Northwest Africa, the historical evidence suffices to establish Morocco's title to Western Sahara on the same principles as in Eastern Greenland.

It should be emphasised that Morocco's "universal" line of argument is universal only from the cultural perspective of international law. By relying on the Eastern Greenland case, Morocco implicitly adopts the Permanent Court of International Justice's utter disregard for the possibility that the native inhabitants of Greenland might have had sovereignty or that, at the very least, their presence might have precluded the classification of the island as terra nullius. The Court's treatment of the disappearance in the fifteenth century of the Nordic settlements in Greenland is particularly revealing. Even though attacks by the native Greenlanders were thought to have destroyed the settlements, the Court gave no consideration to whether this show of force might have demonstrated native sovereignty or occupation of the island. On their reasoning, either the

88 Ibid. at 46.
89 Western Sahara, supra note 6 at para. 91. The Court distinguishes Eastern Greenland on the facts. It finds that while both Eastern Greenland and Western Sahara were thinly populated, the Western Saharan population differed in that it covered the area more actively and aggressively. In addition, the geographic contiguity of Western Sahara with Morocco is debatable, whereas it was uncontroversial in Eastern Greenland. Nor would the assumption of contiguity help Morocco's case, the Court reasons, since it would raise the expectation of evidence of displays of authority by Morocco. Ibid. at para. 92.
90 Denmark's claim to sovereignty over eastern Greenland depended on Greenland's having been terra nullius and Norway's argument was explicitly that eastern Greenland was terra nullius as late as 1931 such that Norway could acquire sovereignty by occupation. Eastern Greenland, supra note 87 at 44.
91 Ibid. at 46-47. See also S.J. Anaya, Indigenous Peoples in International Law (New York: Oxford University Press, 1996) at 23.
92 Ibid. at 47, 83, 97.
end of these settlements had returned Greenland to the status of *terra nullius* or Denmark had later consolidated its sovereignty through further displays of state authority. Instead, the picture of the original inhabitants that emerges from the documentary evidence is one of vulnerability to the predatoriness of European traders and the spread of disease brought by the white races. Their very vulnerability offers a pretext for Danish sovereignty.

While Morocco relies on the universal rules for the acquisition of sovereignty, it also seeks to persuade the Court that the interpretation of the rules should be particularised so as to take account of the special structure of the Sherifan state.

In keeping with the classical idea of sovereignty as a sphere of state autonomy, the International Court of Justice reasons that the structure of a state is not dictated by international law. States are free to choose the form that their sovereign authority will take. It follows that understanding how a state elects to exercise its sovereignty may be useful in assessing whether it has established sovereignty over a particular territory. The structure of a state may, in the Court’s words, “be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty.” An awareness of cultural difference helps in the appreciation of the evidence.

Whereas the Court thus recognises that a state may exercise sovereignty differently, it does not modify the requirement that a state exercise sovereignty effectively:

> the special character of the Moroccan State and special forms in which its exercise of sovereignty may, in consequence, have expressed itself, do not dispense the Court from appreciating whether at the relevant time Moroccan sovereignty was effectively exercised or displayed in Western Sahara.

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94 *Western Sahara, supra* note 6 at para. 94. Compare Flory, “L’Avis,” *supra* note 13 at 272 (Morocco using, on the one hand, the specificity of its state organisation to explain what was not recognisable in common law and relying, on the other hand, on the consequences of its being the only sovereign state in the region in the nineteenth century).

95 *Western Sahara, supra* note 6 at para. 94.

However sovereignty is expressed in a particular culture, it must amount to effective control over territory in order to qualify as sovereignty in international law.\textsuperscript{97}

The Court finds, on the facts, that the Moroccan state circa 1884 consisted of the Bled Makhzen, areas actually subject to the Sultan of Morocco, and the Bled Siba, areas where the tribes were \textit{de facto} not submissive to the Sultan.\textsuperscript{98} Western Sahara fell within the Bled Siba.\textsuperscript{99} According to Morocco, the Bled Makhzen and the Bled Siba simply expressed two different relationships between the Moroccan local authorities and the central power, the Bled Siba being more decentralised than the Bled Makhzen. Because the Sultan’s spiritual authority was always accepted throughout, this difference did not affect the unity of Morocco.

The Court accepts that the Sherifan state was based on “the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs,” as opposed to the notion of territory.\textsuperscript{100} According to the Court, allegiance is more likely than common religious bonds to signify sovereignty. To amount to sovereignty, however, that allegiance must be manifested in the effective display of authority. In the territory of Western Sahara, Morocco could establish allegiance, but not control, and its claim to sovereignty over the territory therefore fails.

Judge Forster objects to the Court’s conclusion that there were no ties of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco on the ground that it “goes too far in minimizing the exceptional importance of the geographical, social and

\textsuperscript{97} Compare Flory, “L'Avis,” \textit{supra} note 13 at 270 (describing the Court’s approach as innovative for its acceptance that account must be taken of the specific structure of the Sherifan state, but as not following through on this innovative approach).

\textsuperscript{98} \textit{Western Sahara}, \textit{supra} note 6 at para. 96.

\textsuperscript{99} \textit{Ibid.} at para. 97.

\textsuperscript{100} \textit{Ibid.} at para 95.
The Africa of former times cannot be expected to produce carbon copies of European institutions. Instead, the Court's perspective on the notions of "state" and "sovereignty" must be the reality of the Sahara, and the specific structure and traditional system of the Moroccan state. In terms of cultural function, the ties of allegiance recognised by the Court "indicate the existence of State power and exercise of political administration analogous to a tie of sovereignty."102

Like Judge Forster, Judge Ammoun and Judge ad hoc Boni criticise the advisory opinion of minimising the importance of allegiance. Judge Boni writes:

As regards Morocco, insufficient emphasis has been placed on the religious ties linking the Sultan and certain tribes of the Sakiet El Hamra. For these tribes, the Sultan was Commander of the Faithful, that is to say, the Steward of God on earth for all matters, whether religious or not. He was thus regarded not only as religious leader but as director of their temporal affairs. The legal ties between them were thus not only religious - which no one denies - but also political, and had the character of territorial sovereignty.103

Ammoun's treatment of the legal ties between the Kingdom of Morocco and the territory of Western Sahara, like his treatment of terra nullius,104 can be read as an attempt to develop an interpretation that is cross-culturally valid.105 He supports his conclusion that Morocco had ties of territory sovereignty to Western Sahara on both universal international law and cultural functionalism. The bulk of his discussion of legal ties is devoted to detailing Morocco's activity in Western Sahara in order to demonstrate that even under the rules of "universal" international law, Morocco has established that it manifested sovereignty over Western Sahara.106 In this connection,

101 Ibid. at 103 (Separate Opinion of Judge Forster).
102 Ibid.
103 Ibid. at 173 (Separate Opinion of Judge Boni).
104 See above at pp.159-160.
105 Compare Prrott, supra note 70 at 166-167.
106 Western Sahara, supra note 6 at 87-92 (Recognition by the International Community of the Legal Ties Between Morocco and Western Sahara), 92-99 (Internal Manifestations of Moroccan Authority Over Western Sahara) (Separate Opinion of Judge Ammoun).
Ammoun does not insist on the local significance of the religious tie between the Sahrawi and Moroccans, but describes it as a neglected element of the legal tie which found expression in their common recourse to holy war over the holy places of Christendom or Islam and later, in the same spirit, in their common resistance to the Christian colonial powers. Seemingly independent of the universal argument for Moroccan sovereignty over Western Sahara, Ammoun begins and ends his opinion with the argument from cultural function that in the Sahara of the late 19th century, political ties of allegiance to the Sultan were ties of sovereignty because the Sultan personified executive, legislative and religious power.

iii Interpretation of Other Legal Ties

While the Court concludes that Morocco and Mauritania had neither ties of territorial sovereignty nor any other legal ties that might influence the exercise of self-determination by the Western Saharan population, it finds that each had other legal ties to Western Sahara. The Sultan of Morocco had ties of allegiance to some of the tribes living in the territory of Western Sahara, while the Mauritanian entity had ties to other tribes in the territory in the form of rights, including some rights relating to land. The advisory opinion is vague, however, as to why these ties qualify as legal. Whether or not the finding is intelligible only as a judicial consolation prize for Morocco and Mauritania, which some commentators maintain, the Court does not so much develop an idea of legality as use it as a catch-all for ties that fall short of territorial sovereignty.

Several of the judges take the position that ties of allegiance to the Sultan of Morocco and rights shared with the Mauritanian entity do not amount to legal ties. Judge Gros dismisses them as

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107 Ibid. at 98.
108 Ibid. at 97-98, 101.
109 Ibid. at 83, 102.
110 E.g. Chappez, supra note 13 at 1177.
merely ethnic, religious or cultural,\textsuperscript{111} while Judge Petren regards the existence of "a way of life and a rich cultural heritage common to a large number of tribes leading a nomadic existence in vast territories of north-west Africa included today in Western Sahara and in the neighbouring States" as indicating non-legal ties which could conceivably lead to the establishment of legal ties.\textsuperscript{112}

Judge Gros’s treatment of ties of allegiance expresses the cultural limitations of international law and its judgments. According to Judge Gros, allegiance takes its legal meaning from European feudalism, and cannot therefore be used to describe the less formal and less hierarchical relationships found between the Sultan of Morocco and some of the tribes in Western Sahara.\textsuperscript{113} Since the concept of allegiance in international law cannot transcend its European origins, the Court’s conclusion that legal ties of allegiance exist between Morocco and Western Sahara is both inaccurate and inauthentic. "If the desert is a separate world," writes Judge Gros, "it is an autonomous world in the conception of its relationships with those who have a different way of life."\textsuperscript{114}

In a related criticism, Judge Gros charges the advisory opinion with idealising the Sahara desert and the nomadic way of life in 1884. Since we do not know the Other, Judge Gros seems to say,\textsuperscript{115} it is better to be silent than to romanticise the Other.\textsuperscript{116} But to be silent is to perpetuate the exclusion of the Other from international law. Moreover, the determination of which societies are

\textsuperscript{111} \textit{Western Sahara}, supra note 6 at 75 (Declaration of Judge Gros).

\textsuperscript{112} Ibid. at 114-115 (Separate Opinion of Judge Petrén), 78 (Declaration of Judge Ignacio-Pinto).

\textsuperscript{113} Compare \textit{Dubai/Sharjah}, supra note 7 at 637, 639 (using the historical European concept of vassellage to analyse the situation of a nomadic desert tribe inhabiting an area disputed between the emirates of Dubai and Sharjah).

\textsuperscript{114} \textit{Western Sahara}, supra note 6 at 76 (Declaration of Judge Gros).

\textsuperscript{115} In comparison, Judge Petren’s concerns relate to the Court’s limited ability to determine the facts in dispute without information beyond that submitted by interested states and without the assistance of assessors expert in Islamic law or the history of Northern Africa. \textit{Ibid.} at 112-113 (Separate Opinion of Judge Petrén). See also \textit{Ibid.} at 141-142 (Separate Opinion of Judge de Castro).

\textsuperscript{116} Compare C. Tennant, "Indigenous Peoples, International Institutions and the International Legal Literature From 1945-1993" (1994) 16 H. Rts. Q. 1 at 6-24 (on the representation of indigenous peoples in international law as the ignoble and the noble primitive successively).
knowable is not neutral. Judge Gros clearly does not recognise European feudal society as Other, yet, as Claude Levi-Strauss observed, the basic problem of perspective is the same whether a society is remote from ours in time or remote in space, or even culturally heterogeneous.117

If Judge Gros accuses the Court in Western Sahara of romanticising the conception of relationships in Saharan society, the discussion of French feudal society in the Minquiers and Écréhous case118 suggests that Judge Gros may just as easily be accused of romanticising the notion of allegiance in European feudalism. In Minquiers and Écréhous, France traced its original title to Minquiers and Écréhous, two small groups of islets lying between the British Channel Island of Jersey and the coast of France, to the feudal relationship between the King of England and the King of France. France derived its original title from the fact that the Dukes of Normandy were the vassals of the Kings of France. Even after William, Duke of Normandy, became King of England in 1066, he and his successors continued to hold the Duchy of Normandy in the capacity of Duke of Normandy and therefore in fee of the French King. France contended that Minquiers and Écréhous were held of the French King because the Channel Islands, including Minquiers and Écréhous, were added to the Duke of Normandy’s fief in 933 when William Longsword received the Islands in fee of the King of France, and William and his successors did homage to the French King for the whole of Normandy.119

In his criticism of the Court’s finding in Western Sahara of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara, Judge Gros writes

How can one speak of a legal tie of allegiance, a concept of feudal law in an extremely hierarchical society, in which allegiance was an obligation which was assumed formally and publicly, which was known to all, was relied on by both sides, and was backed by specific procedures and not merely by the force of arms ... To

119 Ibid. at 56.
give the term allegiance its traditional sense, more would have to be said than that it was possible that the Sultan displayed some authority over some unidentified tribes of the desert.\footnote{Western Sahara, supra note 6 at 76 (Declaration of Judge Gros).}

The United Kingdom argues in *Minquiers and Écréhous*, however, that the homage due to the French King in respect of the fief of Normandy was purely nominal and rendered solely as suited the vassal.\footnote{Minquiers and Écréhous, supra note 118 at 85 (Individual Opinion of Judge Levi Carneiro).} Judge Levi Carneiro agrees, summarising the evidence as showing that in this period, the authority of the Princes, Dukes and Counts in some forty feudal States was increasing, so that the authority of the King of France over the great fiefs was purely nominal. According to one historian, the Duke of Normandy in particular wielded unlimited power: he declared war and made peace, minted money and acted as “the sole great judge in his Duchy.” In effect, the Duchy of Normandy was practically an independent state and its Duke “one of the most absolute sovereigns of the Middle Ages.”\footnote{Ibid. at 86, relying on P. Gaxotte, *Historie des Français*, vol. I at 126, 324-325 and Glasson, *Histoire du Droit et des Institutions de la France*, vol. IV at 487, 497-498, 504-507, 508. But see Minquiers and Écréhous, supra note 118 at 75 (Individual Opinion of Judge Basdevant).}

**iv Western Sahara Considered: The Dubai/Sharjah Boundary Arbitration**

In the 1981 *Dubai/Sharjah* boundary arbitration,\footnote{Dubai/Sharjah, supra note 7.} the arbitral tribunal cites *Western Sahara* as support for its general statement that to apply the rules of international law relating to boundary disputes, which are essentially the rules concerning sovereignty over territory, “to peoples which have had, until very recently, a totally different conception of sovereignty would be highly artificial.”\footnote{Ibid. at 587.} The tribunal concludes that the international law to be applied must be adapted to the special conditions of the region.\footnote{Ibid. at 590.} When it comes to the specific analysis of legal ties in
Dubai/Sharjah, however, the tribunal distinguishes Western Sahara as too Eurocentric to be relevant to its determination of the internal boundary, the segment that runs through the desert territory of the nomadic Bani Qitab tribe. “In the present case,” writes the tribunal, “it is not a question of applying a Western notion of sovereignty, which was unknown in the area.”\(^{126}\)

Derrick Bowett describes the tribunal’s reasoning as “orthodox and fully consistent with established law,”\(^{127}\) but criticises its distinguishing of Western Sahara as “somewhat lacking in conviction.”\(^{128}\) Bowett’s criticism is to be expected, since the tribunal’s rejection of the concept of sovereignty applied in Western Sahara undermines his characterisation of the award as “fully consistent with established law.” I will attempt to show, however, that Bowett’s is not the only possible reading of the Dubai/Sharjah boundary award. In particular, it may be that the tribunal’s distinguishing of Western Sahara is not a minor flaw in an otherwise orthodox treatment of sovereignty, but a sign that the tribunal intends to break with established law by giving greater importance to cultural difference in the interpretation of sovereignty.

Until the mid-twentieth century, the region disputed between the emirates of Dubai and Sharjah was largely desert and sparsely populated. Apart from a fringe of settlements along the coast, its population was nomadic or semi-nomadic. The local world of these peoples was the routes that they travelled. Until the 1930s, the territorially bounded state was alien to the political notion of the rulers and tribes of this area. Instead, the political order was built on the allegiance owed by tribes to a ruler. While these ties of allegiance were the way that a ruler established sovereignty over an area populated by nomadic tribes, the strength of the ties, and hence the ruler’s

\(^{126}\) Ibid. at 641.

\(^{127}\) Bowett, supra note 73 at 133.

\(^{128}\) Ibid. See also ibid. at 123-124.
control, varied from tribe to tribe.\textsuperscript{129} In a passage quoted by the tribunal, Mohammed Morsy Abdullah writes of the emirates at that time:

Political boundaries were dependent on tribal loyalties to particular shaikhs and consequently were subject to frequent change. Therefore, the frontier between the Trucial States and Sultanate of Muscat and the inter-state boundaries changed frequently during the nineteenth and twentieth centuries as it was based on the \textit{dirah} of the tribes. \textit{Dirah} in Arabia at this time was a flexibly defined area, changing in size according to the strength of the tribe which wandered within it. In addition, a tribe's loyalty was determined by its own interests and could, and at this time often did, alter.\textsuperscript{130}

In this light, the tribunal identifies allegiance and control as the two determinants of the legal situation. It recognises, moreover, that the weight and importance to be given to each must vary with the period and the region under consideration.\textsuperscript{131} With the economic and political development of the Emirates, allegiance decreased in importance. Boundaries became easier to identify as the nomadic lifestyle became gradually less prevalent. The corollary was an increase in the significance of control, which had played a variable, even nominal, role in the earlier period. The criteria of allegiance and control also apply differently to the different segments of the disputed boundary. In the interior, which remained a desert region with a nomadic population, the criterion of control gained very little in importance. Control was of much greater significance in the coastal area because its population was more settled and closely linked to two nearby towns. As their population grew and economy developed, the towns also exerted greater control.\textsuperscript{132}

The parties' arguments regarding the internal boundary\textsuperscript{133} present the arbitral tribunal with a choice between allegiance and control. Sharjah claims the area because the Bani Qitab, the nomadic tribes to whom the territory belonged, owe allegiance to Sharjah and are subject to

\textsuperscript{129} \textit{Dubai/Sharjah}, supra note 7 at 587-588.
\textsuperscript{131} \textit{Dubai/Sharjah}, supra note 7 at 589.
\textsuperscript{132} \textit{Ibid.}
\textsuperscript{133} Treated in \textit{ibid.} at 635-652.
Sharjah's control. Dubai argues that Sharjah's control over the Bani Qitab exists only in theory and even the tribe's allegiance is intermittent. While Dubai asserts that the Bani Qitab had on several occasions allied themselves with Dubai, the basis of Dubai's claim is that it exercises effective control over the area.

The tribunal finds on the facts that the only possible basis for Sharjah's sovereignty over the interior is the bond of allegiance. Always a powerful tribe, the Bani Qitab tended, at the end of the nineteenth century and the beginning of the twentieth century, to act as an independent tribe and changed alliances several times. In 1927, they participated in a plot against the ruler of Sharjah. Indeed, Sharjah itself acknowledges that its influence over the Bani Qitab varied considerably over time. Nevertheless, given the evidence as a whole, the tribunal concludes that this bond of allegiance was "generally formally maintained even if it was not always close." In the longer narrative of allegiance, the Bani Qitab's brief alliances with other rulers and opposition to the rule of Sharjah are only short episodes.

Relying on *Western Sahara*, Dubai argues that allegiance alone is not enough to substantiate Sharjah's claim to sovereignty. In particular, Dubai relies on a passage from *Western Sahara*:

> Political ties of allegiance to a ruler ... to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority.

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134 A change of alliance is not taken to signify a change of allegiance. See *ibid.* at 637, 644.
140 *Western Sahara*, *supra* note 6 at para.95, quoted in *ibid.* at 640.
The Tribunal disagrees with Dubai, distinguishing *Western Sahara* on the inapplicability of its Western notion of sovereignty, as well as on the facts.\(^{141}\) It awards the internal boundary to Sharjah, thereby recognising that allegiance may be a sufficient basis for sovereignty.

On Bowett’s reading, the award is nevertheless consistent with the notion of sovereignty in *Western Sahara*. In determining which emirate has sovereignty over the interior, the Tribunal is, in fact, using the ordinary measuring stick of control.\(^{142}\) The distinction it makes between allegiance and control is really a distinction between “different kinds of evidence of control.”\(^{143}\) In basing its award of sovereignty to Sharjah on allegiance, it is therefore basing it on a lesser kind of evidence of control, but evidence of control nonetheless. In addition, Dubai did not claim allegiance and could not substantiate its claim of control, so Sharjah had the better evidence of control. Finally, Bowett sees the *Dubai/Sharjah* award as consistent with the results in previous cases of competing claims to sovereignty over uninhabited or sparsely inhabited areas,\(^{144}\) in which international law has been satisfied with much less evidence of control.

Bowett thus adds the *Dubai/Sharjah* boundary arbitration to a string of cases that condition the requirement of control on the European colonial paradigm, accepting less evidence of control.

\(^{141}\) *Dubai/Sharjah*, supra note 7 at 641.

\(^{142}\) Bowett, *supra* note 73 at 110-111. It should be noted that Bowett regards the conduct of the parties, more specifically Dubai’s lack of protest and Sharjah’s quick action to exclude persons from Dubai, as decisive. *Ibid.* at 125 For a cultural critique of the international legal interpretation of protests in a somewhat different context, see *Temple of Preah Vihear* (*Cambodia v. Thailand*), Merits, [1962] I.C.J. Rep. 6 at 128-129 (Dissenting Opinion of Sir Percy Spender), 90-91 (Dissenting Opinion of Judge Wellington Koo); *Prott*, *supra* note 70 at 158-161.

\(^{143}\) *Ibid.* Bowett footnotes the *Eastern Greenland* case (*supra* note 87) in this regard. To the extent that he regards *Dubai/Sharjah* as factually similar to *Western Sahara* and his footnote suggests that *Dubai/Sharjah* is also factually similar to *Eastern Greenland*, it is interesting to note that the International Court of Justice in *Western Sahara* rejects the argument that *Western Sahara* is on all fours with *Eastern Greenland*. “Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organized tribes were in constant movement and where armed incidents between these tribes were frequent.” *Western Sahara*, *supra* note 6 at para.92. The explanation for why *Dubai/Sharjah* might bear a greater similarity to *Eastern Greenland* than *Western Sahara* does is presumably that *Dubai/Sharjah* and *Eastern Greenland* were both construed as a choice between the sovereignty of two states, whereas *Western Sahara* was not.
over territory that, to the nineteenth century European mind, is unimportant, inaccessible, or otherwise impractical to bring under strong control. To this way of thinking, the culture of the territory's inhabitants was simply one relevant factor, along with a harsh climate, forbidding geography and other physical features of the territory, in the determination of what display of sovereignty could reasonably be expected. In the case of Western Sahara, where the assertion of sovereignty was situated within a non-European precolonial culture, this culture could additionally be "a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty."\textsuperscript{145}

Since Dubai could prove neither allegiance nor control, the internal boundary awarded in Sharjah's favour may well stand for the proposition that some evidence of control, in the form of allegiance, is superior to none.\textsuperscript{146} But it is also possible to read the award for, as Jean Salmon puts it on behalf of Mauritania in Western Sahara, the lesson of modesty that the ethnographer can teach the lawyer, the lesson that the only legal systems of worth are those to which individuals adhere.\textsuperscript{147} On this reading, the Tribunal's upholding of the bond of allegiance might represent an approach to the interpretation of sovereignty similar to Morocco's position in Western Sahara that the political and social structures particular to the subject and object of sovereignty are a reason to modify the interpretation of the international legal rules on the acquisition of sovereignty over territory. Related to this idea of contextuality is the idea, reflected in the opinions of Judge Ammoun and Judge Dillard in Western Sahara, that interpretation should be authentic across the cultures of the groups whose identities and histories it implicates. On the idea of cross-cultural authenticity, it

\textsuperscript{145} Western Sahara, supra note 6 at para. 94.

\textsuperscript{146} Nor did the coastal zone of Al Mamzer present a choice between allegiance and control. In the mid-19th century, Sharjah had title on the basis of allegiance, but from the turn of the century onward Sharjah could not rely on allegiance because the population of the area was mixed and occasional, and could not rely on control since it had lost effective control to Dubai. Dubai/Sharjah, supra note 7 at 595-635, especially at 610.

\textsuperscript{147} Western Sahara, Vol. IV, "Oral Statement of Jean Salmon" (10 July 1975), I.C.J. Pleadings 425 at 436.
becomes important whether the international legal concept of sovereignty is interpreted such that it is plausible within the culture of the sovereign subject and object. This idea would explain the Tribunal’s concern that to apply the modern international legal rules on the acquisition of sovereignty “to peoples which have had, until very recently, a totally different conception of sovereignty would be highly artificial,” and its observation that a Western concept of sovereignty was unknown in the interior. On Bowett’s reading, it would presumably be immaterial whether the requirement of control was natural or familiar, so long as it was capable of application.

The tribunal’s reliance on the British view of the legal situation in the interior during the period of the British protectorate over the emirates and on the British method for ascertaining that legal situation also support a reading of the Dubai/Sharjah boundary arbitration that gives greater importance to cultural difference. The Tribunal stresses that the British authorities always recognised the territory of the Bani Qitab as part of Sharjah and that “it would be unfair to the sense of the realities which the British authorities habitually showed” to think that the British authorities would not sooner or later have recognised the Bani Qitab as totally independent of Sharjah had this been so.

By giving credence to the British “sense of the realities,” the Tribunal indirectly adopts the British approach to interpreting reality in legal terms. As well, the Tribunal comes closer to a direct endorsement of the British approach by presenting it as a response to the question “how may one ascertain to whom these territories belong?” and by drawing the criterion of allegiance and control from a longer list of criteria compiled by the British officials who had earlier investigated

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148 Dubai/Sharjah, supra note 7 at 587.
149 Ibid. at 641.
150 Ibid.
151 Ibid. at 642.
the boundary. In determining to whom a given territory belonged, the British authorities took account of "the special characteristics of the region and of the fact that Western criteria for the establishment of frontiers could not be applied in this period." Instead of requiring direct control by the ruler over the territory, they required allegiance to the ruler by the tribe that effectively controlled the territory.

The Tribunal's characterisation of the British approach as recognising the inapplicability of Western rules concerning sovereignty over territory and its virtual adoption of this approach suggest a greater responsiveness to cultural difference than Bowett grants. At the same time, it means that the Tribunal's award is potentially motivated less by concern for cultural context or cross-cultural authenticity and more by regard for a contemporaneous European perspective on the evidence. It is noteworthy that despite the Bani Qitab's control of the interior, the Tribunal rules out the possibility that the Bani Qitab may have sovereignty over the disputed territory because the British authorities never recognised the Bani Qitab as an emirate. Even if, given the relationship between Britain and the emirates, a new emirate could not come into existence without formal British recognition, this should not mean that the Bani Qitab are entirely without international legal personality. In Western Sahara, the International Court of Justice held that a territory inhabited by tribes or peoples having a social or political organisation is not terra nullius. Yet the Tribunal implies that if not part of Dubai or Sharjah, the territory of the Bani Qitab is terra nullius. "If these lands did not belong to Sharjah and the Bani Qitab, as has been shown, did not constitute an Emirate," it asks rhetorically, "must then the territory be considered terra nullius?"

152 Ibid. at 588-589.
153 Ibid. at 642-643.
154 Ibid. at 642.
155 Ibid.
Moreover, the Tribunal dismisses Dubai’s argument that the British assessment of the legal situation in the interior reflects British interests. Dubai maintains that British dealings with the ruler of Sharjah regarding the negotiation of the oil concession in the territory of the Bani Qitab were not evidence of Sharjah’s authority over the Bani Qitab, but were attributable to their preference for dealing with the rulers in the region rather than with a series of tribal chiefs. The Tribunal reasons that even if the British authorities’ preference was expressed as “the fewer the Shaikhs that we have to deal with ... the better,” their information-gathering and sense of fair play would have compelled them to recognise eventually the total independence of the Bani Qitab from Sharjah, had that come about.

b Legal Entity

[In international law] ... the only legal subject worthy of consideration is the State, other forms of social organization being suspect, qualified as barbarous or savage, or even completely ignored. Among these pre-State or para-State collectivities, nomadic groups have known the most unfavourable fate - and this is not surprising. In effect, one can say without exaggeration that the State is the hereditary enemy of nomads. If the nomad lives inside its frontiers, the State considers him an element of trouble; he escapes its administrative control, its justice, its tax collectors ... if on the contrary the nomad lives outside of its territory ... he often represents for the State a danger of incursion or raid ... the classical ideology, long dominant, has generated deformed representations of nomadism and has tended to deny this phenomenon as a legal reality.

Jean Salmon, representing Mauritania in *Western Sahara*

Unlike Morocco, Mauritania was not a state in 1884, when Spain colonised Western Sahara. This meant that while Mauritania might be able to claim ties of sovereignty to Western Sahara, it could not claim ties of state sovereignty.

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159 *Ibid.* at 431; *Western Sahara*, supra note 6 at para.130.
160 *Western Sahara*, supra note 6 at para.130.
Not only were the ties of sovereignty that Mauritania alleges existed between the Mauritanian entity and Western Sahara not ties of state sovereignty, that being impossible, they were not even vertical ties of subject to object akin to ties of state sovereignty. At the time of colonisation, the Mauritanian entity was, according to Mauritania, "a people formed of tribes, confederations and emirates jointly exercising co-sovereignty over the Shinguitti country." Its relationship to Western Sahara was a horizontal one of inclusion; some of the Western Saharan tribes were part of the ensemble of tribes, confederations and emirates.

For the Mauritanian entity to have had these encompassing legal ties of sovereignty to some of the Western Saharan tribes, it would have had to have been a legal entity with some form of sovereignty. Mauritania’s position therefore depends on the meaning of “legal entity” in the international law of the period. In particular, it revolves around whether the very concept of sovereignty, as opposed to merely the rules for a state to acquire sovereignty over territory, can accommodate cultural difference. Whereas the discussion of Morocco’s legal ties in the previous section retained the distinction between the non-European subject, Morocco, and the non-European object, Western Sahara, the two merge in the analysis of the Mauritanian entity.

Mauritania builds its argument for the international legal subjectivity of the Mauritanian entity on two theses about international law. The first is that international law reflects material reality: if the Mauritanian entity can be shown to have had a real existence which international law misrepresented or excluded due to cultural bias, then international law must recognise its existence. The second thesis, which also informed Mauritania’s interpretation of *terra nullius*, is that there was a humanist tradition in nineteenth century international law that can be recuperated:

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163 See above at pp.156-157.
specifically, nineteenth century international law included peoples among its subjects and was therefore capable of recognising a Mauritanian people as sovereign.

Thus, on Mauritania's first thesis, the Mauritanian entity, while not a state, was sociologically "a reality at the time, with its own characteristics, independence and unity of law, the application of Saharan law." Geographically, culturally and socially, it was a coherent community. Although covering a vast region, it was treated as geographically distinct by its inhabitants and by the other Arabo-Islamic communities. Culturally, the Mauritanian entity was distinguished by a common language, way of life and religion. Its social structure was also uniform, built on three "orders" of tribes: warrior tribes which held political power, marabout tribes which engaged in religious, teaching, cultural, judicial and economic activities, and tribes which were under the protection of a warrior or marabout tribe. In addition, the much freer status of women and the renown of its marabout scholars differentiated the Mauritanian entity socially from the neighbouring Islamic societies.

In terms of political authority, however, the Mauritanian entity was heterogeneous. The constituent tribes, confederations and emirates differed internally in the complexity of their political integration. Moreover, the political organisation of the whole was horizontal; there was no common vertical hierarchy. Each tribe and emirate was autonomous and independent. Within its territory, each was sovereign, protecting its own subjects and others seeking protection while in its territory. Between the various tribes and emirates, alliances and wars had the character of relations among equals.

Despite this political diversity, Mauritania maintains, the Mauritanian entity formed a coherent community internally by virtue of its common laws, as well as its geographic, cultural and social distinctness from neighbouring communities. This common Saharan law dealt with the use

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of water-holes, grazing lands and agricultural lands, the regulation of inter-tribal hostilities and dispute settlement. Externally, the Mauritanian entity had demonstrated its independence in times of threat from outside, exhibiting a common front, for example, against the French.

The Mauritanian entity was not only a sociological reality, it was the functional equivalent of a sovereign state. Prior to the colonial era, the Mauritanian entity succeeded in assuring its coherence and independence without recourse to the form of the state and thus succeeded in achieving the supreme goal of the state without adopting state structures. Having satisfied the purpose of a state, it must constitute a “legal entity” in international law. Mauritania argues:

It matters little whether or not an entity has formed or a state as we understand the concept today. The essential question is whether it constitutes a coherent community capable of ensuring the independence of a people vis-à-vis the exterior and of adopting within its territorial limits an organization that permits this people to live in accordance with its own personality and in its authenticity.

To the extent that international law has not given international legal personality to nomadic societies such as those of the Sahara, Mauritania attributes it to international law’s enduring Eurocentrism, which has created a distorted image of nomadic societies and tended to deny them legal reality. How, Mauritania asks rhetorically, can international law consider as a legal reality a group represented as anarchic and ephemeral, the negation of the ideal of the strongly structured and centralised state? But sociologically, all nomadic peoples “are conscious of belonging to a well-identified human group, all have developed the notion of territory to its highest point, and all have elaborated institutions and legal systems that are often extremely complex.” Seen in context, the social development and political effectiveness exhibited by nomadic peoples are functionally and morally equivalent to a strongly structured state with a settled population.

165 Western Sahara, supra note 6 at para. 136.
166 Salmon, supra note 36 at 296.
167 Ibid. at 297.
169 Ibid.
If classical international law pathologically misrepresents or excludes the reality of nomadic life, its categories of subject can nevertheless accommodate that reality. Mauritania's historical thesis is that a category of people or nation existed in nineteenth century international law and was appropriate to the Mauritanian entity and nomadic peoples more generally. According to Mauritania, the notion of a people or nation flourished in late nineteenth century international law, but was displaced around 1900 by a state-centrism that lasted until the right of self-determination of peoples achieved prominence around 1960. As examples of the idea of a people-nation in nineteenth century international law, Mauritania cites the emergence of an independent Greece and Bulgaria in 1830, a Western consciousness that Christian subjects of the Sublime Porte had a right to self-determination, a unified Italy and Germany, recognition for an independent Romania, Serbia and Montenegro at the 1878 Congress of Berlin and a number of plebiscites of the same period.

Spain characterises Mauritania's approach to the interpretation of legal entity as incorporating an element of legal particularism by inviting the Court to distance itself from the general international law rules and categories in order to retain particular legal facts. In response, Mauritania refers to the coexistence of general public international law in the nineteenth century with various particular legal orders - Latin American international law, relations among members of the British Commonwealth, the law of Dar el Islam - and in the twentieth century with various regional legal systems such as that among European states and formerly among socialist states. But the coexistence of the general with the particular would not appear to be the gist of

170 Ibid. at 427, 436.
171 Salmon, supra note 36 at 297.
172 Western Sahara, Vol. V, "Oral Statement of Santiago Martinez Caro" (22 July 1975) 141 at 145. It should be noted that Spain's argument against the recognition of the Mauritanian entity as a legal entity is both ultra-universalist and ultra-particular. On a universalist understanding of legal entity, Spain argues that the Mauritanian entity is so loose as to have no legal existence. On a particularist understanding, it merges into the larger Islamic world. Western Sahara, supra note 6 at paras. 141-142.
173 Salmon, supra note 36 at 298.
Mauritania's approach to the interpretation of legal entity.\textsuperscript{174} Mauritanias interpretive approach seems not so much that the general yields to the particular in certain cases as that the general must be made truly general. Where a general international legal concept is originally developed by abstracting from the particularity of the European experience, it must now be interpreted by testing against the particularity of other cultural experiences. It must be abstracted across particularities so that the concept is general in some broader sense. The concept of legal entity is thus made cross-culturally relevant through functionalist interpretation: the question is not whether an entity looks like a state, but whether it performs a similar function in another cultural context.\textsuperscript{175}

Spain rejects both Mauritania's interpretive thesis that sociological fact has an impact on legal interpretation and its historical thesis that peoples were represented in nineteenth century international legal thought. On the interpretive thesis, whereas Mauritania quotes the sentence from the \textit{Reparation for Injuries Suffered in the Service of the United Nations} case\textsuperscript{176} "the subjects in any legal system are not necessarily identical in their nature or in the extent of their rights,"\textsuperscript{177} Spain reminds the Court of the end of that sentence: "and their nature depends upon the needs of the community." That is, Mauritania relies on the \textit{Reparations} case for its recognition of the potential diversity of international legal subjects and argues that the sociological fact of diversity is relevant

\textsuperscript{174} For this approach to the interpretation of "legal entity," see Flory, "L'Avis," \textit{supra} note 13 at 273-274. Maurice Flory argues from an appreciation of Dar El Islam as a heterogeneously organised geographical space. According to Flory, from the moment that one leaves the Western legal universe for the legal universe of Dar El Islam, the Bilad Shinguitti must be accepted as a legal entity. The fact that the Court recognised Morocco's simultaneously as a sovereign state and a part of Dar El Islam should not prevent it from recognising the existence of entities that are not included in the Moroccan state but are nevertheless part of Dar El Islam and that maintain cultural, religious and economic links with a neighbouring entity, among them the Moroccan state. Flory suggests that such an analysis would have added to the clarity and efficiency of the advisory opinion in \textit{Western Sahara}.


to the interpretation of international legal subjecthood. Spain points instead to the Reparation case's derivation of international legal personality from the necessities of the international legal community in a given historical period and stresses the limits of interpretation. Spain criticises Mauritania's historical account of a nineteenth century international law configured on peoples as inaccurate and inconsistent with the fact that states were and continue to be the basis for the rules of international law.

In determining whether the Mauritanian entity was a legal entity capable of including the Western Saharan tribes, the International Court of Justice again situates itself notionally at the intersection of universalism with cultural particularism. The Court explicitly gives "full weight" to the observation in the Reparation case that "the subjects of international law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community," and to the "special characteristics of the Saharan region and peoples." At the same time, the Court abstracts from the consideration of the legal nature of the United Nations in the Reparation case to formulate the essential test for a legal entity as whether the group in question is "in such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect." On this test, the Court finds that given the independence of the emirates and tribes from one another and the absence of even the most minimal common institutions, the Bilad Shinguitti is not "an entity capable of availing itself of obligations incumbent upon its Members" and therefore not an entity enjoying some form of sovereignty in Western Sahara.

179 Ibid. at 352-353.
180 Western Sahara, supra note 6 at para 148, quoting from Reparations, supra note 176 at 178.
181 Ibid. at para 149.
In the same vein as Mauritania’s analysis of legal entity, Judge Dillard’s discussion of legality stands as a cultural critique of the Court’s reasoning. Dillard does not vote against the existence of legal ties between Western Sahara and Morocco and Mauritania respectively because he persuades himself that the concept of legality is dependent on the logic of the prevailing cultural forms and therefore potentially a matter for judicial reconsideration. With reference particularly to Mauritania, he develops two approaches to the concept of legality and legal ties, using the second to expose the cultural specificity of the first. On his first approach, a tie is legal “if it expresses a *relationship* in which there is a *sense of obligation* of a special kind.” While this sense of obligation need not be inspired by the fear of sanctions, it must be “pervasively felt as part of the way of life of the people.” It is not sufficient for the inhabitants of the territory to obey the wishes of the Sultan or the Emir out of a feeling of religious affiliation or courtesy; they must do so out of a sense of deferential obligation. The qualitative difference is between their sense that they must obey and that they merely ought to obey. Dillard’s second approach to the nature of legal ties criticizes the first approach as premised on a post-Reformation Western oriented society and as inappropriate to a society such as existed in the Sahara. In societies influenced by the Reformation, the sense of obligation to the sovereign is “focused on his secular authority which is not only paramount but permits a dissociation between obligations owed to the State and those owed to religious authority.” This sharp distinction between modes of authority was not characteristic of the society and popular consciousness that prevailed in the Sahara. In a society that understood power as neither secular nor religious, Dillard argues, it would be artificial to reject a tie as legal because it does not reflect a sense of obligation “owed

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182 Compare Flory, “La notion,” supra note 33 at 75.
183 [emphasis in original] Western Sahara, supra note 6 at 125 (Separate Opinion of Judge Dillard).
184 Ibid.
185 Ibid.
vertically to the secular power of someone in authority." Dillard's alternative approach considers legal ties to be those that are experienced as belonging to a larger collectivity:

The relation between those in power in the Mauritanian entity on the one hand the wandering tribes, on the other hand, is of secondary importance. The important thing is that the tribes criss-crossing the Western Sahara felt themselves to be part of a larger whole, while also claiming rights in the territory focused on the intermittent possession of water-holes, burial grounds and grazing pastures.

3 Conclusion

So far, our discussion has focused on how the interpretation of self-determination in Western Sahara organises nineteenth century international legal space in this corner of North Africa. It is important to keep in mind that it is, in fact, the interpretation of self-determination in modern international law that produces the mapping of identity, legality and sovereignty in the nineteenth century Sahara. Without its normative orientation, we would be left with the justifiability of colonisation in nineteenth century positive international law. The issue would be whether Spain had acquired good title to Western Sahara under the positive international law of the period, an issue that the Court, along with the General Assembly and all the parties, in Western Sahara explicitly sets aside.

We have seen that the Court uses a broad concept of legality to domesticate the exotic relationships of the Sahara, bringing them inside international law by recognising them as legal. Simultaneously, its narrow concept of sovereignty denies these relationships equal status with the European master's by refusing to consider them as sovereign. This double movement of acceptance and rejection, legality and sovereignty, is characteristic of the Court's interpretation of terra nullius, legal ties and legal entity. The Court's interpretation of terra nullius recognises the

186 Ibid. at 126.
187 Ibid.
188 See Cassese, supra note 13 at 361.
189 Ibid. at para.43.
legal existence of the tribes that inhabit Western Sahara, but is silent on their sovereignty. Its interpretation of legal ties encompasses their various ties to Morocco and Mauritania, but does not consider them ties of sovereignty. Its interpretation of legal entity acknowledges a diversity of international legal subjects, but does not recognise the Mauritanian entity as such. The double movement of the advisory opinion is accentuated by the separate opinions. On the one hand, the opinion’s flexible model of legality broadens the rigid European model defended by Judges Petrén and Gros. On the other, the opinion’s essentialist ideas of sovereignty represent a rejection of Judges Forster, Boni and Ammoun’s cultural functionalism. In contrast, the approach to sovereignty taken in the Dubai/Sharjah boundary arbitration may reflect some sort of functionalism or notion of intersubjective validity.

In addition to employing a concept of legality that mediates between sovereignty and nothingness in nineteenth century international law, the Court’s approach to interpretation in each instance - *terra nullius*, legal ties and legal entity - is a response to the different cultural critiques of international law framed by Algeria, Mauritania, Morocco and Zaire. In its interpretation of *terra nullius*, the Court partially heeds Mauritania’s call to recognise the humanist tradition in nineteenth century international law. By contextualising its consideration of legal ties, the Court goes some way toward the Moroccan position that the interpretation of legal ties must take into account the specific character of the Sherifan state. The Court similarly contextualises its interpretation of legal entity. Moreover, Judges Ammoun and Dillard, in particular, elaborate more extensive cross-cultural approaches to interpretation.

Through the intermediate concept of legality, creatively interpreted, the Court presents the precolonial identity of the Western Sahara as complex and overlapping, while its sovereignty is left obscure. Insofar as Western Sahara is not *terra nullius* because it is inhabited by socially and politically organized tribes, the local tribes have a legal identity in nineteenth century
international law. The recognition as legal of ties of allegiance between some Western Saharan tribes and Morocco, and land rights shared by other Western Saharan tribes with the Mauritanian entity adds other layers of identity.\textsuperscript{190}

B Participation Present

For Morocco and Mauritania’s claim to corrective justice to prevail over “the right of the population of the Western Sahara to determine their future political status by their own freely expressed will,”\textsuperscript{191} it is not enough for Morocco and Mauritania to demonstrate that they have legal ties to Western Sahara. They must also establish that these ties are of such a nature as to affect the exercise of self-determination and that that effect is to require the return of their territory regardless of the will of the territory’s population. (Since legal ties could conceivably modify the exercise of self-determination either procedurally or substantively, it does not follow that because legal ties have some effect, that effect is to require the return of the territory regardless of the will of its population.)

This normative conflict in \textit{Western Sahara} between consent-based and corrective justice-based interpretations of self-determination, between the determination of a future identity by popular consultation and the restoration of a past identity, may or may not create a temporal conflict as well. To the extent that the normative conflict is within the complex of modern international legal rules on self-determination, the problem of legal interpretation is not intertemporal. The rules on self-determination may be normatively Janus-faced, but both the forward and backward-looking

\textsuperscript{190} The paradox is that by presenting a fuller and more complex picture of the Western Sahara in 1884, the International Court of Justice has both decolonised and recolonised. Insofar as the Court recognises certain groups and relationships as legal, it has eliminated some of the colonial bias from international law. To the extent that these groups would not have thought of themselves and their relationships in this way, it has simply replaced one foreign system of representation with another.

\textsuperscript{191} \textit{Ibid.} at para.70.
rules belong to modern international law. If, instead, the right of self-determination is seen as central to a new international law reflecting a new world order and the claim of legal ties as remaining from an old international law made by Europe for Europe, then the problem of legal interpretation becomes a more general intertemporal one. International law has developed a doctrine of intertemporal law, which applies in cases where the governing legal rules have changed over time so that the original rules and the later rules require different results.\textsuperscript{192} In addition to the application of this legal doctrine, the broader-based participation behind modern international law is a normative reason for it to take precedence over clubby\textsuperscript{193} traditional international law.

Morocco and Mauritania both argue that the conflict between the right of the Western Saharan population to choose their future political status and the restoration of Morocco's and Mauritania's territorial integrity is a conflict within the modern international legal rules on self-determination. To this effect, they cite the Declaration on the Independence of Colonial Peoples (GA Resolution 1514),\textsuperscript{194} which provides that "all peoples have the right to self-determination" (paragraph 2), but also that "any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" (paragraph 6).\textsuperscript{195} By interpreting the prohibition on the disruption of territorial integrity as protecting past territorial integrity,\textsuperscript{196} Morocco and Mauritania are able to argue that contemporary international law gives the restoration of their precolonial territorial integrity precedence over the right of the Western Saharan population to self-determination.

\textsuperscript{192} See below at note 202 and accompanying text.


\textsuperscript{195} Western Sahara, supra note 6 at paras. 49-50 (arguments of Morocco and Mauritania).

\textsuperscript{196} On paragraph 6 generally, see Musgrave, supra note 23 at c.10; Sánchez, supra note 23 at 564-574.
According to Morocco, what has actually emerged is an international law of decolonization, where decolonization is accomplished by diverse legal principles and techniques. The practice of decolonization resolves into three types of cases, each of which achieves a different balance between the principle of self-determination, understood as the people's right to choose freely, and the principle of territorial integrity. In those cases where an internationally recognised state was dismembered by colonisation, as Morocco was by the Spanish colonisation of Western Sahara, the principle of territorial integrity outweighs the principle of self-determination such that the precolonial state is made whole again. Mauritania is less categorical, relying instead on a contextual interpretation of self-determination, as an ensemble of complex rules that gives an important place to territorial integrity; the weight of one factor or another depends on a whole series of sociological, economic, political, legal and historical elements. These factors are not dead. They live and, as in a kaleidoscope, their mixture can be upset at each moment.

Spain and Algeria maintain that regardless of whether Morocco or Mauritania can establish precolonial legal ties, the population of the Western Sahara is entitled to exercise its right of self-determination through a referendum on independence. While Spain takes the position that the General Assembly is already committed to this result, Algeria relies on the doctrine of intertemporal law.

The most frequently quoted account of the doctrine of intertemporal law is that of Judge Huber in the Island of Palmas case. Huber’s exposition of the doctrine of intertemporal law has

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199 Ibid. at 332.
202 In the Island of Palmas case, supra note 77 at 854, Huber describes this doctrine as follows:
two branches. The first requires that a legal fact be judged in light of the law in force at the time the fact occurred, as opposed to the law in force at the time the dispute arose or its settlement is contemplated. The second branch provides that the existence or maintenance of a right depends on the conditions set by evolving international law. Applying the doctrine of intertemporal law, Algeria argues that Spain originally acquired good title to Western Sahara by colonisation. Because the broad and self-serving interpretation of *terra nullius* by European states excluded non-European peoples from international law, Western Sahara would have been *terra nullius*, and therefore open to acquisition by colonisation.\(^{203}\) Although valid when acquired, Spain’s title to Western Sahara was subsequently invalidated by the development of a right of self-determination of peoples in international law. Since Spain had title to Western Sahara and that title had become subject to the population’s exercise of self-determination, neither Morocco or Mauritania could have any title to the territory.

As normative support for the doctrine of intertemporal law in this case, Algeria emphasises the greater legitimacy of modern international law, based on broader and more diverse participation. Counsel for Algeria, Mohammed Bedjaoui, describes classical international law as

\[\ldots\] international only in name. Elaborated progressively over four centuries by and for Europe, applicable only to European countries to the exclusion of colonies, protectorates and so-called uncivilized countries, it was a law of the European family, inspired by European values, the expression of an era, of a hegemony and of a complex of economic and other interests.\(^{204}\)

As regards the question which of different legal system prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law.


\(^{203}\) See above at pp.153-154.

In comparison, the emergence of new states through decolonization has led to what Charles Chaumont would designate as transitional international law\textsuperscript{205} or Richard Falk would call an emerging international law of participation.\textsuperscript{206} Not only does modern international law therefore have greater legitimacy generally than classical international law, the right of self-determination carries even greater legitimacy within modern international law because it entitles peoples, as well as states, to participate.\textsuperscript{207}

Morocco argues that the theory of intertemporal law put forward by Algeria is mutilated and lacking the logical equilibrium of Huber's formulation in \textit{Island of Palmas}. It objects that intertemporal law affects not just existing titles, but also the rights that were sacrificed to create the them. In the context of \textit{Western Sahara}, intertemporal law operates to invalidate Spain's title to the territory without simultaneously destroying the title lost by Morocco at that time. Second, Morocco objects that intertemporal law cannot be reduced to the ultimate date in the chronology and must do justice to all the legal facts concerning the Western Sahara, from oldest to the newest.\textsuperscript{208}

Since the International Court of Justice does not find "legal ties of such a natures as might affect ... the principle of self-determination through the free and genuine expression of the will of

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the peoples of the Territory,"\textsuperscript{209} it does not need to consider whether and how legal ties of sovereignty or some other stronger nature would have affected the principle of self-determination. Nevertheless, it can be inferred from the structure of the Court’s ratio decidendi that ties of sovereignty, if not also other legal ties, would have had some effect on the decolonization of Western Sahara.\textsuperscript{210}

More difficult to decipher are the Court’s various indications as to exactly what that effect would have been. By detailing the General Assembly’s different treatment of Western Sahara and Ifni,\textsuperscript{211} the Court registers, if not necessarily approves,\textsuperscript{212} that in some cases, decolonization will respect the status quo ante. While both Western Sahara and Ifni were non-self-governing territories administered by Spain and claimed by Morocco, the General Assembly resolutions envisaged the decolonization of Western Sahara through a referendum and the decolonization of Ifni by transfer to Morocco. If the Court does not consider cases such as Ifni to be cases of self-determination, then these are cases that simply do not give rise to a conflict between the interpretation of self-determination as the consent of the territorial population and as the correction of a historical wrong done to the former territorial sovereign. Even so, there may still be cases of self-determination where this conflict occurs. In the alternative, Ifni may be just such a case. If it is, the Court’s tacit approval of its retrocession to Morocco indicates that sometimes the tension between past and present in the interpretation of self-determination will be resolved in favour of the past.

The Court elaborates in the following passage:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of the people, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a “people” entitled to self-

\textsuperscript{209} Western Sahara, supra note 6 at para.162.

\textsuperscript{210} Supra note 74.

\textsuperscript{211} Western Sahara, supra note 6 at paras.61-63.

\textsuperscript{212} See Crawford, The Creation of States, supra note 13 at 383, n.138 (approval by inference).
determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.\(^{213}\)

On a proceduralist reading, the instances of self-determination where consultation would be unnecessary would be those where the inhabitants' wishes had already been made known through some other process of consultation, for example, through free and fair elections held in the territory.\(^{214}\) If this is what is meant by "special circumstances," then the interpretation of self-determination as "free and genuine expression of the will of the peoples of the Territory" admits of no more than a procedural refinement. Since a referendum was not held in the case of Ifni, it must therefore have been considered that the population of Ifni did not constitute a "people" entitled to self-determination. On an alternative reading of the passage, consultation might be unnecessary to the exercise of self-determination not because it would be superfluous, but because it would be irrelevant to the disposition of the territory. This meaning of "special circumstances" is consistent with the interpretation of self-determination as favouring corrective justice between states over the consent of the people in certain cases. On this interpretation of self-determination, the retrocession of Ifni could have represented an exercise of self-determination. This substantivist reading would support the view that the Court has watered down the interpretation of self-determination as the free expression of the people's will.

The Court's final passage of note also reads as either procedural or substantive:

The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized ... As to the future action of the General Assembly, various possibilities exist, for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people.\(^{215}\)

\(^{213}\) *Western Sahara*, supra note 6 at para.59. See also *East Timor*, supra note 9 (Separate Opinion of Judge Vereshchuetin).

\(^{214}\) See *Western Sahara*, supra note 6 at 81 (Separate Opinion of Judge Nagendra Singh).

\(^{215}\) *Western Sahara*, supra note 6 at paras.70-71.
From a procedural perspective, the Court is saying that proof of sovereign ties would not dispense with the requirement of a referendum, but might require that the population vote on the reintegration of the territory (the "forms" by which the right of self-determination is to be realised) or that interested states negotiate safeguards against the coercion or intimidation of the voters (the "procedures" by which the right of self-determination is to be realised). Moreover, a proceduralist would read this passage as a general interpretation of self-determination, rather than one specific to the General Assembly resolutions on Western Sahara. From a substantive perspective, it can be argued that the "form" of self-determination would dictate the "procedure": where the appropriate form of self-determination is determined to be the return of the territory, then the appropriate procedure is the negotiation of the transfer of sovereignty and not the holding of a referendum. On this scenario, the relevant course of action is "consultations between the interested States" regarding the details of the handover instead of the procedures and guarantees for a free and fair referendum. In the alternative, the substantivist would confine the proceduralist interpretation of self-determination to the General Assembly resolutions on Western Sahara.

While the Court does give some indication of the extent to which legal ties could affect the principle of self-determination, it is silent on whether this is contemplated by the modern international legal framework for self-determination or results from the application of intertemporal law.

In comparison, the separate opinions are more forthcoming on the resolution of the normative and temporal conflict in the interpretation of self-determination. Toward the substantive end of the spectrum, Judge Nagendra Singh partly adopts Morocco and Mauritania’s conception of

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216 E.g. Shaw, supra note 13 at 143-144; Shaw, Title to Territory in Africa, supra note 13 at 55.
217 See Morocco’s fall-back position quoted in Western Sahara, supra note 6 at 79 (Declaration of Judge Nagendra Singh).
218 See also ibid. at para.151.
219 E.g. Crawford, The Creation of States, supra note 13 at 382-383.
the interpretive conflict. Like Morocco and Mauritania, Nagendra Singh locates the conflict within the modern international legal rules on self-determination; specifically, the relationship in the Declaration on the Independence of Colonial Peoples (GA Resolution 1514) between the right of self-determination (paragraph 2) and the prohibition on the disruption of territorial integrity (paragraph 6). In Singh’s view, the Declaration’s prohibition on the disruption of territorial integrity requires the restoration of a state’s territorial integrity on decolonisation where the state historically had sovereignty over the territory to be decolonised. Nagendra Singh otherwise considers the consultation of the people of the territory to be “an inescapable imperative.” At most, legal ties short of sovereignty may “point in the direction of the possible options which could be afforded to the population in ascertaining the will of the population”; that is, to procedure rather than substance.

Judge Dillard is more emphatically proceduralist in that he explicitly sets aside the relationship between paragraph 2 and paragraph 6 of the Declaration on the Independence of Colonial Peoples and develops a proceduralist reading of the Court’s opinion:

It hardly seems necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective, it becomes almost self-evident that the existence of ancient “legal ties” of the kind described in this Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people.

220 Western Sahara, supra note 6 at 79-80 (Declaration of Judge Nagendra Singh). See also ibid. at 110 (Separate Opinion of Judge Petrén).
221 Ibid. at 80, 81.
222 Ibid. at 81.
223 Ibid. at 80.
224 Ibid. at 120 (Separate Opinion of Judge Dillard).
225 Ibid. at 122.
At the other end of the spectrum from Judge Nagendra Singh, Judge de Castro applies the Algerian framework of analysis to the Court’s resolution of the temporal and normative conflict in the interpretation of self-determination. De Castro reads the Court as stating that “Whatever the existing legal ties with the territory may have been at the time of colonization by Spain, legally those ties remain subject to intertemporal law and ... as a consequence, they cannot stand in the way of the application of the principle of self-determination.” Similarly, Judge ad hoc Boni finds that while the ties that existed between Morocco and Western Sahara did have the character of territorial sovereignty, consultation of the inhabitants of Western Sahara is nevertheless obligatory.

In his separate opinion, Judge Ammoun is less sanguine that the process of participation can give expression to the authentic identity of the colonial population. He reasons that the violence done by colonialism to the identity of the colonised casts doubt on any such expression. By seeking in stages to alter the culture and consciousness of the colonised, colonialism fosters a false solidarity.

it let the local and regional languages, literature and civilization fall into decay, including the Arab civilization of the Maghreb, upon whose philosophical and scientific sources Europe drew from the Middle Ages up until the beginning of the Renaissance.

In a second stage, the colonizers sought to win over the colonized peoples to their own civilization, in order to bind them more closely to themselves ...

... if this is indeed the explanation for the origin of a certain autonomous way of life on the part of the tribal populations in Western Sahara, one can similarly suppose that the present separatist tendencies ... are also the result of a foreign presence.


\[227\] *Western Sahara, supra* note 6 at 173-174 (Separate Opinion of Judge ad hoc Boni).

\[228\] *Ibid.* at 84 (Separate Opinion of Judge Ammoun). Paradoxically, Ammoun does see national liberation struggles as authentic, adding them to the “special circumstances” that would make consultation unnecessary. *Ibid.* at 99.
More broadly, the Court's method of establishing a right of self-determination in international law implicitly engages Algeria's argument about an emerging international law of participation. With decolonization came a debate in international law, primarily between the newly independent states of Africa and Asia and the Western states, over the sources of law. Developing states took the position that resolutions passed by the UN General Assembly, where they formed the democratic majority, should be recognised as a new source of international law. Western states resisted this expansion of the traditional sources. By relying on General Assembly resolutions to establish the right of self-determination in international law, the Court lends strength to the position of the developing states.

In light of the Court's story of identity in the late nineteenth century Sahara (Section A), what is essential about its treatment of self-determination in the present (Section B) is not whether the balance it strikes in dicta between corrective justice for the former sovereign of the territory and the exercise of free choice by the current territorial population is procedural or substantive, the outcome of a conflict in the modern legal rules or of the application of intertemporal law. The essential is that the fact of a balance means that the Court has not confined its recognition of the historical identities distorted by colonialism to the narrative, but has created the possibility that they may affect the participatory exercise of the present day.

II EU Arbitration Commission Opinion No.2 on Yugoslavia

If the 1975 advisory opinion of the International Court of Justice in Western Sahara is the locus classicus on the interpretation of self-determination, the controversial modern classic is the 1992 opinion of an arbitration commission established by the European Communities Conference

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229 See Introduction above at Part I(B).
230 Western Sahara, supra note 6 at paras.54-59. See Crawford, supra note 3 at 591.
for Peace in Yugoslavia.\textsuperscript{231} The question put to the Arbitration Commission in \textit{Opinion No.2} by the Republic of Serbia was whether the Serbian population in Croatia and Bosnia-Herzegovina had the right to self-determination.\textsuperscript{232} In international law, this question represented the revival of the idea of self-determination traceable to the eighteenth century German Romantic thinkers on nationalism: the idea that every ethnic nation should have its own state.\textsuperscript{233} While this tradition of self-determination had influenced European statecraft after World War I, it had been muted in post-World War II international law by the equation of self-determination with decolonisation.\textsuperscript{234}


\textsuperscript{232} \textit{Opinion No.2}, \textit{supra} note 8. See also the Socialist Federal Republic of Yugoslavia's position. reprinted in (1992) 43 (No.1001) Rev. Int'l Affairs 21 ("The right of self-determination can only be exercised by a people in the sense of the nation and not in the sense of 'demos'.")


\textsuperscript{234} Although in \textit{Western Sahara} Morocco and Mauritania based their claim to Western Sahara on historical patterns of identity in the region, they relied primarily on corrective justice.
In Opinion No. 2, the Arbitration Commission holds, on the one hand, that under no circumstances does the right of self-determination justify changes to the frontiers existing at the time of independence (uti possidetis juris) and that the entitlement of ethnic, religious and linguistic communities, such as the Serbian population in Croatia and Bosnia-Herzegovina, is minority rights within the state. On the other hand, even though minority rights, discredited by the failed experiments in minority rights protection\(^{235}\) in inter-war Europe, have only recently begun to be recognised again in international law, the Arbitration Commission declares them to be *jus cogens*; that is, peremptory norms. Potentially even farther reaching, the Arbitration Commission holds that ethnic, religious and linguistic communities have a right to the recognition of their identity under international law. Moreover, the right of self-determination in article 1 of the *International Covenants on Human Rights* gives individuals the right to choose their ethnic, religious or linguistic community. In the case of the Serbian population in Croatia and Bosnia-Herzegovina, the Arbitration Commission indicates that the right to choose one's community might include the right to choose one's nationality, where that right could be recognised by agreement between the states concerned.

As controversial as it is important, the Arbitration Commission's opinion on self-determination, together with its other early opinions on the international legal ramifications of the breakup of Yugoslavia,\(^{236}\) provoked immediate and widespread comment. Its bold embroidery of the traditional patterns of meaning of self-determination, opaquely presented in the concise formulations of the French legal tradition,\(^{237}\) has divided scholars. For some, the importance of the Arbitration Commission's opinion is limited by its amateurish treatment of international law.

\(^{235}\) See *e.g.* N. Berman, "'But the Alternative is Despair': Nationalism and the Modernist Renewal of International Law" (1993) 106 Harv. L. Rev. 1792; Musgrave, *supra* note 23 at 37-57.

\(^{236}\) To date, the Arbitration Commission has issued fifteen opinions. (1992) 31 ILM 1494 (*Opinions Nos. 1-10*); (1993) 32 ILM 1586 (*Opinions Nos. 11-15*).

\(^{237}\) Pellet, 1991 Note, *supra* note 231 at 337.
Whether the Arbitration Commission, headed by the President of the French Conseil Constitutionnel Robert Badinter and composed originally of five presidents of Western European constitutional courts, was simply ill informed about international law or actually disingenuous in its statement of the law, the extravagance of the mistakes in its presentation of self-determination was seen to diminish the value of the opinion. In his analysis of the Arbitration Commission’s opinion, Matthew Craven methodically goes about qualifying each of its assertions about self-determination. For others, most outspokenly Hurst Hannum, the amateurism lies also in the

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238 The original membership of the Arbitration Commission was Robert Badinter, President of the French Conseil Constitutionnel (President); Aldo Corasaniti, President of the Italian Constitutional Court; Roman Herzog, President of the German Federal Constitutional Court; Irène Petry, President of the Belgian Cour d’Arbitrage; and Francisco Tomas y Valiente, President of the Spanish Constitutional Court. Craven, supra note 231 at 336. Under the new terms of reference, three of the five members are to be chosen from among incumbent Presidents of Constitutional Courts of EC member states or from members of the highest courts of those states, one from among former members of the International Court of Justice, and one from the members of the European Court of Human Rights. The current membership is Robert Badinter, President of the French Conseil Constitutionnel; Francisco Paulo Casavola, President of the Italian Constitutional Court; Roman Herzog, President of the German Federal Constitutional Court; Elizabeth Palm, Judge of the European Court of Human Rights; and Jose Maria Ruda, former President of the International Court of Justice. International Conference on the Former Yugoslavia Documentation on the Arbitration Commission Under the UNEC (Geneva) Conference: Terms of Reference, Reconstitution of the Arbitration Commission, and Rules of Procedure (1993) 32 ILM 1572.

Matthew Craven regards the fact that the Arbitration Commission was initially composed of European constitutional court judges as a sign that the lex arbitri was intended to be Yugoslav law and that the Arbitration Commission was to enquire, among other things, into the legitimacy and effects of the secession of Slovenia and Croatia under the Yugoslav Constitution. Craven, supra note 231 at 340, n.44.


240 Craven, supra note 231.

Arbitration Commission's *ad hoc* and unprincipled approach to self-determination. Yet other authors see the Arbitration Commission's opinions as a breath of fresh air in international law. Had its members been "pure" internationalists, Alain Pellet observes, they would have been more susceptible to the positivist constraints on international law inherited from the Cold War; it is "well and good that the principle of legitimacy (handled with prudence and reason) bursts in on the law." Pellet reads in the Arbitration Commission's opinion on self-determination the possibility of a new configuration of identity in international law.

In this part of the chapter, I argue that the type of criticisms Craven makes of the Arbitration Commission's opinion, based on a categories approach to the interpretation of self-determination, and the type made by Hannum, derived from a coherence approach, both obscure the reconceptualisation of identity implicit in the Arbitration Commission's interpretation of self-determination. Among the commentators, only Pellet remarks on the fruitfulness of the Arbitration Commission's dissociation of nationality and territoriality for identity. By pursuing Pellet's reading, we can see that the Arbitration Commission's opinion, like the International Court of Justice's advisory opinion in *Western Sahara*, involves the creative use and interpretation of legal concepts to produce more complex ideas of identity in international law.

To make this argument, I first introduce the Arbitration Commission's opinion in more detail (Section A). Then, using Craven's discussion of the opinion as reflective of a categories

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65 (quoting Hannum's conclusion in "Old Wine in New Bottles?," *supra* this note at 69 that the members of the Arbitration Commission "appear to have based their judgments on geopolitical concerns and imaginary principles of international law, rather than on the unique situation in Yugoslavia" and describing Hannum's critique of the Arbitration Commission's opinions as "devastating").

242 All translations mine unless otherwise indicated] Pellet, 1992 Update *supra* note 231 at 228. Compare R. Howse & A. Malkin, "Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Can. Bar Rev. 186 (arguing that in deciding the Reference on Quebec Secession, the Supreme Court of Canada must not drive a wedge between legality and legitimacy).

approach to self-determination and Hannum's critique as representative of a coherence approach, I show how both approaches narrow or prevent the consideration of what Pellet sees as the conceptual originality of the opinion: its refusal to confine the recognition of identity in international law within the territory of the state (Section B). Finally, I develop Pellet's insight to show what the Arbitration Commission's vision of identity might look like and how it might look more like certain dynamic conceptions of the relationship between European Union citizenship and the nationality of individual member states than like the static representation of identity in international law. I suggest that the Arbitration Commission has attempted in its use and interpretation of self-determination and related legal concepts to make room for a new view of layered identity and participation in international law, and to integrate Yugoslavia into modern Europe by restructuring the right of self-determination from the superiority of *demos* over *ethnos* to their transnational or postnational reconciliation in the intellectual vein of the European Union (Section C).

A The Opinion

The Arbitration Commission's opinion on the right of self-determination of the Serbian population in Croatia and Bosnia-Herzegovina begins with the familiar proposition that the right of self-determination does not involve changes to the borders of the state. Although the fixity of borders is a leitmotif in the international legal interpretation of self-determination,244 its import in this opinion is unclear. Whereas some commentators read the limitation as subordinating the right of self-determination to the principles of territorial integrity and the stability of borders, others see it

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244 See Chapter 2(I)(A)(1), above.
as balancing the right of self-determination of the Serbian minority against the right of self-
determination of the population of Croatia or Bosnia-Herzegovina as a whole.  

Paragraph 1 reads in full:

The Commission considers that international law as it currently stands does not spell out all the implications of the right of self-determination. However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise.

Although the phrasing implies that Croatia and Bosnia-Herzegovina are independent states at the time of the opinion, this is contradicted by the sequence of the Arbitration Commission’s opinions on Yugoslavia and partly contradicted by the chronology developed in a later opinion. Opinion No.2 was issued on January 11, 1992. The Arbitration Commission had earlier found, in Opinion No.1, that the Socialist Federal Republic of Yugoslavia was in the process of dissolution. Without more, this would suggest that at the time of Opinion No.2, neither Croatia nor Bosnia-Herzegovina had become a state. In Opinion No.11, however, the Arbitration Commission determines that the process of dissolution started on November 29, 1991. In the same opinion, it dates Croatia’s statehood to October 8, 1991 and Bosnia-Herzegovina’s statehood to March 6, 1992. Based on these dates, the Arbitration Commission’s opinion on self-

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245 For the purposes of this discussion, it is not necessary to engage the more technical debate about whether Yugoslavia is a case of dissolution or secession and what that implies. Compare e.g. Crawford, Expert Report, supra note 231 at paras.38-46 and Crawford, Response to Expert Reports of the Amicus Curiae, Reference re Secession of Quebec, S.C.C. No. 25506, http://canada.justice.gc.ca/Orientations/secess/crappt_en.html at para.20 (Yugoslavia is a case of dissolution and has no implications for self-determination) with Franck, Supplément à la duplicate Rapports additionnels des experts de l’amicus curiae, Reference re Secession of Quebec, S.C.C. No. 25506 at 4 (dissolution being in practice no more than “multiple concurrent secessions,” the case of Yugoslavia establishes that a group that does not have a right of self-determination is nevertheless not prohibited by international law from seceding and will be recognised as a state if it meets certain standards).


determination was, technically, issued after Croatia had become a state, but before Bosnia-Herzegovina had emerged from the process of dissolution as a state.

If the first paragraph is read as a proposition about territory, then, on the assumption that Croatia and Bosnia-Herzegovina are states, it simply repeats the legal mantra of decolonisation that the right of self-determination cannot disrupt the territorial integrity of a state. However, if Croatia, Bosnia-Herzegovina or both have not yet become states, then the paragraph is saying something more. As opposed to just protecting the territorial integrity of an independent state, it is actually determining the territorial entity that is eligible to somehow become an independent state. This quandry over the implications for territory and borders reappears in Opinion No.3, which expands the Arbitration Commission’s reference to uti possidetis in Opinion No.2. Similarly ambiguous in its time frame, Opinion No.3 holds that the stability of borders is a general principle of international law and, as applied to Yugoslavia, transforms the internal borders between republics under the old Socialist Federal Republic of Yugoslavia into the international boundaries of the new states.

In the alternative, the Arbitration Commission may start with the stability of borders not as a function of territory but as a consequence of the paramount self-determination of the population of the republics as a whole. If there is some idea of self-determination behind the stability of borders, then what might it be? On the assumption again that Croatia and Bosnia-Herzegovina are already states, it might be no more than what Istvan Bibó calls self-determination as a stabilising force: the right of a state’s population to be free from territorial incursions. But for Bibó, the stabilising force of self-determination could only follow from its revolutionary force: self-

248 Declaration on the Independence of Colonial Peoples, supra note 194.
249 Craven, supra note 231 at 388-390.
determination only protects the territorial integrity of a state where that state was created by self-determination. Along the same lines, it may be that whether or not Croatia and Bosnia-Herzegovina are already independent states, the Arbitration Commission sees their borders as becoming legitimate through the *de jure* or *de facto* exercise of self-determination.²⁵¹

To the extent that Croatia and Bosnia-Herzegovina represent the exercise of self-determination, the pattern is that of colonial self-determination. As peoples, they are defined by their old federal borders, just as colonial peoples were defined by their old colonial borders. Their recognition as new states is also consonant with the definition of self-determination in *Western Sahara* as "the need to pay regard to the freely expressed will of the people."²⁵² In *Opinions Nos. 4 to 7*, dealing with whether Bosnia-Herzegovina, Croatia, Macedonia and Slovenia respectively have complied with the EC *Declaration on Yugoslavia*²⁵⁴ and *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*,²⁵⁵ the Arbitration Commission requires the demonstration of popular support for independence. In the case of Bosnia-Herzegovina,²⁵⁶ where the Serbian population expressed its opposition to an independent Bosnia-Herzegovina through a separate plebiscite, a resolution of an "Assembly of the Serbian people of Bosnia-Herzegovina" and ultimately a declaration of an independent Serbian Republic of Bosnia-Herzegovina, the Arbitration Commission held that Bosnia-Herzegovina did not qualify for recognition because the will of the people of Bosnia-Herzegovina to constitute a sovereign and independent state could not be held to

²⁵² *Western Sahara, supra* note 6 at 33, para.59.
²⁵⁶ *Opinion No.4* (1992) 31 ILM 1501.
have been fully established. However, it was prepared to review its assessment of the situation if there were, for example, an internationally supervised referendum on independence in which all citizens voted.

As opposed to some notion of the external self-determination of the republics’ populations, the Arbitration Commission’s insistence on the existing borders may be informed by Croatia and Bosnia-Herzegovina’s international obligations to give effect to internal self-determination in the form of democratic government. That is, whatever else the borders represented or represent, they currently define a democratic community. All Yugoslav republics seeking recognition as independent states were required by the EC Declaration on Yugoslavia to accept the commitments in the EC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, among them “respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights.”

The Arbitration Commission’s opinion on the right of self-determination of the Serbian population in Croatia and Bosnia-Herzegovina thus upholds the territorial status quo, whether as fact or organising principle for chaos, community of result or choice, inhabitants or citizens. It goes on to find, however, that the Serbian population is entitled to minority rights within the state, a right of identity and a right of self-determination that gives them the right to choose their community beyond the state through nationality.

Extensive minority rights were already among the EC’s conditions for the recognition of new states in Yugoslavia. In addition to the minority rights contained in the CSCE commitments

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257 See Bieber, supra note 251 at 377; Cassese, supra note 251 at 144.
258 Declaration on Yugoslavia, supra note 254.
259 Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, supra note 255.
required of all new states in Eastern Europe and the Soviet Union, the Yugoslav republics were required to guarantee the more extensive minority rights provided for in a draft convention then under consideration by the EC Conference on Yugoslavia. In Opinion No.5, the Arbitration Commission found that Croatia did not satisfy the EC conditions for recognition to the extent that its new constitutional law did not fully reflect the article of the draft Convention giving a special status of autonomy to areas in which persons belonging to a national or ethnic group form a majority.

In its opinion on the right of self-determination, the Arbitration Commission went further, finding controversially that minority rights are now *jus cogens* and therefore that independent of any minority rights obligations that Croatia and Bosnia-Herzegovina had voluntarily assumed, they were bound by “every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the draft Convention.” In classifying minority rights as *jus cogens*, the Arbitration Commission cited its Opinion No.1, which held that “respect for the fundamental rights of the individual and the rights of peoples and minorities” were all *jus cogens*.

The Arbitration Commission’s conclusion that the Serbian population in Croatia and Bosnia-Herzegovina are entitled to minority rights does not, by itself, disturb the orthodox view that ethnic groups are “minorities” with minority rights and not “peoples” with a right of self-determination in international law. Its paragraphs 2 and 3, however, may be read as complicating

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263 See also Opinion No.9 (1992) 31 ILM 1523.
these categories. The second paragraph prefaces its discussion of the minority rights of the Serbian population with the statement: “where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.” On the one hand, this right of ethnic, religious and linguistic communities to the recognition of their identity may simply be a normative description of minority rights. On the other, it may construct a broader right of identity, which includes, but is not limited to, the existing definitions of minority and minority rights.

The third paragraph similarly has the potential to alter the relationship between the categories of minority and people. From the right of self-determination of peoples in article 1 of the International Covenants on Human Rights, the Arbitration Commission derives the principle that the right of self-determination serves to safeguard human rights; in other words, that the right is a means of protecting other rights, as opposed to an end in itself. “By virtue of that right,” the Arbitration Commission continues, “every individual may choose to belong to whatever ethnic, religious or language community he or she wishes.” Some commentators have nevertheless treated this right to choose one’s community as unconnected or mistakenly connected to the right of self-determination. But if the Arbitration Commission regards the right of self-determination of peoples as instrumental to other rights, it could logically interpret the concepts of people and self-determination as open to modification through the choice of individuals belonging to ethnic, religious and linguistic communities on the assumption that it will further the rights of those communities and their members. At the end of the third paragraph the Arbitration Commission raises the possibility that the people of Croatia and Bosnia-Herzegovina are not be exhaustively defined by the territorial borders or the self-determination represented by the territorial state or its government:

One possible consequence of this principle might be for the members of the Serbian population in Bosnia-Hercegovina 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.

B Two Schools of Criticism

Generally speaking, commentators on the Arbitration Commission's opinion on self-determination have taken one of two approaches. One, illustrated by Matthew Craven, catalogues the audacity of the Arbitration Commission's interpretation of the international legal rules relating to self-determination, discussing each rule in isolation from the others. Hurst Hannum's critique of the Arbitration Commission provides the most extensive example of the other approach, which measures the model of self-determination that can be built from the Arbitration Commission's opinions against the standard of coherence set by a model that sees self-determination as furthering some single principle or policy.

Behind Craven's discussion of the Arbitration Commission's opinion seems to be the idea that the international law of self-determination consists of discrete and determinate rules that develop through practice and not interpretation. He meticulously describes the ways in which the Arbitration Commission's interpretation of each rule conforms and does not conform to the current state of international law, prudently qualifying what he takes to be the Arbitration Commission's misstatements and overstatements of the rule. Consistent with the idea that rules develop through the practice and not the interpretation of international law, Craven does not examine whether the Arbitration Commission's interpretation of a particular rule could be grounded in, for example, the fabric of the rules or the principles or purposes that run through international law.

In this descriptive vein, Craven argues that the Arbitration Commission has taken liberties with the rules governing self-determination. By using _uti possedetis_ to establish that the right of

264 Craven, _supra_ note 231.
265 Reference will be made primarily to Hannum, "Rethinking Self-Determination," _supra_ note 241.
self-determination cannot change the borders that exist on independence, the Arbitration Commission has, for the first time, applied the principle of the stability of borders outside the historical frame of decolonisation and possibly to the time period prior to independence. It has strengthened rights within the borders of the state by elevating the right of self-determination, minority rights and basic human rights to the status of *jus cogens*, although there is scant support for calling the right of self-determination and basic human rights *jus cogens* and none for minority rights. In addition to elevating them to *jus cogens*, the Arbitration Commission has gone beyond the traditional approach to these categories of human rights by effecting a synthesis of the categories. Nor does its interpretation of the right of self-determination in article 1 of the *Covenants* as giving individuals the right to choose their ethnic, religious or linguistic community have any basis in the jurisprudence of the committees responsible for monitoring and interpreting the *Covenants*. Insofar as the Arbitration Commission further derives the right of individuals belonging to ethnic, religious and linguistic communities to choose their nationality, Craven’s search for authority in international treaty and custom reveals only the faint possibility of a right of expatriation or a right of option.

If Craven’s description implicitly rejects the idea that the Arbitration Commission might legitimately - or indeed inescapably - develop the rules on self-determination through interpretation, his prescriptive criticisms are similarly wary of interpretation. As a reason not to recognise

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268 Craven, *supra* note 231 at 392-393.

269 *Ibid.* at 393.

minority rights as *jus cogens*, Craven gives the potential for conflict between minority rights, raised to the status of *jus cogens*, and ordinary human rights, such as the right of non-discrimination on the grounds of sex.\(^{271}\) He gives the same reason for not interpreting the right of self-determination to include the right to choose one’s community, citing the *Lovelace\(^{272}\) and *Kitok\(^{273}\) cases as evidence of the potential for conflict between the interests of a minority and the ability of the individual to enjoy the benefits of membership in the minority group.\(^{274}\) Yet, if the Arbitration Commission is correct that basic human rights are also *jus cogens* and if individual and collective rights are already balanced through interpretation, as in *Lovelace* and *Kitok*, it is unclear why the need for interpretation would be a reason to reject the rights as recognised by the Arbitration Commission.

As well as causing him to discard much of the Arbitration Commission’s opinion on self-determination, Craven’s perspective limits his view of its originality. Since international legal practice is his school for imagination, as well as his test of soundness, he is inclined to understand the Arbitration Commission’s interpretation of self-determination through the stock of ideas that already exist in international legal practice. Ironically, in his discussion of the right of self-determination as the right to choose one’s nationality, this lack of imagination returns self-determination either to the classical liberal framework which the Arbitration Commission’s attention to ethnicity seeks to modify or to the ethnic ideal which informs the Republic of Serbia’s question and which the Arbitration Commission’s vision of democracy within stable borders dismisses. The only glimmer of authority that Craven finds for the right of the Serbian population

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\(^{271}\) Ibid. at 391.


\(^{274}\) Craven, *supra* note 231 at 393-394.
in Croatia and Bosnia-Herzegovina to the nationality of their choice is a right of expatriation or a
right of option. A right of expatriation, which Craven defines by reference to the right not to be
arbitrarily deprived of one’s nationality nor denied the right to change one’s nationality in article 15
of the Universal Declaration of Human Rights,\(^{275}\) assimilates the choice of nationality to a range of
other isolated choices made by individuals. As such, the right of expatriation is both indifferent to
the ethnic community motivating the individual’s choice of nationality and oblivious to the
possibility that the whole may be greater than the sum of the parts: the outcome of these individual
choices may actually be a new trans-border nationality which gives expression to that ethnic
community. In contrast, the right of option historically reflected the strength of ethnic ties in that it
gave the inhabitants of a territory which had changed sovereignty the right to opt for a nationality
other than that of the new sovereign.\(^{276}\) Under the right of option, however, the state that acquired
sovereignty over the territory was entitled to demand the withdrawal of those individuals who opted
and the removal of their property.\(^{277}\) By tracing the Serbian population’s right to choose their
nationality to a right of option, Craven rhetorically introduces the possibility of large-scale transfers
of ethnic populations destined to enhance the ethnic homogeneity of the states involved.\(^{278}\)

Hannum, like Craven, finds the Arbitration Commission’s presentation of the positive
international law governing self-determination to be inaccurate. But whereas Craven notes

\(^{275}\) As “somewhat less direct” support for a right of expatriation, Craven cites article 12 of the
International Covenant on Civil and Political Rights. Ibid. at 395, n.364.

\(^{276}\) See J.L. Kunz, “L’Option de Nationalité” (1930-I) 31 Rec. des Cours 112; D.P. O’Connell, State
c. 21.

\(^{277}\) O’Connell, supra note 276 at 32-533.

\(^{278}\) Because the right of option required the individual who exercised the right to emigrate to the state for
which he had opted, some publicists of the time saw the right as demos in the service of ethnus.
Engström wrote that the goal of the Treaty of Versailles was thereby “d’appliquer purement et
simplesment le principe des nationalités en réunissant sure le même territoire des hommes de même race,
de même langue et de même civilisation.” M. Engström, Les changements de nationalité d’après les
traités de paix (Paris, 1923) at 8, quoted by Kunz, supra note 276 at 152.
discreetly that the Arbitration Commission’s assertions about the right of self-determination cannot
“be accepted in an unqualified form.” Hannum is more scathing, accusing the Arbitration
Commission of basing its judgments on “imaginary principles of international law.” Hannum’s
main criticism, however, is that even if the Arbitration Commission’s statement of the law were
correct, it would be normatively incoherent. Not only can its opinion on self-determination
“charitably be described as unclear,” it fobs international law off with shoddy geopolitical
relativism in place of a sound theory of self-determination, a “non-response” for a response.
Hannum summarises the approach taken to the Yugoslav conflict by the European Communities,
including the EC Arbitration Commission, as

a one-time-only reaction to secessionist demands based on no discernible criteria
other than the desire of some territorially based population to secede. The principle
that borders should not be altered except by mutual agreement has been elevated to
a hypocritical immutability and contradicted by the very act of recognizing
secessionist states. New minorities have been trapped, not by any comprehensible
legal principle, but by the historical accident of administrative borders drawn by an
undemocratic government. Ethnic issues are ignored...

Since the gist of Hannum’s criticism is that the Arbitration Commission’s opinion is
incoherent, it is important to understand what he means by incoherence. Throughout his recent
writings on self-determination, Hannum distinguishes between the coherent theory of secession and
what he calls “the geopolitical non-theory of secession,” as if this distinction were self-evident.
Yet even the provocative passage from Jonathan Swift’s Gulliver’s Travels with which Hannum
introduces his article “Rethinking Self-Determination” can be used to show that coherence requires

279 Craven, supra note 231 at 385.
281 Hannum, “Rethinking Self-Determination,” supra note 241 at 54.
282 Ibid. at 48.
283 Ibid. at 54.
284 Ibid. at 55-56.
285 Ibid. at 49.
a context. Hannum opens with a quotation from *Gulliver's Travels* in which a doctor at the Grand Academy of Lagado proposes to reconcile violent parties in a state by exchanging half of the brain of each man with half of his political opponent's:

For he argued thus; that the two half brains being left to debate the Matter between themselves within the Space of one Scull, would soon come to a good understanding, and produce that Moderation as well as Regularity of Thinking, so much to be wished for in the Heads of those, who imagine they come into the World only to watch and govern its Motion.\(^{286}\)

In the paragraph that follows, Hannum implicitly classifies the Doctor's proposal as a political compromise aimed at conflict resolution (which literally splits the difference). But, in the realm of satire, the proposal could just as easily be described as normatively coherent in the sense that Lord Acton commended the heterogeneous state as the best guarantee of minimum government and negative rights because it frustrates any consensus on what more the government should do.\(^{287}\)

Coherence relies on cultural, as well as normative, context. Discussing the meaning of self-determination that emerged from decolonisation, Hannum does not criticize the practice of limiting the right of independence to colonies, without regard for the minorities trapped in the new states by the historical accident of borders drawn by the imperial power. On the contrary, Hannum defends United Nations practice from charges of "hypocrisy" and "inconsistency," arguing that such charges mistakenly assume that the right of self-determination of all peoples was intended to be absolute. The United Nations has always, he maintains, interpreted the right of self-determination of all peoples such that only the populations of classical colonies had an absolute right to immediate independence. Outside classical colonialism, the international community has balanced the right of self-determination against other rights in the manner of United States constitutional


jurisprudence. Particularly to an American audience, this description of a "pragmatic, balancing approach" lacks the unsavouriness of Realpolitik that Hannum gives to his descriptions of other balancing exercises in self-determination. Indeed, later in the discussion, he favourably compares "the absolutist anti-colonial advocacy of the United Nations General Assembly" with "the relativist geopolitical calculations of the victors at Versailles" after World War I.

Moving from decolonisation to the Yugoslav crisis, Hannum observes that the Arbitration Commission’s upholding of the old federal borders between republics as the new international frontiers is consistent with the post-1945 emphasis on territory in decolonisation. As applied to Yugoslavia, however, Hannum is quick to point out the inconsistencies and weaknesses of "this neo-decolonisation territorial approach." Even assuming that it was the most appropriate approach to the Yugoslav crisis, he argues, it is inconsistent to recognise the federal republics as new states, but not lesser federal subdivisions, such as the ethnically Albanian province of Kosovo. Moreover, even remedying this inconsistency would not deal with the problem of minorities created by the breakup of Yugoslavia.

But if Hannum’s criticisms of the "neo-decolonisation territorial approach" taken to Yugoslavia are well founded, then why did he not also make them of the approach as originally taken to Africa and Asia? In his recent writing on the crisis of the African state, Makau wa Mutua argues that the numerous failed states in Africa are a result of the preservation of the colonial borders and makes the case for a radical new map of Africa that would better reflect its history and ethnography. Alternatively, if the colonial borders in Africa and Asia can be defended, for

288 Hannum, "Rethinking Self-Determination," supra note 241 at 33.
289 Ibid.
290 Ibid. at 48.
291 Ibid. at 38.
example, as an identity created by imperial line-drawing that gradually became real to the population, then why did Hannum not consider whether the borders of the Yugoslav republics might similarly have become defensible as the primary civic identity of their inhabitants?294

It thus becomes apparent that the terms peppering Hannum’s criticisms of the Arbitration Commission’s opinion on self-determination - hypocritical, contradictory, unprincipled - depend on context and culture for their bite. Is Swift’s doctor proposing a political saw-off or a design for the protection of negative liberty? Why does the denial of a right of secession to tribes within a former colony strike a balance worthy of the US constitutional tradition and its denial to ethnic minorities within a former Yugoslav republic raise issues of consistency and fairness?

Given that Hannum puts Harry Beran’s theory of secession in the camp of consistency, theory and universalism and Lee Buchheit’s and Lung-Chu Chen’s theories in the camp of inconsistency, non-theory and geopolitical relativism, a comparison of the two types of theory may explain how Hannum makes these judgments.

On Beran’s liberal theory of secession, the liberal “commitment to the freedom of self-governing choosers to live in societies that approach as closely as possible to voluntary schemes, requires that the unity of the state itself be voluntary and, therefore, that secession by part of a state be permitted where it is possible.” Beran’s liberal logic permits any territorially concentrated

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294 But compare Hannum, Book Review, supra note 241 at 467 (commenting on the greater media coverage of recent secessionist claims in the former Soviet Union and Yugoslavia than of earlier secessionist claims in Africa and Asia).
group within the state to secede if the majority of the group so chooses, which, for Hannum, has “the appeal of consistency.” Yet Hannum does not dwell on the fact that Beran limits secession to the morally and politically possible, and thereby introduces conditions that are not necessarily justifiable in liberal terms. Among these conditions are that the group be sufficiently large to assume the basic responsibilities of an independent state, that it occupy an area which is not culturally, economically or militarily essential to the existing state, and that it occupy an area which does not have a disproportionately high share of the economic resources of the existing state.

The balance between the importance of secession for the group and the consequences for other communities is central to both Buchheit’s and Chen’s theories of secession. For Buchheit, a claim to secession made by an ethnically distinct group should be permitted unless it is outweighed by the disruption to the international community. Chen similarly seeks to achieve the optimal combination of minimum world order, defined in terms of unauthorised coercion and violence, and optimum world order, defined in terms of human dignity.

Hannum’s comparison of Buchheit’s and Chen’s theories of secession with Beran’s “philosophically absolutist approach of permitting any secession supported by a majority of the seceding people” suggests a variety of ways in which Hannum might distinguish between coherence and incoherence. First of all, Hannum sees Buchheit’s and Chen’s theories as different from Beran’s because they do not enable us to say anything about a right to secede in the abstract: “The very flexibility that characterizes pragmatism leaves unanswered the fundamental question of whether ethnic homogeneity is a legitimate criterion for statehood.” Yet this distinction seems shaky, given that we could reformulate Buchheit’s theory as the right of an ethnic group to secede

299 Hannum, “Rethinking Self-Determination,” supra note 241 at 44.
301 Chen, “Self-Determination and World Public Order,” supra note 297 at 1293.
303 Ibid.
subject to a limitation and that Beran’s right to secede is also subject to a limitation. A related
distinction made by Hannum is that Buchheit’s and Chen’s theories of secession lack predictability:
“unfortunately the proposed criteria provide no readily manageable norm against which to judge the
legitimacy of secessionist claims.”\textsuperscript{304} If this is a point about the need for interpretation, then
certainly there is no less need for interpretation in the application of Beran’s conditions of viability
as an independent state, the territory in question not being culturally, economically or militarily
essential to the existing state and the territory not representing a disproportionately high share of the
economic resources of the existing state. Perhaps, then, Hannum’s distinction is not about
intelligibility in the abstract, but about structure. Deontological and teleological theories of
secession seem not to capture his critical distinction completely, though, because he ultimately
proposes that we view self-determination teleologically, where the telos is “a democratic
participatory political and economic system in which the rights of individuals and the identity of
minority communities are protected.”\textsuperscript{305} More likely is that Hannum also distinguishes between
the kinds of ends to which self-determination is a means. Hannum compares Buchheit’s
determination of whether a potential secession would promote “general international harmony” to
“the relativist geopolitical calculations of the victors at Versailles.”\textsuperscript{306} But surely this comparison
is overdrawn. A theory that subordinates a right of secession to the goal of international peace and
security is not reducible to a political decision about secession, which reflects the self-interest of the
decision-makers. In this respect, Hannum’s description of the approach to self-determination
developed by Morton Halperin and David Scheffer in \textit{Self-Determination in the New World
Order}\textsuperscript{307} as “somewhat similar”\textsuperscript{308} to Buchheit’s and Chen’s approaches to self-determination

\textsuperscript{304} Ibid.
\textsuperscript{305} Ibid. at 66.
\textsuperscript{306} Ibid. at 48. As a point about discretion, this has already been addressed.
\textsuperscript{307} M.H. Halperin & D.J. Scheffer, with P.L. Small, \textit{Self-Determination in the New World Order}
disregards the fact that Halperin and Scheffer's enterprise was the development of a new US foreign policy on self-determination, an enterprise in which US interests might legitimately be considered. In Buchheit's or Chen's analysis of secession, it would presumably be illegitimate to consider, for instance, the advantages of secession for American multinational corporations. We are left with the impression that Hannum's distinctions between consistent/inconsistent, theory/non-theory and universalism/geopolitical relativism in theories of secession depend largely on an unarticulated distinction between legitimate and illegitimate considerations, where any consideration of international peace and security is illegitimate.

In this light, it appears that Hannum's dismissal of the Arbitration Commission's opinion on self-determination as incoherent is informed by his view of the Arbitration Commission's true motives as geopolitical\textsuperscript{309} and therefore illegitimate. But by comparing Hannum's preferred theory of self-determination with the Arbitration Commission's opinion, we can see that not only may they be similarly inspired, but that the Arbitration Commission's opinion may be more far-sighted.

On Hannum's theory of self-determination, the right of self-determination is one means of achieving a participatory democracy that protects the rights of individuals and the identity of minority communities. As such, it gives all individuals the right to democratic governance and gives minorities the rights necessary to their identity as a community, whether cultural, religious and linguistic rights, a right of autonomy or even a right of self-government.\textsuperscript{310} Only where the state has irremediably failed to respect the rights of a minority does the right of self-determination give that minority a right to secede.\textsuperscript{311}

\textsuperscript{308} Hannum, "Rethinking Self-Determination," \textit{supra} note 241 at 48, n.191.

\textsuperscript{309} Hannum, "Old Wine in New Bottles?," \textit{supra} note 241 at 69.

\textsuperscript{310} Hannum, "Rethinking Self-Determination," \textit{supra} note 241 at 66. On the right of autonomy, see Hannum, \textit{Autonomy, Sovereignty and Self-Determination}, \textit{supra} note 241.

\textsuperscript{311} Hannum, "Rethinking Self-Determination," \textit{supra} note 241 at 63-69.
If we adopt Roland Bieber’s reading of the Arbitration Commission’s opinion on self-determination, a remedial right to secede is the only difference between Hannum’s theory of self-determination and the Arbitration Commission’s opinion. Bieber identifies the primary aim of the Western European states in Yugoslavia as “establishing solid foundations for states based on democratic government, wherein pressure for separation is counterbalanced by adequate means for participation in the democratic process and by efficient instruments for the protection of minorities,” an idea of the state very similar to Hannum’s. Insofar as the Arbitration Commission frames the right of self-determination of the Serbian minority as a right of identity, including a wide range of minority rights, it envisages self-determination as achieving this idea of the state just as Hannum does. The Arbitration Commission clearly does not share Hannum’s view that self-determination justifies the secession of a minority as a last resort where its right of identity is not realised within the state. Its opinion starts with the primacy of territorial integrity and the stability of borders over the right of self-determination. But, Bieber argues, the Arbitration Commission gives this traditional primacy a “consolidated justification”; namely,

In an effective democratic system, coupled with the rule of law and protection of human rights, the right of self-determination of individuals and minorities is sufficiently achieved in as much as it enables each individual to maintain and practice an identity.

And the “consolidated justification” Bieber finds in the Arbitration Commission’s opinion is identical to Hannum’s theory of secession, except in those few extreme cases where Hannum would allow secession and the Arbitration Commission would uphold the territorial status quo. Moreover, these cases become even rarer if one assumes, with Bieber, that the EC approach to Yugoslavia

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312 Bieber, supra note 251.
313 Ibid. at 377.
314 Insofar as the Arbitration Commission implements the EC guidelines on the recognition of new states in Yugoslavia, it may be seen as contradicting this interpretation of self-determination.
315 Bieber, supra note 251 at 377.
increases the overall responsibility of the international community for the internal affairs of states.\textsuperscript{316}

Hannum's idea of coherence thus prevents him from seeing the Arbitration Commission's opinion on self-determination as fundamentally similar to his own theory of self-determination. It similarly prevents him from appreciating that while the Arbitration Commission's interpretation of self-determination does not give minorities a remedial right to secede, it designs new alternatives to secession. Discussing general trends in self-determination, Hannum approves that "as self-determination is expressed in increasingly diverse relationships between central and sub-state entities, the relevance of international frontiers to the lives of most people will continue to diminish."\textsuperscript{317} Indeed, for him, one of the tragic ironies of Yugoslavia is that the borders fetishised in the conflict will be made largely irrelevant by the inevitable desire of the Yugoslav republics to join the European Union. Nevertheless, Hannum deems the Arbitration Commission's interpretation of self-determination as the right to choose one's community through nationality a confused "non-response,"\textsuperscript{318} instead of seeing that it might further diminish the relevance of international frontiers by adding trans-state identifications to the sub-state, state and potentially supra-state identifications.

C A Variable Geometry of Identity

Hannum's assumption that the Arbitration Commission has confused the individual right to choose one's nationality with the collective right of self-determination,\textsuperscript{319} like Craven's precedent of a right of expatriation, causes him to disregard the Arbitration Commission's suggestion that in

\textsuperscript{316} Ibid. at 377-378.
\textsuperscript{317} Hannum, "Rethinking Self-Determination," supra note 241 at 65.
\textsuperscript{318} Ibid. at 54.
\textsuperscript{319} Ibid.
the former Yugoslavia, the concept of nationality could be used to recognise a Serbian identity which cuts across state borders. Although Craven’s other precedent, the right of option, could result in a Serbian community living on Croatian or Bosnian territory while opting for Serbian nationality, the right of option does not prevent Croatia or Bosnia-Herzegovina from realigning identity with the state by requiring those who opted to leave the territory.

In contrast to Craven and Hannum, Alain Pellet reads the right to choose one’s nationality as part of the variable geometry of identity created for Yugoslavia by the Arbitration Commission’s interpretation of self-determination, describing it as

a very remarkable dissociation of nationality and territoriality, certainly fruitful for the future and even more indispensable since the imbrication of ethnies is such in certain republics - above all in Bosnia-Herzegovina - that the carving out of new territories seems totally unrealistic.\(^{320}\)

From Pellet’s perspective, no configuration of states in the former Yugoslavia can do equal justice to all ethnies. By dissociating nationality from territoriality, the Arbitration Commission introduces the possibility of using nationality to recognise an ethnic identity independent of territory and thereby help transcend the limitations inherent in any territorial settlement in the former Yugoslavia.\(^{321}\) Over and above their identity as citizens or residents of a multicultural Croatia or Bosnia-Herzegovina, the Serbian minority could have an identity as Serbian nationals. Pellet uses the example of the European Union citizenship established by the 1992 Maastricht Treaty, which the 1997 draft Amsterdam Treaty describes as complementing but not replacing the nationality of the EU member states.\(^{322}\) The analogy may be not only to the complementarity of citizenship and nationality in the European Union, but also to their relationship as theorised by


some EU scholars. One school of thought on EU citizenship sees the civic virtues represented by
EU citizenship as a moderating influence on the nationalism embodied in member states'
nationality, in Joseph Weiler's words, Civilization taming Eros.\textsuperscript{323}

In all, Pellet see the geometry of identity in the Arbitration Commission's opinions as
having three dimensions: state, sub-state and trans-state. In terms of the state, Opinion No.2 starts
with two ideas about self-determination. The first, developed further in Opinion No.3, is that the
right of self-determination of peoples cannot disturb the territorial integrity of the state and the
stability of borders.\textsuperscript{324} The second idea, that the right of self-determination of peoples is the right
of the population of the state to democratic governance, follows from the EC guidelines on
recognition applied in Opinions Nos.4 to 7, which make democracy a condition for the recognition
of new states in Yugoslavia. The first dimension of identity is therefore the state as democratic
community.

By treating minority rights as part of the Serbian population's right of self-determination,
the Arbitration Commission may be signalling that a "people" need not be the legally homogeneous
population of a state, but can include cultural minorities with a right of identity in the form of
minority rights, and that the right of self-determination can accordingly mean the right to
multicultural democracy.\textsuperscript{325} The alternative to this conception of the multicultural demos is the
view that "peoples" means separately the demos represented by the state and the ethnos within the

\textsuperscript{323} J. Weiler, "To Be a European Citizen - Eros and Civilization" (University of Toronto Faculty of Law
Legal Theory Workshop paper 1997-98 (7)). Weiler draws on, among others, C. Closa, "The Concept of
Citizenship in the Treaty on European Union" (1992) 29 Common Market L. Rev. 1137; C. Closa,

\textsuperscript{324} Pellet, "A Second Breath," supra note 243 at 180.

\textsuperscript{325} See e.g. W. Kymlicka, Multicultural Citizenship (Oxford: Oxford University Press, 1995); I. Young,
state. On the alternative conception, the self-determination of the whole is realised by individual rights of political participation and the self-determination of the parts by minority rights.\textsuperscript{326}

In addition to the state and sub-state dimensions of identity given expression by self-determination, the Arbitration Commission interprets self-determination as potentially expressing a trans-state dimension. Through the right to choose their nationality, individuals belonging to the Serbian minority in Croatia and Bosnia-Herzegovina would effectively expand Serbian nationality beyond the inhabitants of the Republic of Serbia to ethnic Serbs throughout the successor states to Yugoslavia. In other words, Serbian nationality would constitute the Serbian \textit{ethnos} in international law. Technically, Pellet assumes that those individuals living in Croatia and Bosnia-Herzegovina who choose Serbian nationality would retain only assured residency status in those states.\textsuperscript{327} He describes the ultimate objective as “to allow those persons who so wish to, to declare themselves as Serbs while retaining certain civil and political rights in the territories of Bosnia-Herzegovina and Croatia - for example, the right to vote in local elections - without thereby questioning the sovereignty of the State.”\textsuperscript{328} By analogy to EU citizenship, the other possibility\textsuperscript{329} would be to allow dual nationality\textsuperscript{330} and perhaps tailor to the former Yugoslavia the international legal rules regarding the rights of the one state of nationality \textit{vis-à-vis} the other.\textsuperscript{331}

\textsuperscript{326} See Pellet, “A Second Breath,” \textit{supra} note 243 at 179.
\textsuperscript{327} See also B. Kingsbury, “Claims by Non-State Groups in International Law” (1992) 25 Cornell Int’l L.J. 481 at 508 (“Although the Commission is not explicit, it is presumed that choice of Serbian nationality would not entail loss of the right of residence in whichever state the individual lived.”).
\textsuperscript{328} \textit{Ibid.} at 180.
\textsuperscript{330} Article I(7)(d) of the \textit{Constitution of Bosnia and Herzegovina} contained in Annex 4 to the \textit{General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords)}, 14 December 1995. (1996) 35 I.L.M. 117 at 119 provides:

\begin{quote}
Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and
Pellet also provides a broader context for the Arbitration Commission's interpretation of self-determination which resonates with the interpretation of self-determination in *Western Sahara*. Not only do both decisions use interpretation to construct a complex understanding of identity in international law, both expand the relevant community of international law. By this, I mean that it is possible to see the Arbitration Commission's interpretation of self-determination as other than curiously stitched together from various legal categories or jerrybuilt by Western Europe to deal with the political problems of Eastern Europe. Pellet\(^\text{332}\) connects the Arbitration Commission's thinking on self-determination with the European project of identity. With the establishment of EU citizenship in the 1992 *Maastricht Treaty* came renewed interest in how European identity should be conceived. To the old alternatives of building a common "European fatherland" or preserving a "Europe of fatherlands" was added the alternative of European constitutional patriotism.\(^\text{333}\)

Whereas the common "European fatherland" strives for a single European nationality and the "Europe of fatherlands" holds fast to the nationality of the individual European states, European constitutional patriotism decouples citizenship from nationality. This decoupling makes it possible to theorise different types of identifications with different communities. On Joseph Weiler's version, "the invitation is to embrace the national in the in-reaching strong sense of organic-cultural identification and belongingness and to embrace the European in terms of European transnational

\[\text{Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.}\]

\(^{331}\) See *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* (1930) 179 L.N.T.S. 89 at art.4; *Canevaro Case (Italy v Peru)* (1912), 11 R.I.A.A. 397, 6 AJIL 746; *Salem Case (Egypt v U.S.)* (1932), 2 R.I.A.A. 1161; *Mergé Claim* (1955), 22 I.L.R. 443; *Iran v. United States, Case No. A/18* (1984), 5 Iran-U.S. Claims Tribunal Reports 251.

\(^{332}\) See also Bieber, *supra* note 251.

affinities to shared values which transcend the ethno-national diversity. The European is not intended to replace the national, but rather to encourage in it the virtues of tolerance and humanity by subordinating it to certain broader values and decision-making processes. On Pellet’s reading, the Arbitration Commission’s interpretation of self-determination may harbour a similar hope: that by decoupling Serbian nationality from citizenship or residency in a multicultural Croatia and Bosnia-Herzegovina, nationality can recognise legally the importance of ethnicity, and the values of democracy and pluralism required of the territorial state legally can temper the excesses of ethnic nationalism.

III East Timor

In her commentary on the 1995 judgment of the International Court of Justice in East Timor, Christine Chinkin uses the haunting image of an Indonesian wayang: a shadow puppet show, in which the actions and words of the characters appearing before the audience blend with the shadows and reflections of other actors concealed behind the screens. Troublingly visible as

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334 Weiler, supra note 323 at 21.
335 Ibid. at 22.
336 It should be emphasised that the interest of this chapter is in what the Arbitration Commission’s opinion tells us about the evolving relationship between interpretation and identity in decisions on self-determination. Whether the Arbitration Commission’s particular conception of identity is either desirable or realistic in the former Yugoslavia is, of course, altogether different. On the history of international legal schemes for European minorities, see Berman, supra note 235.


For a select bibliography on East Timor generally, see East Timor: Basic Documents, supra note 9 at 487-489.
dark shapes are Indonesia’s actions against the people of East Timor, which shadow Australia’s actions as challenged by Portugal before the Court.

Behind the *East Timor* case is the 1975 military invasion of East Timor by Indonesia and the territory’s subsequent incorporation into Indonesia. East Timor comprises the eastern part of the island of Timor, the nearby islands of Atauro and Jaco, and the enclave of Olé-Cusse in the western part of Timor. East Timor was colonised by Portugal in the sixteenth century, while the western part of the island was a Dutch colony which became part of an independent Indonesia. At the time of the invasion, East Timor was a non-self-governing territory administered by Portugal under chapter XI of the United Nations *Charter*. As a non-self-governing territory, East Timor, like Western Sahara, was entitled to self-determination. To the extent that Indonesia could rely on an interpretation of self-determination similar to those given by Morocco and Mauritania in *Western Sahara* or on competing doctrines of international law to justify its actions, the normative background to the *East Timor* case resembles the *Western Sahara* case. The Court in *East Timor* also upholds the interpretation of self-determination in *Western Sahara* as “the right of the population ... to determine their future political status by their own freely expressed will,” going so far as to recognise the right of self-determination as *erga omnes*.

The parties before the Court in *East Timor* are not, however, the people of East Timor and the state of Indonesia. Instead, it was Portugal that brought the case against Australia.

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338 *East Timor*, supra note 9 at para. 13.
340 See Musgrave, supra note 23 at 242-243; Simpson, supra note 337 at 334-343. For the Indonesian position on the situation in East Timor as it unfolded, see *East Timor: Basic Documents*, supra note 9.
341 *East Timor*, supra note 9 at paras. 31, 37. In fact, this interpretation of self-determination is not in dispute because the parties agree that “the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.” *Ibid.* at para.31.
Although the Portuguese authorities withdrew from East Timor in 1975\textsuperscript{343} and have not exercised control over the territory since then, Portugal alleged that it continued to be the administering power in East Timor. In this capacity, Portugal instituted proceedings against Australia for negotiating, concluding and implementing the 1989 \textit{Timor Gap Treaty}, in which Australia and Indonesia established a provisional arrangement for the exploration and exploitation of the resources of the “Timor Gap,” the undelimited part of the continental shelf between the northern coast of Australia and the southern coast of East Timor.\textsuperscript{344} Portugal maintained that Australia had thereby infringed the rights of the people of East Timor to self-determination and permanent sovereignty over their natural resources, and the rights of Portugal as the administering power.\textsuperscript{345} By a majority of fourteen to two, the Court held that it could not exercise jurisdiction in the case because “in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent.”\textsuperscript{346}

Who is before the Court and who is in shadow serves as a reminder of the Court’s procedural limitations. Australia was the defendant instead of Indonesia because Australia recognises the Court’s compulsory jurisdiction\textsuperscript{347} and Indonesia does not. More disturbing, the presence of Portugal, in place of the people of East Timor, emphasises that the rules of adjudication in international law, whether the \textit{Statute} and \textit{Rules} of the International Court of Justice or the procedures for arbitral tribunals, preclude peoples from participating directly in the adjudication of their right to self-determination, and thereby from the development of self-

\footnotesize{\textsuperscript{343} Ibid. at para.13.  
\textsuperscript{344} Ibid. at paras.18-19.  
\textsuperscript{345} Ibid. at para.19.  
\textsuperscript{346} Ibid. at para.35.  
\textsuperscript{347} Australia, Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with article 36, paragraph 2, of the Statute of the International Court of Justice, 13 March 1975, 961 U.N.T.S. 183.}
determination and international law through interpretation by international judges and arbitrators. The Sahrawi in Western Sahara, the Bani Qitab in the Dubai/Sharjah boundary arbitration\(^{348}\) and the ethnic groups of the former Yugoslavia in the EU Arbitration Commission's *Opinion No. 2*, as well as the people of East Timor, were all excluded from direct participation in these cases.

Under the *ICJ Statute* and *Rules*,\(^{349}\) only states can be parties\(^{350}\) or interveners\(^{351}\) in a contentious proceeding such as the *East Timor* case between Portugal and Australia. While the *ICJ Statute* allows the Court to request information relevant to a contentious case from "public international organizations" and to receive relevant information submitted by "public international organizations" on their own initiative,\(^{352}\) the *ICJ Rules* define such organizations narrowly as "international organizations of states."\(^{353}\) In an advisory proceeding, like Western Sahara, which may be initiated by the General Assembly, Security Council and such other UN bodies as may be authorised,\(^{354}\) the *ICJ Statute* contemplates the appearance of all states so

\(^{348}\) In the *Dubai/Sharjah* boundary arbitration, the Tribunal, despite its usual caution with respect to statements made in the case, did emphasise the importance of a statement made by two paramount chiefs, seventeen chiefs and three elders of the Bani Qitab was emphasised by the Tribunal. *Dubai/Sharjah*, supra note 7 at 639.


\(^{350}\) *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No.7, art.34(1) [hereinafter *ICJ Statute*]. Indigenous peoples have tried unsuccessfully to invoke the jurisdiction of the Court on the ground that they constitute nations. J.G.S., "Access of Individuals to the International Court of Justice" (1978) 52 Australian L.J. 523, 523.


\(^{352}\) *Ibid.* at art.34(2).

\(^{353}\) *Rules of the International Court of Justice*, adopted 14 April 1978, reprinted in (1979) 73 AJIL 748 at 770, art.69(4). On the drafting history of the term "public international organizations," see Shelton, supra note 349 at 620-621. In the *Asylum* case, the Registrar of the Court rejected a request by an international human rights organisation to participate on the grounds that it could not "be characterized as a public international organization as envisaged by Statute." *Asylum Case (Columbia v. Peru)*, Letter from Robert Delson, Member of Board of Directors of International League for the Rights of Man to the Registrar, [1950] 2 I.C.J. Pleadings 227 (7 March 1950).

entitled355 and of relevant "international organizations,"356 a term potentially broader than "public international organizations." The Court’s granting early on of a request from an international human rights organisation to submit information in the 1950 International Status of South West Africa proceedings357 demonstrates that international organizations need not be organizations of states, but the denial of similar requests in later advisory proceedings358 indicates that the Court is generally reluctant to expand participation to nongovernmental organizations. Moreover, its rulings have made clear that national groups and individuals cannot submit information in advisory proceedings.359 Independent of other parties and interveners, the only opportunities for a people to participate directly in either a contentious or advisory proceeding would therefore seem to be360 the Statute’s provision for expert opinions361 and the Court’s recognition in Military and Paramilitary Activities in and Against Nicaragua that information could come to it “in ways and by means not contemplated by the Rules.”362

355 ICJ Statute, supra note 350 at art.66(1).
356 Ibid. at art.66(2). On the drafting history of the term “international organizations,” see Shelton, supra note 349 at 621-623.
358 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 [hereinafter Namibia], Telegram and Letter of the Chairman of the Board of Directors of the International League for the Rights of Man to the Registrar, [1970] 2 I.C.J. Pleadings 639 (10 November 1970); Letter of the Registrar to the Chairman of the Board of Directors of the International League for the Rights of Man, in ibid. at 672 (4 February 1971); Letter of the Chairman of the Board of Directors of the International League for the Rights of Man to the Registrar in ibid. at 678 (16 February 1971); Letter from the Registrar to the Chairman of the Board of Directors of the International League for the Rights of Man in ibid. at 679 (18 March 1971); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Letter from the Registrar, cited by Shelton, supra note 349 at 624.
360 Shelton, supra note 349 at 627-628.
361 ICJ Statute, supra note 350 at art.50.
For some observers of the Court, the shadow puppet show in cases like East Timor points to the need for reform of the Court’s rules on standing or to the Court’s duty to develop some functional equivalent for peoples.\(^{363}\) In fact, as will be seen, the separate opinion of Judge Vereshchetin in *East Timor* already goes some distance toward the latter through its interpretation of Portugal’s legal obligations to the people of East Timor.

As Chinkin describes the *wayang*, it depends on the relationship between the characters in front of the screen and those behind it. Similarly, even if Portugal’s motives for bringing the case had nothing whatsoever to do with the welfare of the East Timorese people, it has a special legal relationship to them as the administering power. In international law, the inter-war mandate territories supervised by the League of Nations and after World War II all dependent territories under the United Nations were treated as a “sacred trust,” where the state administering the territory had certain duties toward the people of the territory. These duties have traditionally been analogised to a trustee’s duty to act in the interests of the beneficiary, supplemented by the assumption that colonial peoples, like children, were not yet capable of judging what was in their own interests.

The issue of interpretation of self-determination examined in this part of the chapter is how several of the judges in *East Timor* reconcile this traditional conception of trusteeship found in article 73 of the *UN Charter* with the right of self-determination of colonial peoples later developed in the *Declaration on the Independence of Colonial Peoples* (GA Resolution 1514),\(^{364}\) *Declaration on Friendly Relations* (GA Resolution 2625),\(^{365}\) *Resolution on Permanent Sovereignty*.

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\(^{363}\) E.g. Klein, *supra* note 337 at 345; Reisman, *supra* note 5 at 361-362.

\(^{364}\) *Declaration on the Independence of Colonial Peoples*, *supra* note 194.

over Natural Resources (GA Resolution 1803)\textsuperscript{366} and other General Assembly resolutions. The way in which trusteeship, predicated on cultural inferiority and the consequent irrelevance of the people’s wishes, is reconciled with self-determination, based on equality and the need to consult the people on their future political status, implicates both the image of colonial peoples in international law and their entitlement to participate in cases that immediately concern them.

Following a historical overview of the issue in Section A, Section B examines the relevant arguments and opinions in East Timor. Since the Court dismisses the East Timor case on the ground that Indonesia is a necessary third party, it does not deal\textsuperscript{367} with the interpretation and application of the concept of trusteeship.\textsuperscript{368} However, Judge Vereshchetin focuses his separate opinion on the interpretation of the relationship between the administering power of a UN non-self-governing territory and the territory’s inhabitants, and Judges Weeramantry and Skubiszewski also address the issue in their dissenting opinions.

A Historical Overview

Although the idea that colonialism was a trust exercised by the coloniser for the benefit of the colonised has a very long history in international law,\textsuperscript{369} the idea that finds expression in the


\textsuperscript{367} The Court does find, however, that the relevant UN resolutions do not establish a duty of third states, such as Australia, to treat exclusively with Portugal as regards the continental shelf of East Timor. East Timor, supra note 9 at para.32.

\textsuperscript{368} Apart from the duties of the administering power of a non-self-governing territory to the territory’s inhabitants, the “sacred trust” in East Timor raises other issues of interpretation (notably, what the rights of the administering power are and what the duties of third states, such as Australia, are to the people and to the administering power) and application (in what sense Portugal is still the administering power and, depending on the interpretation given to trusteeship, how to determine which East Timorese group or groups represent the East Timorese people).

\textsuperscript{369} See F. de Victoria, De Indis et de Ivre Belli Relectiones (1557) (First in the series “The Classics of International Law”) (Washington: Carnegie Endowment for International Peace, 1917); South West Africa, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa), [1966] I.C.J. Rep. 6 at 265 (Dissenting Opinion of Judge Tanaka). The idea of the trust also seems to be inexhaustible in
League of Nations system of mandate territories and later in the United Nations system of trust and non-self-governing territories is traced back by its mid-twentieth century chroniclers, such as Duncan Hall\textsuperscript{370} and Charmian Toussaint,\textsuperscript{371} only as far as Edmund Burke's 1783 speech in the British House of Commons on the principles of colonial rule in India:

All political power which is set over men, and ... all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation [sic] from the natural equality of mankind at large, ought to be in some way or other exercised ultimately for their benefit.

If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original self-derived rights, or grants for the benefit of the holders, then such rights or privileges, or whatever else you choose to call them, are all, in the strictest sense, a trust; and it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence.\textsuperscript{372}

Five years later, in the impeachment trial of the Governor-General of India Warren Hastings before the House of Lords, Burke would charge Hastings with breach of the colonial trust, impeaching him in the name of the people of India.\textsuperscript{373} Hall, in his 1948 work on mandates, dependencies and trusteeship, groups the trial of Warren Hastings with the struggle for the abolition of the slave trade and slavery as the progressive forces that gave birth to the national trusteeship systems and, later, the international mandate and trusteeship systems of this century.\textsuperscript{374}


\textsuperscript{372} Hansard, \textit{Parliamentary History}, Vol. 23 (1783), cols. 1316-1317, \textit{quoted in} Toussaint, \textit{supra} note 371 at 6. See also Hall, \textit{supra} note 370 at 92, 98.


\textsuperscript{374} Hall, \textit{supra} note 370 at 99.
In this sense, the idea of the colonial trust represented an extension of liberalism\textsuperscript{375} to the British colonies: the application to the colonies of Locke’s conception of political power as a trust.\textsuperscript{376} The reference in article 22 of the \textit{League Covenant}, which establishes the system of mandate territories, to the well-being of the inhabitants of these territories as a “sacred trust” echoes Locke’s idea, as do the opening words of article 73 of the UN \textit{Charter}:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories ...

Post-colonial writers on international law\textsuperscript{377} narrate the history of trusteeship differently, tending to view it as structuring the justification of colonialism from the time of Francisco de Vitoria in the sixteenth century, adaptable to the successive justifications of Christianity and civilisation. For these authors, the “sacred trust” did not well up from eighteenth century European liberalism, but dissimulated from early on the combination of political and economic incentives and profoundly racist attitudes towards non-European peoples which drove colonialism.\textsuperscript{378} In Toussaint’s\textsuperscript{379} mid-twentieth century account, the political and economic

\begin{itemize}
\item \textsuperscript{375} Compare Mauritania’s argument on \textit{terra nullius} in Western Sahara. Above at pp.156-157.
\item \textsuperscript{376} Toussaint, \textit{supra} note 371 at 6.
\item \textsuperscript{378} It should be noted that alongside the noble motives for the mandate system, Hall stresses that of politically expedient solutions to problems of the balance of power in frontier zones. Hall, \textit{supra} note 370 at 92.
\item \textsuperscript{379} Toussaint, \textit{supra} note 371 at 11-14. See also Hall, \textit{supra} note 370 at 33, 97, 105. Toussaint actually identifies two separate principles in this regard: colonial administration for the benefit of the world at large and international accountability. In the \textit{League Covenant}, see art.22(5) (Mandatory power to prevent “the establishment of fortifications or military and naval bases and of military training of the
incentives are disguised in Lord Lugard's enduring idea of the "dual mandate": the administration of the colonies for the benefit of the native people and the benefit once of the colonial power, now of the world at large. However, it is the racial prejudice that I wish to pursue here.

As Toussaint points out, Burke's 1783 speech anticipates that the trust will cease when it no longer serves its purpose. At the 1926 Imperial Conference, the British government officially recognised that British colonialism was a temporary status leading to self-government. What Toussaint and his contemporaries make less of is the sociological premise informing the determination of when a colony was ready for self-government: the idea that colonial societies worked their way up an evolutionary ladder of development with the highest rung being European society, and that while they could not skip a rung, their progress up the ladder could be speeded by European assistance. Perhaps nowhere was this assumption more obvious than in the institutional form given to trusteeship in the League system of mandate territories. In practice, mandate territories were colonies and territories detached from the defeated Germany and Turkey after World War I and administered, under mandate, by one or more of the victorious powers. Article 22 of the Covenant reads in part:

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle

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natives for other than police purposes and the defence of the territory" and to secure “equal opportunities for the trade and commerce of other Members of the League”) and art.22(7), (9) (Mandatory to report annually to the Council, which will be advised by a permanent Commission on mandates). In the UN Charter, see arts.73(d) (non-self-governing territories) and 76(a), (d) (trust territories) regarding benefit to the world at large and chapters XI (non-self-governing territories) and XII-XIII (trust territories) regarding international accountability.

380 Ibid. at 14-15.
381 C. Hurst, Great Britain and the Dominions (Chicago: University of Chicago Press, 1928) at 12.
382 The ladder metaphor is used by Hall, supra note 370 at 97 ("a ladder ... up which primitive native tribes could climb steadily to the goal of a self-governing people").
that the well-being and development of such peoples form a sacred trust of
civilisation ...

2. The best method of giving practical effect to this principle is that the tutelage
of such people should be entrusted to advanced nations who, by reason of their
resources, their experience or their geographical position, can best undertake this
responsibility ...

3. The character of the mandate must differ according to the stage of development
of the people, the geographical situation of the territory, its economic conditions
and other similar circumstances.\footnote{Covenant of the League of Nations, 28 June 1919, 112 U.K.F.S. 13, art.22.}

Under article 22, the mandates were classified as A, B or C according to their stage of
development. The A mandates, which included Iraq, Syria and Lebanon, were described as those
communities that “had reached a stage of development where their existence as independent
nations can be provisionally recognised subject to the rendering of administrative advice and
assistance by a Mandatory until such time as they are able to stand alone.”\footnote{Ibid. at art.22(4).}
Whereas the
destiny of the A mandates was full independence, the goal for the B mandates was not stated.\footnote{Ibid. at art.22(5).}
The C mandates, considered the least likely to be able to stand alone under “the strenuous
conditions of the modern world,” were slated for assimilation into the territory of the mandatory
state. In the words of article 22, the C mandates, among which were South West Africa and a
number of South Pacific islands, could “be best administered under the laws of the Mandatory as
integral portions of its territory.”\footnote{Ibid. at art.22(6).}

This distinction between mature and immature societies\footnote{The language of maturity is used, for example, by N. Bentwich, “Le Système des Mandats” (1929-IV) 29 Rec. des Cours 115 at 129-130.} differentiated the concept of
trusteeship applied to colonies from the liberal idea that those who possessed political power had
a duty to exercise it for the benefit of those subjected to it. To trusteeship thus was added
tutelage. Quincy Wright, in his 1930 *Mandates Under the League of Nations*, compares the relationship between mandatory power and mandate territory to the guardianship of a minor, with the mandate territory to be educated for self-government. Norman Bentwich compounds the common law concept of the trust – "that is to say, goods held by one person for the benefit of another for a certain purpose and with the duty to account to a tribunal for the way in which he fulfils the charge" – with the civil law concept of the tutelle of a minor.

Analysing the "sacred trust" embodied in the League of Nations mandate system, Judge McNair wrote in the 1950 advisory opinion of the International Court of Justice in *International Status of South-West Africa*:

Nearly every legal system possesses some institution whereby the property (and sometimes the persons) of those who are not sui juris, such as a minor or a lunatic, can be entrusted to some responsible person such as a trustee or tuteur or curateur. The Anglo-American trust serves this purpose, and another purpose even more closely akin to the Mandates System, namely, the vesting of property in trustees, and its management by them in order that the public or some class of the public may derive benefit or that some public purpose may be served. The trust has frequently been used to protect the weak and the dependent ...

In addition to the liberal aim of trusteeship, the chapters of the UN Charter on non-self-governing (chapter XI) and trust territories (chapters XII and XIII) reflect the cultural paternalism of this guardianship or tutelage. In keeping with their role as guardian or tutor,

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389 Bentwich, *supra* note 387 at 125.
390 *ibid*. at 130.
391 *International Status of South-West Africa*, Advisory Opinion, [1950] I.C.J. Rep. 128 at 149 (Separate Opinion of Judge McNair). See also *ibid*. at 174, 179-180 (Dissenting Opinion of Judge Alvarez) (stressing the duty to prepare the people of a mandate or trusteeship for independent life, as well as the duty to protect them).

In *International Status of South-West Africa*, there is some discussion among the judges as to the appropriateness of analogies to private law.
392 While both non-self-governing and trust territories are treated conceptually as a "sacred trust," institutionally they are governed by different systems under the UN Charter, *supra* note 354. As East Timor is a non-self-governing territory, the discussion here will focus on non-self-governing territories. On trust territories, see Chapter 7, below.
states administering non-self-governing territories are responsible for the protection and education of the people. 393 Whereas the Charter requires administering states to develop self-government, 394 it makes no mention of a right of self-determination of peoples.

In contrast, the later Declaration on the Independence of Colonial Peoples (GA Resolution 1514), 395 the international legal manifesto of decolonization, unequivocally gives all colonial peoples the right of self-determination; that is, the right to determine their political status freely and to pursue their economic, social and cultural development freely. Not only does every colonial people have the choice of independence, the choice is theirs immediately. Sweeping aside the discourse of stages of development, the Declaration states “inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.” In a complete rejection of trusteeship and its racial underpinnings of tutelage, it insists that

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of these territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

393 Ibid. at art.73(a). But see the following petition submitted to the Trusteeship Council in 1950 by the Évolution sociale camerounaise concerning the French trust territory of Cameroons:

What is beginning to make us anxious is that the French, who have undertaken before the League of Nations [under the mandate system to which the UN trusteeship system was heir] the task of civilizing us, retire in the heart of the African continent into special restaurants and cinemas. We have, so to speak, no contact with them except during working hours, when they are still nearly all shut away in their offices. Even if we admit that such civilizing contact is sufficient for us, what will become of our wives and children, who do not come to work and see the white Frenchman? If it were possible to civilize men from a distance, we should have preferred to take our civilization by correspondence.

...

Why do educated Africans at the present day not enjoy the same social privileges as Europeans? ... It will therefore be necessary to define the degree of evolution necessary to an African in order that he may enjoy the same advantages as Europeans without needing to become a French citizen.

Petition from the Évolution sociale camerounaise concerning the Cameroons under French administration, UN Doc. T/Pet.5/54 (1950). The Évolution sociale camerounaise describes itself in the petition as a political party that supports the French trusteeship.

394 Ibid. at art.73(b).

395 Declaration on the Independence of Colonial Peoples, supra note 364.
In its 1971 advisory opinion on Namibia, the International Court of Justice concluded that developments in international law, culminating in the Declaration on the Independence of Colonial Peoples, had left little doubt that "the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."396

The UN Charter and the Declaration on the Independence of Colonial Peoples thus represent two different approaches to decolonisation. When drafted, the UN Charter envisaged self-government as the eventual outcome of the sacred trust, which would protect a colonial people while preparing them politically, economically, socially and educationally for self-government. On the basis of the equality of peoples, the Declaration and the resolutions that came after it397 demand the immediate exercise of self-determination, which is assumed to result in independence.

The quandary in East Timor is therefore as follows. The Declaration on the Independence of Colonial Peoples and later the Declaration on Friendly Relations, recognised by the International Court of Justice in Western Sahara as the source of the right of self-determination in international law,398 make no room for the idea of trusteeship. They anticipate the immediate exercise of the right of self-determination of peoples. How, especially in a case such as East Timor, where the exercise of self-determination is indefinitely delayed, should the Court interpret the ongoing relationship between the administering power and the people of the non-self-governing territory? In particular, is the governing idea the traditional understanding of the administering power as better-knowing trustee or has it been replaced by some conception of the administering power as the agent of the people?

397 See the principle of self-determination in Declaration on Friendly Relations (GA Resolution 2625), supra note 365 at paras. 1, 2, 4.
398 See Western Sahara, supra note 6 at paras. 57-58.
The difference between trustee and agent in a similar legal context is captured by the Supreme Court of Canada’s discussion in *Guerin v. The Queen*\(^{399}\) of the fiduciary relationship in Canadian law between aboriginal peoples and the federal government. In *Guerin*, the Musqueam Indian Band had aboriginal title to four hundred acres of land in the City of Vancouver. Under Canadian law, aboriginal title to land is alienable only to the Crown. As a result, any sale or lease to a third party cannot take place directly, but must be carried out by surrender to the Crown, whereupon the Crown acts on the aboriginal people’s behalf. The Court in *Guerin* found that the Crown’s lease of part of the Musqueam land for a golf course violated the Crown’s fiduciary duty to the band because Crown officials had promised to lease the land on certain specified terms and then, after surrender, had obtained a lease on different and much less valuable terms. The Court described the relationship between the Crown and aboriginal peoples as combining the characteristics of trust and agency:

[While the Crown’s fiduciary obligation to the Indians is not technically a trust,] the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land *for the use and benefit* of the surrendering band ... The fiduciary relationship between the Crown and Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act *on behalf* of the Indian bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties.\(^{400}\)

The Crown’s breach of duty in *Guerin* therefore was by analogy to both trust and agency: it lay both in the Crown’s failure to obtain the best possible terms and in its acting without the band’s authorisation.


\(^{400}\) [emphasis mine] *Guerin*, supra note 399 at 342.
B  Arguments and Opinions in *East Timor*

Having not sought the consent of the people of East Timor before bringing the case, Portugal appeals to the traditional role of the administering power as trustee and additionally to its role as representative of the East Timorese people by virtue of its singular position as administering power. To the first, Australia responds that an administering power no longer in control of a non-self-governing territory does not have automatic standing as trustee for the territory’s inhabitants. Capitalising on Portugal’s lack of demonstrated support from the East Timorese people, Australia argues as to the second that Portugal must be the people’s chosen and authorised representative in the case. In any event, according to Australia, the appropriate dispute-resolution process is not adjudication, which, at best, allows the people of East Timor to participate only indirectly, but a process of consultation and negotiation which includes them directly as one of the parties.

Portugal’s claim that it has standing as trustee rests on its modern reinterpretation of the “sacred trust,” which incorporates the paradigm shift from Charter article 73 to the right of self-determination in the *Declaration on the Independence of Colonial Peoples* and subsequent resolutions. On Portugal’s account of the development of self-determination in international law, the *Declaration* is a watershed. It replaces “the international control of management by the

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401 *East Timor*, supra note 9 at 1 (Separate Opinion of Judge Vereshchetin).
403 *East Timor*, Rejoinder of the Government of Australia, pt.I, c.2, s.I (60-66) (paras.125-144) [hereinafter Australia, Rejoinder]. As the issue under consideration in this part of the chapter is Portugal’s duties as the administering power to the people of East Timor, as distinct from its rights vis-à-vis other states, this response by Australia is not pursued here.
405 *East Timor*, Counter-Memorial of the Government of Australia, pt.II, c.3, s.II (128-135) (paras.287-305) [hereinafter Australia, Counter-Memorial].
406 *East Timor*, Mémoire du Gouvernement de la République Portugaise, pt.II, cc.IV-V (79-160) (paras.4.01-5.60) [hereinafter Portugal, Memorial].
administering power" envisaged by article 73 with "the pure and simple abolition of colonial administration." In Eduardo Jiménez de Aréchaga's phrase, quoted by Portugal, the Declaration recognises that "good government is not a substitute for self-government."

By reading the right of self-determination of peoples into article 73, Portugal actualises the interpretation of the "sacred trust": the principle of trusteeship applies, but only transitionally, while the principle of tutelage is rejected outright. As trustee, Portugal has the duty to act in the interests of the East Timorese people and to promote their well-being. But this duty no longer involves the political, economic and social remaking of the people in the European image. Instead, Portugal must expedite the exercise of self-determination by the people and, in the interim, preserve the people's resources and sovereignty over their resources.

Thus, working from the idea that all peoples are equal and all have the same right to choose their place in the world, Portugal reinterprets the administering power's duty as to give the people that choice in short order and not to undermine it through political, economic and social engineering. No matter how narrowly this duty is defined, however, it would still seem to be the

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408 Ibid. at pt.II, c.IV, s.1(B)(1)(a) (86) (paras.4.14) at 88, para.4.18.
409 Ibid., quoting E. Jiménez de Aréchaga, "International Law in the Last Third of a Century" (1978-l) 159 Rec. des Cours 1 at 103.
410 The French expression used by Portugal is "interprétation actualiste." Ibid. at pt.II, c.V, s.2(B) (151)(para.5.46) at 153, para.5.48. Older provisions of international law are actualised or contemporised by reading in contemporary values. Reisman identifies the Court's remarks on the need for actualisation as a method of interpretation (he gives as an example South West Africa - Voting Procedure, Advisory Opinion, [1955] I.C.J. Rep. 67 at 77) as one of the procedural steps that the Court could take to respond to the anachronistic treatment of indigenous peoples' rights. Reisman, supra note 5 at 360.
411 Ibid., Memorial, supra note 406 at pt.II, c.V, s.1(B) (128) (para.5.07) at 141-146, paras.5.29-5.38.
412 Ibid. at pt.II, c.V, s.1(A) (125-128) (para.5.10-5.06) ("La qualification de la fonction juridique de la puissance administrante comme 'sacred trust' ... s'inspire fondamentalement de la conception anglo-saxonne de 'trust'" at 127-128, para.5.05); pt.II, c.V, s.2(A) (148) (para.5.41) ("Les idées de primauté des intérêts des habitants du territoire et de 'mission sacrée' signifient que les pouvoirs d'administration sont des pouvoirs fonctionnels, des pouvoirs qui existent comme instrument juridique de satisfaction d'un devoir de gestion d'intérêts étrangers à leur titulaire" at 149-150, para.5.42).
413 Ibid. at pt.II, c.V, s.2(B) (151-154) (para.5.46-5.49); Portugal, Reply, supra note 402 at pt.II, c.VIII, s.2 (238) (para.8.03) at 239, para.8.03.
administering power that decides how best to carry it out. Pending the exercise of self-determination, the people have no right to be consulted by the administering power. In a case before the International Court of Justice, such as *East Timor*, the administering power speaks for the people of a non-self-governing territory, but the people themselves do not speak through it.

In contrast, Portugal's other basis for standing, that as the administering power of East Timor, it represents the people of the territory, could be seen as requiring the consent of the people. Instead of treating the non-self-governing status of East Timor as a relic of colonialism, this conception of Portugal's standing presents East Timor as one of those geopolitical oddities where a territorially-based non-state entity must rely on a particular state, from which it is separate and distinct, to represent it internationally.\(^{414}\) For example, Portugal maintains that the relationship of Portugal to East Timor is analogous to that of the United Kingdom to the Island of Jersey in the *Minquiers and Écréhous* case. Jersey and the other Channel Islands belong to the British Crown, but are not part of the United Kingdom. Historically, they were not colonies. They have a unique status and enjoy extensive autonomy founded on ancient constitutional conventions. In *Minquiers and Écréhous*, the disputed groups of small islands and rocks were considered by the UK government to be dependencies of Jersey. In this sense, the United Kingdom in the case represented a separate and distinct political entity that it was uniquely placed to represent.\(^{415}\) Although Portugal does not elaborate on what is involved in representation, it would arguably require Portugal to consult, if not obtain the consent of, the people of East Timor to the proceedings against Australia. If the meaning of representation is taken this far, then a colonial people would be able to communicate its wishes and views to the Court through the administering power.

\(^{414}\) Portugal, Memorial, *supra* note 406 at pt.II, c.IV, s.1(C)(I)(b) (108) (para.4.51) at 111-112, para.4.55; Portugal, Reply, *supra* note 402 at pt.II, c.8, s.3 (243) (para.8.09) at 243-246, paras.8.09-8.13.

\(^{415}\) Portugal, Reply, *supra* note 402 at pt.II, c.8, s.2 (238) (para.8.03) at 241-242, para.8.06; *ibid.* at pt.II, c.8, s.3 (243) (para.8.09) at 246, para.8.13.
Australia takes the idea of representation further, arguing that it must involve choice of representative as well as consent to the course of action. Australia points to evidence that when Portugal withdrew from East Timor in 1975, none of the conflicting local political forces wanted to depend on Portugal as the continuing administering power; one proclaimed independence, while another proclaimed integration with Indonesia. If there is now, as Portugal's evidence indicates, some East Timorese support for Portugal and the Portuguese case against Australia, it does not amount to a meaningful choice of Portugal as representative. Moreover, Australia contends that the appropriate process for resolving the East Timor dispute is and is seen by representatives of the East Timorese people to be, direct consultation and negotiation between the people of East Timor, Portugal and Indonesia under the auspices of the United Nations.

In his separate opinion, Judge Vereshchetin begins with the fact that although Portugal, the applicant state in East Timor, has acted in the name of the people of East Timor, it did not seek their consent before filing the application. He recalls that the Court's finding of inadmissibility in East Timor is based on Indonesia's right not to be subjected to the Court's jurisdiction without its consent. Although there is no similar reference to the people of East Timor in the Court's judgment, writes Vereshchetin, it would be a mistake to conclude that their consent was therefore not equally necessary for admissibility.

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416 Australia, Counter-Memorial, supra note 405 at pt.II, c.2, s.II(A) (111-112) (para.242); Australia, Reply, supra note 403 at pt.I, c.2, s.II (66) (para.145) at 67, paras.148-149.
417 Portugal, Memorial, supra note 406 at c.I, s.2(H) (46-48) (paras.1.67-1.72); Portugal, Reply, supra note 402 at Preliminary Part, c.III, s.3 (36-39) (paras.3.13-3.18).
418 Supra note 405 and accompanying text.
419 Australia, Reply, supra note 403 at pt.I, c.2, s.II (66) (para.145) at 68, para.150.
420 Technically, the Court applied the so-called Monetary Gold principle, which interprets the requirement of consent to mean that the Court has no jurisdiction where the legal interests of a third state, such as Indonesia, form the very subject-matter of the decision. Monetary Gold Removed From Rome in 1943 (Italy v. France, United Kingdom and United States), [1954] I.C.J. Rep. 19.
421 East Timor, supra note 9 at 1 (Separate Opinion of Judge Vereshchetin).
While Judge Vereshchetin equates the people of East Timor with the state of Indonesia as necessary third parties, he acknowledges that the *ICJ Statute* does not give peoples the same access as states to the Court.\(^{422}\) As already discussed,\(^{423}\) the *Statute* allows only states to be parties in cases before the Court. Without disturbing this limit on standing, Vereshchetin finds that Portugal had "a duty to consult the leaders or representatives of the people before submitting the case to the Court on its behalf."\(^{424}\)

In an international order traditionally centred on states, Judge Vereshchetin’s starting assumption that peoples can normatively be third parties on a par with states is, by itself, remarkable and indicative of how different international law might look from the perspective of the right of self-determination of peoples.\(^{425}\) Similarly, Vereshchetin’s conclusion that in a Court for states, a state bringing a case as the administering power of a non-self-governing territory has the duty to consult the people of the territory follows from viewing the “sacred trust” through the lens of self-determination. Vereshchetin’s method of interpretation resembles Portugal’s\(^{426}\) in that he reads the right of self-determination developed in the *Declaration on the Independence of Colonial Peoples* into the “sacred trust” in article 73 of the *Charter*.\(^{427}\) The difference is that Portugal

\(^{422}\) *Ibid.*

\(^{423}\) See above at pp.234-235.

\(^{424}\) *East Timor, supra* note 9 at 2 (Separate Opinion of Judge Vereshchetin).

\(^{425}\) Compare Klein, *supra* note 337 (using Antonio Cassese’s state-centric “Westphalian” and diversified “UN Charter” models of international law to analyse *East Timor*).

\(^{426}\) Unlike Vereshchetin, Portugal does not integrate the ideas of trustee and representative in the “sacred trust.”

\(^{427}\) *East Timor, supra* note 9 at 3 (Separate Opinion of Judge Vereshchetin):

The United Nations Charter, having been adopted at the very outset of the process of decolonization, could not explicitly impose on the administering Power the obligation to consult the people of a non-self-governing territory when the matter at issue directly concerned that people. This does not mean, however, that such a duty has no place at all in international law at the present stage of its development and in the contemporary setting of the decolonization process, after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).
projects only the urgency and the imperativeness of self-determination, whereas Vereshchetin projects the actual meaning. Portugal abbreviates and neutralises the idea of trusteeship in order to guarantee self-determination. Vereshchetin instead infuses trusteeship with the essence of self-determination as expressed by the Court in *Western Sahara*: “the need to pay regard to the freely expressed will of peoples.” For Vereshchetin, all administering powers have a duty of consultation, although, as an administering power that for many years has not been in effective control of the territory, Portugal has an even more compelling duty to ascertain and take into account the wishes of the people.429

Like the Canadian Supreme Court’s interpretation of the fiduciary relationship between aboriginal peoples and the Crown in *Guerin*, Judge Vereshchetin thus reinterprets the concept of the “sacred trust” such that the characteristics of the trust, once tied to the indignity of tutelage, are now combined with the characteristics of agency. Vereshchetin thereby creates the possibility of a colonial people’s indirect participation before the Court in a case concerning their right of self-determination.430 The larger point, which ties into the other cases in this chapter, is that the reconception of participation is intimately connected to the reconception of identity. So long as colonial peoples were imagined as child-like, it would have been unthinkable for them to be consulted, rather than guided, by the administering power. The duty to consult is only made possible by the recognition of their equality in the right of self-determination.

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428 *Western Sahara*, supra note 6 at para.59, discussed by Judge Vereshchetin at *East Timor*, supra note 9 at 2-4. As possible justifications for Portugal’s failure to consult, Vereshchetin considers and dismisses the exceptions given in *Western Sahara* to the requirement of consultation.


430 This is not to underestimate the resulting problems of agency. Interestingly, Vereshchetin’s language is broad enough to suggest that the Court itself might have a duty to verify the wishes and views of the people. In addition to his reference to the need for the Court to ascertain and take into account the people’s wishes, his reference to “the necessity for the Court to check [the claims of the administering power] by reference to the existing evidence of the will of the people concerned” may contemplate available evidence beyond that presented by the parties. *East Timor*, supra note 9 at 1 (Separate opinion of Judge Vereshchetin).
But if identity says something about participation, then participation also says something about identity. Judge Vereshchetin reconciles the two by reconceiving participation. Accordingly, he concludes that the *East Timor* case is inadmissible because Portugal did not consult the East Timorese people. Chinkin points out, however, that “this conclusion is a double-edged sword for the East Timorese: while it recognizes the inappropriateness of proceedings that fail to accord a voice to those most immediately concerned, the outcome is to deny judicial consideration of their situation.”

Sensitive to this Hobson’s choice, the two dissenting judges, Weeramantry and Skubiszewski, find the case admissible. Applying the pure principle of trusteeship, Judge Weeramantry finds that Portugal’s failure to consult the East Timorese people is not a bar to admissibility:

...the power given by the Charter under Chapter XI is clearly the power of a trustee. The power derives expressly from the concept of a “sacred trust”, thus underlining its fiduciary character. The very concept of trusteeship carries with it the power of representation, whether one looks at the common law concept of trusteeship or the civil law concept of *tutela*. A trustee, once appointed, always carries out his or her duties under supervision, but is not required to seek afresh the right of representation each time it is to be exercised, for that it part and parcel of the concept of trusteeship itself.

But to accept that the people of East Timor need have no say is to risk perpetuating the stereotype of colonial peoples as unready to make decisions about their own lives. To outweigh Australia’s objections to jurisdiction and admissibility, Weeramantry invokes “the high idealism which is the essential spirit of the *Charter* - an idealism which spoke in terms of a ‘sacred trust’ lying upon the powers assuming responsibilities for their administration, an idealism which stipulated that the interests of the inhabitants were paramount.”

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431 Chinkin, Case Comment, *supra* note 337 at 722.
433 Ibid. at 31.
ideals of the Charter, however, is also a return to the unreconstructed notions of trusteeship, under which a European administering power decided what was in the best interests of a colonial people; and of tutelage, which assumed that the colonial people was too backward to do so.434

Presumably to avoid this stereotype, Judge Weeramantry strives to present the purpose of the "sacred trust" as procedural and the administering power's duties under the trust as conservationist. He identifies the underlying philosophy of the UN Charter's system of non-self-governing territories as to avoid leaving the people of these territories defenceless and voiceless in a world order which had not yet accorded them an independent status.435 The administering power is their voice - indeed, their only voice436 - in the international community. To deprive them of it, for whatever reason, would be to silence them altogether and thereby defeat the very purpose of the Charter's institutional design. Weeramantry writes:

The deep concern for their welfare, which is a primary object of Chapter XI of the Charter, and the "sacred trust" notion which is its highest conceptual expression, would then be reduced to futility; and the protective structure, so carefully built upon these concepts, would disintegrate ...437

The legacy of cultural paternalism in the "sacred trust" is also downplayed by Weeramantry's portrayal, like Portugal's, of the administering power as a caretaker: its duty is to safeguard the people's sovereignty, including their economic sovereignty, until they freely exercise their right of self-determination.438

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434 Judge Weeramantry uses the language of trusteeship and tutelage at 42, 44, 49.
435 Ibid. at 31.
436 Ibid. at 33.
437 Ibid. at 32. See also ibid. at 41 (stating that Portugal's poor colonial record is irrelevant because a refusal to recognise Portugal's power to protect the East Timorese people, based on its past performance, would leave the people defenceless).
438 Ibid. at 35. See also ibid. at 38 ("the duty of an administering Power to conserve the interests of the people of the territory"). Of course, even the most conservative decision regarding the use of resources will choose between the conservation of wealth and the conservation of the environment. The inevitability of such choices about what to conserve makes the case for consultation all the more compelling.
Judge Skubiszewski, in his dissenting opinion, implicitly negotiates the relationship between the absence of participation and the image of identity somewhat differently. Against the rules on jurisdiction and admissibility, Skubiszewski weighs not the Charter ideal of the "sacred trust," but the more general demands of justice.\textsuperscript{439} Whereas Weeramantry’s reliance on the Charter’s conception of trusteeship establishes non-consultation as the rule, Skubiszewski is able to present consultation as the rule\textsuperscript{440} and the situation in East Timor as an exception. Skubiszewski characterises East Timor as exceptional because the interests of the East Timorese people which Portugal seeks to protect in the case are so self-evident as to make consultation of them unnecessary.\textsuperscript{441}

C Conclusion

The moment of legal creativity in the East Timor case which links it to the other cases discussed in the chapter is thus Judge Vereshchetin’s attempt to bridge the participation gap with the concept of the "sacred trust." His interpretation of the trust recognises a role in the case for the East Timorese people, which falls short of standing, but improves on the time-honoured

\textsuperscript{439} Ibid. at 10, para.43 (Dissenting Opinion of Judge Skubiszewski).

\textsuperscript{440} Ibid. at 40, para.163; 41-42, para.167(7). It is possible to distinguish between the East Timorese people’s role in bringing the case and the role that they should have played in the negotiation of the Timor Gap Treaty. Although Judge Weeramantry acknowledges no role for the East Timorese people in the context of the case, he does refer in the context of Australia’s negotiation of the treaty to the need to consult the administering power or the people. Ibid. at 46, 65 (Dissenting Opinion of Judge Weeramantry).

\textsuperscript{441} Ibid. at 12, para.52.

...during the proceedings, both Parties invoked the interests of the East Timorese people, but they presented us with little or no evidence of what the actual wishes of that people were. Be this as it may, I think that the Court can base itself on certain elementary assumptions: the interests of the people are enhanced when recourse is made to peaceful mechanisms, not to military intervention; when there is free choice, not incorporation into another State brought about essentially by the use of force; when the active participation of the people is guaranteed, in contradistinction to arrangements arrived at by some States alone with the exclusion of the people and/or the United Nations Member who accepted “the sacred trust” under Chapter XI of the Charter.
interpretation that the administering power that determines their best interests. By conceiving of the "sacred trust" as an entitlement to participate through the administering power, Vereshchetin also addresses the Eurocentric idea of tutelage that pervades the notion of trusteeship, despite its universalist pretensions to apply liberal ideas of political legitimacy to the colonies.\footnote{442} In this way, Vereshchetin's complication of the legal relationship between Portugal and the people of East Timor, unlike the legal relationships recognised in *Western Sahara* and the Yugoslavia opinion, represents the extension of the liberal project of identity in international law. That is, Vereshchetin projects the normative model of self-determination as the collectively exercised free will of equal individuals onto the internationalised legal regime of trusteeship that precedes that exercise. In their dissenting opinions, Judges Weeramantry and Skubiszewski retell the story of identity embedded in the notion of the trust, but without changing the story of participation.

\section*{IV Conclusion}

That cloud was Europe, dissolving past the thorn branches of the lignum-vitae, the tree of life. A thunderhead remains Derek Walcott, "Signs"\footnote{443}

The premise of this chapter has been that the major international decisions on the meaning of self-determination - *Western Sahara*, the Yugoslavia opinion and *East Timor* - should be read for more than just the reinforcement of a particular liberal European account of self-determination, whether translated into international law by categories or coherence. The larger significance of these cases lies in the identity of the actors, the nature of their arguments and the types of judicial reasoning and values. The chapter sought to show in some detail how

\footnote{442} Discussed in Section A, above.  
\footnote{443} Walcott, *supra* note 1 at 23.
the interpretation of self-determination in the cases has served as a point of entry into international law for newcomers, the newly-returned and even the absent, and for their often fundamental challenges to international law and its images of them. Insofar as a pattern emerges from the decisions, it is one of legal creativity in response to these challenges, resulting in a more complex and inclusive narrative of identity and, in a smaller way, participation in international law. 444

444 The extent to which this is also a better narrative is a separate question.
Chapter 5
Modern Classics

As discussed in connection with the *East Timor* case, the cases on self-determination treated in the previous chapter were adjudicated or arbitrated in forums that excluded the participation of those groups whose right of self-determination was at issue. This chapter turns to two international institutional environments where the meaning of self-determination for indigenous peoples\(^1\) was developed with the participation of indigenous peoples themselves.\(^2\)

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1. The definitions of "indigenous" and "peoples" in international law are discussed below in Parts II(B) and III(B). Generally speaking, "indigenous" refers to descent from those groups that inhabited particular areas before the arrival of other groups and to the cultural distinctiveness of those groups relative to the dominant society established by groups arriving later.


2. This is not to suggest that the participation of non-state communities in the interpretation of their rights by an international institution is new. There have long been various individual and collective entitlements to petition. To give two historical examples, European minorities governed by the inter-war minority treaties could petition the League of Nations. See Musgrave, *supra* note 1 at 44-46; Thornberry, *supra* note 1 at 44-46. During the period of decolonization after World War II, much use was made of a broad right of petition to the UN Trusteeship Council. See Chapter 7, below.

In particular, indigenous peoples have, for the last twenty years, been involved in the interpretation of the *International Covenant on Civil and Political Rights*, 16 December 1966, Can. T.S. 1976 No. 47, 999
These two institutional environments\(^3\) are the International Labour Organisation which in 1989 concluded *Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries*,\(^4\) and the United Nations Working Group on Indigenous Populations\(^5\) which in 1993 completed a draft declaration on indigenous rights.\(^6\) Indigenous participation was a part of both


\(^{4}\) The Working Group on Indigenous Populations is its formal name, although it is often referred to as the Working Group on Indigenous Peoples. For the "populations" versus "peoples" debate, see below at Part II(B)(I).

processes, although much more integrated into the UN Working Group's credo and methods. The number of participants in the 1993 session of the Working Group, including observer governments, UN organizations, indigenous nations, organizations and communities, non-governmental organizations, individual experts and scholars, totalled over six hundred. In addition to the dozen or so indigenous NGOs having consultative status with the UN Economic and Social Council, more than one hundred indigenous nations and organizations were represented at the session.

Like the adjudication and arbitration of self-determination, the ILO's adoption of Convention No.169 and the Working Group's preparation of the draft declaration produce legal outcomes. The ILO is a specialised agency within the UN system, but is actually 26 years older than the United Nations. Created by the Treaty of Versailles in 1919 to abolish the "injustice, hardship, and privation" which workers suffered and to guarantee "fair and humane conditions of labour," it was the only major intergovernmental organisation to survive World War II and the demise of the League of Nations. ILO conventions are international treaties, binding on the parties,


7 See S.J. Anaya, "Canada's Fiduciary Obligations Toward Indigenous Peoples in Quebec under International Law in General" in Anaya, Falk & Pharand, supra note 1 at 9, 19, 24; Anaya, Indigenous Peoples in International Law, supra note 6 at 45, 51, 57; S. Henderson, "The United Nations and Aboriginal Peoples" in S. Léger, ed., Linguistic Rights in Canada: Collusions or Collisions? (Proceedings of the First Conference, University of Ottawa, 4-6 November 1993) (Canadian Centre For Linguistic Rights, University of Ottawa, 1995) 615 at 630 (asserting that recent developments in the international law governing indigenous peoples have been shaped by indigenous peoples' participation and articulation of their positions).

It should be noted that indigenous groups and organisation have also held their own international conferences, meetings and consultations. This chapter will make reference to some of the resulting texts. See also Anaya, Indigenous Peoples in International Law, supra note 6 at Appendix, 185, 188, 190.

8 Report on Eleventh Session, supra note 6 at 14, para.36.

9 Ibid. at 5-7, paras. 8-11.

and may also contribute to the formation of international custom.\footnote{According to the International Labour Office, \textit{Convention No.169} has had significant influence on domestic policies and programmes in states that have not yet ratified the \textit{Convention} and on the policy guidelines of several international funding agencies. M. Tomei & L. Swepston, \textit{Indigenous and Tribal Peoples: A Guide to ILO Convention No.169} (Geneva: International Labour Office, July 1996) (with the International Centre for Human Rights and Democratic Development, Montreal) at viii-ix, 31-32 [hereinafter \textit{A Guide}].} By contrast, the UN Working Group on Indigenous Populations is not a full-fledged institution like the ILO. Set up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities; which, in turn, was created by the Commission on Human Rights; which, in its turn, is a functional commission of the Economic and Social Council, the Working Group on Indigenous Populations lies at the perimeter of the UN human rights system.\footnote{On the UN human rights system generally, see P. Alston, ed., \textit{The United Nations and Human Rights: A Critical Appraisal} (Oxford: Clarendon Press, 1992).} To be adopted, the draft declaration on indigenous rights finalised by the Working Group in 1993 must work its way inward through these various UN organs. In 1995, the Commission on Human Rights established its own Working Group to elaborate a draft \textit{Declaration on the Rights of Indigenous Peoples} based on the 1993 Working Group draft declaration,\footnote{Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Operative Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994, UN CHR Res.1995/32, reprinted in (1995) 34 I.L.M. 535. See B.D. Marantz, “Issues Affecting the Rights of Indigenous Peoples in International Fora” in \textit{People or Peoples}, supra note 1 at 9, 63-66; “Working Group on the Draft Declaration of the Rights of Indigenous Peoples, 3rd Session (Geneva, 27 October-7 November 1997)” (1997) No.39-40 Hum. Rts. Monitor 23.} and this Working Group has been making slow progress on a new draft.\footnote{Progress in the Working Group under the Commission on Human Rights is slowed by the fundamental difference of opinion between indigenous participants, who support the adoption of the 1993 Working Group draft declaration as is; and states, which favour a close examination of its articles and have voiced concerns about its implications for state sovereignty. “3rd Session,” supra note 13 at 23.} Even if finally adopted, the declaration will not be binding. Nevertheless, the 1993 Working Group draft declaration may already have advanced the cause of indigenous rights as a matter of international custom.\footnote{Anaya, supra note 7 at 25-30. In \textit{Indigenous Peoples in International Law}, supra note 6 at 53, Anaya writes: The Draft United Nations Declaration on the Rights of Indigenous Peoples - developed by the working group and adopted by the full body of independent experts who comprise the}
Whereas Chapter 4 looked mainly at outsiders’ challenges to the story of identity contained in the dominant interpretation of self-determination, this chapter draws attention to the relationship in the interpretation of self-determination between these challenges to the story of identity in international law and challenges to the story of participation in particular international institutions. In comparison to the parties to the cases on self-determination in Chapter 4, indigenous participants in the adoption of ILO Convention No.169 and the preparation of the Working Group on Indigenous Populations’ draft declaration are doubly outsiders: normative outsiders to the European origins of international law and institutional outsiders to the system of states. With this greater diversity of participation comes a greater diversity in the idea of participation. Outsiders may understand the process, its object and nature, differently from insiders. As a result, the meaning that indigenous participants give to their rights in international law, including their right of self-determination, often combines a challenge to the interpretation of international law with a challenge to the interpretation of the international institutional context.

Part I of the chapter gives an overview of these three types of competing visions: of self-determination, of the object of the institutional process and of the nature of that process.

Part II, which examines ILO Convention No.169, describes the International Labour Organisation as receptive to indigenous perspectives within a fixed idea of itself as an institution. This part demonstrates that the Organisation’s tripartite structure did not permit indigenous peoples to participate equally with governments, employers and workers in the adoption of Convention

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16 It bears emphasis that, as with Chapter 4, the focus on the process of articulation should not be taken to imply that strategic considerations, among them the different legal value or authority of conventions and declarations and some states’ lack of engagement with low-level UN drafting exercises, are not important. The attention of this chapter is confined to the inter-relation of ideas of text and ideas of context.
For some indigenous representatives, this unequal participation automatically discredited the Convention. Even with equal participation, however, the International Labour Office, the staff of experts responsible for the preparation, co-ordination and revision of conventions, would have cast itself in a directive role. In the discussion and drafting of Convention No.169, the Office secured agreement to the use of the term "peoples," but with the qualification that its use had no implications for a right of self-determination in international law, and, more generally, ensured that the Convention would be consistent with the ILO's tradition of functionalism. This tradition represents a middle ground distinct from both indigenous peoples' and states' normative approaches to the rights of indigenous peoples and one reminiscent of the functionalism of Judges Ammoun, Dillard and Forster and Judge ad hoc Boni in Western Sahara.

Part III of the chapter suggests that the Working Group on Indigenous Populations' greater receptiveness to indigenous perspectives corresponds to the mutability of its self-image. This part shows how a strengthening of the right of self-determination over the course of drafting the declaration went hand in hand with a change in the Chair's idea of the process. The Chair of the Working Group, Erica-Irene Daes, explains the article on self-determination in the final draft of the declaration so as to create an overlap between the normative approaches of indigenous peoples and states to secession. Whereas Convention No.169 applies a third approach - that of the ILO - the declaration derives its via media from the approaches of the parties. Most authors who have tracked the increasing recognition of a right of self-determination in the successive drafts of the declaration have noted the extensive participation of indigenous peoples in the discussions and drafting. Many of them regard this participation as adding legitimacy to the formulation of self-determination in the final draft. Some also point to it as a chief reason for the broad formulation.

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17 It should be noted that this middle ground was not available in the cases of self-determination in Chapter 4, where the competing normative approaches led to mutually exclusive results.
Part III develops not the fact of this participation, but the various meanings given to this participation and their relevance. In particular, Part III identifies a transformation not in the process, but in the Chair's conception of the process, which brings her conception closer to those of indigenous peoples. This transformation, I suggest, enables and structures her ultimate conception of self-determination and its normative justifications for secession. The only commentator on the Working Group to have theorised the relevance of its institutional ground rules to the progress achieved in the draft declaration is Robert Williams, Jr.\footnote{R.A. Williams, Jr., “Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World” [1990] Duke L.J. 660.} Williams links the progress made to the diverse forms of discourse allowed in the Working Group, and the ethic of equality and respect between states and indigenous peoples mediated by the Chair. Williams’s analysis thereby applies the insights of the legal literature on narrative or “storytelling.”\footnote{The legal literature on narrative or “storytelling” has shown the pervasive narrative structure of legal discourse. Much of this literature has focused on “outsider” narratives, meaning stories by members of groups usually subordinated in or excluded from mainstream legal discourse. These “outsider” narratives both challenge assumptions about such subordinated or excluded groups and expose the partiality of the dominant narrative - which masquerades as universal. See R. Delgado, ed., \textit{Critical Race Theory: The Cutting Edge} (Philadelphia: Temple University Press, 1995) at pt. II.} In this chapter, I bring to bear an analysis similar to Friedrich Kratochwil’s analysis of different types of third-party situations...
involving international law in order to focus on and refine Williams’s and others’ observations about “equal status contact” with outsiders.

I Competing Visions

In this part, I introduce three sets of ideas involved in the negotiation of ILO Convention No. 169 and the preparation of the UN Working Group draft declaration on indigenous rights: ideas about self-determination (Section A), ideas about the object of the institutional process (Section B) and ideas about the nature of that process (Section C). With respect to each set of ideas, I outline the differences between the ideas held by states and those held by indigenous peoples. Part I thereby sets the stage for the more detailed and technical consideration, in the subsequent parts of the chapter, of how these competing ideas have been reflected and reconciled in the ILO and Working Group processes.

20 F.V. Kratochwil, Rules, norms and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs (Cambridge: Cambridge University Press, 1989), especially c.7.

This is not to suggest that other analyses, such as those of legal process and international institutions, might not also prove relevant. Equally, the inquiry into why and how the Working Group on Indigenous Populations proved responsive joins with the discussion in philosophy and political theory on public space, in particular, on ideas of discursive democracy in the face of cultural and gender differences. For an introduction to the political and philosophical discussion on public space, see S. Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992) at c.3. Two recent collections are S. Benhabib, ed., Democracy and Difference: Contesting the Boundaries of the Political (Princeton: Princeton University Press, 1996) and R. Bontekoe & M. Stepaniants, eds., Justice and Democracy: Cross-Cultural Perspectives (Honolulu: University of Hawai’i Press, 1997). Some critiques of discursive democracy incorporate the importance of storytelling. See I.M. Young, “Communication and the Other: Beyond Deliberative Democracy” in Democracy and Difference,” supra at 120.


22 As will be seen in the discussion of Convention No. 169 and the draft declaration, in Parts II and III, respectively, neither the positions taken by states nor those taken by indigenous peoples were monolithic. Nevertheless, both the negotiation of Convention No. 169 and the preparation of the draft declaration were structured by certain basic differences between the perspectives of states and indigenous peoples.
A Self-Determination

During the discussion and drafting of ILO Convention No. 169 and the UN Working Group draft declaration on indigenous rights, the most contentious subtext of the successive drafts - and most accurate gauge of their responsiveness to indigenous demands - was the status of a right of secession.23 Governments were vigilant for any terminology that might sanction secession. For some governments, the term "peoples" was unacceptable because it could signify the right-holder of "self-determination," which, in turn, could signify the right-holder of secession. Many indigenous groups were indignant at the hypocrisy of coded phrases carefully chosen to foreclose that option.24

Among those indigenous peoples who argued that indigenous self-determination must mean the right to choose freely any political status, including independence, secession was a matter of principle as much as, if not more than, a desirable or viable alternative.25 Its denial was associated with refusal to acknowledge the colonial fact, the historical injustice of conquest or broken treaties

23 The sharp normative distinctions drawn in this chapter between the positions taken by indigenous peoples and governments are generally true for states such as Australia, Canada, New Zealand and the United States. At the same time, they are neither accurate nor helpful for many other indigenous peoples. See below the discussion of ILO Convention No. 169, which covers indigenous and tribal peoples, at note 102 (noting North-South split in indigenous groups' attitudes toward Convention No. 169) and Part II(B)(2) generally (discussing the normative implications of Convention No. 169's broad coverage).

It should also be noted that although these distinctions may also hold for the national level, there may be an interplay, or even a contrast, between states' and indigenous peoples' positions at the international and the national levels. For a discussion of the interplay from the perspective of the Sánté Mawiomi wjict Míkmaq (Grand Council of Míkmaq), see Henderson, supra note 7 at 617-618.

24 E.g. Statement of Dalee Sambo to the Martin Ennals Memorial Symposium on Self-Determination, March 1993, Saskatoon, Saskatchewan at 4 [unpublished].

on which the modern state rested.26 These views correspond to the corrective justice models of self-determination described in Chapter 2:27 in the case of conquest, the wrongful taking model; and in the case of treaty, the breach of pact model.28

In contrast, states were inclined to be receptive to equality or the familiarity of minority rights as a basis for group rights for indigenous peoples - stopping short, that is, of secession. Since the negotiating stands taken by states may involve little more than ritual invocation of normative language or unreflective advocacy of the domestic status quo, it is difficult and perhaps even misleading to generalise or extrapolate further. The shape that an equality-based argument might take, however, may be illustrated using Will Kymlicka’s work.29 In outline, Kymlicka proceeds from the idea that cultural membership is a good that should be equally protected for the members of all national groups in a multinational state. Since decisions in areas such as official languages, political boundaries and the division of powers unavoidably support one culture or another, the

26 Compare C.C. Tennant & M.E. Turpel, “A Case-Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination” (1990) 59 Nordic J. Int’l L. 287 at 292 (arguing that the underlying political claim is generally more important to the claimants than the particular rights by which the claim may be expressed).


28 A breach of pact argument for self-determination should be distinguished from the argument that the pact itself guarantees self-determination. For an example of the former, see Mikmaq Communication of 30 September 1980 to the UN Human Rights Committee, UN Doc. G/SO 215/51 CANA (18) R. 19/78, reprinted in Henderson, supra note 7 at 619.

majority in a democratic state will always have its language and culture supported, and will always have the legislative power to protect its interests in decisions that affect culture. Kymlicka argues that fairness demands that the same benefits and opportunities should be given to national minorities:

[G]roup-differentiated self-government rights compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural market-place, regardless of their personal choices in life. This is one of the many areas in which true equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs.\(^\text{30}\)

To the extent that indigenous rights derive from the acceptance of minority rights in international law, as opposed to the sort of equality argument that Kymlicka makes, their normative derivation is unclear. Minority rights were recognised in inter-war international law, but only as the international legal expression of particular political solutions.\(^\text{31}\) Hence the international law of the day left untouched the question of their justification.\(^\text{32}\) On the one hand, some inter-war theorists believed in autonomy for ethnic groups and protection of minorities as palliatives where the ideal of an ethnic nation-state could not be contrived through new borders or population transfer.\(^\text{33}\) On the other, in developing a justification for group-specific rights grounded in equality, Kymlicka resurrects and joins with liberal defences of minority rights current during the inter-war period and before.\(^\text{34}\) The failure of the League of Nations’ scheme for minority protection and its role in the outbreak of World War II\(^\text{35}\) led to disenchantment with minority rights after 1945.\(^\text{36}\) Omitted from

\(^{30}\) Kymlicka, Multicultural Citizenship, supra note 29 at 113.

\(^{31}\) According to Patrick Thornberry, the common opinion is that the inter-war treaties on minority rights did not create international customary law. Thornberry, supra note 1 at c.9.


\(^{33}\) E.g. R. Redslob, Le principe des nationalités: Les origines, les fondements psychologiques, les forces adverses, les solutions possibles (Paris: Recueil Sirey, 1930) at 174-175.

\(^{34}\) Kymlicka, Multicultural Citizenship, supra note 29 at 50-57.


\(^{36}\) Thornberry, supra note 1 at pts.III-IV; Musgrave, supra note 1 at 126-137.
the *Universal Declaration of Human Rights*, minority rights were included in the 1966 *International Covenant on Civil and Political Rights*, but in a formulation that scarcely acknowledged their collective nature. Although the recent proliferation of minority rights instruments testifies to their rediscovery in international human rights law, the tendency is to accept minority rights as a useful vestigial category, without much attention to their *raison d'être*. Such attention as is paid, however, leans toward deriving minority rights from equal rights.

In short, to the extent that various states supported indigenous rights, they did so on grounds of rights rather than history. It follows that if states were inclined to accept a right to secede, secession would be a last resort in the case of gross and sustained abuses of the group's rights - what Chapter 2 called an individual or collective rights model of self-determination - and not at the option of the group as the victim of a historical wrong.

Thus the issue of secession that fell to the ILO and the UN Working Group on Indigenous Populations was both whether to recognise a right to secede and if so, on what basis. In his opening statement to the 1992 session of the Working Group, the Canadian representative warned:

> Throughout the present version of the draft declaration we find repeated references or allusions to self-determination which seem designed to assuage all interests in

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38 Article 27 in the *International Covenant on Civil and Political Rights*, supra note 2 reads:

> 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 the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.


40 Crawford, *supra* note 32.
this process: but as is said in the French language, "on ne peut ménager la chèvre et le chou" or in English: "You can’t have it both ways".\textsuperscript{41}

Despite this colloquialism, the possibility of providing both a right (or no right) to secede and a rationale creates the possibility of a middle ground.

\textbf{B Object of the Process}

As with the different conceptions of international law or its norm-types applied to the interpretation of self-determination by scholars\textsuperscript{42} and judges,\textsuperscript{43} different assumptions about the mandates of the ILO and the Working Group on Indigenous Populations with respect to the interpretation of indigenous rights - technical standard-setting or vision for a new century,\textsuperscript{44} codification or progressive development - create more or less discursive space.

By way of example, consider the self-styled "impartial comments" of the Comisión Jurídica de los Pueblos de Integración Tawantinsuyana, an indigenous organisation, on the 1991 Working Group Session:

(a) The organizers/rapporteurs and the representatives of the indigenous organizations were all given the opportunity to express themselves in a democratic manner;
(b) The experiences described by each people and the participating representatives were very useful;
(c) The legal instrument which is being discussed, namely the declaration, is a supranational instrument that will lay the foundation for the next century;
(d) Most of the participants representing their organizations had little legal expertise;


\textsuperscript{42} See Chapters 1-3, above, especially Chapter 1.

\textsuperscript{43} See Chapter 4.

\textsuperscript{44} See M.C. Lám, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination" (1992) 25 Cornell Int'l L.J. 603 at 617-618 (contrasting the "apolitically" technical discourse privileged in the UN specialised agencies, \textit{ad hoc} committees and working groups with the "visionary" discourse used by NGOs in the UN). See also C.J. Iorns, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) 24 Case W. Res. J. Int'l L. 199 at 224-228 (positivism versus natural law in the Working Group debates).
(e) The debate was serious and of a high standard.45

From the perspective of the Comisión Jurídica, the Working Group was engaged in visionary law-making, akin to the drafting of a supranational constitution for indigenous peoples (comment (c)). Among its subsequent “suggestions” were that the draft declaration project the new relationship between nation states and indigenous peoples, and incline toward new models of legal pluralism.46

To the extent that the draft declaration is understood as forward looking, contributions to the discussion need not be exclusively grounded in legal norms. The Comisión Jurídica was therefore consistent in describing the debate as “serious and of a high standard” (comment (e)), despite the lack of much legal expertise on the part of most of the participants representing their organizations (comment (d)). Similarly, styles of speaking other than argumentative are appropriate to the discussion; the narration of experiences by each people and the participating representatives was “very useful” (comment (b)). Nevertheless, given the legal form that the document would take, the Comisión Jurídica identified in its suggestions the need for more participation by indigenous jurists in capacities such as rapporteur and for greater legal expertise in the drafting of the declaration.47

The interpretation of the Working Group’s objective by the Comisión Jurídica and other indigenous groups as legal innovation helped shape their perceptions of the appropriate discussion: the degree to which legal norms need be used, the acceptability of policy considerations and the

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46 Ibid. Suggestions 3-4.
balance of speaking styles.\textsuperscript{48} Comparing international and domestic law, Chris Tennant and Mary Ellen Turpel have written:

Because existing [international] human rights norms cannot readily accommodate important aspects of indigenous claims, such as the claim to collective existence as a people, there is a tendency to fragment and decontextualise indigenous claims, just as indigenous claims are decontextualised in national jurisdictions. At the same time, there is greater scope for discussion in international fora.\textsuperscript{49}

In contrast, most states were inclined to view the objective of the ILO and the Working Group on Indigenous Populations more as technical standard-setting, which entails stricter resort to legal norms, a narrower range of considerations and less recourse to narrative and storytelling as a style of speaking.\textsuperscript{50}

This difference between indigenous groups and states mimics the classic rationalist distinction between the development of international law through codification and through progressive development.\textsuperscript{51} This is not to say that the distinction is tenable. As Judge Sørensen noted in the \textit{North Sea Continental Shelf} case, codification may be innovative and “progressive,” and development often lacking in boldness.\textsuperscript{52} Rather, the distinction’s usefulness is that codification and progressive development are ideal types which help structure expectations of UN human rights bodies.\textsuperscript{53}

\textsuperscript{48} See similarly P. Alston, “Critical Appraisal of the UN Human Rights Regime” in \textit{The United Nations and Human Rights}, supra note 12 at 1, 4-5.

\textsuperscript{49} Tennant & Turpel, \textit{supra} note 26 at 291-292.

\textsuperscript{50} Compare Lâm, “Making Room,” \textit{supra} note 44 at 619 (presenting the importance of the Working Group on Indigenous Populations to indigenous peoples as analogous to the importance of the General Assembly to the Third World in the early days of decolonisation and recalling that Western commentators often criticised the Third World representatives in the General Assembly for “their lack of positivist legal acumen and derided their aspirational speeches”).


\textsuperscript{52} \textit{North Sea Continental Shelf} (FRG v. Denmark; FRG v. Netherlands), [1969] I.C.J. Rep. 3 at 242-243 (Judge Sørensen, dissenting).

\textsuperscript{53} Philip Alston, who otherwise dismisses as unhelpful attempts to apply conventional distinctions such as legal/political and judicial/quasi-judicial/non-judicial to UN human rights bodies (Alston, \textit{supra} note 48 at 3) observed that
C  Nature of the Process

It is significant that the first of the Comisión Jurídica de los Pueblos de Integración Tawantinsuyana's comments on the 1991 Session of the Working Group on Indigenous Populations deals with the democratic nature of the discussion.\(^{54}\) The perception of the Working Group as, in Maivân Clech Lâm's words, "a forum for the world's powerless to voice their vision of identity and destiny in a setting of formal equality with others materially far more powerful than

... in UN institutional terms, such distinctions (for example, 'X' is an expert committee, whereas 'Y' is a political body) are very useful since they convey an indication as to the type of membership profiles to be expected, the procedures to be used, and the types of outcomes envisaged.

Ibid. at 4.

\(^{54}\) Although my focus here is the nature of "democracy" in the ILO and UN Working Group on Indigenous Population sessions, it bears emphasis that the ability to participate meaningfully inside the sessions also depends on institutional processes, political power and material conditions outside the sessions.

The importance of related institutional processes is reflected in the suggestions of the Comisión Jurídica regarding translation of the text, its early distribution to participants and wider dissemination among indigenous groups. Note by Secretary-General, supra note 45 at 8, suggestions 9-11.

The distribution of power affects not only indigenous groups' access to these sessions (see R.L. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 AJIL 369 at 384, claiming interference with indigenous representatives travelling to Geneva to attend the Working Group's sessions), but also relations and priorities among indigenous groups (see e.g. notes 100-102 below and accompanying text) and between indigenous men and women (At the 1994 session of the Sub-Commission on Minorities, a member of the Sub-Commission made reference to a group of indigenous women that had contacted a government observer, asserting that they had not dared approach the Working Group out of fear of what the indigenous men might do. UN Sub-Commission on Minorities, 46th Sess., 29th Mtg., UN Doc. E/CN.4/Sub.2/1994/SR.29 (1994) at 12, para.50. See Chapter 8, below.).

Access to travel funding is perhaps the most apparent material limitation on equal participation (See M.C. Lâm, "The Legal Value of Self-Determination: Vision or Inconvenience?" in People or Peoples, supra note 1 at 127), although a UN Voluntary Fund has gone some way to removing this limitation. Indeed, the Comisión Jurídica commented that the need to find general funding for indigenous organizations and the funding opportunity provided by international fora detracted from the discussions in the sessions of the UN Working Group on Indigenous Populations: "there was a lack of interest in the debate on the part of some of the participants, who were more concerned with making appointments to obtain financial support for their organizations." Note by Secretary-General, supra note 45 at comment (f). A less obvious material constraint on participation, pointed out by Denis Marantz, was that while government delegations could consult with their capitals during the sessions, indigenous representatives most often did not have the means to consult with their community leaders (Marantz, supra note 13 at 31).
they" contrasts with the impression of the marginalisation of indigenous peoples by the ILO in the discussion and adoption of Convention No.169.56

The East Timor case in Chapter 4 demonstrated that different participants may read differently the absence of a people from the institutional interpretation of their right of self-determination. Since there was no evidence that the applicant Portugal, the administering power for East Timor, had brought the case in accordance with the wishes of the people of East Timor, Judge Vereshchetin found the case inadmissible. Whereas Judge Vereshchetin interpreted the absence of the East Timorese people as illegitimate, the two dissenting judges did not, but differed as to why. Judge Weeramantry characterised the absence of the East Timorese people and the lack of evidence of their wishes as normal, given Portugal's function as trustee, whereas Judge Skubiszewski considered this lack of evidence as justified exceptionally by the clear-cut nature of the wrongs done by the respondent Australia to the people of East Timor.

Similarly, different meanings are given to the relative absence of indigenous peoples from the ILO's discussion and adoption of Convention No.169. The ILO is unique among international organisations for its tripartite structure, involving government, management and worker representation. Certain indigenous groups opposed Convention No.169 based on the unequal access this structure afforded them to the ILO, as well as on the approach of the Convention, whereas others valued the Convention for its concrete rights and goals regardless.

In contrast to the ILO, the Working Group on Indigenous Populations requires an interpretation of the meaning of presence. Over the course of its work on the draft declaration, the Working Group gave maximal access to indigenous peoples. Denis Marantz, a member of the Canadian government delegation to the Working Group during this time, analyses the contest

55 See Lâm, “Making Room,” supra note 44 at 619. See also Williams supra note 18 (“equal status contact”).
56 See e.g. Lâm, “The Legal Value of Self-Determination,” supra note 54 at 126.
between the state view of the process and the indigenous and NGO view as inter-national versus supranational:

It is critically important to understand the environment in which indigenous issues are debated by states. It is particularly important to be sensitive to the perspectives of these same states if one wishes to arrive at a multilateral and universal institutionalisation of the collective rights of indigenous peoples.

In the UN, the universal application of standards and the acceptance of these by consensus, are fundamental principles for progressing on a corpus of human rights. Because of conflicting value systems and political/economic interests, often the lowest common denominator emerges from the exhaustive process of debate. No rights instruments would have come into existence if all participants to their elaboration had held fast to their highest aspirations.

The impression is often created by indigenous representatives and some observers that multilateral organizations (the UN in particular) are supranational bodies in their own right, empowered to supersede the national authority of the state. Some who press for the eventual acceptance of a declaration on the rights of indigenous peoples would like to see in the UN, an institution independent of the will of states. Misled by this view, many indigenous organizations divert their major lobbying efforts to the UN from the relations that they ought to entertain as a first priority with the governments of the countries from which they come. Some others do so in the hope of circumscribing the powers of states because of their past abuses of power...

Marantz thus contrasts the “true” state perspective of the development of international law through the negotiated consensus of states with the “false” indigenous and NGO perspective of its supranational development by the UN. From the “true” perspective, the Working Group had no autonomous existence or authority, but was subsumed by the eventual need to secure the consensus of states. From the “false” perspective, the Working Group operated in utopian isolation from this need. The relevance of Marantz’s analysis is not his lesson in Realpolitik, which seems too simple. If Marantz’s real picture were real, then one would expect discussion of the draft declaration to have whittled away the indigenous rights recognised in the declaration, whereas quite the opposite occurred. If this progress is merely a cynical strategy on the part of states to wait until a later stage, before a higher UN body composed of state representatives, to control the content of the

57 Marantz, supra note 13 at 14-15. See also Iorns, note 41 at 228-235 (principle versus pragmatism).
declaration, then states have been accomplices in the creation of expectations that may prove too much for them. As Martha Minow has written:

Sometimes people who seem to have little power over exercising either their desires or their identities can nonetheless exert control by playing off other people’s misconceptions and misunderstandings. People with apparently greater power in these areas nonetheless encounter sharp limits because of the presence and influence of others, even those who have less status and authority.  

What is relevant about Marantz’s account is the fact of a gulf between how states and indigenous peoples saw the Working Group on Indigenous Populations, even if his account has painted the gulf too wide. Also telling is that Marantz groups the Chair of the Working Group, Erica-Irene Daes, with the naive and deluded who envisaged the Working Group as supranational. As will be seen, Daes did, over the course of drafting the declaration, change her representation of the process in a way responsive to indigenous peoples, but it was a more subtle shift than Marantz indicates.

II International Labour Organisation

In 1989, the International Labour Organisation completed Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries. This convention revised Convention No.107, a 1957 ILO convention on the subject which had come under strong criticism for its integrationist orientation. The two ILO Conventions, now both in force, are the only international instruments to deal specifically with the rights of indigenous peoples.

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59 Convention No.169, supra note 4.
This part of the chapter traces the controversies over the limited participation afforded indigenous peoples in the adoption of ILO Convention No.169 (Section A) and the agreement reached to use the term “peoples” in the Convention with the express proviso that its use not be construed as implying that indigenous peoples have a right of self-determination or any other rights of peoples at international law (Section B). The dampening effect of these procedural and substantive controversies on support for Convention No.169 demonstrates the problem of insider and outsider perspectives and the difficulty in seeking to bridge them in this institutional context through an approach that is true to the institution rather than to the parties’ positions. This part shows that from the ILO’s insider perspective on its institutional theory and praxis, Convention No.169 is intelligible as a gain for the rights of indigenous peoples. Read against the rigid ILO procedures for the adoption of conventions, the limited participation of indigenous peoples represents an achievement. Read in the ILO’s tradition of integrated, interactive and empirically-based functionalism, the provisions of Convention No.169 hold greater promise than their wording might indicate. The Convention is effectively a product not of the ILO’s mediation between parties, but of its standard-setting as interested expert. To the extent that the rights in the Convention are thereby true to a procedural and substantive perspective that is too far from or too alien to the outside perspectives of indigenous peoples, indigenous peoples have not supported ratification.

62 On the coming into force of Convention No.169 on September 5, 1991, Convention No.107 ceased to be open to ratification.
63 Convention No.107 deals with indigenous, tribal and semi-tribal populations; Convention No. 169 with indigenous and tribal peoples. For convenience, I shall refer generally to indigenous peoples.
A process

1. ILO Procedure

The International Labour Organisation consists of three main bodies: the International Labour Conference, the International Labour Office and the Governing Body of the International Labour Office. Conventions are adopted by the annual International Labour Conference, at which governments, employers and workers from each country are represented. In accordance with the ILO’s “double-discussion” procedure, the convention must be considered at two consecutive annual Conferences before it can be adopted.

The Governing Body, the executive organ of the ILO and also tripartite in composition, meets between the yearly Conferences and determines the agenda for the Conference. In the case of Convention No.169, the Governing Body convened a Meeting of Experts in 1986 on the revision of the existing Convention. The experts were unanimous in recommending the Convention’s urgent revision, drawing particular attention to the need to review its overall integrationist approach and its provisions on land rights.

By adding the item to the agenda of the 1988 Conference in accordance with the experts’ recommendation, the Governing Body set in motion the “double-discussion” process. The International Labour Office (the ILO’s Secretariat) plays a central and directive role in this process, beginning with its background “law and practice” report. The report, which includes a

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67 In the case of a partial revision, discussion at only one session of the Conference may be sufficient. Convention No.169 is technically the partial revision of Convention No.107, but was subjected to the full double-discussion procedure for adopting conventions.

68 Report VI(1), supra note 61.
questionnaire, is circulated to governments for their comments. Governments are expected - and, if they have ratified the 1976 *Tripartite Consultation Convention*, required - to consult representative employers’ and workers’ associations. In this instance, governments were invited to consult representatives of indigenous peoples as well. Another report by the Office\(^\text{69}\) summarises and analyses the replies received, as well as offering “proposed conclusions” for discussion at the first of the two successive Conferences to consider the item.\(^\text{70}\)

The sequence is repeated between the first and second Conferences: in three separate reports, the Office prepares a draft convention based on the conclusions adopted at the first Conference,\(^\text{71}\) summarises the comments received on this draft\(^\text{72}\) and prepares a further draft for discussion.\(^\text{73}\) The final text is adopted following discussion at the second annual Conference.\(^\text{74}\)

*Convention No. 169* was adopted at the 1989 session of the Conference by a vote of 328:1:49.\(^\text{75}\)

### 2. Adoption of ILO Convention No. 169

Much of the ILO’s success in adopting and implementing conventions is attributed to its tripartitism, which means that representatives of governments, employers’ organizations and workers’ organizations participate in all ILO deliberative bodies and activities, including the


\(^{74}\) International Labour Conference, *Provisional Record Nos. 25, 31, 32, 76th Sess. (1989)*.

drafting of conventions and supervision of their implementation. Delegations to the annual International Labour Conference, which votes on whether to adopt conventions, are composed of two government representatives, one employers' representative and one workers' representative, each of whom has a vote.76

Whereas the ILO structurally incorporates the full participation of employers' and workers' organizations, its rather rigid procedures do not permit the same degree of participation by non-occupational NGOs, and the latter have reciprocated by showing relatively little interest in the Organisation.77

In the adoption of Convention No.169, the ILO was concerned that the limitations on access for indigenous groups would jeopardise the relevance and legitimacy of the process. The challenge was articulated by an indigenous adviser to the Canadian workers' delegation

This forum is one which is used for bargaining and negotiating to achieve a desired result. But how can you negotiate and bargain over who we are and what our rights are? This is not a normal labour issue concerning which each party gives and takes something of what they want. How can you bargain away something which does not belong to you?78

The 1986 Meeting of Experts, which concluded that Convention No.107 should be revised, recommended that the ILO take all possible measures to ensure the participation of indigenous representatives in the process leading to the revision of the convention and in other ILO activities relating to indigenous peoples.79 Since neither the Organisation's Constitution nor the Standing...
Orders of the Conference allowed for the formal participation of representatives of indigenous groups in the Conference discussions, the ILO used such flexibility as these documents gave it to include indigenous groups informally.

For the Meeting of Experts, the ILO Governing Body included two experts representing NGOs among the sixteen experts appointed: one of the two was from an international organisation of indigenous peoples and the other from an organisation working for the protection of indigenous peoples. The Governing Body also took the unusual step of inviting observers from NGOs active in the field of indigenous rights. The Meeting decided to give these observers the right to speak during the sessions, although the experts and representatives of other intergovernmental organisation took priority. The report of the Meeting records that “many of these participants played an active and useful part in the discussions” - too active a part, it seems, for some experts.

The International Labour Office suggested to governments that in preparing their replies to the questionnaire on revision of the old convention, they consult indigenous peoples in their country as well as the usual employers’ and workers’ organizations. The governments of Australia, Canada, Finland and Sweden indicated in their reply that they had consulted with indigenous peoples. The government of Peru stated that due to time pressures, it had not been able to hold formal consultations and had relied instead on the views expressed by indigenous peoples in previous consultations. The Canadian indigenous working group’s comments were submitted separately by Canada and are treated separately in the Office’s summary and analysis of replies to

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80 ILO Governing Body, supra note 79 at 8, para.33.
81 Ibid. at 1, para.2.
82 See Barsh, supra note 60 at 758, note 13.
83 Report of the Meeting of Experts, supra note 66 at 103, paras.21-22. See also ILO Governing Body, supra note 79 at 2, para.4.
84 Report VI(1), supra note 61 at 2.
85 Report VI(2), supra note 69 at 2.
the questionnaire. Responses to the questionnaire received from indigenous and other NGOs were summarised by the Office in an additional document.\(^{86}\) Six governments, the original four and the governments of Norway and the United States, indicated that they had consulted with indigenous representatives in composing their comments on the first draft of the convention, and the Office stated that it had taken account of the views expressed directly to it by indigenous organizations.\(^{87}\)

As regards participation in the International Labour Conference, the *Standing Orders of the Conference* provide that entry to the Conference hall, other than for delegates and their advisers, is restricted to international NGOs with ILO observer credentials and such other international NGOs as have been invited.\(^{88}\) A number of international groups were accredited and took part in the Conference as observers, although, according to Howard Berman, some of the groups most closely in touch with the needs and aspirations of particular indigenous communities were ineligible because they were local or national, as opposed to international, organizations.\(^{89}\) Furthermore, the workers allowed representatives from accredited indigenous NGOs to attend the workers’ caucus meetings and introduced amendments that coincided with many of the indigenous positions.\(^{90}\) Finally, indigenous persons took part in the Conference as advisers to various government, employer and worker delegations.\(^{91}\)

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87 Report IV(2A), supra note 72 at 2.

88 Standing Orders, supra note 65 at art.2(3)(j).


91 See ILO Constitution, supra note 76 at art.3(2). International Labour Conference, Provisional Record No.36, 75th Sess. (1988) at 36/3. The American government, employer and worker delegations, for example, each included at least one indigenous adviser. International Labour Conference, Provisional Record No.31, 76th Sess. (1989) at 31/14 (Kickingbird, Government adviser, US). For a full list, see Berman, supra note 89 at 57, n.9.
As much of the Conference work is done in committees, participation in committees and other working groups is an important dimension of participation in the Conference. The Standing Orders allowed indigenous representatives, with the permission of the committee's chair and vice-chair, to make or circulate statements to the committees. The Committee on Convention No. 107 at the 1989 Conference agreed that international non-governmental organisations would be allowed to make interventions during one hour of the general discussion. They would then be able to make 12 more interventions at given moments during the discussion of the text of the draft Convention. The Committee also agreed to adjourn one sitting in order to be able to hear the views of non-governmental organisations which were not international organisations outside of its formal sittings. Representatives of four international NGOs are on record, for instance, as having made statements to the Committee on the question of land rights. Berman writes that in the result, each indigenous organisation with ILO accreditation was given ten minutes to address the Committee following the close of business on the second day of actual deliberations, and the organizations collectively were given the opportunity to make one ten-minute presentation on each category of articles being considered by the committee. Berman also reports that during the second week of the committee session, representatives of the National Coalition of Aboriginal Organizations publicly withdrew from the process in frustration. Speaking of the "sorely inadequate ILO procedures," Sharon Venne, a representative of the International Work Group on Indigenous Affairs, stated that the most critical provisions were negotiated behind closed doors.

92 Standing Orders, supra note 65 at Art. 56(9).
94 Ibid. at 25/16, para. 107.
95 Berman, supra note 89 at 51.
96 Ibid. at 52.
For several indigenous representatives who spoke prior to the vote on Convention No. 169, their experience of the process undermined the legitimacy of the Convention. A representative of the Indian Council of South America described the absurdity of watching

... from the observers' seats, deprived as we were of the right to speak or to vote by the regulations and structures of the ILO, the Government and Employers' delegates of a larger part of the world (Canada, the United States, Argentina, Brazil, Bolivia and Venezuela) behave like representatives of the old colonial empires which despoiled the Americas, denying us the right to exist ...  

Another indigenous speaker stated that indigenous peoples did not have to accept Convention No. 169 even if it were the best result that could have been obtained in the ILO context. She suggested that it might have been better to reserve the issues for "other appropriate forums where time is not limited and input from indigenous peoples' positions are respected and taken into account."  

The general indigenous response to Convention No. 169 has been mixed. In the 1992 Indigenous Peoples Earth Charter, the article urging ratification of the Convention is the only one of the 109 articles with a reservation noted. There is some indication, however, of growing support for the Convention.  

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98 Ibid. at 31/8 (Ontiveros Yulquila, representative of the Indian Council of South America). See also ibid. at 31/6-31/10; and Berman, supra note 89 generally.  
99 International Labour Conference, Provisional Record No.31, 76th Sess. (1989) at 31/9-31/10 (Sayers, Workers' advisers, Canada). Contra Sambo, supra note 3 at 19-20 (maintaining that direct input by indigenous peoples did have an effect on Convention No. 169 and that the Convention offers a number of important protections).  
102 Anaya, supra note 7 at 22-23; Anaya, Indigenous Peoples in International Law, supra note 6 at 49 (noting that indigenous peoples; organizations from Central and South America have been especially active in pressing for ratification, other organizations include the Nordic Sami Council, Inuit Circumpolar
Implicit in criticism of the ILO's tripartite structure and its inability to accommodate indigenous peoples as equal participants is the ideal of direct negotiation with indigenous peoples. But this ideal does not contend with the significant role played by the International Labour Office in the adoption of conventions. In many ways, the standard ILO procedure for adopting conventions resembles not so much three-way bargaining, as standard-setting by the Office with the input of governments, employers and workers.

Consider the mechanics alone of the Office's role in the adoption of Convention No.169. The Office prepared a working document for the 1986 Meeting of Experts. Once the revision of Convention No.107 had been placed on the agenda for the 1988 Conference, the Office prepared a background "law and practice" report, which was circulated to governments on the expectation that they would consult with representative employers' and workers' associations. Of particular significance was the questionnaire contained in the law and practice report, which identified the parts of the old Convention for revision. A second report by the Office not only summarised and analysed the replies received to the questionnaire, but offered "proposed conclusions" for discussion at the first of the two successive Conferences to consider the item. Following the first Conference, the Office prepared a draft convention based on the conclusions adopted at the Conference. In two final reports, the Office summarised the comments received on the draft and prepared a further draft for discussion.

Not only does the Office play a central role in the adoption of conventions, its officials consider themselves, according to scholar and former ILO official Virginia Leary, "not as simple


103 See generally Leary, supra note 77 at 581 (listing the "activist ILO Secretariat (the "Office")" as among the ILO's lessons for the UN), 613-616 (on the Office). With respect to Convention No.169, see Berman, supra note 89 at 49.
executors of the desires of member States, but rather as collaborators in the pursuit of social justice.\textsuperscript{104} The conviction that they are independent experts, rather than the servants of states, is a legacy of the ILO's history:

The International Labour Office emerged from World War II as a small staff with a high sense of commitment to building a new world order. The staff members were united by their efforts to survive the debacle of the League of Nations, by the tradition of strong executive leadership, and by their conviction that they had a right to express collectively an independent international viewpoint on the postwar issues of social policy.\textsuperscript{105}

Given the Office's control over the shape of Convention No.169, contact between indigenous groups and the International Labour Office had the potential to compensate in outlook and result for the limited access of indigenous groups to the discussions. But even with equal access, their effectiveness would have depended on the Office's appreciation of the ILO's goals, norms and rules. In Leary's words, "[t]he Office plays a leadership role in promoting the objectives of the ILO and keeping it 'on course' as well as embodying the institutional memory of the Organisation."\textsuperscript{106} As a result, its tendency is to discard, rather than engage with, legal and normative positions it considers incompatible with ILO theory and praxis. This tendency is illustrated by one Office account of the ILO debate on the right of self-determination of indigenous peoples.

It has been argued that international law would be taking a step backward if the revised Convention failed to recognise the right of these peoples to self-determination and control of all activities which affect them. Others have argued that the recognition of such rights in the revised Convention would seriously limit its prospects for ratification or would lead to the creation of a State within a State. Both arguments, however, fail to take into account the characteristics of ILO Conventions, and the requirements of a Convention on this subject.\textsuperscript{107}

\textsuperscript{104} Leary, supra note 77 at 613.


\textsuperscript{106} Leary, supra note 77 at 613.

\textsuperscript{107} Report VI(1), supra note 61 at 89. See below at Part II(B)(1) for a discussion of this debate.
Whereas this concern for the integrity of ILO conventions reflects the Office’s role as an expert engaged in standard-setting for the Organisation, its assertion of jurisdiction in *Convention No.169* and concern for its adoption, ratification and implementation point to another role as guardian of the Organisation’s historical prominence on indigenous issues, its wide relevance and its reputation for effectiveness. In this sense, any authority that standard-setting by the Office might carry due to its expertise is diminished by the perception of its interestedness.

*Convention No.169*, like its predecessor, is sometimes regarded as an anomalous, if not suspect, assertion of jurisdiction by the International Labour Organisation. Writing in the early 1970s on whether *Convention No.107* was outside the competence of the Organisation, Gordon Bennett commented:

> It is difficult to see how a tribal food-gatherer can be described, by any stretch of the imagination, as the “systematic”, “habitual”, industrial worker with whose welfare alone the I.L.O. is properly concerned. Nor does the primitive ordinarily engage in any “form of production”, if that term is intended to connote the creation of surplus wealth to be exchanged in the market for other goods.

*Convention No.169* is intelligible, however, as the outgrowth of early ILO standard-setting relating to indigenous workers and ILO technical assistance for indigenous peoples. As a historical matter, it was a product of the ILO’s long and prominent involvement in indigenous issues. Created in 1919, the International Labour Organisation undertook studies on the situation of

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With respect to *Convention No.169*, compare *Report of the Meeting of Experts*, supra note 66 at 106, para.40 (The issue of the ILO’s competence to deal with the subject of indigenous peoples had been resolved at the time of the original discussion of the issue.) with Berman, *supra* note 89 at 49, 56 (“the ILO has sought to maintain an institutional hold on a human rights process that has evolved far beyond its mandate...”).

109 Bennett, *supra* note 108 at 386.

indigenous workers as early as 1921. In 1926, its Governing Body established a Committee of
Experts on Native Labour to formulate international standards for the protection of indigenous
workers. This Committee’s work provided the basis for the *Forced Labour Convention, 1930*
*(No.29)* and various other conventions more directly concerned with indigenous workers. In 1953,
the ILO published *Indigenous Peoples*, an extensive volume which covered preliminary definitions
and data, living conditions, the place of indigenous workers in the economy, and national and
international action. In the early 1950s, several years before the adoption of *Convention No.107*, a
Committee of Experts on Indigenous Labour brought the scientific hubris of the period to bear on
problems such as the plight of forest-dwelling indigenous peoples, engaging in detailed study of
these problems and adopting resolutions.

ILO technical assistance for indigenous peoples took such forms as the Andean Indian
Programme and the 1962 Panel of Consultants on Indigenous and Tribal Populations. In
accordance with the approach then prevalent in the ILO, the Andean Indian Programme aimed to
improve the living and working conditions of the indigenous peoples of the Andes so as to facilitate
their integration into the economic, social and political life of their respective countries. In this
vastly ambitious development programme, described as “inter-agency, multi-sectoral and multi-
country,” the ILO spearheaded the efforts of the United Nations, the FAO, UNICEF, UNESCO and
the WHO in Bolivia, Ecuador, Peru, Columbia, Chile, Argentina and Venezuela.\(^{111}\)

More fundamentally, the ILO’s adoption of a convention on indigenous peoples reflects the
Organisation’s philosophy.\(^{112}\) In defence of the ILO’s jurisdiction, Lee Swepston of the
International Labour Office maintains that those who see the ILO’s mandate as limited to labour in
the sense of wage-earning employment fail to grasp the “complex of activities surrounding the

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\(^{112}\) As will be seen in Part II(B)(2), the ILO’s philosophy is central not only to the Organisation’s re-
assertion of jurisdiction in *Convention No.169*, but also to the approach taken in the Convention.
means by which, and the conditions under which, humanity pursues its economic and survival struggle.” Speaking at the first of the two International Labour Conferences to discuss Convention No. 169, a Cherokee adviser to the employers’ delegation from the United States argued along similar lines:

So I ask, has the ILO been stretched beyond its mandate in focussing attention on indigenous peoples? Surely not, if its aim is to protect a people’s fundamental right to organise. Surely not, if its aim is to prevent discrimination and safeguard precarious human rights. Surely not, if its efforts will result in economic justice and a fair and dignified livelihood for those peoples.114

Intimately related to the manifold idea of labour that Swepston implicitly presents is the ILO’s “holistic” or integrated approach to human rights.115 The ILO has largely avoided the gulf between civil and political rights and economic and social rights institutionalised in the UN system by the two Covenants and their separate implementation mechanisms. The Organisation’s refusal to sever human rights from social justice is apparent in its 1944 declaration of aims and purposes: “all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ...”116

The ILO also invoked its institutional strengths as a reason to act. In the past, the Organisation has been accused of being uncooperative and parochial with respect to the UN International Covenants on Human Rights and of demonstrating “agency imperialism.”117 Leary

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113 Swepston, supra note 102 at 222.
115 Leary, supra note 77 at 590-594.
117 J. Humphrey, Human Rights and the United Nations: A Great Adventure (Dobbs Ferry, N.Y.: Transnational Publishers, 1984) at 12, 103 (Humphrey was Director of the UN Human Rights Division during the drafting of the Covenants.).
justifies the ILO's response as understandable reluctance to sever the human rights under its jurisdiction from the Organisation's remarkably effective system of protection for those rights.\textsuperscript{118} She observes, however, that this institutional effectiveness is largely an article of faith, since it is virtually impossible to establish scientifically in such a complex multi-variable world.\textsuperscript{119}

Swepston similarly defends the ILO's assertion of jurisdiction in *Convention No. 169* on the grounds that the ILO has the technical capacity to adopt conventions, to revise them as needed and to supervise their application.\textsuperscript{120} Under the ILO Constitution, member states must submit any new or revised convention to their legislature within a certain time period.\textsuperscript{121} Once a convention is ratified, and thus binding on the ratifying state, its implementation is subject to regular supervision by an independent body of experts, which can ask specific questions, make recommendations for action, and follow up the action taken. In appropriate cases,\textsuperscript{122} a ratifying state can be called before the annual Conference to explain its conduct, and technical assistance can be provided to assist government in overcoming any barriers to implementation. Swepston cites the ILO practice of supplementing standard-setting with practical technical assistance to the relevant groups as a further reason for the Organisation to act in the area of indigenous peoples.\textsuperscript{123}

\textsuperscript{118} Leary, *supra* note 77 at 588.


\textsuperscript{120} L. Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15 Okla. City U. L. Rev 677 at 681; Swepston, *supra* note 102 at 221. See also International Labour Conference, Provisional Record No.31, 76th Sess. (1989) at 31/12 (Ms Salway, Employers' adviser, United States and member of Lakota people (Sioux)) ("[T]he true value and force of the ILO and these instruments lie in the application of the standards."). For an overview of the supervisory and monitoring procedures for the application of *Convention (No.169)*, see *A Guide, supra* note 11 at 28-29.

\textsuperscript{121} *ILO Constitution, supra* note 76 at art. 19.

\textsuperscript{122} For such a case involving *Convention No. 107*, see D. Sanders, "The UN Working Group on Indigenous Populations" (1989) 11 Hum. Rts. Q. 406 at 423-427 (tribal populations in the Chittagong Hill Tracts of Bangladesh).

\textsuperscript{123} Swepston, "A New Step," *supra* note 120 at 681. See International Labour Conference, Provisional Record No.25, 76th Sess. (1989) at 25/6, para.23 (Representative of Four Directions Council recommends Convention be followed by an ILO plan of action including technical assistance.)
The perception of institutional strength, or effectiveness, also enters into how the final text of the Convention No. 169 is read. Venne warns that its saturation with "unnecessary qualifications, such as 'where appropriate' and 'where possible', in respect to government obligations ... will make enforcement highly problematic." In contrast, the Office supports the Convention's mixture of "goals, priorities and minimal rights" on the assumption that the ILO's supervisory bodies can be trusted to interpret ambiguous and general terms in the Convention, and may gradually increase their expectations of countries under the more aspirational language in the Convention.

It should be pointed out, however, that the supervisory and monitoring procedures for the application of Convention No. 169 raise the same issues of legitimacy as the procedures for the adoption of the Convention did. Namely, due to the ILO's tripartite structure, indigenous individuals or organisations (unless they are indigenous workers' or employers' associations) have to channel comments or more formal complaints and representations through trade unions or employers' bodies.

B Substance

I. Debates

The debate over self-determination in the negotiation of Convention No. 169 took the shape of a definitional dispute over whether to replace the term "populations" in the old convention with the term "peoples." At stake was the possibility that the term "peoples" could be taken to imply...

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125 Swepston, supra note 102 at 227; Swepston, "A New Step," supra note 120 at 689.
126 Swepston, supra note 102 at 231.
128 A Guide, supra note 11 at 29-30 (also discussing other ways to forward information to the ILO which may be available to indigenous groups in some cases). On the potential of the ILO complaint procedures for addressing indigenous peoples' concerns, see also Anaya, Indigenous Peoples in International Law, supra note 6 at 161-162.
recognition of the right of indigenous peoples to self-determination and, further, their right to secede. The initial responses of the Canadian government and the indigenous working group (IWG) it consulted to the question give the contours of the debate:

Canada. The term “populations” should be retained. It is non-pejorative and its use is consistent with the current practice of United Nations bodies and agencies, including the Working Group on Indigenous Populations. The term “peoples”, on the other hand, does not have a clear meaning in international law and could prevent ratification of a revised Convention by some countries. The words “aboriginal peoples” are used in Canadian law. However, the Government of Canada would, along with many other member States, have strong reservations about supporting the use of the term “peoples” in an international Convention.

IWG. Yes. It is absolutely essential that the distinctiveness of indigenous societies be fully reflected in the terminology of the revised Convention.\(^{129}\)

a First Round of Discussion

Discussions before and during the 1988 Session of the International Labour Conference, the first round of the ILO’s “double-discussion” procedure,\(^{130}\) betrayed little movement on this question of terminology. By the end of the Session, there was widespread agreement on an intermediate position: “peoples” would be used with the proviso that this choice of term should not be taken to express a position on the right of self-determination.\(^{131}\) Nevertheless, a consensus could not be reached, and the Conference put over the issue until its 1989 Session.\(^{132}\)

In this round of discussion, the retention of the term “populations” was supported by the employers’ delegates\(^{133}\) and the delegates of certain governments. Only two of the 32\(^{134}\)

\(^{129}\) *Report VI(2),* supra note 69 at 13.

\(^{130}\) See above at Part II(A)(1).

\(^{131}\) International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/6, paras. 35-38.

\(^{132}\) *Ibid.* at 32/6, para. 39; 32/24, pt.1 (proposed conclusions); International Labour Conference, Provisional Record No.36, 75th Sess. (1988) at 36/24 (adoption of proposed conclusions).

\(^{133}\) As evidenced by their amendment to that effect, see International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/5, para. 30. For the position of the Council of Netherlands Employers’ Federation (RCO), see *Report VI(2),* supra note 69 at 13.

\(^{134}\) Replies were received from 53 member states. *Report VI(2),* supra note 69 at 1.
governments that replied to this question on the initial questionnaire - Canada and Ecuador - were
recorded as actually favouring "populations." While Canada proposed such an amendment
during the Session, it also introduced an alternative amendment, to the effect that if the term
"people" were used, its use would "not imply the right of self-determination as that term is
understood in international law."

Four of the 32 governments offered what the International Labour Office categorised as
other than affirmative or negative views. Of the four, Bolivia, in fact, favoured "populations"
outright, the opinion of Saudi Arabia is not quoted, and Australia and Sweden occupied a middle
ground. Sweden appears to have hesitated between "populations" and the qualified use of
"peoples." In this regard, it is noteworthy that Sweden seconded both the above-mentioned
amendments introduced during the Session by the Canadian Government.

Although they had not answered the question about terminology in their response to the
initial questionnaire, the Governments of France and India in statements made during the Session
expressed some doubts about the term "peoples."

135 Ibid. at 12.
136 International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/5, para. 30. Canada
later offered another formulation of its alternative position:

Nothing in this Convention shall be taken to imply that the peoples concerned are, by the
force of this Convention, being accorded the right of self-determination or other rights in
international law or as understood in other international organisations.

Ibid. at 32/6, para. 36.
137 "The term 'populations' would create fewer conflicts, and is probably more widely accepted." Report
VI(2), supra note 69 at 12.
138 If the term "peoples" is used, it should be made clear that this does not imply an extension
of the principle of national self-determination to the indigenous population. The
introduction of the term "peoples" immediately prompts the question of political self-
determination for indigenous populations. Since this question could have far-reaching
political effects which are evidently not intended, the substitution of "peoples" for
"populations" would be inappropriate.

Ibid. at 13.
139 Notes of Lee Swepston, International Labour Office.
140 International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/3, para. 15.
Proponents of the term “populations” relied on three types of argument. The uncertainty argument related to both the content of the term “peoples” in international law and the international legal consequences of recognising a group as a “people.” According to the jurisdictional argument, since these issues had not been settled in international law, use of the term “peoples” would make, as opposed to reflect, international law. In so doing, the ILO would go beyond its competence in the spheres of economic, social and cultural rights, and trespass on the field of political rights. The pragmatic objection to the term “peoples” was that it would deter a number of states from ratifying the Convention.

Support for the term “peoples” came from indigenous groups, workers’ delegates and a majority of the states that responded to the relevant question on the questionnaire. Of the 26 states that responded positively to the substitution, however, Bulgaria, Nigeria and Portugal expressed the view that the use of “people” should be strictly circumscribed.

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141 See e.g. Report VI(2), supra note 69 at 13 (Canada’s reply); International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/3, para. 15 (general discussion).
142 See e.g. Report VI(2), supra note 69 (replies of Ecuador and the Netherlands RCO); International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/3, para. 15 (Governments of Canada and France in general discussion); ibid., at 32/5, para. 31 (employers). See also Report VI(1), supra note 61 at 31.
143 See e.g. Report of the Meeting of Experts, supra note 66 at 105, para. 31.
144 See e.g. ibid.; Report VI(2), supra note 69 at 13 (Canada’s reply); International Labour Conference, Provisional Record No.32, 75th Sess. (1988) at 32/3, para. 15 (India); ibid. at 32/5, para. 31 (employers).
146 Report VI(2), supra note 69 at 32/5, para. 31.
147 Ibid. at 13 (“...but it should be defined accurately”).
148 Ibid. (“It should however be made clear that the term “peoples” is used to recognize that the groups have an identity of their own”).
149 Adopts the reservation offered by the Office in its “law and practice” report, namely
...the term is used to recognize that these groups have an identity of their own and consider themselves to be peoples, but that the implications of the term within the national context of ratifying States must be determined at the national level.

Ibid.
During the debate, six main reasons emerged for adopting the term “peoples.” Three of these reasons concerned its implications for identity: “peoples” reflected the fact that indigenous groups had an identity of their own; “populations” had degrading overtones because the term indicated merely a grouping or aggregate of individuals; “peoples” corresponded to indigenous groups’ own view of themselves.

A fourth reason to adopt the term “peoples” was apparent consistency with the terminology used in other international organizations. The fifth and sixth reasons were contradictory, the fifth being the implied recognition of a right of self-determination, and the sixth that since the ILO’s competence and the original Convention extended only to economic, social and cultural matters, use of the term “peoples” could not possibly imply a right of self-determination.

The groundwork for a compromise was laid by the International Labour Office already in its initial “law and practice” report, which assured states that the implication [of self-determination] can be avoided if the term is used to recognise that these groups have an identity of their own and consider themselves to be peoples, but that the implications of the term within the national context of ratifying States must be determined at the national level.

Based on responses to the questionnaire, the Office concluded that the term “peoples” should be used “in order to be consistent with the terminology used in other international organisations and by these groups themselves.” Its analysis also advised clarifying that “the use of the term in this

150 Report of the Meeting of Experts, supra note 66, at 104-105, para. 30; Report VI(2), supra note 69 at 13 (replies of IWG (Canada) and Gabon).
152 Report VI(2), supra note 69 at 13 (replies of Gabon and Mexico); International Labour Conference, Provisional Record No. 32, 75th Sess. (1988) at 32/5, para. 31 (workers); 32/4, para. 21 (NGOs); at 32/5, para. 26 (Nordic Sme [sic] Council).
153 Report VI(2), supra note 69 at 13 (replies of Finland and Mexico).
156 Report VI(1), supra note 61 at 31.
157 Report VI(2), supra note 69 at 105, Conclusion no. 1.
Convention should not be taken to imply the right to political self-determination, since this issue is clearly beyond the competence of the ILO."158

Judging from the Office’s written commentary, the Office was neutral on whether indigenous peoples should have a right of self-determination (although indirectly acknowledging that they do not currently have the right). The reasons it gave for supporting the use of “peoples” turned on the implications for indigenous identity, as well as a more technical interest in standardising terminology across international organizations. The Office’s preference for a qualification on the use of “peoples” was based on respecting the limitations of the Organisation’s mandate and, by the very fact of its addressing governments’ concerns, working toward the adoption of a Convention.

b Second Round of Discussion

The second round of discussion added little to the substantive debate. In commenting on the draft convention, Brazil, Chile and India, three states that had previously been silent on the issue, supported the term “populations” rather than “peoples.”159 The next draft prepared by the Office used “peoples” with the disclaimer that the term had no “implications as regards the rights which may attach to the term under other international instruments.”160

Shifting their emphasis to criticize the qualified use of “peoples,” various indigenous groups characterised this position as racist and discriminatory because it distinguished between peoples: the fact that a people was indigenous was no reason to deny it the full range of international legal

158 Ibid. at 14.
159 Report IV(2A), supra note 72, at 8-10.
160 Report IV(2B), supra note 73 at 6, art. 1 (3).
Another shift in approach was the assertion by some indigenous groups that recognition of indigenous groups as "peoples" would not lead to secession. Another shift in approach was the assertion by some indigenous groups that recognition of indigenous groups as "peoples" would not lead to secession. The final outcome was a proviso worded much like the one proposed by the Office:

1(3) The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The intention behind the Office's wording was to be neutral on the future development of a right of self-determination for indigenous peoples in international law. The Office reasoned that the omission of any reference to the right of self-determination would eliminate the possibility that the disclaimer might be construed as preventing or impeding the development of such a right. The Committee of the Conference nevertheless approved an explanatory statement:

It is understood by the Committee that the use of the term "peoples" in this Convention had no implication as regards the right to self-determination as understood in international law.

2. Normative Model

From the perspective of governments, employers, workers and indigenous peoples, article 1(3) is a "compromise" that concedes little to indigenous peoples. Governments (and employers) were not attached to the term "populations" in and of itself, so these parties conceded little by agreeing to the substitution of the term "peoples." Their concern was the right of self-determination, in particular, the right of secession, that might flow from the recognition of

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162 International Labour Conference, Provisional Record No. 25, 76th Sess. (1989) at 25/6, para. 27.

163 Report IV(2A), supra note 72 at 12.


indigenous and tribal groups as “peoples,” and this concern had been met by the qualifier in article 1(3). The qualified use of the term “peoples” is significant to indigenous peoples (and the workers and others who support them) for, as James Anaya expresses it, “a certain affirmation of indigenous group identity and corresponding attributes of community.” But it is a recognition of identity as “peoples” without a corresponding recognition of rights as “peoples,” those rights remaining in the control of the Convention as a whole.

From the perspective of the International Labour Office, however, the approach taken to self-determination in Convention No.169 is not a lopsided saw-off between the parties; it follows from the requirements of ILO standard-setting and the interests of the Organisation. As seen in the preceding subsection, the integrity of the Organisation and the success of the Convention were among the Office’s reasons for uncoupling “peoples” from self-determination.

If we consider the extent to which the Convention more generally has subscribed to the competing normative visions of states and indigenous peoples - the different world views behind their differences over self-determination - it is apparent that, here again, the Convention does not subscribe to one of these visions or attempt to compose some pastiche of them. Rather than states’ receptiveness to individual and minority rights or indigenous peoples’ insistence on corrective justice, the Convention is, above all, true to the ILO’s tradition of functionalism: integrated, interactive and empirically-based.

For Sumpston, who directed the Office’s efforts in the adoption of Convention No.169, the Convention’s “flaws” are intentional:

it contains few absolute rules, but fixes goals, priorities and minimal rights ... it sets out basic obligations, leaving the means of action to the national governments concerned. It is full of qualifying and flexibility phrases ... its terms are not always

166 Anaya, supra note 7 at 22. See also Anaya, Indigenous Peoples in International Law, supra note 6 at 49.
167 See Part (I)(A) above.
capable of immediate application, but are instead goals ... These things all describe what the ILO set out to do when it began the procedure. 168

Consistent with the ILO integrated approach to human rights,169 the Convention combines rights as enforceable minima with social goals as aspirational maxima. The potential of the goals identified in the Convention must be read against the developed ILO system for supervising conventions, 170 the article of faith being that a government obliged by its ratification of the Convention to carry on a dialogue with the Organisation will be more susceptible to the promotion of these goals by the ILO. 171 Finally, the Organisation's method is primarily empirical: as its history of engagement with issues of indigenous peoples shows, 172 the Organisation tends to begin from its observation and cataloguing of common problems, rather than from a particular normative framework.

The application of the Convention signals the ILO's empirical bent. The first two subsections of article 1 read:

1. This Convention applies to:

a) tribal173 peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

168 Swepston, supra note 102 at 227; Swepston, "A New Step," supra note 120 at 689-690. Compare Report VI(1), supra note 61 at 89-90 (stating already in 1987 that the Convention "must establish general guide-lines or promotional measures, as well as specific obligations").

169 See above notes 54-57 and accompanying text.

170 Leary includes the ILO system for supervising conventions among the lessons for the United Nations. Leary, supra note 77 at 581, 595-612.

171 Swepston, supra note 102 at 224. See above note 126 and accompanying text.

172 See above at notes 110-111 and accompanying text.

173 As in Convention No.107, supra note 60 the term "tribal" is undefined.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

The different historical experience - and, therefore, potentially different normative argument - of indigenous and tribal peoples is acknowledged by defining them separately, but nothing in the Convention turns on this difference. At the time of Convention No.107, which distinguishes tribal, semi-tribal and indigenous populations, the attitude of the Conference was summarised as being that the distinction "affected the theoretical basis for considering their situation, but had little effect on the practical aspects of their existence."

The ILO approach is thus to work from common problems of living and working conditions. Among the definitional criteria examined in the Organisation's 1953 tome, Indigenous Peoples, was a "functional" criterion, that instead of attempting to define the Indian first of all and then to apply for his benefit the measures considered appropriate, information should first be collected regarding

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175 Article 1 of Convention No.107, supra note 60 reads:

1. This Convention applies to -
   (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

2. For the purposes of this Convention, the term "semi-tribal" includes groups and peoples who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

176 Working Document, supra note 110 at 15, n.2.
the conditions of life of the groups commonly described as indigenous in each
country where there is an indigenous problem.177

To some extent, the ILO was locked into its utilitarian definition by the fact that Convention
No.169 revises Convention No.107.178 In recommending revision, the Meeting of Experts noted
that the earlier Convention is intended to apply and has been applied to a wide variety of indigenous
and tribal peoples. It covers, for instance, Indians in the Americas, whatever their degree of
integration into the national culture; tribal peoples in Asia, including in Bangladesh, India and
Pakistan which have all ratified Convention No.107; and nomadic populations in desert and other
regions. The experts from Africa agreed that Convention No.107 is applicable in Africa, including
to relatively isolated groups such as the San or Bushmen, the Pygmies and the Bedouin and other
nomadic populations.179

To a greater extent, the broad application of Convention No.169 reflects the ILO’s
deliberate rejection of a priori normative constructs as the appropriate analytical apparatus, in
favour of observed common needs. The Office stated that

attempts to analyse the historical precedence of different parts of the national
population would detract from the need to protect vulnerable groups which in all
other respects share many common characteristics, wherever they are found.180

Even where historical precedence could be established, the Office insisted that there also be
some present need. It did not consider historical precedence sufficient to define an “indigenous
people” - which it would be from the standpoint of corrective justice. In contrast, the Indigenous
Working Group consulted by the Canadian Government objected to the requirement that the people

177 Quoted in ibid. at 4.
178 Report VI(1), supra note 61 at 32.
179 Report of the Meeting of Experts, supra note 66 at 105, paras. 33-34.
180 Report VI(1), supra note 61 at 32. See also A Guide, supra note 11 at 5 (the ILO intention ab initio “was
to cover a social situation, rather than to establish a priority based on whose ancestors had arrived in a
particular area first.”)
in question retain some or all of their social, economic, cultural and political institutions, arguing that some indigenous peoples may have lost these institutions through no fault of their own.181

Further, the critical date in the definition of "indigenous peoples" was generalised from "the time of conquest or colonisation" to "the time of conquest or colonisation or the establishment of present state boundaries" at the suggestion of Norway.182 Whereas conquest and colonisation encode the wrong central to an historical argument for the rights of indigenous peoples, the phrase "establishment of present state boundaries" is more neutral and could be seen as diminishing the normative power of the other two.

The provisions on land claims in Convention No.169 offer another window on the underlying philosophy of the Convention.183 The background debate is between recognition of the rights of indigenous peoples to the lands they now occupy and restitution of lands of which they have been deprived and to which they lay claim.184 During the discussion of Convention No.169, states were critical of proposed wording that could be interpreted as recognising the rights of indigenous peoples over lands that they had ceased to occupy.185 Recognition of rights to land currently occupied is usually grounded in traditional occupancy and can be accommodated within

181 Report VI(2), supra note 69 at 14-16.
182 Report IV(2A), supra note 72 at 13. It was incorporated into the draft Convention in Report IV(2B), supra note 73 at 6 and appears in the Convention as adopted.

In the first round of discussion, Norway had made a similar suggestion. Report VI(2), supra note 69 at 15. A Workers' amendment to this effect was made during the first Session, but was withdrawn. International Labour Conference, Provisional Record No. 32, 75th Sess. (1988) at 32/6-7, para. 40.
184 Working Document, supra note 110 at 38.
185 E.g. Report VI(2), supra note 69 at 46-49 (Canada and the United States); Report IV(2A), supra note 72 at 34-36 (same countries).
many existing systems of property law. Restitution is often sought by indigenous peoples on the basis of prior sovereignty or treaty, thereby posing a fundamental challenge to the state.  

An alternative argument for recognition of rights to land and, in some cases, restitution derives from the importance of a land base for the survival and traditional culture of a minority group. This argument is particularly strong for indigenous peoples, whose relationship with the land is central to their spiritual and cultural life. The Office, in its law and practice report, refers to the situation where, their lands having been fragmented over the course of centuries, the demand of an indigenous people is for “the restitution of sufficient ancestral land to provide them with a cohesive territory over which they may exercise management and control in accordance with their own traditions.”  

Restitution of land on the basis of need is thus distinguishable from restitution on the basis of historical claims. Generally speaking, the provisions on land in Convention No. 169 are not based on historical claims. Article 14(1) recognises that peoples who traditionally occupy the land have special rights to it, but does not thereby recognise rights over any lands they ever occupied. The first reason given by Swepston for not satisfying indigenous demands for recognition of prior sovereignty is the

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187 See e.g. Innu Communication submitted to the UN Secretary-General pursuant to ESC Resolution 1503, reprinted in edited form in Tennant & Turpel, supra note 26 at 302, 302-303 (25 March 1990).

188 Report VI(1), supra note 61 at 69.

189 Report IV(2A), supra note 72 at 36. Regarding the wording “traditionally occupy,” A Guide, supra note 11 at 18-19 states:

it was suggested, at various times during the discussion of the adoption of the Convention, that this provision should read “have traditionally occupied” which would have indicated that the occupation would have to continue into the present to give rise to any rights. The wording, as it was adopted, does indicate that their should be some connection with the present - a relatively recent expulsion from these lands, for example, or a recent loss of title.
near certainty that governments would not ratify an instrument that required them to alter their entire legal system.\footnote{190}

Swepston's other line of reasoning is that the recognition of prior sovereignty would exclude "groups, equally disadvantaged and equally exploited, [who] do not necessarily enjoy this temporal priority."\footnote{191} This reasoning highlights the normative implications of the *Convention's* broad coverage. In choosing to group together indigenous and tribal peoples, the ILO has restricted the approach that can be taken in the *Convention* to those that apply equally to both groups. At the same time, it has ensured that the common characteristics and needs seen to unite indigenous and tribal peoples will always be available as basis for the *Convention's* provisions.

Thus, like the *Convention's* definition of indigenous and tribal peoples - or because of it - the *Convention's* provisions on land respond to the perceived commonality of indigenous and tribal peoples' needs; here, their needs for territory. Article 13 obliges governments to respect the special cultural and spiritual importance of territory for indigenous peoples. Article 19(a) acknowledges the importance of a sufficient land base for collective survival:

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

While *Convention No.169* is not intended to give rise to new land claims, it requires, in article 14(3), the establishment of domestic legal procedures adequate to resolve such land claims as might exist. Whereas indigenous peoples may be inclined to read the term "adequate" as cold comfort, the ILO reads it interactively. In the working document prepared for the Meeting of

\footnote{190} This is not to say that states may not still have concerns about the *Convention's* provisions on land. For Canada's concerns, see D. Pharand, "The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns" in Anaya, Falk & Pharand, *supra* note 1 at Annex III, 132.

\footnote{191} Swepston, "A New Step," *supra* note 120 at 697.
Experts, the Office states that requiring a mechanism for settling land claims without specifying the exact mechanism "would allow the ILO’s supervisory bodies to ascertain whether governments are seriously attempting to deal with the difficult questions raised," as is rarely the case.\footnote{Working Document, supra note 110 at 44.}

Although article 14(3) appears to offer no guidance on how land claims are to be judged, Swepston points to article 19(a) as "indicating a dynamic examination within established procedures to determine whether the peoples concerned in fact have any valid claim to given parcels or areas of land, as well as what their needs are in this connection."\footnote{Swepston, "A New Step," supra note 120 at 703.} Swepston’s gloss may mean that a land claim could be reduced by showing that the claimant indigenous people did not need the entire area in order to provide, in the words of article 19(a), the essentials of a "normal" existence. Then again, perhaps a land claim could be augmented where the area covered by the claim would still be insufficient to provide, as article 19(a) puts it, for any possible increase in numbers. In any event, the linking of articles 14(3) and 19(a) further underscores the pragmatic outlook of the ILO.

Besides land claims, the benchmark of corrective justice in the Convention is the recognition of treaties. On the suggestion of the Indigenous Working Group consulted by the Canadian government, a reference to treaty claims was added to the land claims provision,\footnote{Report VI(2), supra note 69 at 63. It appears as article 19 in Report IV(1), supra note 71 at 11 and Report VI(2A), supra note 72 at 50-51. It was changed to article 14(4) in Report IV(2B), supra note 73.} but was later dropped.\footnote{International Labour Conference, Provisional Record No. 25, 76th Sess. (1989) at 25/19, para. 129 (Argentina objects to the term "treaties" in art. 14(4)).}

Treaties are mentioned in article 35, but the position of the term illustrates again the ILO’s self-imposed neutrality in matters of political rights. After the 1988 Session of the Conference, the article (then article 34) read:
The application of the provisions of this Convention shall not adversely affect rights and benefits of the (peoples/populations) concerned pursuant to other Conventions and Recommendations, under treaties or international instruments, or under national laws, awards, custom or agreements.\textsuperscript{196}

In this formulation, the legal categories are other ILO standards, international law and national law. By grouping "treaties" with international instruments, indigenous treaties are potentially recognised as treaties as agreements between sovereigns. Canada proposed instead that the categories should be "Conventions and Recommendations and other international instruments, or under national laws, awards, custom, treaties or agreements," thereby including treaties between states under international law and indigenous treaties under national law.\textsuperscript{197} The Office's solution, which was adopted by the Conference,\textsuperscript{198} was to make treaties into a separate category in between international and national law.\textsuperscript{199} Behind this solution was the Office's concern that the ILO not prejudice the results of studies then being done by the United Nations on the nature of treaties between states and indigenous peoples.\textsuperscript{200}

\section*{III \hspace{1em} UN Working Group on Indigenous Populations}

The draft declaration on indigenous rights completed by the UN Working Group on Indigenous Populations in 1993 has been described by Williams as "one of the most important encounters occurring on the frontiers of international human rights law."\textsuperscript{201} For Williams and other indigenous commentators, its importance is both procedural and substantive. Turpel describes the draft as significant, first and foremost, for the remarkable "power-sharing of the pen" between the

\footnotesize
\begin{itemize}
\item\textsuperscript{196} Report IV(1), supra note 71 at 16.
\item\textsuperscript{197} Report IV(2A), supra note 72 at 67-68.
\item\textsuperscript{198} It was adopted without a debate and without change.
\item\textsuperscript{199} Report IV(2B), supra note 73 at 26, art. 34.
\item\textsuperscript{200} Ibid. at 68.
\item\textsuperscript{201} Williams, supra note 18 at 700.
\end{itemize}
human rights experts who comprised the Working Group and the indigenous peoples and state representatives who took part in its work.\(^{202}\) The draft is also portrayed as responding significantly to the stories told by indigenous peoples about their place in the world and to their arguments about the human rights that must be recognised for them to preserve this place.\(^{203}\)

This part of the chapter documents a change in the Chair of the Working Group's presentation of the object and nature of the drafting process, moving it closer to indigenous peoples' aspirations for the declaration and understandings of the dynamics of its drafting (Section A). The part suggests that this change permitted and ultimately structured the achievement of a right of self-determination in the draft that combines states' and indigenous peoples' ideas of the right and its justifications for secession (Section B). That is, the Working Group's responsiveness to the perspectives of indigenous peoples was a function not simply of the exceptional openness and accessibility of this forum throughout, but of the Chair's eventual reconception of the process and the place of indigenous peoples in that process.

### A Process

The UN Working Group on Indigenous Populations\(^{204}\) is made up of five individuals drawn from the Sub-Commission on Prevention of Discrimination and Protection of Minorities,\(^{205}\) a body of independent experts\(^{206}\) subordinate to the Commission on Human Rights and the Economic and

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\(^{203}\) E.g. R. Kuptana, "The Human Rights of Peoples" (Canadian Bar Association Conference on Aboriginal Peoples in the Canadian Constitutional Context: Application of International Law Standards & Comparative Law Models, Montreal, 28-29 April 1995); Sambo, supra note 3.

\(^{204}\) See generally Sanders, supra note 122. The members of the Working Group are listed in its annual report.


\(^{206}\) According to Asbjørn Eide, the requirements of independence and expertise are neither well-defined nor well-policing. Ibid. at 212, 252-254.
Social Council. While the membership of the Working Group has changed over the course of
drafting the declaration on indigenous rights, Erica-Irene Daes has been its Chair throughout.

The 1982 Economic and Social Council resolution establishing the Working Group
instructs it to
give special attention to the evolution of standards concerning the rights of
indigenous populations, taking account of both the similarities and the differences in
the situations and aspirations of indigenous populations throughout the world.

By not specifying how standards would evolve, the resolution leaves open whether the Working
Group's mandate is the passive codification of changing standards in international law or the active
development of new standards. Depending on the interpretation given to the Working Group's
mandate, the requirement that it take account of indigenous peoples' own aspirations constitutes
these aspirations as either data to be evaluated or choices to be reconciled with those of states.

Following the Working Group's first draft of principles for the declaration, the Commission
on Human Rights passed a resolution\(^{208}\) in 1986 commending the Working Group for its
"continued broad approach and flexible methods of work,"\(^ {209} \) and the participating observer
governments, specialised agencies, NGOs, and, in particular, organisations and communities of
indigenous peoples for their contributions. The resolution also urged the Working Group to

\(^{207}\) Study of the problem of discrimination against indigenous populations, ESC Res. 1982/34, UN ESCOR,

\(^{208}\) Report of the Working Group on Indigenous Populations of the Sub-Commission on Prevention of
E/1986/22 (1986) 86. See also Working Group on Indigenous Populations of the Sub-Commission on
No.5, UN Doc. E/1987/18 (1987) 90 at 91. (There was no 1986 session of the Working Group.)

\(^{209}\) See Barsh, "An Emerging Object," supra note 54 at 83 (Working Group is unique in having opened
its doors to indigenous groups regardless of their formal status with ECOSOC); Lâm, "Making Room,"
supra note 44 at 617 (The Working Group is exceptional in inviting all concerned parties to speak in their
true representative capacities.); Marantz, supra note 13 at 14, ("Working Group process is unique with
respect to the proceedings of the United Nations"); D. Sanders, "Draft Declaration on the Rights of
beginnings of the Working Group in 1982, any Indigenous person could speak, making the Working
Group the most open forum in the whole U.N. system.").
continue its development of international standards "based on a continued and comprehensive review of developments" in the area of indigenous rights and "of the situations and aspirations of indigenous populations throughout the world." As with the earlier resolution, there is a tension between the technical consolidation implicit in "based on a continued and comprehensive review of developments" and the potential for dialogic innovation in "aspirations of indigenous populations."

However ambivalent, these resolutions on the Working Group's mandate made more room for the development of new standards on indigenous peoples than the General Assembly's 1986 resolution on standard-setting in the field of international human rights. A form of "quality control" for the recognition of new human rights, GA resolution 41/120 reads in part

*Recalling* the extensive network of international standards in the field of human rights ...

*Emphasizing* the primacy of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in this network, ...

*Recognizing* the value of continuing efforts to identify specific areas where further international action is required to develop the existing international legal framework in the field of human rights ...

2. **Urges** Member States and United Nations bodies engaged in developing new international human rights standards to give due consideration in this work to the established international legal framework;

4. **Invites** Member States and United Nations bodies to bear in mind the following guidelines in developing international instruments in the field of human rights, such instruments should, *inter alia:*

   (a) Be consistent with the existing body of international human rights law,

   ...  

   (e) Attract broad international support;\(^{211}\)

\(^{210}\) Philip Alston uses the notion of "quality control" in an article published two years before GA Resolution 41/120 was passed. "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 AJIL 607. Alston offers a formal list of substantive requirements for new human rights, much like that in GA Resolution 41/120, but dismisses this approach as unworkable. *Ibid.* at 614-617.

Throughout the drafting of the declaration in the Working Group, Resolution 41/120 would be the touchstone for states arguing that the declaration should exhibit strict consistency with existing international human rights instruments or be capable of attracting broad international support.212

Australia early on summarised the two contending interpretations of the standard-setting process and exemplified the preference of most states:

...it is not clear from the draft itself whether it operates within the framework of existing agreements or whether the draft declaration is conferring additional rights specifically for indigenous peoples and thus going beyond the provisions for minorities in the International Covenant on Civil and Political Rights.

From Australia’s perspective, it is clearly the former relationship which the draft declaration should seek to foster.213

Canada argued that close correspondence to existing international norms would ensure that the declaration’s objectives were achievable and acceptable.214 For Sweden, the risk of straying from established norms was a blurring of concepts and an incoherent system of norms:

... to make indigenous rights individual ones, as for instance minority rights in article 27 of the Covenant...would undoubtedly be the best way of ensuring a clear, coherent and functional normative system in the field of human rights, which would be in accordance with the aims set out in General Assembly resolution 41/120.215

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214 Analytical compilation of observations and comments received pursuant to Sub-Commission resolution 1988/18, UN Doc. E/CN.4/Sub.2/1989/33/Add.1 (1989) at 5, paras.2-4 (Canada).

215 Ibid. at 10, paras.4-5 (Sweden).
States understood the Working Group to be engaged in the production of a text precise enough to be easily understood and effectively implemented.\textsuperscript{216} Lastly, many expected a text that "reconciled the points of view of all interested parties, based on a spirit of consensus."\textsuperscript{217}

The conceptions that indigenous groups had of the Working Group’s standard-setting function correspond to the other pole of its mandate: that which required the Working Group to develop standards based on the aspirations of indigenous peoples.\textsuperscript{218} Indigenous groups maintained that the draft declaration should not be limited by existing international human rights instruments.\textsuperscript{219} Were consistency with the established international legal framework necessary, one NGO representative argued, then a broad notion of consistency should be employed.\textsuperscript{220}

Also in contrast to states, a number of indigenous representatives to the Working Group viewed the declaration as a manifesto of the rights of indigenous peoples, with the more detailed provisions on implementing, protecting and enforcing these rights left to a convention.\textsuperscript{221} In the words of the Indian Law Resource Center, the declaration should "declare universal rights for indigenous peoples in broad, ringing and enduring terms."\textsuperscript{222} Finally, indigenous voices in the

\begin{footnotes}
\item[216] Report on Ninth Session, supra note 212 at 8, para.37 (New Zealand); Report on Tenth Session, supra note 212 at 15, para.57 (Canada, Denmark, Finland, Norway, Sweden).
\item[219] Report on Seventh Session, supra note 212 at 17, para.52.
\item[220] Report on Tenth Session, supra note 212 at 16, para.60 (Minority Rights Group).
\item[222] UN Doc. E/CN.4/Sub.2/1989/33/Add.1 at 13 (Indian Law Resource Center); Recommendations concerning the August 1989 Draft Universal Declaration on the Rights of Indigenous People, 21 June 1990, in Information received from non-governmental organizations, UN Doc. E/CN.4/Sub.2/AC.4/1990/3/Add.2
\end{footnotes}
Working Group tended to speak of the draft declaration as a balance between the aspirations of indigenous peoples and the legitimate interests of states, and were less inclined to insist on consensus.

Over the eight years of drafting the declaration on the rights of indigenous peoples, Chair Erica-Irene Daes shifted the process away from judicious standard-setting by a group of experts with input from interested parties toward negotiations between the parties as equals mediated by the Chair. In an early account of the Working Group’s progress on the draft declaration, she drew attention to the guidelines in General Assembly resolution 41/120, including consistency with existing human rights law, and reproduced the resolution as an annex. By the time the Working Group completed the draft declaration in 1993, the declaration had become too radical to satisfy resolution 41/120. Moreover, a description of the declaration given by Daes in 1989 makes clear that she has cut the process loose from its moorings in international human rights law and was navigating between the Scylla and Charybdis of the parties’ demands:

the text as it stands now, constitutes a fair balance between the aspirations of indigenous peoples and the legitimate concern of States and, for that reason, seems

(1990) at 5 (Indian Law Resource Center). See also Report on Tenth Session, supra note 212 at 15-16, para.59 (National Indian Youth Council concerned about use of excessively specific language).


225 Alston finds that the loose mandates of most UN human rights bodies and their predilection for ad hoc responses mean that there is some capacity to shift from one type of institutional actor to another. Alston, supra note 48 at 5. What is remarkable about the Working Group is that the shift was promoted by peoples, as opposed to states or other more powerful institutional actors.

226 Report on Fifth Session, supra note 212 at 12, para.42.

to be a realistic approach to the issues. It has also been mentioned that substantial changes have to be acceptable to all parties concerned.\textsuperscript{228}

In a 1994 comment to the Sub-Commission, Daes indicates that the declaration is not a consensus document: “The Working Group which, with some 790 participants, was more like a community had agreed on many constructive points but on some matters opinions still differed.”\textsuperscript{229}

Williams attributes the far-reaching rights in the draft declaration to the transformative potential of “equal status contact” for outsider groups.\textsuperscript{230} By this, he means both the equal status of governments and indigenous peoples as observers in the Working Group, including the safeguarding of dignity and respect through the formality of addressing remarks to the Chair,\textsuperscript{231} and the absence of rules that would prevent indigenous persons from presenting the information they consider relevant in the way that they consider appropriate.\textsuperscript{232}

In light of the analysis in this section, Williams’s thesis of “equal status contact” between states and indigenous peoples does not go far enough in exploring the nature of that status. So long as the Working Group tended to see itself as engaged in standard-setting based on a world-wide review of the legal developments affecting indigenous peoples and of their situations, and in the conservative manner of resolution 41/120, statements to the Working Group by representatives of indigenous groups would simply be data for the review and not arguments about what standards

\textsuperscript{228} First revised text of the Draft Universal Declaration on Rights of Indigenous Peoples prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs. Erica-Irene Daes, pursuant to Sub-Commission resolution 1988/18, UN Doc. E/CN.4/Sub.2/1989/33 at 3, para.12 [hereinafter First revised text].
\textsuperscript{230} Williams, \textit{supra} note 18.
\textsuperscript{231} \textit{Ibid.} at 678.

With respect to the latitude for indigenous peoples to choose various forms of discourse, it is unclear whether Williams considers their use of storytelling or rights talk to be the discursive engine of change in the Working Group.
should be set. Only through reconceiving the process as “a fair balance between the aspirations of indigenous peoples and the legitimate concerns of states” could indigenous voices have had the impact that they did on the rights in the draft declaration. Had the process been reconceived as unconstrained negotiations instead, the power differential between states and indigenous peoples would have affected the balance struck. What Williams overlooks is that it was the way in which the Chair representationally altered the process that gave effect to indigenous people’s stories and arguments about the right of self-determination.

B Substance

1. Debates

Whereas in discussions of ILO Convention No.169 the issue of self-determination was confined to the debate over “populations” or “peoples,” discussions of the UN draft declaration on indigenous rights also engaged the issue of self-determination directly. In the sessions of the UN Working Group on Indigenous Populations, the populations/peoples debate became a debate over “people” or “peoples.” For certain states, the danger of “peoples” in the plural continued to be that the use of the term might implicitly recognise a right of self-determination and, in turn, a right of secession. “People” in the singular, like “populations,” denoted merely an aggregate of individuals. The third possibility was, as in Convention No.169, to use “peoples” with a proviso that explicitly uncoupled “peoples” from the right of self-determination and thereby from the right

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233 For a detailed discussion of the debates on self-determination in the Working Group, see also Iorns supra note 44 at 204-223.

234 E.-I. A. Daes, Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1993/26/Add.1 (1993) at 2, para.4 [hereinafter Explanatory Note]. E.g. Marantz Statement, supra note 41 at 6 (“With regard of the use of the term ‘peoples’, Canada’s concern ... is linked solely to the self-determination implications of this term in international law: it is not an objection to the term itself”); Canada’s Suggestions on Draft Operative Paragraphs (submitted to the 10th Session of the Working Group, 1992) [undated].

It should be noted that states’ positions may have changed since the Working Group completed its draft declaration in 1993.
of secession. In addition, the term “self-determination” was, with successive formal and informal drafts, increasingly sprinkled throughout the preamble and operative paragraphs of the declaration. States’ willingness to recognise a right of self-determination was largely dependent on decoupling the right of self-determination, in turn, from the right of secession.

By the time that the Working Group produced its final draft of the declaration, a minority of states accepted without reservation a right of self-determination for indigenous peoples. This does not necessarily mean, however, that these states recognised indigenous peoples as having the same right of self-determination as colonial peoples; that is, the right to choose independent statehood, free association or integration with another state, or other political status. Australia’s position, for example, was that this right of self-determination has become less and less relevant, and that it could and must be reconceived for a new age. At the 1992 session of the Working Group, Australia presented its post-colonial conception of self-determination, which recognises the special position of indigenous peoples, as well as guarantees their fundamental human rights and their full and genuine participation in the political process. This and later statements to the Working Group give some indication that Australia subscribed to a rights model of self-determination: in its 1992 statement, it proposed the penultimate paragraph on self-determination found in the Declaration on Friendly Relations for inclusion in the draft declaration. As discussed in Chapter 2, this paragraph is considered by some to grant a group the right of external self-determination where it has been denied a right of internal self-

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235 Report on Eleventh Session, supra note 6 at 16, para.50.
determination (which, on the Australian interpretation, may be a complex of individual and group rights).\textsuperscript{238}

For most states, the policy on indigenous peoples was to negotiate an increasing range of options within the framework of the state. Canada, for example, refused to support “peoples” in the absence of a qualification that the use of the term did not imply a right of self-determination,\textsuperscript{239} while simultaneously moving toward an expansive notion of internal self-determination.\textsuperscript{240} The Canadian approach was to discard the existing concept of self-determination in international law and to produce a new concept of self-determination within the draft declaration. The existing concept, with its risk of secession, would be jettisoned by severing the use of the term “peoples” from it and by making plain that any right of self-determination recognised in the declaration was not understood by Canada “to be a right of self-determination as that term was understood in international law.”\textsuperscript{241} Even though the same term would be used, whatever right of self-determination emerged from the drafting of the declaration would be treated by Canada as unconnected to the right of self-determination already established in international law. With respect to the content of the new and distinct right, Canada stated during the 1992 session of the Working Group that it

is sensitive to the desire of many to exercise control over their own lives and how they are governed. Canada supports the principle of self-determination for indigenous peoples, within the framework of existing states, where there is an inter-

\textsuperscript{238} Similarly, Denmark’s support without reservation for a right of self-determination of indigenous peoples may have assumed that the current right of self-determination in international law did not apply to indigenous peoples, so that unqualified use could be made of the term “self-determination” in the declaration without recognising any right of self-determination for indigenous peoples beyond the range of internal options specified in the declaration (autonomy, self-government and so on).

\textsuperscript{239} \textit{Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18, UN Doc. E/CN.4/Sub.2/1989/33/Add.1 (1989) at 4; Information Received from Governments, UN Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.3 (1990) at 2; 1992 Marantz Statement, supra note 41 at 6; Report on Tenth Session, supra note 212 at 19, para 73; Report on Eleventh Session, supra note 6 at 19, para 62.}

\textsuperscript{240} Marantz Statement, supra note 41 at 5; \textit{Report on Tenth Session, supra note 212 at 17, para 64; Report on Eleventh Session, supra note 6 at 16, para 50, as corrected in UN Doc. E/CN.4/Sub.2/1993/29/Add.1 (1993).}

\textsuperscript{241} Marantz Statement, supra note 41 at 5.
relationship between indigenous and non-indigenous jurisdictions that gives indigenous people greater levels of autonomy over their own affairs but that also recognizes the jurisdiction of the state. Canada's understanding of self-determination is that it would be exercised in a manner which recognizes that inter-relationship between the jurisdiction of the existing state and that of the indigenous community, and where the parameters of jurisdiction are mutually agreed upon.  

For Canada, the right of self-determination articulated in the draft declaration must be internal, recognise that greater autonomy for indigenous communities can modify but not eliminate the jurisdiction of the existing state, and require agreement on jurisdiction. These three requirements remained constant in its position at the 1993 session, at which the reading of the draft declaration was completed. What is different about Canada's position on record at the 1993 session is that whereas Canada had previously been at pains to distinguish any right of self-determination developed in the draft declaration from the traditional right of self-determination in international law, it pointed out that indigenous peoples qualify for the traditional right of self-determination in international law on the same basis as non-indigenous peoples if they otherwise meet the criteria.

To the extent that states articulated a normative basis for their policies on indigenous peoples within the state, it tended to be some understanding of equality or extension of accepted minority rights. Sweden consistently argued:

The concept of human rights flowed from the idea of the inherent right of each individual. This concept should not become weakened or ambiguous. Therefore, indigenous rights, even when exercised collectively, should be based on the non-discriminatory application of individual rights. [Sweden] suggested an approach similar to the one adopted in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

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242 Ibid.
244 See Part I(A), above.
Venezuela resisted provisions in the draft declaration that it regarded as undermining equality: “rather than preventing discrimination, the draft declaration tends to increase it by promoting the formation within States of watertight compartments or independent communities.”

Other states identified, as the United States did, both the right of indigenous peoples to “non-discrimination and equality before the law, and their right to preserve and develop their identity.” Australia initially supported “the right of indigenous people to be free and equal to all other human beings, to preserve their cultural identity and traditions, and to pursue their own cultural development.” The same normative concerns are present in its subsequent position that self-determination can be realised by “a system which would guarantee full and genuine participation and fundamental human rights, as well as recognize the special position of indigenous peoples.”

Generalising across the states that participated in the Working Group, states were prepared to recognise group-differentiated rights only if they were referable to equality, or, to the extent that this was not subsumed in equality, the preservation and development of culture. This was put succinctly by India,

> With regard to territorial arrangements, the degree of autonomy appropriate to a given indigenous community had to be judged in the light of what was necessary to maintain its own culture and separate identity, while protecting the rights of other population groups.

If historical claims by indigenous peoples to vast tracts of land are supportable on this type of argument, it would be because the land was demonstrably necessary to their culture and not on the

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247 Report on the Tenth Session, supra note 212 at 14, para 52.
248 First revised text, supra note 228 at 2.
249 Report on Tenth Session, supra note 212 at 17, para. 66.
250 For other analyses of states’ positions in the Working Group, see Alfredsson, supra note 25 at 43-44; Marantz, supra note 13 at 19-21.
basis of historical entitlement. By and large, states involved in the drafting of the declaration opposed language that might indicate support for historical land claims, notably the use of "occupy" in the past tense.\textsuperscript{252} A number of states also took exception to revisiting the injustices of the international legal doctrine of \textit{terra nullius}, according to which some territories inhabited by indigenous peoples had been considered "empty lands."\textsuperscript{253}

Throughout the drafting of the declaration, as with ILO Convention No.169, indigenous participants advocated that the terms "peoples" and "self-determination" be used without any reservation.\textsuperscript{254} Although secession is not a desirable or viable option for many indigenous peoples, a right of self-determination without a right of secession was criticised as a double standard.\textsuperscript{255}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{252} Analytical Compilation of observations and comments received pursuant to Sub-Commission resolution 1988/18, UN Doc. E/CN.4/Sub.2/1989/33/Add.1 (1989) at 24 (Canada); Analytical Compilation of observations and comments received pursuant to Sub-Commission resolution 1988/18, UN Doc. E/CN.4/Sub.2/1989/33/Add.3 (1989) at 7 (Norway); Information Received from Governments: Addendum, UN Doc. E/CN.4/Sub.2/AC.4/1990/1 (1990) at 3, 5 (Argentina); Information Received from Governments: Addendum, UN Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.1 (1990) at 5 (Australia).
\item \textsuperscript{253} Information Received from Governments: Addendum, UN Doc. E/CN.4/Sub.2/AC.4/1990/1 (1990) at 6 (Argentina). See also Information Received from Governments: Addendum, UN Doc. E/CN.4/Sub.2/AC.4/1990/1/Add.1 (1990) at 6 (Australia), although a reference in the Report on the Tenth Session to what is presumably Australia and the Mabo case may signal a change. Report on Tenth Session, supra note 212 at 28, para.125.
\item \textsuperscript{254} Report on Fifth Session, supra note 212 at 14, para.52; Report on Seventh Session, supra note 212 at 17-18, paras.54-56; Report on the Tenth Session, supra note 212 at 18, para. 68, 28, para. 122; Explanatory Note, supra note 234 at para.11; Report on Eleventh Session, supra note 6 at 18, paras. 57-58, 60.
\end{enumerate}
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Indigenous peoples are peoples and are therefore entitled to the same right of self-determination as other peoples.

Among the indigenous groups taking part in the Working Group, the dominant model of self-determination was historical. Nevertheless, it should not be assumed that illegal taking or breach of pact was the whole of indigenous perspectives on the colonial encounter. Rather, through the idea of corrective justice, a part could be rendered normatively intelligible to international morality. The preamble to the 1992 *Indigenous Peoples Earth Charter* illustrates the broader indigenous philosophy that informs indigenous perspectives on historical events:

> We the indigenous peoples walk to the future in the footprints of our ancestors.

> From the smallest to the largest living being, from the four directions. From the air, the land and the mountains, the creator has placed us, the indigenous peoples upon our mother the earth.

> The footprints of our ancestors are permanently etched upon the lands of our peoples.

> We, the indigenous peoples maintain our inherent right to self-determination. We have always had the right to decide our own forms of government, to use our own ways to raise and educate our children, to our own cultural identity without interference.

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To the extent that indigenous peoples have participated meaningfully in the drafting of the UN declaration on indigenous rights, it becomes necessary to modify the critique that international law projects onto indigenous peoples a representation that does not correspond to their own. Compare C. Perrin, "Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples" (1995) 6 Law & Critique 55 (whose critique of the draft declaration appears to assume no indigenous participation) with Tennant, *supra* (whose discussion embraces both representation of and resistance by indigenous peoples in contemporary international law).
We continue to maintain our rights as people despite centuries of deprivation, assimilation and genocide.

We maintain our inalienable rights to our lands and territories, to all of our resources - above and below - and to our waters. We assert our ongoing responsibility to pass these on to future generations.

We cannot be removed from our lands. We, the indigenous peoples, are connected by the circle of life to our lands and environments.

We, the indigenous peoples, walk to the future in the footprints of our ancestors.258

The preamble tells a story of endurance: indigenous peoples have suffered centuries of colonialism and their rights as sovereign peoples have survived. Many indigenous groups argue that their historical experience is indistinguishable from that of other colonial peoples,259 whose right of self-determination, including a right of independence, has been recognised in international law. The case is strongly put in a 1992 statement to the Sub-Commission on Minorities by sixteen non-governmental organizations:

... How can there be any Partnership between the World's Indigenous peoples and the non-indigenous when the legacies left by Captain Cook and Christopher Columbus are the invisible, captive, dependent Indigenous minorities of the "New World", who are denied their right of self-determination because they are excluded from the list of peoples and territories which have enjoyed decolonization?260

258 Earth Charter, supra note 101 at 2.

259 For a comparison of indigenous peoples, more generally, to other occupied peoples, see G. Erasmus, National Chief, Assembly of First Nations, in F. Cassidy, ed., Aboriginal Self-Determination (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1991) 22 at 26:

We would like an end to the repugnant proposals forever coming from Canada, that we must accept some kind of delegated authority that started from some Sovereign in Europe. That the indigenous people have absolutely no sovereignty left; nothing, it's a blank sheet...That is not acceptable.

Canadians would not accept that from any other situations in the world. Are we in Kuwait? Why did we bother with what was going on with Saddam Hussein? Why were we concerned with the institutions of a people that are being obliterated completely and taken away, when we can't even see right in front of us?

260 Statement of concern for the Year of Indigenous Peoples and the institutionalized racism that would adversely affect it, signed by sixteen NGOs and directed to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 19 August 1992 [unpublished, on letterhead of National Aboriginal & Islander Legal Services Secretariat]. See also M.B. Trask, "Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective" (1991) 8 Ariz. J. Int'l & Comp. L. 77 (arguing that Hawaii is a non-self-governing territory, with the right of self-determination in international law).
In defining colonialism, Rosemary Kuptana, President of the Inuit Tapirisat of Canada, implicitly signals the principles that constitute a remedy: “Colonialism is a process of assuming control of other peoples’ lands in one’s own self-interest without their consent and without regard to their prior rights.” The principle of consent must inform the relationship between states and indigenous peoples. It follows that all lands taken from indigenous peoples without their consent must be restored to them, even lands not “traditionally occupied” in the strict sense of the words. The international legal doctrine of *terra nullius*, which had been invoked to legalise the acquisition of territory with indigenous inhabitants, should be, in the words of the *Earth Charter*, “forever erased from the law books of States.” Finally, where indigenous peoples did consent, through treaties with the pre-colonial or postcolonial government, these treaties must be recognised and respected.

The drafting history of the declaration on the rights of indigenous peoples in the Working Group shows that to the extent that states supported the text, they did so on grounds of rights. If states were to accept a right of secession - and it is unclear whether any states actually did -

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261 Kuptana, *supra* note 203 at 5.
264 See Chapter 4 above.
265 *Earth Charter*, *supra* note 101 at 5, para. 36. See also *ibid.* at 3, para. 6.
consistency suggests that they would consider secession justifiable only as a last resort for severe violations of the group’s rights. The Australian government even appeared to raise this model of self-determination by proposing that the language of the Declaration on Friendly Relations be used in the draft declaration. In contrast, a number of indigenous groups saw the goal of the declaration as, among other things, correcting historical wrongs done to them. On this reasoning, where an indigenous people and its territory were incorporated into the state by force, that people, as the victim, should have the choice of being restored to their prior independence or negotiating more equitable terms of membership in the state. Similarly, in the case where an indigenous people consented to become part of the state by concluding a treaty with the newcomers and the state has since breached the treaty, that people should be able to choose freely between the restoration of their independence and the observance of the treaty.

Thus the issue of secession to be resolved in the declaration on the rights of indigenous peoples was both whether to recognise a right to secede and if so, on what basis. The next subsection discusses whether the right of self-determination that ultimately became part of the Working Group’s draft includes a right to secede, and the final subsection examines the normative structure of the right.

2. Development of Positive Law

During the eight years that the UN Working Group on Indigenous Populations prepared the declaration on the rights of indigenous peoples, the document developed from an inoffensive standard-setting exercise to a bold forerunner of the rights of indigenous peoples. The declaration began with seven principles developed by the Working Group at its 1985 session. By the time that the Working Group finalised its draft in 1993, the declaration had grown to a nineteen-paragraph
preamble and forty five articles, covering indigenous rights from the right of self-determination to the rights to the repatriation of human remains and protection of vital medicinal plants.

The first set of principles amounts to a compilation of the individual and minority rights applicable to indigenous peoples in international law. These early principles make no allusion to a right of self-determination, internal or external. Nor do they include any of the rights we now associate with internal self-determination: a right of indigenous peoples to participate in political life and in economic and social decision-making that affects them, or a right of autonomy. The goal of the declaration, as Working Group member Miguel Alfonso Martinez observed in retrospect, “was to deal with the problem of discrimination against indigenous peoples.”

Comprised of the equal rights of individuals and of minority rights, the principles contain none of the imperatives that would be generated by corrective justice, such as land rights or respect for treaty rights.

Three of the principles ensure individual equal rights for indigenous persons, the only collective right being the right to exist:

The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.

The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.

The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of the person.

The remaining four principles basically follow from the rights of persons belonging to minorities guaranteed by article 27 of the International Covenant on Civil and Political Rights:

The right to manifest, teach, practise and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to sites for these purposes.

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267 Report on Fifth Session, supra note 212 at Annex II.
The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.

The right to preserve their cultural identity and traditions, and to pursue their own cultural development.

The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.

a 1989 Session

By 1989, the parts of the declaration on equality (part I) and traditionally recognised minority rights (part II) are now supplemented with parts on land rights (part III), maintenance and development of traditional ways of life (part IV), and political participation and autonomy (part V). Although the term “self-determination” does not appear in the operative paragraphs of the declaration, the preamble contains a “saving” provision:

Bearing in mind that nothing in this declaration may be used as a justification for denying to any people, which otherwise satisfies the criteria generally established by human rights instruments and international law, its right to self-determination,

A provision on honouring treaties with indigenous peoples and some of the provisions on land rights seek to remedy historical wrongs. In particular, paragraph 12 recognises a right of collective and individual ownership of land that has been traditionally occupied, the implication being that the land need not still be occupied by the indigenous group claiming ownership. Paragraph 15 reads in part:

The right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprival has been based on theories such as those related to discovery, terra nullius, waste lands or idle lands.

269 First revised text, supra note 228 at 4; also reproduced in Report on the Seventh Session, supra note 212 at Annex II. For intermediate drafts, see Report on Fifth Session, supra note 212 at Annex II.

270 The final parts deal with dispute resolution (part VI) and interpretation of the declaration (part VII). First revised text, supra note 228.

271 Paragraph 27 in ibid.
b 1990 Session

Drafting during the 1990 session of the Working Group took place in three informal drafting groups, each group tasked with revising certain parts of the declaration.\(^{272}\) The result was to multiply the number of references to “peoples” and “self-determination” in the draft.

Among the revisions suggested to the first paragraph of the preamble were “[c]onsidering that indigenous peoples … are born free and are equal to all other peoples … in rights”\(^{273}\) and “[c]onsidering indigenous peoples equal to all others in dignity and rights, while recognizing the right of all peoples … to be different.”\(^{274}\) The effect of the word “other” or “others” is to group indigenous peoples with “peoples.” Along similar lines, it was proposed that “human groups and peoples” be added to “human beings” in operative paragraph 2, which recognised the right to be free and equal to all other human beings in dignity and rights.\(^{275}\)

One alternative formulation of the saving provision in the preamble seems to imply that all indigenous peoples have the right of self-determination: “nothing in this declaration may be used as a justification for denying to any indigenous peoples their right to self-determination.”\(^{276}\) The same drafting group proposed that a paragraph be added to the preamble noting that the International Covenants “affirm the fundamental importance of the right to self-determination.”\(^{277}\)


\(^{273}\) 1991 Revised working paper, supra note 272 at 5 (Informal Drafting Group I, chaired by Miguel Alfonso Martinez).

\(^{274}\) Ibid. (Working Group II, chaired by Danilo Turk)

\(^{275}\) Ibid. at 43 (Informal Drafting Group III, chaired by Erica-Irene Daes).

\(^{276}\) Draft 10th preambular paragraph, in ibid. at 28-29 (Informal Drafting Group II, chaired by Working Group member Danilo Turk).

\(^{277}\) Ibid. at 37 (Informal Drafting Group II).
Most significantly, this group concluded that a new first paragraph on the right of self-determination of indigenous peoples, its wording almost identical to common article 1 of the Covenants, should be added to the operative portion of the declaration. Another drafting group suggested revising one of the recitations in the preamble to include in the right of indigenous peoples to self-determination

their right freely to determine their present and future relationships with the political, economic and social life of States and that the reaffirmation of the said right and of all others enshrined in this Declaration is not to be construed, at present, as in any way limiting their enjoyment of equal rights with citizens of the States in which they currently reside.

The right of indigenous peoples to determine their relationship with states indicates that they are free to choose their place in the world community, as does the qualification that their enjoyment of equal rights governs their status “at present” within the state in which they “currently” reside.

The idea of internal, as opposed to external, self-determination is developed by suggested revisions linking the right of self-determination in the preamble to the “right to development oriented to the fulfilment of [indigenous peoples’] own spiritual and material needs” and in operative paragraph 20 to the right to design and deliver social and economic programmes affecting indigenous peoples.

None of the changes proposed by the informal drafting groups affect the elements of corrective justice in the provisions on land rights. The drafting group examining the paragraph

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278 Ibid. at 41 (Working Group II).
279 Draft 9th preambular paragraph in ibid. at 26-27 (suggested revisions by Working Group I, chaired by Working Group member Miguel Alfonso Martinez).
280 Draft 7th preambular paragraph in ibid. at 20-21 (revision suggested by Informal Drafting Group I, chaired by Miguel Alfonso Martinez).
281 Draft operative paragraph 20 in ibid. at 87 (Informal Drafting Group I).
282 Draft operative paragraph 12 in ibid. at 65 and draft operative paragraph 15 in ibid. at 73.
on treaties with indigenous peoples suggested adding that the treaties must be interpreted "according to their original intent, pursuant to the principle of *pacta sunt servanda.*"\textsuperscript{283}

c 1991 Session

The 1991 session completed a first reading of the preamble and the operative paragraph up to paragraph 17 \textit{bis}, resulting in what was seen as a retreat from the text’s earlier position on self-determination.\textsuperscript{284} The reference to "peoples" added to the opening paragraph of the preamble is only faintly equated to indigenous peoples. The saving provision in the preamble refers to "any people," thereby remaining neutral on whether indigenous peoples are "peoples" under existing international law.\textsuperscript{285} Similarly, the preamble notes that the \textit{International Covenants} affirm the fundamental importance of the right of self-determination, but makes no connection between article 1 of the \textit{Covenants} and indigenous peoples.\textsuperscript{286} There are no other references to self-determination in the preamble.

The right of indigenous peoples to be equal in rights to all other peoples is now included in the third operative paragraph. More specifically, the right of indigenous peoples to self-determination is established in the first operative paragraph of the draft, but is coded as a right of internal self-determination. By recognising the right “in accordance with international law,” the paragraph consigns the prospect of external self-determination to the uncertainty and conservatism of state-driven international law in this area. Moreover, the right of indigenous peoples to self-determination is expressed as the right to determine their relationship with the state in which they

\textsuperscript{283} \textit{Ibid.} at 101 (Informal Drafting Group II).

\textsuperscript{284} \textit{Report on Ninth Session, supra} note 212 at 11, para. 54.

\textsuperscript{285} 14th preambular paragraph, \textit{Draft universal declaration on the rights of indigenous peoples} in \textit{ibid.} at Annex II.

\textsuperscript{286} 13th preambular paragraph in \textit{ibid.}. 
A prohibition on the violation of territorial integrity is also introduced into the declaration indirectly in a new paragraph that would prevent the declaration from being interpreted contrary to the UN Charter and the Declaration on Friendly Relations. We have seen in Chapter 2, however, that the Charter as interpreted by the Declaration on Friendly Relations can be read as allowing the secession of a group that has been denied any say in its government.

While the provision on treaties was not dealt with in this reading, the provision on reclaiming lands taken away from indigenous peoples without their consent is redrafted to remove the obviously historical slant. The phrase “in particular, if such deprival has been based on theories such as those related to discovery, occupation, cession, abandonment, terra nullius, waste lands or idle lands” has been omitted.

Prior to the 1992 session of the Working Group, the Chair further altered the right of self-determination in the draft. The indirect (near total) prohibition on the disruption of territorial integrity remains, but the formulation of the right in operative paragraph 1 has been made to echo article 1 of the International Covenants. The phrase “in accordance with international law” no longer ends the first sentence, thereby limiting the most general expression of the right. Instead,

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287 See also 12th preambular paragraph in ibid. which mentions the “right freely to determine their relationship with the States in which they live” without attributing the right to the broader right of self-determination,

288 After operative paragraph 13 (unnumbered) in ibid.

289 Operative paragraph 16 in ibid.


291 Now numbered operative paragraph 4 in ibid.

292 Although this limitation exists for the newly added reference to “peoples” in the first paragraph of the preamble:
the phrase runs on without punctuation: "in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development." The equation is between "in accordance with international law" and the expression given to the right of self-determination in article 1 of the International Covenants. While this formulation suggests the full right of self-determination, internal and external, operative paragraph 1 makes clear that internal self-determination is more extensive than it has hitherto been in international law. "An integral part of this," the paragraph continues, "is the right to autonomy and self-government."

The Chair also expands the reference in the preamble to the right of self-determination contained in the International Covenants. Since the preamble says nothing about the application of that right to indigenous peoples, this change, by itself, is simply trompe-l'oeil. In conjunction with the changes to the operative paragraph on self-determination, this change strengthens the cautious and circumspect association of the right of self-determination of indigenous peoples with the right of self-determination in the Covenants.

The Working Group completed the first reading of the declaration at its 1992 session. Although the paragraphs remaining for first reading at that session developed the complex of rights associated with internal self-determination, such as the right of autonomy, the term "self-determination" is not used in the revised text of the paragraphs. The right to claim that states

Affirming that all indigenous peoples are free and equal in dignity and rights to all peoples in accordance with international standards, while recognizing ...

Ibid.

293 14th preambular paragraph in ibid.

294 Report on Tenth Session, supra note 212 at Annex I. Revisions to these paragraphs were suggested prior to the session in 1992 Revised working paper, supra note 290.
honour treaties with indigenous peoples is modified to include dispute resolution, and an ambiguously placed allusion to original intent is added.

1993 Session

At the 1993 session, the Working Group produced its final draft of the declaration, whereupon the declaration began its ascent through the hierarchy of UN human rights bodies. The draft declaration was further revised prior to the final session by the Chair. Among the revisions affecting the right of self-determination are changes to the order of the paragraphs. The paragraph on the right of self-determination is no longer the first operative paragraph. Renumbered as operative paragraph 3, it now follows two paragraphs affirming different aspects of the right of indigenous peoples to equality. If self-determination has been moved down in the order of rights, so has its opposite. The reference to compliance with the UN Charter and the Declaration on Friendly Relations has been moved to the end of the declaration, becoming operative paragraph 42.

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295 This revision was suggested by the Chair already in 1991 Revised working paper, supra note 272 at 100.
296 Operative paragraph 31 in Report on Tenth Session, supra note 212 at Annex I.
298 My discussion of the draft declaration thus far has included certain provisions on land claims and treaties, as well as the provisions on self-determination, because the treatment of land claims and treaties is a barometer of the Working Group’s receptiveness to a corrective justice model of self-determination. In 1993, the Chair took the step of preparing and circulating an explanatory note with her text. As the note gives a more accurate reading of the degree to which corrective justice informs the right of self-determination in the declaration, the discussion does not pursue the treatment of land claims and treaties in the 1993 drafts.
299 One of the two lead paragraphs, now operative paragraph 2, has been strengthened by replacing “have the right to be” with “are” in the phrase “Indigenous peoples are free and equal to all other ... peoples.”
The paragraph on the right of self-determination (now operative paragraph 3) reads

Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, *inter alia*, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests.

An integral part of this is the right to autonomy and self-government;

By using “indigenous peoples” and “other peoples” in the same sentence, this paragraph recognises that indigenous peoples are peoples and that their right of self-determination is the same as that of any people in international law. To the extent that the ramifications of the right are novel or particular to indigenous peoples, they are spelled out in the second and third sentences.

Corresponding changes were made to a paragraph of the preamble that previously read:

“Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of coexistence with other citizens.” In the version presented prior to the 1993 session, the words “in which they live” and “with other citizens” are omitted, with the effect that relationships with states may not be limited to the domestic framework.

In the draft declaration agreed upon by the members of the Working Group at its 1993 session, the right of self-determination of indigenous peoples in article 3 is an exact replica of the right of self-determination of peoples in article 1(1) of the two *International Covenants*.

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300 Similarly, “all other peoples” has replaced “all peoples” in the first paragraph of the preamble: “Affirming that indigenous peoples are equal in dignity and rights to all other peoples...” The change conveys that indigenous peoples are peoples, as opposed to being equal to peoples.

301 13th preambular paragraph, in *Report on Tenth Session*, supra note 212 at Annex I.


304 The term “article” is now used instead of “paragraph.” *Report on Eleventh Session*, supra note 6 at 14, para. 38.

Thus indigenous peoples are equated with peoples, and their right of self-determination with the right of self-determination of peoples recognised in article 1 of the Covenants. This equation is rhetorically reinforced by the addition of a reference to colonisation in the preamble. Elsewhere in the preamble, however, new wording suggests that indigenous peoples do not have an unfettered right to determine their relationship with states - which colonies have - but must determine that relationship in a spirit of “mutual benefit and full respect” as well as “coexistence.” The elaboration of forms of self-determination specific to indigenous peoples has been moved from article 3 to article 31, which deals with autonomy or self-government in matters relating to internal and local affairs.

Finally, article 45, previously operative paragraph 42, provides that nothing in the declaration can be interpreted as authorisation for acts contrary to the UN Charter, but no longer refers to the Declaration on Friendly Relations in this connection. The significance of this omission may be that territorial integrity is explicitly made the counterweight to self-determination is in the Declaration on Friendly Relations. Then again, the Declaration on Friendly Relations may be read back into the article as an authoritative interpretation of Charter principles.

3. Overlapping Normative Models

The article on self-determination in the UN Working Group on Indigenous Populations' final draft of the declaration on indigenous rights aligns the right of self-determination of indigenous peoples with the right of self-determination in article 1(1) of the Covenants. Whereas the formulation of the right and other language used in earlier drafts suggested that the right could
be exercised only within the state framework, the limits on the right are not express in the final draft.

Accordingly, over the course of drafting, there was an increasing tendency to read the right of self-determination in the declaration as coming very close to the demands of indigenous peoples. One member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities remarked negatively that the Working Group’s Chair, Erica-Irene Daes, “had been carried away by her commitment to the cause of indigenous peoples,” while the Four Directions Council referred positively to the Working Group’s “spirit of growing sympathy for indigenous peoples’ aspirations.” Several indigenous representatives were still concerned that the articulation of a right of autonomy or self-government in article 31 as a specific form in which indigenous peoples could exercise their right of self-determination implicitly excluded secession from their right of self-determination in article 3, however other indigenous representatives consented to the text on the ground that article 31 did not limit article 3.

In a 1993 note on her text, Daes gives a more complex, and non-obvious, reading of the right of self-determination in the declaration. Essentially, she grants indigenous peoples some right of secession, but grants states most of the underlying reasons.

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310 Report on Twelfth Session, supra note 223 at 13, para.37.


312 Explanatory note, supra note 234.
On Daes's analysis, indigenous peoples are "peoples" for the purposes of self-determination in international law.\(^{113}\) For those indigenous peoples that also fit the colonial pattern by satisfying the requirement in GA Resolution 1541 of a "geographically separate and ethnically or culturally distinct" territory, the right of self-determination includes the right to choose independent statehood.\(^{114}\) For other indigenous peoples, the Declaration on Friendly Relations expresses the limitation on the right of secession. Daes's passages on the right of secession are worth quoting at length:

... [peoples within a state] must try to express their aspirations through the national political system ... unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be "representing the whole people". At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State for their safety and security....Continued government representivity and accountability is therefore a condition ... for continued application of the territorial integrity and national unity principles.

... The concept of "self-determination" has accordingly taken on a new meaning in the post-colonial era. Ordinarily it is the right of the citizens of an existing independent state to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. The international community and the present writer discourage secession as a remedy for the abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is "effectively representative."\(^{115}\)

\(^{113}\) *Ibid.* at 2, paras.5-7; Daes, "Some Considerations," *supra* note 308 at 6. See final draft in, for example, preambular paras.1 ("all other peoples"), 2 ("all peoples"), 3 ("of peoples"), 14 ("all peoples"); arts.2 ("all other ... peoples"), 3. *Report on Eleventh Session,* *supra* note 6 at Annex I.


Daes thus adopts a rights model of self-determination, which justifies secession as a remedy of last resort for the grievous abuse of a people's right to share power democratically. As a corollary, both the government and the indigenous people concerned have a duty to reach an agreement on power-sharing.\textsuperscript{316}

In presenting an additional reason for sharing power democratically between the government and indigenous peoples, Daes develops a historical model which is not necessarily consistent with the rights model she has already presented:

Furthermore, the right of self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of "belated State-building", through which indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed and just terms, after many years of isolation and exclusion.\textsuperscript{317}

The agreement that Daes describes here is not intended to actualise some abstract notion of group-differentiated democratic rights, but to rewrite history by acting as the social contract in which indigenous peoples agreed to join the state. She has written elsewhere:

... the principle of territorial security ... means that indigenous peoples have defined historical territories - even within the borders of existing States - and the right to keep these territories physically intact, environmentally sound and economically sustainable in their own ways. Here again, I regard this not so much as a special right of indigenousness, as it is a condition indigenous peoples would generally impose on their free incorporation, as peoples, into existing States.\textsuperscript{318}

The rights of indigenous peoples in the draft declaration are thus justifiable as what indigenous peoples, standing outside the state, would have imposed as the terms of their membership in the state - had they been free to do so. While some idealised historical bargaining situation might

\textsuperscript{316} \textit{Explanatory note, supra} note 234 at 5, at para.25. See also Daes, "Contemporary World Order," \textit{supra} note 314 at 53; Daes "Some Considerations," \textit{supra} note 308 at 9.

\textsuperscript{317} \textit{Explanatory note, supra} note 234 at 5, para.26. See also Daes, "Some Considerations," \textit{supra} note 308 at 8-9; Daes, "Contemporary World Order," \textit{supra} note 314 at 53-54. In the final draft, see preambular paragraph 12. \textit{Report on Eleventh Session, supra} note 6 at Annex I.

\textsuperscript{318} E.-I. A. Daes, "Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples" (1994) 63 Nordic \textit{J. Int'l L.} 205 at 208.
produce the same rights as the principles of equality or minority rights, this is not necessarily true. Moreover, it is consistent with the historical hypothetical that indigenous peoples would have the option of remaining (becoming) independent if no satisfactory agreement could be reached.

Daes clarifies the right of secession at the same time that she muddies its normative basis. The rights model of self-determination, which she develops from the Declaration on Friendly Relations, justifies exactly the limited right of secession that she reads into the draft declaration. The implication of her historical model of "belated state-building" is a much broader right of secession. Daes's overlap of models in the draft declaration recalls the legal creativity that we saw in the decisions on self-determination in Chapter 4. It confirms the dominant movement in the international law of self-determination, forward, toward non-historical solutions based on liberal notions of consent and equal rights. Yet it may also support a movement backward in time: an undoing of historical wrongs done to indigenous groups and symbolic restoration of them to a past from which they can develop in accordance with indigenous traditions.

IV Conclusion

This chapter examined at close range two of the texts and institutions through which the UN human rights system resolves whether indigenous peoples have a right of self-determination. Following from the East Timor case discussed in Chapter 4, it sought to highlight the gatekeeper role of international institutions in the progressive interpretation of self-determination and the role of ideas about international institutions in this interpretation.\footnote{For an excellent analysis of these issues in the case of the draft Inter-American Declaration on the Rights of Indigenous Peoples, see C. Hilling, "La protection des droits des peuples autochtones et de leur membres dans les Amériques" (1996) 41 McGill L.J. 855.}

In the case of ILO Convention No.169, the chapter showed that the ILO Constitution and Standing Orders did not permit indigenous peoples to participate equally with governments,
employers and workers in the revision of the old convention on indigenous populations because the highly formalised procedure for adopting conventions could only be modified so far. Whereas the process for the adoption of ILO conventions might, at first glance, appear to be the product of negotiations between governments, employers and workers, the chapter indicated why the role played by the International Labour Office, the ILO staff of experts responsible for the preparation, co-ordination and revision of conventions, makes the process more akin to standard-setting by an interested expert with input from the ILO constituencies. Had the International Labour Office not been interested, its expertise might have lent authority to the Convention. Alternatively, it might have been able to compensate in result, that is, in the outlook and provisions of Convention No.169, for the limited participation of indigenous groups. However, the Office’s strong sense of the history, philosophy and reputation of the ILO, and its commitment to the adoption and widespread ratification of the Convention led it to produce a highly consistent and well-integrated text that eschewed both states’ and indigenous peoples’ normative approaches to the rights of indigenous peoples for the ILO’s functionalist approach. In the result, Convention No.169 recognised indigenous and tribal peoples as “peoples” without thereby recognising their right of self-determination.

In the case of the draft declaration on indigenous rights completed by the UN Working Group on Indigenous Populations, the Working Group opened the sessions to governments and indigenous peoples as equal “observers.” The chapter reads the Chair’s reports over the eight years of work on the draft declaration as registering a change in the character of the process: from standard-setting by a group of experts with input from interested parties to negotiations between the parties as equals mediated by the group’s Chair. On the former characterisation, states,

international organisations, NGOs and indigenous groups might participate equally in the deliberations of the Working Group, but in keeping with their official capacity as “observers.” Their interventions would have the quality of evidence, to be evaluated by the experts collaborating on the draft declaration. Evidence of states’ intransigence might outweigh storytelling by indigenous peoples, with neither being taken as arguments. The declaration would be the province of experts and would derive authority from that expertise. Once the process is recharacterised as negotiations between states and indigenous peoples mediated by the Chair of the Working Group, the declaration becomes a product of their positions. On this characterisation, the interventions of states and indigenous peoples do not depend for their effectiveness so much on political power or narrative persuasion as on the Chair’s determination of the relative status of states and indigenous peoples. Based on her commitment to their equal status, their arguments are accorded equal respect as arguments. Rather than a technical exercise by experts, the declaration becomes the outcome of mediation and, as such, stands to be evaluated on the balance it strikes between the parties.

Correspondingly, the right of self-determination in the final draft is explained by the Chair in a way that mediates between states and indigenous peoples on secession by offering both a rights-based and a corrective justice-based model of self-determination. Whereas the middle ground on the rights of indigenous peoples represented by Convention No.169 reflects a third perspective - that of the ILO - in keeping with the idea of expert standard-setting, the middle ground on the right of self-determination in the draft declaration reflects an overlap of the parties’ perspectives consistent with the Chair’s shift to the idea of mediated negotiation.
All too often in male nationalisms, gender difference between women and men serves to symbolically define the limits of national difference and power between men. Excluded from direct action as national citizens, women are subsumed symbolically into the national body politic as its boundary and metaphoric limit.

Anne McClintock, *Imperial Leather*¹

In the international legal literature on self-determination, the judgments, arbitral decisions and other authoritative texts of self-determination most often appear as stepping stones in the development of a particular approach to self-determination. By looking at self-determination as the expression of a relationship between interpretation, identity and participation, Part II noticed aspects usually passed over in the history of its interpretation. The texts relied on by most authors of the post-Cold War period in their interpretation of self-determination thereby emerged as successive encounters with groups traditionally marginalized in international law: Islamic communities and nomadic desert peoples in *Western Sahara* and *Dubai/Sharjah*, ethnic minorities in *Opinion No.2* of the EU Arbitration Commission on Yugoslavia, a colonial population in *East Timor*, and indigenous peoples in ILO *Convention No.169* and the UN Working Group on Indigenous Populations’ draft declaration on indigenous rights. As read in Part II, the modern canon of self-determination traced international law’s engagement with those on the margins of its culture and their critiques of international law’s regulation, narration and exclusion of them.

Part III applies the same approach to the interpretation of self-determination, but whereas the cases in Part II involved cultural difference, Part III chooses three cases that develop

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¹ A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (New York: Routledge, 1995) at 354.
women's relationship to self-determination. Chapter 6 discusses the issues of women's equality in the plebiscites held in Europe after World War I to determine the sovereignty of a number of disputed border territories. Chapter 7 examines the monitoring by the United Nations Trusteeship Council and Commission on the Status of Women of the development of women's equality in the trust territories from the 1950s to the 1970s. In connection with indigenous self-determination, Chapter 8 examines the implications of the *International Covenant on Civil and Political Rights* for a state party's power to determine a woman's legal status as indigenous.

By further problematising the representation of the "self" in the successive dominant liberal interpretations of self-determination, Part III continues the project of Part II. At the same time, it problematises alternative representations of the "self" seen in Part II. To the extent that marginalized groups invoked the authenticity of the community with its own cultural traditions against the notions of equality and individual rights entrenched in international law, Part III shows

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\(^2\) Little has been written in international law on women and self-determination as such. Perhaps the only work to look at the effects of self-determination norms on women generally is C. Chinkin & S. Wright, "The Hunger Trap: Women, Food, and Self-Determination" (1993) 14 Mich. L. Int'l L. 262 (the effects of the privileging of political self-determination).

There is, however, growing attention to particular problems of women in international law related to self-determination conflicts. The widespread sexual abuse of women in ethnic self-determination conflicts has resulted in an extensive literature on women and international humanitarian law. See R. J. Cook & V. L. Oosterveld, "A Select Bibliography Of Women's Human Rights" at <http://www.law.utoronto.ca/pubs/hr_issue.htm#humanitarian>. Among the unpublished works on this subject are D.E. Buss, *Crossing the Line: Feminist International Legal Theory, Rape and the War in Bosnia-Herzegovina* (LL.M. Thesis, University of British Columbia, 1995) and M. Jarvis, *Redress for Female Victims of Sexual Violence During Armed Conflict: Security Council Responses* (LL.M. Thesis, University of Toronto, 1997). Women's status as refugees in self-determination conflicts has also been treated in the international legal literature. See e.g. C.M. Cervenak, "Promoting Inequality: Gender-Based Discrimination in UNRWA's Approach to Palestine Refugee Status" (1994) 16 Hum. Rts. Q. 300.

that neither of these representations is adequate to the complexity and contingency of women’s identity.\textsuperscript{3} Within Part III, Chapters 7 and 8 similarly demonstrate that the representations of women’s relationship to the “self” by a white Western international women’s movement, discussed in Chapter 6 in the context of European women, are inadequate to the representation of non-Western women and women of colour.\textsuperscript{4}

In 1930s Britain, Virginia Woolf wrote: “as a woman, I have no country. As a woman I want no country. As a woman my country is the whole world.”\textsuperscript{5} The poles of identity that orient her three clarion phrases - unequal/equal, male/female, national/international - provide new bearings for the significance of the plebiscites held in Europe after World War I, which are the subject of this chapter, and the movements and metaphors at work in them.

“As a woman, I have no country” is an allusion to the British nationality laws of the day which deprived women of British nationality on their marriage to a foreigner, as well as to the ways in which the law still excluded women from public life. United by their legal inequality, women in Britain and other countries actively campaigned domestically and internationally for the same right as men to choose their nationality, just as they fought for the same right to vote.

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\textsuperscript{3} See D. Riley, "Am I That Name?" *Feminism and the Category of “Women” in History* (Minneapolis: University of Minnesota, 1988) at 1-5. Riley’s thesis is that the category of “women” is historically constructed and therefore unstable. It must always be understood as relative to other categories, which themselves change over time. The ways in which feminism is defined and argued at any historical time and place will depend on against whom or what the term “women” is positioned.

\textsuperscript{4} The greatest affinity of the project of Part III is perhaps with Anne McClintock’s blueprint for a feminist theory of nationalism:

(1) investigating the gendered formation of sanctioned male theories [of nationalism]; (2) bringing into historical visibility women’s active cultural and political participation in national formations; (3) bringing nationalist institutions into critical relation with other social structures and institutions; and (4) at the same time paying scrupulous attention to the structures of racial, ethnic and class power that continue to bedevil privileged forms of feminism.

McClintock, *supra* note 1 at 357.

Woolf presents her pledge of indifference - "As a woman I want no country" - as logical given that England was ready to make her a foreigner if she married a foreigner. But she maintains that even if the laws on nationality treated women and men equally, women would not be nationalists. "As a woman I want no country" reflects Woolf's contention too that women cannot understand what instinct compels men to take up arms for their country, "what glory, what interest, what manly satisfaction fighting provides for him."7

While Woolf insists on this commonality of gender,8 she uses it to proclaim that "as a woman, my country is the whole world." In this resolution of her identity, Woolf resembles the international women's peace movement that emerged during World War I, based on the belief that women's nature caused them to feel a particular moral revulsion at war, and that their role as child-bearers and care-givers gave them a special position in the campaign for peace and internationalism.

Nevertheless, Woolf allows that nationalism is not so easily shed: even "when reason has said its say, still some obstinate emotion ... some love of England dropped into a child's ears by the cawing of rooks in an elm tree, by the splash of waves on a beach, or by English voices murmuring nursery rhymes" may remain.9 Moreover, in arguing that the discriminatory nationality laws show women to be "stepdaughters, not full daughters, of England,"10 Woolf perpetuates the idea of their

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7 Ibid. at 232. It is not clear how much of this Woolf attributes to the essence of women's nature and how much to the effect of socialisation. Although Woolf refers to fighting as male instinct, she also acknowledges it as "an instinct which is as foreign to her as centuries of tradition and education can make it." Ibid. at 233. Her note to this passage offers an example intended to show that "if sanctioned, the fighting instinct easily develops in women." Ibid. at 311, n.15.
8 Woolf is not uniformly complimentary about feminism in Three Guineas. See Barrett's introduction at xliii. On the different schools of pre-war and post-war feminism, see generally S. K. Kent, Making Peace: The Reconstruction of Gender in Interwar Britain (Princeton: Princeton University Press, 1993).
9 Ibid. at 234.
10 Ibid. at 277, n.12.
natural belongingness and also, ironically, the analogy of family and state often used to support this discrimination.

Part I of this chapter shows that if we orient the plebiscites provided for in the peace treaties ending World War I by ideas of equality and gender, as well as ideas of the international order, they appear as a feminist landmark in the history of self-determination. On a standard account, the significance of these plebiscites\(^{11}\) lies in the departure from the traditional international law on transfer of territory by giving the population of certain border areas the opportunity to choose between the two states disputing the territory. Plebiscites had been used episodically from the French Revolution onward, but by the end of the nineteenth century, they had come to be "[a]bandoned by diplomats, condemned by the majority of writers on international law, and forgotten by the world at large."\(^{12}\) With World War I, however, plebiscites, and the underlying principle of self-determination, were advocated as the basis for the new frontiers to be drawn by the Peace Conference. "Peoples ... are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game," declared American President Woodrow Wilson in 1918.\(^{13}\)

For women, the plebiscites are also significant as the first time that women had the right to participate in an international expression of popular sovereignty. Given that the treaties were negotiated when women's suffrage was still the exception, it is remarkable that women were given

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\(^{13}\) "Four Points" speech to Congress, 11 February 1918, quoted in *ibid.* at 11.
the vote in all the plebiscites held. Although many Western states had recently granted or were on
the verge of granting the vote to women, only two of the five powers that composed the Supreme
Council at the Peace Conference, the United States and Britain, were close to enfranchising women
fully. France, Italy and Japan did not extend the franchise to women for more than two decades.
Of the seven states involved in the plebiscites, two would not give women the vote for some time.

Women themselves were very much part of the spirit of the times that fostered the
plebiscites and women's equal participation in them. International women's organizations existed
long before the 1919 Paris Peace Conference, several international conferences of women were
held with the goal of influencing the peace process, and women lobbied the delegations to the
Peace Conference on women's rights and other issues concerning the peace treaties and proposed
league of nations. White, Western, well-educated and well-connected, these leaders of the
international women's movement enjoyed considerable access to the statesmen and diplomats who
controlled the peace process.

The issue of women's right to vote in the plebiscites lay at the intersection of the campaign
for women's suffrage and the advocacy of the principle of self-determination and plebiscites by

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14 See L.J. Rupp, “Constructing Internationalism: The Case of Transnational Women's Organizations, 1888-1945” (1994) 99 Am. Historical Rev. 1571. It should be emphasised that while this chapter focuses on what is essentially the white Western liberal women's movement, there were also, for example, a Socialist Women's International (see E.C. DuBois, “Woman Suffrage and the Left: An International Socialist-Feminist Perspective” (March-April 1991) 186 New Left Rev. 20) and an International Council of Women of the Darker Races of the World (see C. Neverdon-Morton, Afro-American Women of the South and the Advancement of the Race, 1895-1925 (Knoxville, Tenn.: University of Tennessee Press, 1989) at 198-201).

Rupp's article discusses the problem of cultural imperialism in the mainstream international women's movement, a problem which Chapter 7 develops in relation to women in the trust territories and Chapter 8 in relation to indigenous women. Although this chapter only touches on national suffrage movements, it should similarly be noted, for example, that recent scholarship on the history of women's suffrage in the United States argues that white women's suffrage leaders practised a nationalism based on exclusive citizenship that was conditioned on whiteness. P.N. Cohen, “Nationalism and Suffrage: Gender Struggle in Nation-Building America” (1996) 21 Signs 707.

15 Although this chapter uses the term “women's suffrage,” it will be noted that some authors and names mentioned in the chapter use the term “woman suffrage.” In “Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right” (1994) 5 U.C.L.A. Women's L.J. 103 at 105, n.4, JoEllen Lind explains that the use of “woman suffrage” by the movement’s originators and early chroniclers was meant to
the women's peace movement. The American campaign for women's suffrage capitalised on President Wilson's wartime proclamations on the principle of self-determination, the picket signs of some suffragists\textsuperscript{16} outside the White House quoting Wilson's war aims to emphasise the hypocrisy of fighting for the principle of the will of the people when half of the American people were without a vote. At the Paris Peace Conference in 1919, a delegation of women suffragists presented a demand for the vote that began with the right of self-determination of peoples and included the right of women to take part in the plebiscites. The history of this express demand by women to be given the same voting rights in the plebiscites as men is, however, more closely entwined with the history of the women's peace movement. The incorporation of women's suffrage into the principle of self-determination, as opposed to the principle of self-determination into the basis for women's suffrage, figured in the feminist pacifism popularised by Emmeline Pethick-Lawrence in her 1914 speaking tour of the United States, the platform of the American Women's Peace Party established in the wake of her tour, Chrystal Macmillan's proposals for the first International Congress of Women at The Hague in 1915, and the resolutions that emerged from this and the International Congress of Women held in Zurich during the Peace Conference.

The texts contributed by women suffragists and pacifists to the peace process did not simply add women's equality to the right of self-determination. In these texts, women also sought to identify themselves with an idea of the international order which would be furthered by women's suffrage. The suffragists strove to associate women with the grit of nationalism and

\textsuperscript{16} This chapter uses the general term "suffragist," as opposed to "suffragette." "Suffragette" was a derogatory nickname coined by the British press and adopted by the militant section of the British women's suffrage movement headed by Emmeline Pankhurst and her daughter Christabel. A. Wiltsher, \textit{Most Dangerous Women: Feminist Peace Campaigners of the Great War} (London: Pandora, 1985) at xi.
war, as workers who had proved their worth during the war and as mothers who, by giving birth
to sons who had fought for their country, had provided the human *matériel* for the war. By
pitching in with the war work and arming the nation with their sons, women had earned the right
to vote. In contrast, the pacifists linked women to an ideal of internationalism and peace.
Women, as the custodians of the life destroyed by war, the care-givers to those helpless in its
face, the toilers whose patient drudgery had built the home and peaceful industry smashed by
war, were particularly inclined toward peace. The extension of the franchise to women would
therefore further humanize the governments of the world.

While women had the right to vote in the plebiscites, Part II of this chapter shows that
they had not achieved complete equality in them. Since the transfer of territory pursuant to the
plebiscites automatically changed the nationality of the inhabitants, the peace treaties gave
affected individuals the right to opt for their former nationality. But the terms provided for a
“collective option,” whereby the husband’s right to opt for his former nationality covered himself
and his wife. The right of option thus involved another issue that would become a priority for
women activists in the aftermath of the War: a married woman’s right to a nationality independent
of her husband.

Similar to the question of women’s right to vote, the question of an “individual option” for
married women or their right to their own nationality more generally involved not only thinking
about women and the family, but the ways that this thinking combined with thinking about the state
and international society. In the shadow of the Great War, nationalism competed with
internationalism as visions of international society. Through the question of women’s equal right to
choose their nationality, these rival visions of the state and relations between states variously
constructed and were constructed by rival visions of women and the relations between women and
men. As well as being confronted with what Simone de Beauvoir called the contradictory myth of woman - "woman is at once Eve and the Virgin Mary" - and the patriarchal conception of the family, women campaigning for the independent nationality of married women were thus confronted with the rhetorical synergies between images of the family and images of international society.

I Collective Self-Determination: Women’s Right to Vote in the Plebiscites

A Background

1 Self-Determination

With the end of World War I, it fell to the victorious powers to redraw a number of European borders central to the national imagination of the respective states (the statue of Strasbourg in the Place de la Concorde was shrouded in black crepe until Alsace-Lorraine was restored to France by the Treaty of Versailles), as well as to draw borders in Europe where before there had been only empire. In a series of famous speeches from 1916 onward, President Wilson had developed the principle of self-determination as among the imperatives defended by the Allies in the war and among the guides to a just peace. Gradually adopted to varying degrees by both the Allies and the Central Powers, the principle of self-determination was prominent in the portrayal of the peace settlements.

At the time, self-determination was not yet recognised as a principle of international law, so its application depended on mustering sufficient political will to give it binding expression in the

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17 Compare Kent, supra note 8 (showing how in Britain during and after World War I gender was used to construct war, and war, conceived of in gendered terms, then shaped understandings of gender).
20 See the discussion of the Aaland Islands case in Chapter 2, above.
various peace treaties. Despite its universal import, its sphere of application was, according to a scholarly paper presented in 1921, generally understood by the Paris Peace Conference to be limited to "those peoples and territories whose destinies had to be resettled in one way or another because they had been unsettled by the War."21 Even when dealing with territorial questions in Europe, the Peace Conference did not always invoke the principle of self-determination.22

To the extent that the methods found in the peace treaties for adjusting borders did express the principle of self-determination, moreover, they reflected its range of meanings from the ideal of the ethnically homogenous state, to the state founded on the consent of its citizens, to the liberal democratic state.23 One set of solutions employed by the treaties, including the allocation of borderlands on the basis of ethnographic data,24 population transfers and the regimes of minority rights25 was consistent with the organising principle of ethnicity, while the plebiscites and accompanying right to opt for a nationality could be associated with that of consent.26

21 G. Murray, "Self-Determination of Nationalities" (1921) 1 J. Brit. Institute Int’l Affairs 9 at 12. See also Cobban’s bon mot: "[t]he British and American delegations [at the Peace Conference] were anxious to confine self-determination to Europe, while the French and Italian delegations would have preferred to confine it to Utopia." Cobban, supra note 19 at 66.
23 This confusion of the different traditions of thought on self-determination is often attributed to President Wilson. See e.g. M. Pomerance, “The United States and Self-Determination: Perspectives on the Wilsonian Conception” (1976) 70 AJIL 1; Cassese, supra note 22 at 19-23.
24 Cassese, supra note 22 at 21-22; Wambaugh, supra note 12 at vol. 1, 13.
26 As the interest of this chapter is in a feminist retelling of the familiar story of the plebiscites in the international legal history of self-determination, I have begun with the usual correspondence between these different solutions and the ideas of ethnos and demos. For a different retelling, see Berman, supra note 25 (showing that the tendency of the bolder experimental regimes engineered for different territorial disputes and minority problems in interwar Europe was to combine objective and subjective solutions).

Thus the plebiscites are taken to correspond to a limited form of the model that Chapter 2, above, called the consent model of self-determination or perhaps to a limited form of the peace and security model of self-determination.
2 Plebiscites

Although not without a history in international law,27 the idea that individuals had a say in what states did with the land on which they lived was not established international law at the end of World War I. Territory could be acquired by conquest; the consent of its inhabitants was not a prerequisite for the transfer of sovereignty from conquered to conquering state.

By making the consent of the territory's inhabitants the basis for a change in its sovereignty, the plebiscites marked an important departure from the traditional position. More generally, they were depicted as a foothold for liberal self-determination in international law;28 the imperfect realisation of President Wilson's 1917 pronouncement that "no right exists anywhere to hand peoples about from sovereignty to sovereignty as if they were property."29

Plebiscites involving Germany were held under the Treaty of Versailles in northern Schleswig,30 a cattle and dairy-farming area on the border with Denmark, where a plebiscite had been discussed already in the last century after Denmark had lost Schleswig to Germany;31 in Allenstein and Marienwerder,32 two agricultural regions of some strategic importance, disputed with Poland; in Upper Silesia,33 then one of the richest mining and industrial regions in the world,

29 Address of President Wilson to the American Senate on January 22, 1917, U.S. Congressional Record, vol. 54, pt.2, 1742, quoted in Wambaugh, supra note 12 at vol. 1, 5.
31 Wambaugh, supra note 12 at vol. 1, 48-51.
32 Treaty of Versailles, supra note 30 at part III, arts. 94-97. See Wambaugh, supra note 12 at vol. 1, c.3 (discussion); vol. 2, 48-107 (documentation).
33 Treaty of Versailles, supra note 30 at part III, arts. 88-91. See Wambaugh, supra note 12 at vol. 1, c.6 (discussion); vol. 2, 163-261 (documentation).
claimed by Poland; and, after a fifteen year period of international administration, in the Saar Basin, where the fate of the third most important coal fields in Europe was at stake for Germany and France. Two plebiscites involving Austria were carried out by the Paris Peace Conference: one in the Klagenfurt Basin on the Yugoslav border, of considerable interest to Italy because of the railway links; and the other in Sopron, involving the city and some nearby rural communes on the old Austro-Hungarian frontier. Plebiscites were attempted between Czechoslovakia and Poland over Teschen, Spisz and Orava, and, under League of Nations auspices, between Lithuania and Poland over the city of Vilnius, but were abandoned by the international authority due to the political tension and unrest in the period leading up to the plebiscite. Finally, a plebiscite agreed to by Chile and Peru for Tacna and Arica in the 1883 Treaty of Ancón was attempted in 1925-26 pursuant to an arbitral award of President Coolidge.


36 Protocol and Additional Article regarding the settlement of the question of Western Hungary, 13 October 1921, 9 L.N.T.S. 203-9 (1922) (Signed at Venice, ratified by Austria on 28 Dec. 1921, ratification not required by the Hungarian constitution). See Wambaugh, supra note 12 at vol. 1, c.7 (discussion); vol. 2, 261-269 (documentation).


38 Resolution of the Council of the League of Nations calling for a public expression of opinion under the auspices and supervision of the League, Adopted 28 October 1920, L.N. Council Minutes, 10th Sess., October 1920 [hereinafter Vilnius Resolution]. See Wambaugh, supra note 12 at vol. 1, c.8 and appendix at 547-556 (discussion); vol. 2, 269-281 (documentation).

39 Treaty of Peace and Friendship between Chile and Peru, October 20, 1883, 10 Martens, Nouveau Recueil Général des Traités, 2d Ser., 191, 162 Cons. T.S. 453 (Made at Ancón, signed in Lima) art.3.

40 Opinion and Award of the Arbitrator in the matter of the arbitration between the Republic of Chile and the Republic of Peru, with respect to the unfulfilled provisions of the Treaty of Peace of October 20, 1883, under the Protocol and Supplementary Articles signed at Washington, July 20, 1922, 4 March 1925, reprinted in Wambaugh, supra note 12 at vol. 2, 282 [hereinafter Tacna-Arica Award]. On the attempted
B Women’s Right to Vote in the Plebiscites

1 Women’s Interventions

[In] the suggestion that territory should not be transferred without the consent of the population of the country ... It is essential to make clear both nationally and internationally that women are included ... in the population ...

Chrystal Macmillan, Letter proposing what became the 1915 Hague International Congress of Women 41

While women’s right to vote in the international plebiscites provided for by the peace treaties would follow logically from their right to vote nationally, the tide was just beginning to turn for women’s suffrage after World War I. 42 The 1919 Paris Peace Conference took place at the height of the campaign to ratify an amendment to the United States Constitution giving women the vote, 43 and the American suffragist leader Carrie Chapman Catt, 44 president of the National American Woman Suffrage (NAWSA) and president and founder of the International Woman Suffrage Alliance, 45 was therefore absent from the Peace Conference. By the end of the war, plebiscite in Tacna-Arica, see Wambaugh, supra note 12 at vol. 1, c.9 (discussion); vol. 2, 281-491 (documentation). See also W.J. Dennis, Tacna and Arica: An Account of the Chile-Peru Boundary Dispute and of the Arbitration by the United States (1931) (Archon Books, 1976).

41 Quoted in Wiltsher, supra note 16 at 61-62.

42 See A. Winslow, ed., Women, Politics, and the United Nations (Westport, Conn.: Greenwood Press, 1995) at App.1, 185-186 (women’s right to vote by country and date).


45 On the International Woman Suffrage Alliance, see generally M. Bosch & A. Klooserman, eds., Politics and Friendship: Letters from the International Woman Suffrage Alliance, 1902-1942 (Columbus, Ohio: Ohio State University Press, 1990). In 1926, the IWSA became the International Alliance of Women for Suffrage and Equal Citizenship, abbreviated as IAW. Ibid. at 176.
Britain had partially enfranchised women, but would not fully enfranchise them until 1928. The United States and Britain, however, were the only members of the Supreme Council at the Peace Conference that were within a decade of fully enfranchising women. The other three members of the Supreme Council, France, Italy and Japan, would not give women the vote until the 1940s. Of the seven states involved in the plebiscites actually held, Austria, Denmark, Germany, Hungary and Poland had extended the franchise to women during or after the war, but France and Yugoslavia were over twenty years away from doing so.

Even though women’s suffrage was not yet assured in any of the states that composed the Supreme Council, the principal Allied leaders at the Peace Conference were well aware of the issue from the national women’s suffrage movements. Not only had President Wilson come to support the American women’s suffrage movement by this time, but his support has been attributed to propaganda by the militant National Women’s Party (NWP) in 1917 that stressed the inconsistency between Wilson’s prominent advocacy of democracy abroad and his administration’s indifference to women’s suffrage at home. As part of this strategy, one banner carried by a NWP picket

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46 Mackie & Rose, supra note 43 at 438.
47 Winslow, supra note 42 (in 1944).
48 Ibid. (in 1945).
49 Ibid. (in 1945).
50 Women had the vote in Austria (1918), Denmark (1915), Germany (1919), Poland (1918). Ibid. Universal suffrage had been extended in Hungary immediately after World War I, but a period of political change followed with the result that by 1922, women were voting on more restricted terms than men. C.J.C. Street, Hungary and Democracy (London: T. Fisher Unwin Ltd., 1923) at 185-186, 190-191; A. Nyerges, Women in Hungary (Budapest: Pannonia, 1962) at 18-19, 21, 34; Van Voris, supra note 44 at 174.

Like France, Yugoslavia only gave women the vote in the 1940s. Winslow, supra note 42.

Four other states would have been involved in the plebiscites had three plebiscites not been abandoned in midstream. Of these additional states, women had the vote in Czechoslovakia (1920) and Lithuania (1921), but not in Chile (1931) and Peru (1950). Ibid.

outside the White House bore the excerpt from Wilson's war message "We shall fight for the things we have always held nearest our hearts - for democracy," and NWP leader Alice Paul was arrested for carrying a banner with Wilson's Liberty Bond slogan: "The time has come to conquer or submit." NAWSA also fastened onto Wilson's wartime aim of democratic self-determination, and the theme of many of Chapman Catt's talks was that the United States had no right to talk about making the world safe for democracy so long as it denied women the vote. Chapman Catt, in the words of one biographer, "frankly used the war psychology to further her cause." In the following speech, she characterized women's suffrage as a war measure:

Our nation is engaged in the defence of democracy; the hearts of women would beat more happily if they could feel that our own Government had been true to the standard it proposes to unfurl upon an international field. We speak not so much for ourselves as in defense of our republic, in hope that it will resume its historic place as leader of democracy. *We demand the suffrage by Federal amendment in the United States as a war measure.*

The British leader at the Peace Conference, David Lloyd George, had long been a supporter of the British suffrage movement. Although the French leader, Georges Clemenceau, opposed women's suffrage in France, his opposition has been attributed not to general principle, but to his fear that French women voters would be controlled by the Catholic Church and would therefore not exercise the right to vote freely.

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52 Ibid. at 667.
53 Ibid. at 676.
54 Van Voris, *supra* note 44 at 146.
56 [emphasis in original] Quoted in *ibid*.
In addition to the political awareness already created by the national women's suffrage movements, women present at the Peace Conference\(^\text{59}\) pressed the demand for women's suffrage with the Allied leaders. For example, the diary of Millicent Garrett Fawcett, doyenne of the moderate British suffragists, records her interviews with President Wilson, Prime Minister Clemenceau and a number of other leading figures at the Peace Conference. With Clemenceau she discussed his opposition to women's suffrage; on Wilson she urged a "people's peace" based on the votes of all the people.\(^\text{60}\) French suffragists had organised a conference of suffragists from Allied countries and the United States in parallel to the Peace Conference,\(^\text{61}\) and a joint delegation from the Conference of Women Suffragists of the Allied Countries and the United States and the International Council of Women (ICW),\(^\text{62}\) was heard at the next-to-last meeting of the Peace Conference commission dealing with the part of the peace treaty that would be the Covenant of the new League of Nations. At the April 10, 1919 meeting of the commission, which was presided

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\(^{60}\) Women's lobbying to be represented on the official delegations to the Paris Peace Conference was unsuccessful. See Resolution 18, adopted by the International Congress of Women at The Hague, 1 May 1915, reprinted in J. Addams, E.G. Balch & A. Hamilton, Women at The Hague: The International Congress of Women and Its Results (1915) (New York: Garland Publishing Inc., 1971) [hereinafter Women at The Hague] at Appendix III, 150 at 158 (urging "that representatives of the people should take part in the conference that shall frame the peace settlement after the war, and ... that amongst them women should be included"); M.L. Degen, The History of the Women's Peace Party (1939) (New York: Burt Franklin Reprints, 1974) at 210 (resolution of the New York City branch of the Women's Peace Party calling for men and women representing the ideals of their countries to be appointed to the Peace Conference); Peck, supra note 44 at 269, 301-302 (Chapman Catt's efforts to have women represented on the American delegation); Van Voris, supra note 44 at 186 (women in Canada, England and the United States had requested that women be appointed to the treaty delegations).


over by President Wilson at the Hôtel Crillon, this delegation presented, among its demands on women’s rights, a demand on suffrage which marshalled the right of self-determination of peoples in support of women’s equal right to vote generally and in the plebiscites specifically:

Whereas the Peace Conference concerns all of humanity, women as well as men, and this Conference must issue forth the reign of a lasting peace and the recognition of the right of peoples to self-determination;

Considering that no one can consider himself authorized to speak in the name of the people so long as women, who represent half of humanity, are excluded from the political life of nations;

Considering that those women who lack the suffrage are without a voice in the government of their country; that it is profoundly unjust that they can take no part in the decisions which may give rise to war or peace, decisions that determine a future of which they must bear the consequences without a share in the responsibility,

Considering that without being combatants, they play an essential role in war since by giving their sons for the defence of their country, they furnish what may be called the human matériel;

Considering, on the other hand, that women have, during the war, shown what the value of their work and their social activity could be;

Considering that the participation of mothers and wives in the suffrage would be one of the best guarantees for future peace;

Considering that the status of women has always been recognized as the criterion of the degree of civilization and liberalism of states;  

The International Council of Women and the Conference of Women Suffragists of the Allied Countries and the United States petition as follows:

That the principle of women’s suffrage be proclaimed by the Peace Conference and the League of Nations in order that it may be applied throughout the world as soon as the degree of civilization and democratic development of each nation may permit;

That in any popular consultation held to decide the nationality of a state, women shall be called upon, equally with men, to reach a decision on the fate of their homeland.

63 See “An Account of the ICW Delegation Received by the Committee for the League of Nations at the Paris Peace Conference in 1919” in P. Rossello, The Precursors of the International Bureau of Education (1943) 133, reprinted in ibid. at Appendix 7, 344. Rossello’s account gives the list of the Commission members present and the members of the delegation of women. For other communiqués and notes of the meeting, see C.A. Kluyver, Documents on the League of Nations (Leiden: A.W. Sijthoff’s Uitgeversmaatschappij, 1920) 27; D.H. Miller, My Diary at the Conference of Paris with Documents, vol. 1 (n.p.: 40 sets printed for author by Appeal Printing Co., n.d.) (Set No.26, Thomas Fisher Rare Book Library, University of Toronto) at 238.

64 See Chapter 7.

The history of the advocacy of women's right to vote in the plebiscites belongs more particularly, however, to the history of the women's peace movement, which developed during the war. Many national women's suffrage organizations devoted their energies to their country's war effort, and the established international women's organizations did not meet for the duration of the war. As Chapman Catt's wartime speech illustrates, American women's suffrage leaders were prepared to characterise women's suffrage as a "war measure." At the Peace Conference, the delegation from the Conference of Women Suffragists of the Allied Countries and the United States and the ICW would preface their post-war demand for the right to vote with a reminder of women's contribution to the war in the form of labour and even the "human matérielle" of their sons. In opposition to the war, a number of prominent suffragists in different countries took initiatives that led to the formation of national and international women's committees for peace. In 1914, Emmeline Pethick-Lawrence, having split with British radical suffragist Emmeline Pankhurst and renounced Pankhurst's resort to violence in the campaign for the vote, embarked on a series of talks and articles in the United States on the theme of women and war. Pethick-Lawrence's feminist

According to Carol Ann Miller, the delegation strategically chose not to present a more controversial International Charter of Women's Rights and Liberties. Miller, Lobbying the League, supra note 61 at 22.

66 See generally Wiltsher, supra note 16. This history has also been told as the history of the Woman's Peace Party, an American women's peace society established in 1915 (Degen, supra note 59), or that of the Woman's International League for Peace and Freedom, established at the 1919 Zurich International Congress of Women as the successor to the International Committee of Women for Permanent Peace which emerged from the first International Congress of Women at The Hague in 1915 (G. Bussey & M. Tims, Women's International League for Peace and Freedom, 1915-1965: A Record of Fifty Years' Work (London: George Allen & Unwin Ltd., 1965); C. Foster, Women for All Seasons: The Story of the Women's International League for Peace and Freedom (Athens: University of Georgia Press, 1989)).

67 See Hause, supra note 58 at 191-197 (France); Kent, supra note 8 at c.4 (Britain); Rupp, supra note 14 at 1588-1589 (Britain, France and Germany); Van Voris, supra note 44 at 138-141 (United States); Wiltsher, supra note 16 at c.4 (Britain).

68 On the tensions in the IWSP, see Politics and Friendship, supra note 45 at c.5.


70 F.W. Pethick-Lawrence, "Motherhood and War" (1914) 59 Harper's Weekly 542; Pethick-Lawrence, "Union of Women for Constructive Peace" (1914) 33 Survey 230.
pacifism was influenced by the ideology of the women's suffrage movement and also by the Union of Democratic Control's platform for permanent peace. Among the principles of peace formulated by this organisation of English liberals and socialists was the principle of self-determination and plebiscites in the peace settlements. To these principles, Pethick-Lawrence added not only women's suffrage, but also the sharing of women in any plebiscite to determine the disposition of territories. Pethick-Lawrence's agenda for feminist pacifism included the establishment of an international women's movement for constructive peace. In the United States, a first step was taken with the formation of the Woman's Peace Party in 1915, headed by Jane Addams, the social worker who was already a nationally recognised figure in both the women's movement and the peace movement and who would receive the Nobel Peace Prize in 1931. The preamble of the Party's founding platform illustrates the combination of internationalist pacifism with feminism,


Degen, supra note 59 at 32.

Ibid.

"Motherhood and War," supra note 70; "Union of Women for Constructive Peace," supra note 70.

Ibid. As did that of Rosika Schwimmer, the Hungarian feminist who lectured on pacifism in the United States at the same time as Pethick-Lawrence, often sharing the stage with her. On Schwimmer, see Wiltsher, supra note 16, especially c.3 on this period. Wiltsher notes the differences between Pethick-Lawrence's and Schwimmer's pacifism at 52. In Peace and Bread in Time of War (1945) (New York: Garland Publishing Inc., 1972) at 6-7, Jane Addams describes Pethick-Lawrence and Schwimmer as influences in the formation of the Women's Peace Party in the United States.

Degen, supra note 59 at c.2. The word "party" is used in the non-political sense of a society. Ibid. at 11.

For her own account of this time, see Addams, Peace and Bread, supra note 75.

Internationalist pacifism aimed not simply at peace, but at a just, or constructive, peace. For internationalist pacifists, the design for a just peace was some combination of democratisation, the enhancement of international law and international institutions, and disarmament. See generally D. Kennedy, "The Move to Institutions" (1987) 8 Cardozo L. Rev. 841 at 878-898. For a recent appreciation of the American legalists in internationalist pacifism, see F.L. Kirgis, "The Formative Years of the American Society of International Law" (1996) 90 AJIL 559.
and the identification of peace with women, that informed the promotion of the principle of self-
determination amended by the principle of women's suffrage:

_We, Women of the United States_, assembled in behalf of World Peace, grateful for the security of our own country, but sorrowing for the misery of all involved in the present struggle among warring nations, do hereby band ourselves together to demand that war be abolished.

Equally with men pacifists, we understand that planned-for, legalized, wholesale, human slaughter is today the sum of all villainies.

As women, we feel a peculiar moral passion of revolt against both the cruelty and the waste of war.

As women, we are especially the custodian of the life of the ages. We will not longer consent to its reckless destruction.

As women, we are particularly charged with the future of childhood and with the care of the helpless and the unfortunate. We will not longer endure without protest that added burden of maimed and invalid men and poverty-stricken widows and orphans which war places upon us.

As women, we have builded by the patient drudgery of the past the basic foundation of the home and of peaceful industry. We will not longer endure without a protest that must be heard and heeded by men, that hoary evil which in an hour destroys the social structure that centuries of toil have reared.

As women, we are called upon to start each generation onward toward a better humanity. We will no longer tolerate without determined opposition that denial of the sovereignty of reason and justice by which war and all that makes for war today render impotent the idealism of the race.

Therefore, as human beings and the mother half of humanity, we demand that our right to be consulted in the settlement of questions concerning not alone the life of individuals but of nations be recognized and respected.

We demand that women be given a share in deciding between war and peace in all the courts of high debate - within the home, the school, the church, the industrial order, and the state.

So protesting, and so demanding, we hereby form ourselves into a national organization to be called the Woman's Peace Party.79

A part of this initial platform was "the further humanizing of governments by the extension of the franchise to women."80 The later, more detailed Program for Constructive Peace included the following principle among those "to insure such terms of settlement as will prevent this war

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79 Reprinted in Degen, _supra_ note 59 at 40; Wiltsher, _supra_ note 16 at Appendix 1, 218.

80 Degen, _supra_ note 59 at 41; Wiltsher, _supra_ note 16 at 219 (point 6).
from being but the prelude to new wars": "No province should be transferred as a result of
conquest from one government to another against the will of the people ..."81

Internationally, the women's peace movement was a result of the International Congress of
Women held at The Hague in 1915.82 In a letter sowing the seeds for this meeting,83 Scottish
feminist Chrystal Macmillan84 proposed as the topic the terms of the peace settlement, listing the
criteria for the transfer of territory, the democratic control of foreign policy and a number of other

81 Degen, supra note 59 at 44; Wiltsher, supra note 16 at 220 (point II(1)).
82 See generally Women at The Hague, supra note 59; Bussey & Tims, supra note 66 at c.1; Degen,
supra note 59 at c.3; J. Liddington, The Long Road to Greenham: Feminism and Anti-Militarism in
Britain Since 1820 (London: Virago Press, 1989) at c.5; M.M. Randall, Improper Bostonian: Emily
Greene Balch, Nobel Peace Laureate, 1946 (New York: Twayne Publishers, 1964) at c.6; Wiltsher, supra
note 16 at c.5.

The resolutions of the International Congress of Women held at The Hague in 1915 are reproduced in
Women at The Hague, supra note 59 at Appendix III, 150.
83 The principal credit for organising the International Congress of Women goes to the Dutch doctor and
84 Macmillan, perhaps the closest thing to a prominent feminist international lawyer of the time, was
called to the English Bar in 1924, shortly after admission was granted to women, but, as Cicely Hamilton
writes in an appreciation of Macmillan, "for many years before that date her legal knowledge had been of
value to the causes for which she worked." In 1908 before the House of Lords, Macmillan
unsuccessfully pleaded in person the Scottish women university graduates' claim to the Parliamentary
vote. While women did not have the vote, Macmillan argued that the right of "persons" registered as
graduates of a Scottish university to vote for the Parliamentary representative of the university should be
interpreted to include women as "persons." C. Hamilton, "Miss Chrystal Macmillan: Appreciations" The
On this and other "persons" cases, see A. Sachs & J. Hoff Wilson, Sexism and the Law: A Study of Male

Prominent nationally and internationally for her work on women's suffrage and peace, Macmillan also
became a leader in the campaign for the right of married women to choose their nationality independent
of their husband, which became a priority for feminists shortly after the war. See notes 187-188 and
accompanying text, below. In addition to her efforts in Britain on the subject of married women's
nationality, she was chair of the women's international demonstration on the subject at The Hague, where
she led deputations from it to the Bureau and the Commissioner on Nationality of The Hague
Codification Conference in 1930. From 1931 to 1933, she was a member of the Committee on the
Nationality of Women of representatives of International Women's Organizations set up on the invitation
[London] Times (2 September 1937) 14d. For one verbatim record of Macmillan's encounters with the
international law establishment on the subject of married women's nationality, see her presentation of the
IWSA draft International Convention on the Nationality of Married Women at the 32nd International Law
Association Conference in 1923 and her comments at the 33rd Conference the following year.
International Law Association, 32nd Conference Report (1923) at 40-44, with the IWSA draft
Convention reproduced as an appendix at 45; International Law Association, 33rd Conference Report
(1924) at 38-40.
terms similar to those being mooted at the time by various organisations devoted to the building of internationalism through the peace settlements. Macmillan wrote that in the suggestion that territory should not be transferred without the consent of the population of the country and the suggestion that foreign policy should be open to discussion and democratic control, it was specially important to keep women’s suffrage to the fore: “It is essential to make it clear both nationally and internationally that women are included both in the population and in the democracy.”

Successive generations of historians have alternately dismissed the International Congress of Women held at The Hague in 1915 as naive radicalism and recalled it as courageous visionariness. Belittled in the press as an international ladies’ tea-party or criticised as the folly of “Pro-Hun peacettes,” the Congress adopted a series of resolutions for a just peace that were later credited with inspiring President Wilson’s famous “Fourteen Points,” Wilson himself having told Jane Addams that he considered the resolutions the best formulation he had seen up to that time.

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85 In addition to the Union of Democratic Control in England, these included the Anti-Oorlog Raad (Anti-War Council) in The Netherlands; the National Executive Committee of the United States Socialist Party in the United States; the Bund Neues Vaterland and the Deutsche Friedensgesellschaft in Germany; and internationally the “Minimum Program” of the Central Organization for a Durable Peace and the Ford Peace Expedition. Randall, “Introduction” in Women at The Hague, supra note 59 at 16, n.1.

86 Quoted in Wiltsher, supra note 16 at 61-62.

87 For a superb analysis, see Kennedy, supra note 78.

88 Wiltsher, supra note 16 at 88 quotes the Northern Mail’s “this amiable chatter of a bevy of well-meaning ladies.”


90 Wiltsher, supra note 16 at 92; Degen, supra note 59 at 243. For a comparison of Wilson’s “Fourteen Points” with the resolutions of the 1915 Hague International Congress of Women, see Degen at 179-180 (Notably, “whereas Wilson had called merely for the recognition of the principle of the consent of the governed, the women had demanded a specific logical implication of this principle - woman suffrage.”)

91 Addams, Peace and Bread, supra note 75 at 59.
The two broad planks of the Congress platform, that international disputes should be settled by pacific means and that the parliamentary franchise should be extended to women, meet in the following resolution on the principles of peace:

The International Congress of Women, recognizing the right of the people to self-government, affirms that there should be no transference of territory without the consent of the men and women residing therein, and urges that autonomy and a democratic parliament should not be refused to any people.

In a remarkable epilogue, two delegations of women appointed by the Congress travelled from one capital to the next with the purpose of transmitting the resolutions of the Congress, especially a plan for mediation by a conference of neutral states, to belligerent and neutral governments alike. In a manifesto issued by these envoys, they state that one or the other of the delegations was received by the governments in fourteen capitals: Berlin, Berne, Budapest, Christiania, Copenhagen, The Hague, Havre (Belgian Government), London, Paris, Petrograd, Rome, Stockholm, Vienna, and Washington. They met with the Prime Ministers and Foreign Ministers of the Powers, the King of Norway, the Presidents of Switzerland and the United States, the Pope and the Cardinal Secretary of State. In addition to these thirty-five government visits, the delegations spoke everywhere with members of parliaments and other leaders of public opinion.

92 "Some Particulars About the Congress" in Women at The Hague, supra note 59 at Appendix II, 146 at 147.

93 The Congress declared by vote that it interpreted no transference of territory without the consent of the men and women in it to imply that the right of conquest was not to be recognised.


95 Resolution 20, adopted by the International Congress of Women at The Hague, 1 May 1915, reprinted in Women at The Hague, supra note 59 at Appendix III, 150 at 159.

96 For some of the delegates' own impressions, see J. Addams, "The Revolt Against War" and "Factors in Continuing the War"; E.G. Balch, "At the Northern Capitals"; A. Hamilton, "At the War Capitals" in Women at The Hague, supra note 59. See also Degen, supra note 59 at c.4; Randall, Improper Bostonian, supra note 82 at c.7-9; Wiltsher, supra note 16 at c.6.

97 Aletta Jacobs (Holland), Chrystal Macmillan (Great Britain), Rosika Schwimmer (Austro-Hungary), Emily G. Balch (United States), and Jane Addams (United States), Manifesto Issued by Envoys of the International Congress of Women at The Hague to the Governments of Europe and the President of the United States, reprinted in Women at The Hague, supra note 59 at Appendix IV, 160. The Manifesto, along with a list of the members of the two delegations and a list of officials who received the
The International Congress of Women had already resolved at The Hague in 1915 to hold a congress at the same time as the Peace Conference with the goal of influencing the peace process. This International Congress of Women, held in Zurich in May 1919, had as the basis for its discussions an advance copy of the peace treaty. Strongly critical of the treaty’s terms as a betrayal of the principle of self-determination and the other principles first framed by President Wilson, the Congress passed a resolution that adherence to the principle of self-determination in territorial adjustments and matters of nationality was among the essential principles omitted from the Covenant of the League of Nations, and the introduction of equal suffrage among the additional principles. It also passed a resolution that a clause be introduced into the peace treaty giving women the same voting rights in the plebiscites as men. In addition to telegraphing the first resolution of the Congress, concerning relief from blockade and famine, to President Wilson, who responded sympathetically, the Congress appointed a delegation to take these resolutions to the delegations, is given in “Women Envoys Urge Neutrals to Meet” The New York Times (16 October 1915) 3:5. The Manifesto is also reproduced in Bussey & Tims, supra note 66 at Appendix 1, 22; Foster, supra note 66 at Appendix A, 205.


99 See generally Addams, Peace and Bread, supra note 75 at c.8; Alberti, supra note 61 at 86-90; Bussey & Tims, supra note 66 at 28-33; Degen, supra note 59 at c.7; Liddington, supra note 82 at 136-138; Randall, Improper Bostonian, supra note 82 at c.12; Wiltsher, supra note 16 at c.7.

Some of the resolutions of the International Congress of Women held in Zurich in May, 1919 are reprinted in French in Kuyver, supra note 63 at 323-325. In addition, the Congress drew up a Women’s Charter which it proposed should be included in the peace treaty.

100 The resolution of protest is quoted in Addams, Peace and Bread, supra note 75 at 162-163; Degen, supra note 59 at 229.

101 Resolution reproduced in Kluyver, supra note 63 at 323-325.

For specific cases of self-determination in which the women’s peace movement took a position, see Liddington, supra note 82 at 138 (WILPF and Ireland); Addams, Peace and Bread, supra note 75 at 55-56 (Women’s Peace Party and the sale of the Virgin Islands from Denmark to the United States); Wambaugh, The Saar Plebiscite, supra note 34 at 237 (WILPF and the conditions for the Saar plebiscite).

102 Degen, supra note 59 at 231.

103 Addams, Peace and Bread, supra note 75 at 160-162; Degen, supra note 59 at 227-228; Wiltsher, supra note 16 at 201-202.
Peace Conference. Detailing its contact with the Allied leaders at Paris, Jane Addams, president of the delegation, wrote that two of the English members discussed the resolutions with Lord Robert Cecil, she saw Colonel House several times, and the delegation through the efforts of an Italian member was received by Signor Orlando and also had a hearing at the Quai d’Orsay with the French minister of foreign affairs, and with the delegates from other countries.

2 Success

Mother, vote Danish. Think of me!

Poster for the Schleswig plebiscite, showing a little boy with a Danish flag

It sounds like a fairy tale, a legend from olden days:
an abducted daughter deeply lamented has been rescued and returned

... Welcome home to your mother's house, our sister dear,
How pale you became in the giant’s embrace while struggling for your honour

You sat in chains mocked by wild boys
The lives of six thousand young sons were your ransom

But you don’t want mourning while tears are burning in your eyes
You proudly hide what you suffered at the hands of your tormenters

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104 Degen, supra note 59 at 231.
105 Addams, Peace and Bread, supra note 75 at 164.
106 Wambaugh, supra note 12 at vol. 1, 78.

In a striking vignette of German-governed Schleswig prior to the plebiscite, Paul Verrier transforms the figure of the little boy into the Danish flag:

This lad that you meet along an empty road, in the process of gathering hazelnuts in the hedges, look at him: the red and white of the Danish flag, the Dannebrog, bursts forth on his cheeks with the vigour of contrast that only the complexion of Danish children displays.

A Teutonic schoolmaster, irritated at this silent protest, one day grabbed one of his students and crossed his face with a spot of ink: “Black, white and red,” he sniggered, “There’s your Dannebrog transformed, as it should be, into the German tricolour.”

You come dressed in white and red and meet us smiling
Hail to you, apple of our mother's eye, at the new dawn.

Words to a Danish song written in 1918

The plebiscites held after World War I were the first time that women were given the right to participate in an international expression of popular sovereignty. Indeed, Sarah Wambaugh, who authored a magisterial history of plebiscites at the request of the Peace Conference, gives

[translation by H. Knop] "Sønderjylland" in Berlingske Tidende's Christmas Day Supplement 1918, No.51, p.3. Words by Henrik Pontoppidan (who shared the Nobel Prize for Literature with Karl Gjellerup in 1917) and music by Th. Laub in 1919. Danske Sange at 288. By this time, there was both popular momentum and German and Danish support for a plebiscite in Schleswig. The third stanza refers to "[w]hat we barely dared whisper about in corners among friends" as now being "proclaimed in Danish and German like words of promise among friends." See Wambaugh, supra note 12 at vol. 1, 54-56.


As opposed to Chrystal Macmillan, a feminist who used international law to achieve the goal of women's equality, Sarah Wambaugh's significance for a feminist history of international law is the way that her technical expertise on plebiscites gained her access to international legal scholarship and practice. As a scholar, she authored the definitive A Monograph on Plebiscites (1920), Plebiscites Since the World War (1933) and The Saar Plebiscite (1940); and, according to the 1934 New York Times article, was the first woman invited to lecture at The Hague Academy of International Law, delivering the lecture "La Pratique des Plebiscites Internationaux" in 1927 ((1927-III) 18 Rec. des Cours 151). Among her professional positions, she served beginning in 1920 as expert for a time on the Saar and Danzig in the Administrative Commissions and Minorities Section of the League of Nations Secretariat; as expert adviser to the Peruvian Government for the Tacna-Arica plebiscite in a boundary dispute with Chile in 1925-1926; as one of the three experts appointed by the League of Nations in 1934 to draft the Saar Plebiscite Regulations and later as technical adviser and deputy member of the Saar Plebiscite Commission, as technical consultant to the six hundred Americans designated to observe Greek elections in 1945-1946; and as adviser to the United Nations Plebiscite Commission to Jammu and Kashmir in 1949. Biographical notes in H.E. Davis, ed., Pioneers in World Order: An American Appraisal of the League of Nations (New York: Columbia University Press, 1944) at 107 and Who Was Who in America, Vol. III (1935-60) (Wilmette, Ill.: Macmillan Directory Division) at 888; "Dr. Sarah Wambaugh, Plebiscite Expert Who Advised League and U.N., is Dead" The New York Times (13 November 1955) 88. Her contribution was recognised by six honourary degrees, including from the University of Geneva (1935) and Columbia (1936); and by the Knight Cross, First Class, Austrian Order of Merit (1935); Officer Order of the Sun, Peru (1937); and several other decorations. Who Was Who in America, supra.

Despite these accolades, Wambaugh's professional role tended to be that of handmaiden rather than decision-maker. At the time of a vacancy on the Saar Governing Commission in 1924, Wambaugh's name was raised, but among the objections were that it was undesirable to place a woman on such a commission. "Want Miss Wambaugh on Sarre [sic] Commission" The New York Times (24 September 1924) 23:2. While she later became a part of the Saar Plebiscite Commission, it was as technical adviser and deputy member. Moreover, the slighting title of the 1934 New York Times article on Wambaugh's work on the Saar plebiscite, "Fair Vote in Saar is Woman's Task," is not atypical of the press coverage her career received. A 1946 New York Times article on Wambaugh begins: "If you are looking for work involving agreeable working hours, little competition and a good deal of distinction, you might take up plebiscites." It goes on to sketch her as a carefully composed lady member of the Harvard sherry set with an energetic interest in "worthy causes":

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107 [translation by H. Knop] "Sønderjylland" in Berlingske Tidende's Christmas Day Supplement 1918, No.51, p.3. Words by Henrik Pontoppidan (who shared the Nobel Prize for Literature with Karl Gjellerup in 1917) and music by Th. Laub in 1919. Danske Sange at 288. By this time, there was both popular momentum and German and Danish support for a plebiscite in Schleswig. The third stanza refers to "[w]hat we barely dared whisper about in corners among friends" as now being "proclaimed in Danish and German like words of promise among friends." See Wambaugh, supra note 12 at vol. 1, 54-56.

women's suffrage as the first major difference between the pre-war and post-war plebiscites.\textsuperscript{109} Women had the vote in all the plebiscites held,\textsuperscript{110} as well as all the informal consultations.\textsuperscript{111} In addition, the Treaty of Versailles gave women in the Saar Basin the vote during the fifteen year period of international administration that preceded the plebiscite between France and Germany.\textsuperscript{112}

Given the interventions of women themselves, the question is whether the peace treaties' provision for women's suffrage in the plebiscites reflects the acceptance of the women's arguments that the principle of self-determination should be interpreted consistent with women's equality or the traditional acceptance of the will of the states concerned, as expressed either directly in their proposals for the plebiscites or indirectly in their national laws on suffrage.\textsuperscript{113} Wambaugh,

\begin{itemize}
\item She was soft brown hair, brown eyes and is decidedly handsome. She dresses carefully, in the best of taste. She talks slowly and carefully ...
\item In between plebiscites she lives in the same large, austere Victorian house where she was raised in Cambridge, taking an active part in the academic social life of Harvard. She is always taking up causes - and always worthy ones.
\end{itemize}


It may be also that her very approach to plebiscites, which Nathaniel Berman analyses as an "alliance between modern social scientific ‘technique’ and the implementation of the passions of national groups,” mirrored the need for women to establish their professional credibility by demonstrating that they were capable of subordinating the emotional to the rational. N. Berman, "Modernism, Nationalism, and the Rhetoric of Reconstruction" (1992) 4 Yale J. L. & Hum. 351 at 366.

\textsuperscript{109} Wambaugh, "La Pratique des Plébiscites Internationaux," \textit{supra} note 108 at 225.

\textsuperscript{110} \textit{Treaty of Versailles}, \textit{supra} note 30 at art.109(2) (Schleswig); art.88, Annex s.4 (Upper Silesia); art.95 (Allenstein); art.97 (Marienwerder plebiscite to conform to the same rules); art.49, Annex, c.III, s.34 (Saar Basin); \textit{Treaty of St. Germain}, \textit{supra} note 35 at art.50 (Klagenfurt Basin); \textit{Decision of the Commission of Allied Generals for Sopron regarding the organization of the plebiscite for the Sopron Territory}, 15 November 1921, art.III, reprinted in Wambaugh, \textit{supra} note 12 at vol. 2. 265. Women would also have been given the vote in the plebiscite in Teschen, Spisz and Orava. \textit{Decision with regard to Teschen, supra} note 37 at art.V.

\textsuperscript{111} Wambaugh, \textit{supra} note 12 at vol. 1, 477. Notably, women voted in the unilateral consultation held by Poland in Vilnius after the League of Nations plebiscite was abandoned, even though the League Plebiscite Commission had proposed excluding women. See note 151, below.

\textsuperscript{112} \textit{Treaty of Versailles}, \textit{supra} note 30 at art.49, Annex, c.II, s.28.

\textsuperscript{113} The question is whether the primary rationale is liberal feminism or positivism. A concerned state might, of course, propose giving women the right to vote in the plebiscites for reasons of liberal feminism, as opposed to the utility of additional voters or the low number of male voters due to casualties of war.
although she personally supported women’s suffrage in the plebiscites on grounds of equality, is careful to present its significance from the dual viewpoint of principle and the effect on the number of voters.

Wambaugh’s impression was that the “principle of women suffrage appears to have been adopted as a matter of course by the Allies at Paris.” This impression is consistent with David Hunter Miller’s notes of the official meeting at which the joint delegation of the ICW and the inter-Allied conference of women suffragists presented their demand that in any popular consultation to decide the sovereignty of a territory, women be called upon equally with men to decide the fate of their homeland. Whereas the ICW’s account of the meeting records that this demand was “immediately accepted,” which suggests that the women carried their point, Miller’s notes read: “I handed note to President that every referendum had a provision for equal suffrage so far as I had seen the treaties. The President announced this.” Further evidence that women’s right to vote in the plebiscites was a foregone conclusion by this time is provided by a newspaper report that an American delegate to the Peace Conference had told the later delegation of women from the Zurich International Congress of Women that women would participate in the various plebiscites provided for by the peace treaties.

The fact that the Peace Conference had already provided for women’s suffrage in the plebiscites may mean that the earlier efforts of the women’s movement had been effective. For

114 Wambaugh, supra note 12 at vol. 1, 506 (point 18).
116 Wambaugh, supra note 12 at vol. 1, 477.
117 See above note 65 and accompanying text.
118 Women in a Changing World, supra note 63 at 45.
119 Miller, My Diary at the Conference of Paris, supra note 63 at vol. 1, 238, n.b.
120 “Women Delegates are Received in Paris” New York Times (8 June 1919) 1:10.
121 Consider the history of article 7 of the Covenant of the League of Nations, 28 June 1919, 112 U.K.F.S. 13, which provided that “all positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.” E.F. Ranshofen-Wertheimer, a member of the
example, Jane Addams wrote of governments' reception of the delegations from the 1915 Hague International Congress of Women:

Our mission was simple, and foolish it may be, but it was not impossible. Perhaps the ministers talked freely to us because we were so absolutely unofficial ... We do not wish to overestimate a very slight achievement nor to take too seriously the kindness with which the delegation was received, but we do wish to record ourselves as being quite sure that at least a few citizens in these various countries, some of them officials in high places, were grateful for the effort we made.\textsuperscript{122}

Alternatively, women's suffrage in the plebiscites could be attributed to the fact that women's suffrage was among the conditions for the plebiscite demanded by the Danish, German, Austrian and Hungarian delegations.\textsuperscript{123} In the case of the Schleswig plebiscite, the first and in

\textsuperscript{122} J. Addams, "Factors in Continuing the War," in Women at The Hague, supra note 59 at 97-98. While Addams is referring primarily to the prospects for their proposal for mediation, the possibility of persuasion may be more general. See also Balch, "At the Northern Capitals" in Women at The Hague, supra note 59 at 110:

They were received gravely, kindly, perhaps gladly, by twenty-one ministers, the presidents of two republics, a king, and the Pope. All, apparently, recognized without argument that an expression of the public opinion of a large body of women had every claim to consideration in questions of war and peace.

Addams and Balch were, however, writing for the general public in 1915, when a quietly optimistic account of their peace mission might have furthered its objective. Women writing privately or as the time to influence the peace process was slipping away sometimes betrayed frustration. With respect to the inter-Allied conference of women suffragists and its delegation to the Peace Conference, see Alberti, supra note 61 at 88-89; Rubinstein, supra note 58 at 254. For example, Margery Corbett Ashby, a delegate to the Peace Conference from the mainstream British National Union of Women's Suffrage Societies, wrote to Millicent Garrett Fawcett, president of NUWSS and a previous delegate to the Peace Conference, that it was pointless to send another delegation to the Peace Conference to continue to press for their demands since the "men in Paris are under the impression that we have been wonderfully well treated by them and have acquitted ourselves very well." Alberti at 89. With respect to the reception of the delegation to the Peace Conference from the International Congress of Women, held later in Zurich, Jane Addams wrote, "They all received our resolutions politely and sometimes discussed them at length, but only a few of the journalists and 'experts' were enthusiastic about them." Addams, Peace and Bread, supra note 75 at 164.

\textsuperscript{123} Wambaugh, supra note 12 at vol. 1, 477.
many respects the model for the others,¹²⁴ David Hunter Miller’s collection of papers on Danish affairs from the peace conference¹²⁵ records no controversy over the Danish proposal that women should be allowed to vote.¹²⁶ In addition, women’s right to vote nationally in a number of the states concerned could be interpreted as a type of indirect consent by those states.

The depiction of women by propaganda for the various plebiscite campaigns mirrors the dual interpretation of women’s right to vote in the plebiscites as the recognition of women as individuals and the acceptance of the will of states. Some posters sought to appeal to women as voters, while others used the figure of woman to embody the country or plebiscite region. Posters of the former type sought to appeal in particular to women’s interest in their children’s welfare. “Mother vote Danish. Think of me!” read a poster for the Schleswig plebiscite showing a little boy with a Danish flag.¹²⁷ During the plebiscite campaign in Schleswig, which as German territory was still suffering the effects of the Allied blockade, the Danish Government sent food supplies to the region, and Danish committees invited German trade unions to send ailing children to Denmark


¹²⁶ At the March 6, 1919 meeting of the Peace Conference’s Commission on Belgian and Danish Affairs, the Minister of Denmark read a note on the method of voting. *Procès-verbaux* No.5 of the Commission on Danish Affairs, March 6, 1919, reproduced in *ibid.* at vol. 10, 84, 87. Draft article II in the note provides for the vote without distinction of sex. Annex III to the procès-verbaux of that meeting, reproduced in *ibid.* at 91.

This aspect of the suffrage is not commented on and remains unchanged in the procès-verbaux leading to the final report of the Commission to the Supreme Council of the Allies. *Procès-verbaux* No.6, March 8, 1919, Annex I, M. Laroche, “Report on the Danish Claims Respecting Schleswig” (draft, English revision, with conclusions in the form of clauses) part 2, reproduced in *ibid.* at 93, 114; *Procès-verbaux* No.7, March 10, 1919, Annex III, “Articles Proposed for Insertion in the Preliminaries of Peace,” art.1(2), reproduced in *ibid.* at 118, 131 [after review by the jurisconsults]; *Report (with annexes) presented to the Supreme Council of the Allies by the Committee on Danish Affairs*, art.1(2), reproduced in *ibid.* at 211, 215.

Most of these records are also reproduced in *Questions Territoriales, supra* note 30.

¹²⁷ *Supra* note 106. Wambaugh records that this poster was sent by the Danes to the Polish propaganda committees, which also made wide use of it, modifying the design by hanging an amulet around the child’s neck. Wambaugh, *supra* note 12 at vol. 1, 79.
for a week’s outing. In a poster for the Klagenfurt Basin plebiscite, a boy tells his mother not to vote for Yugoslavia or he will have to report for duty to King Peter.

In the 1918 words to the Danish song “Sønderjylland,” the story of Schleswig is told as a fairy tale about a daughter abducted from Denmark. Similarly, in the posters that portray the plebiscite as a story about states, the state or plebiscite region is often represented as daughter, mother, sister or maiden in order to project certain emotions onto the state or the plebiscite region.

De Beauvoir maintains that this likening of places to women is a symbolism that corresponds to real emotions felt by many men. Woman, de Beauvoir writes,

is the soul of such larger groups ... as the city, state, and nation. Jung remarks that cities have always been likened to the Mother, because they contain the citizens in their bosom ... but it is not only the nourishing soil, it is a more subtle reality that finds its symbol in woman. In the Old Testament and in the Apocalypse, Jerusalem and Babylon are not merely mothers: they are also wives. There are virgin cities, and whorish cities like Babel and Tyre. And so France has been called the “eldest daughter of the Church”; France and Italy are Latin sisters.

One poster in the Saar plebiscite described by Wambaugh offers a straightforward example of this metaphor: showing “a grey-haired mother embracing her son, about his feet broken chains and pieces of a frontier post and behind him the smoking chimneys of the Saar, the legend reading, ‘Deutsche Mutter - heim zu dir’.” More complex examples are the posters bearing nationalist fairy tales, which implicitly make the voter responsible for the fate of the heroine. On a Slovene poster in the Klagenfurt Basin plebiscite, the text accompanying a series of images entitled “A Tale of Carinthia” reads:

During the course of centuries the German magpie has stolen from us many a pearl and treasure, among them the golden cradle of Slovenia, our Carinthia. But in an

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128 Ibid. at vol.1, 71, 78-79.
130 de Beauvoir, supra note 18 at 177-178.
131 Wambaugh, The Saar Plebiscite, supra note 34 at 253. (“German mother - home to you.”)
heroic effort the falcon rose from south of the magpie and took the stolen cradle. On the day of the plebiscite the falcon presents the cradle to its sister Slovenia.132

A German poster for the plebiscite in Upper Silesia shows a German Little Red Riding Hood holding a basket of city buildings labelled “Silesia” away from a hungry wolf with the Polish eagle on its flank. At the top of the poster are her words to the slavering animal:

You want my little basket?
It holds my darling Silesia.
Undivided it shall stay with me,
For with you it would become arid and wild.133

Perhaps the strongest evidence that these posters consciously relied on stereotypes of women134 is an Austrian poster in the Sopron plebiscite and the Hungarian poster developed to counter it. In the Austrian poster, a woman holding the shield of Austria knocks on the gates of Ödenburg, crying, “Open! Mother is here!”135 The Hungarian version shows the woman transformed into a man, dressed in red and hiding behind the white mask of Germania, symbol of Austria’s Pan-German movement. The Austrian shield now bears the red star of the Communists and partially obscures sacks of meal. “Open!” reads the caption on the Hungarian poster, “We have not stolen enough.”136

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132 Wambaugh, supra note 12 at vol. 1, 187.
133 Ibid. at 228.
134 In Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe (New York: Howard Fertig, 1985) at c.5, George L. Mosse argues that the promotion of woman as a symbol of the nation in Europe represented a form of social control through the imposition of a standard type: conformity to that standard served the interests of the nation, while deviance undermined it.
135 Described in ibid. at 286 (“Macht auf! Die Mutter ist’s!”).
136 Reproduced in ibid. at 289 (“Macht auf! Wir haben noch nicht genug geraubt.”).
3 Failure

In contrast to the plebiscites held under the peace treaties, women would not have had the right to vote in the plebiscites planned for Vilnius under the League of Nations in 1921 and for Tacna-Arica under American President Calvin Coolidge’s 1925 arbitral award. The decisions to exclude women from these plebiscites, neither of which ultimately took place, tell us something about the limited success of women’s interventions in international law. In the case of the Vilnius plebiscite between Lithuania and Poland, women in Poland protested strongly to Colonel Chardigny, the president of the League of Nations commission that had recommended against women’s suffrage in the plebiscite. According to a snippet in The Times, after Chardigny refused to receive a delegation of women who met his train at the Vilnius station to present a petition of protest, the women pelted him with eggs when he appeared in the door of his railway carriage. International women’s organizations in Geneva, seat of the League of Nations, also took up the cause of women’s right to vote in the Vilnius plebiscite. In the case of the Tacna-Arica plebiscite between Chile and Peru, Coolidge gave the fact that women’s suffrage did not exist in either Chile or Peru as a reason to deny women’s suffrage in the plebiscite. By this time, however, women had begun working for women’s suffrage through the inter-American system.

137 Based on the Report of the Commission charged with the preparation of the public expression of opinion, signed at Warsaw on February 17, 1921 and presented to the Council of the League of Nations on February 24, 1921, reprinted in ibid. at vol. 2, 273, 279 (part III) [hereinafter Vilnius Report]. (This Commission is variously referred to as the Plebiscite Commission or the Civil Commission to distinguish it from the International Force or Military Commission responsible for maintaining order in the plebiscite area.) As Wambaugh points out, the Commission’s recommendation that women be excluded from the plebiscite had not yet been approved by the Council of the League of Nations when the plebiscite was abandoned, so it is possible that the Council might not have approved it. Ibid. at vol. 1, 325, 477.

138 Ibid. at vol. 1, 325.


140 Wambaugh, supra note 12 at vol. 1, 325, 477.

141 For a précis of the initiatives taken by the Consejo Nacional de Mujeres, established in Chile in 1919 and in Peru in 1923, around this time, see Women in a Changing World, supra note 63 at 275-276, 283-284.
In 1922, a Pan American Conference of Women had been held in Baltimore with the purpose of furthering women's suffrage within the hemisphere, and the International Conference of American States held in Santiago, Chile in 1923, during Coolidge's presidency, had passed a motion on the rights of women in the hemisphere. Sarah Wambaugh, who advised the Peruvian government on the plebiscite, later wrote: "If the desire is really to ascertain the popular will, women as well as men must be allowed to vote, no matter what the previous custom in the area."

The decisions to deny women the vote in the plebiscites planned for Vilnius and Tacna-Arica also suggest to us something about the extent of male hegemony in international law, in the Comaroffs' sense of hegemony as an order of signs and practices that are taken for granted as the natural, universal and true shape of social being. It is otherwise difficult to account for the internal weaknesses and inconsistencies of these two decisions. In the Vilnius plebiscite, the League Commission disregarded the wishes of Lithuania and Poland by excluding women, even though its instructions were to have regard "as far as possible to the points on which both parties have been able to agree." In the Tacna-Arica plebiscite, Coolidge justified the exclusion of women on the ground of the parties' wishes, even though he did not apply this ground to illiterates.

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142 F. Miller, "The International Relations of Women of the Americas 1890-1928" (1986) 43:2 The Americas 171 at 178-179. The fact that United States Secretary of State Charles Evans Hughes addressed the conference gives some indication of the event's prominence.

143 Ibid. at 180-181. For the resolution, see J.B. Scott, ed., The International Conferences of American States, 1889-1928 (New York: Oxford Press, 1931) at 244.

144 Wambaugh, supra note 12 at vol. 1, 501. See also Wambaugh, "La Pratique des Plébiscites Internationaux," supra note 108 at 249.


146 Instructions for the Commission entrusted with the arrangements for the taking of a public expression of opinion in the Vilna District, approved by the Council on December 1, 1920, L.N. Council Minutes, 11th Sess., November-December 1920, annex 129i, reprinted in Wambaugh, supra note 12 at vol. 2, 272 [hereinafter Vilnius Instructions].
Sovereignty over Vilnius was among the border issues left unsettled in the Treaty of Versailles, which reserved the right to fix such borders at a later date. In the meantime, the League of Nations had been unable to prevent Vilnius from becoming a battleground between Lithuania and Poland. Eventually, the Council of the League of Nations passed a resolution calling for a plebiscite, its preamble stating that the Council’s desire was, above all, to re-establish peace between Lithuania and Poland and noting that both states based their claims to Vilnius on the right of self-determination.

The Council appointed a Plebiscite Commission for Vilnius, headed by Colonel Chardigny, and instructed the Commission to ascertain whether an agreement could be reached between Lithuania and Poland in regard to the procedures for the plebiscite and to notify the Council of the conditions for the plebiscite, “having regard as far as possible to the points on which both parties have been able to agree.” Although Lithuania and Poland took the common position that women should be allowed to vote in the plebiscite, the Commission rejected this position in its report to the Council, stating that it should be noted that in the contested territory, women having never voted, neither of the two Governments can express an opinion on the way in which the women’s vote is likely to modify the result of a vote where men alone took part. Under these conditions and to save time and money, the Commission is of the view that a right of suffrage accorded only to men could finally be accepted by the two Governments.

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147 Treaty of Versailles, supra note 30 at art. 87.
148 Warnbaugh, supra note 12 at vol. 1, 303-308.
149 Vilnius Resolution, supra note 38.
150 Vilnius Instructions, supra note 146 at 272.
151 Vilnius Report, supra note 137 at 279. Although women had yet to vote nationally in either Lithuania or Poland, both states had enfranchised women by this time. Warnbaugh, supra note 12 at vol. 1, 327. Moreover, during his occupation of Vilnius, the Polish Marshal Pilsudski had issued a proclamation that the inhabitants of Vilnius had the right of self-determination, to be exercised by universal suffrage without distinction of sex. Ibid. at 303. After the League of Nations abandoned the plebiscite in Vilnius, Poland carried out, under protest from Lithuania, a unilateral consultation in which women voted. Ibid. at 548-550.
152 [translation mine] Vilnius Report, supra note 137 at 279.
Before the Council, Chardigny argued more plainly that it would be “simpler for the men only to have the right to vote.”

What is striking about the Commission’s recommendation is that it is not even persuasive on its own terms. Since women’s suffrage was a point on which Lithuania and Poland agreed and the Council’s instructions to the Commission were to have regard “as far as possible” to the parties’ points of agreement, the Commission would arguably have had to convince the Council that women’s suffrage was impossible under the circumstances. Yet the Commission’s report estimated that registering women voters would add fifteen days to the roughly two hundred days allocated for the plebiscite. It is not entirely inconceivable, however, that fifteen days might have been critical. Not only did the Council’s resolution refer to its paramount desire to re-establish peace between Lithuania and Poland, but its instructions to the Commission anticipated that it might “become impossible to take the public expression of opinion owing ... to fighting occurring in the plebiscite area.” Nevertheless, if fifteen days could therefore have made a difference, it is still significant that the Commission’s report did not trouble to spell this out. More important, even if it was necessary to minimise time and expense, the Commission’s reasoning is remarkable in its assumption that women’s right to vote was so obviously the place to do so.

In addition to saving time and money, the Commission gave as a reason for male suffrage that since women had never voted in either Lithuania or Poland, neither government could predict how the women’s vote would modify the result of a men-only vote. Wambaugh described this

154 Vilnius Report, supra note 137 at 279 at 280 (part VI).
155 Vilnius Resolution, supra note 38.
156 Vilnius Instructions, supra note 146 at 273.
157 Ironically, the case against women’s suffrage domestically was often precisely the opposite: that women’s vote would simply follow their husband’s or that it would be captive to the Church.
reason as "somewhat inconsequential," meaning presumably that the value of individual choice in liberal self-determination is independent of the choice made by an individual or the effect of that individual's choice on the outcome. But it seems more likely that the unpredictability of the women's vote was a separate argument for male suffrage. The phrasing - "Under these conditions ... the Commission is of the view that a right of suffrage accorded only to men could finally be accepted by the two Governments" - indicates that this unpredictability was addressed to the self-interest of the parties; it was not offered to the League Council as anything more than a reason why the proposal might find acceptance by the disputants. Assuming that the Commission began by accepting that the principle of self-determination had equal application to women, it gave time and money as the practical limits of the principle. Alternatively, if the Commission did not even start with the presumption of women's equality, then its only intention would have been to give the Commission sufficient reasons why the parties would agree to its proposal.

In his arbitral opinion and award on the plebiscite in Tacna-Arica, President Coolidge denied women the vote as follows: "Women's suffrage does not exist either in Chile or Peru. Neither Party has requested it nor has it been suggested in any of the negotiations between the Parties." This reasoning might have been internally persuasive, had Coolidge also applied it to other categories of voters. Instead, he concluded that illiterates who owned real property situated in the territory should be allowed to vote despite the fact that both Chile and Peru made

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158 Warnbaugh, supra note 12 at vol. 1, 324.
159 Tacna-Arica Award, supra note 40 at 305.
160 It is possible that President Coolidge's decision to exclude women from the electorate may have been an attempt to strike a balance between Chile and Peru. According to Dennis, Coolidge's ruling that a plebiscite should be held favoured Chile, while his definition of the electorate favoured Peru. Dennis, supra note 40 at 213, 215. Including women in the electorate would have favoured Peru further, given that the Chilean administration had deported or conscripted many of the Peruvian men in the plebiscite area. Warnbaugh, supra note 12 at vol. 1, 359 (loss of Peruvian men), 407 (Peru would certainly have won had women voted); Dennis, supra at 228 (few Peruvian men remained). If Coolidge's decision to exclude women was an attempt to make his award acceptable to both states, it is significant that he saw the women's vote as the way to do it, just as it was significant that the League of Nations Commission saw the women's vote as the place to save on time and money.
ability to read and write a qualification for voting. He justified giving this subcategory of illiterates the vote "in view of the circumstances and of what is understood to be the character of a considerable portion of the population."\textsuperscript{161} As Wambaugh observed crisply, "[i]f the character of the population was considered, it is pertinent to call attention to the fact that while only a small part of the inhabitants were illiterate, more than half of the population were women, and that when an exception was made for property it might well have been made for sex."\textsuperscript{162}

Moreover, there were international lawyers writing on plebiscites in this period who distinguished giving women the vote in plebiscites from giving them the vote in domestic elections. In 1920, Paul de Auer wrote:

The peace contracts give the right of voting without regard to sex. There can be no objection to this, even in States where women have no votes in questions of internal politics. This is supported by the fact that in deciding the question of an annexation a special political training is not necessary. The decision of the question as to whether somebody wants to be Hungarian or Czech, French or German, is easier than that as to whether the happiness of the people is better assured by the liberal or the conservative party.\textsuperscript{163}

What is common to the decision to deny women the vote in the League of Nations Commission’s report on the Vilnius plebiscite and in President Coolidge’s arbitral award on the plebiscite in Tacna-Arica is not the arguments used. The Commission rejects the wishes of the parties, whereas Coolidge represents his decision as the acceptance of the parties’ wishes. What is shared is the bias against women that emerges through a series of questions about the reasoning: why not here? why is this the obvious place? why here, but not there? Yet the matter-of-fact tone of the decisions suggests that these questions did not even occur to the decision-makers; both the Commission and Coolidge present their ruling as obvious in its practicality or naturalness and

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{161} \textit{Ibid.}
\item\textsuperscript{162} Wambaugh, \textit{supra} note 12 at vol. 1, 408, n.1.
\item\textsuperscript{163} P. de Auer, "Plebiscites and the League of Nations Covenant" (1920) 6 Trans. Grotian Soc’y 45 at 53-54.
\end{enumerate}
\end{footnotesize}
therefore in need of only the briefest justification. What renders the weaknesses and inconsistencies in these justifications invisible to them and produces the attitude of “of-courseness” would seem to be the assumption that women are not equal members of the “self” and therefore that their equal participation in the exercise of self-determination is not essential.

II Individual Self-Determination: Women’s Right of Option

A Right of Option

Under the peace treaties, the transfer of territory pursuant to a plebiscite changed the nationality of the inhabitants automatically. When Schleswig was transferred from Germany to Denmark in accordance with the Danish victory in the plebiscite, for example, the Treaty of Versailles provided that its inhabitants ipso facto acquired Danish nationality and lost their German nationality. Whereas the plebiscite reflected the right of self-determination of peoples, that is, the right of individuals to decide democratically the sovereignty of their homeland, this automatic change of nationality denied them the right to choose individually the sovereignty under which they would live. “Since a plebiscite is decided by majority vote,” Joseph Kunz wrote, “a plebiscite without an option of nationality constitutes an oppression of the dissident minority.”

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164 Compare C. Geertz, “Common Sense as a Cultural System” in C. Geertz, Local Knowledge: Further Essays in Interpretive Anthropology (Basic Books, 1983) 73.

165 In the case of every transfer of territory, except for that of Alsace-Lorraine, the peace treaties provided that the nationality of the inhabitants would change automatically. J.L. Kunz, “L’Option de Nationalité” (1930-I) 31 Rec. des Cours 107 at 142.

166 Treaty of Versailles, supra note 30 at art.112. For the other plebiscites, see Treaty of Versailles, supra note 30 at art.91; Treaty of St. Germain, supra note 35 at art.70. There were no provisions of the Treaty of Versailles dealing with the consequences of the Saar plebiscite for nationality.

167 [emphasis in original] [translation mine] Kunz, supra note 165 at 122-123.
The peace treaties therefore gave those individuals whose nationality was affected by the plebiscites the right to opt for the other nationality. In the example of Schleswig, those Germans who were born in Schleswig, but did not automatically become Danish because they were not inhabitants of the territory had the right to opt for Denmark. Those who, as inhabitants of Schleswig, had automatically become Danish had the right to opt for Germany. The right of option had to be exercised within two years of the change in sovereignty, and those who exercised the right were then required to transfer their place of residence to the state in favour of which they had opted.

While the right of option was better established in international law than the plebiscite, it was also not accepted as custom. It was therefore significant that both the plebiscite and the right of option were used to give the individual some say in the grand designs of the Peace Conference for Europe. By supplementing the right of collective self-determination represented by the plebiscite with a right of individual self-determination, moreover, the option gave a firmer foothold to liberal democracy in international law.

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168 A right of option was provided in connection with every transfer of territory under the peace treaties, with the exception of Alsace-Lorraine and Neutral-Moresnet. Kunz, supra note 165 at 143.
169 Treaty of Versailles, supra note 30 at art.113. For the other plebiscites, see Treaty of Versailles, supra note 30 at art.91; Treaty of St. Germain, supra note 35 at arts.78-79.
171 Kunz, supra note 165 at 122.
172 Kunz, supra note 165 at 119, 122; C.L. Gettys, "The Effect of Changes of Sovereignty on Nationality" (1927) 21 AJIL 268 at 270.
173 Because the right of option required the individual who exercised the right to emigrate to the state for which he had opted, some publicists of the time saw the right as demos in the service of ethnos. Engström wrote that the goal of the Treaty of Versailles was thereby "d'appliquer purement et simplement le principe des nationalités en réunissant sure le même territoire des hommes de même race, de même langue et de même civilisation." M. Engström, Les changements de nationalité d'après les traités de paix (Paris, 1923) at 8, quoted by Kunz, note 165 at 152 and cited by Gettys, supra note 172 at
B  Collective Option

Under the present law a man can never have his ... nationality taken from him unless he voluntarily naturalises in another country or is disloyal, and a woman should receive the same treatment. She, despite her sex, is a human being, and should have the rights enjoyed by male human beings. Marriage should not be a reason for penalising a woman by treating her as a minor and refusing her the status of an adult. Nationality and allegiance are matters of too great importance to be imposed or taken away from any adult citizen without consent. It is an indignity to a woman to assume that an outside force shall determine to what country her loyalty is to be directed ...

Chrystal Macmillan, 1931

1  Introduction

Although a married woman could participate in the process of collective self-determination by voting on an equal footing with men in the plebiscite, she was not an equal participant in the process of individual self-determination that followed. In accordance with the dominant practice of the previous century, the provisions of the peace treaties on the plebiscites specified a “collective option,” whereby the option of the husband covered that of the wife. If Kunz termed a

269. Compare the discussion of the European Union Arbitration Commission’s Opinion No.2 on Yugoslavia, Chapter 4, above.


175  Kunz, supra note 165 at 147.

176  Treaty of Versailles, supra note 30 at arts. 91; 113; Treaty of St. Germain, supra note 35 at arts. 78-79.

The peace treaties provided for a collective option in connection with every transfer of territory, with the exception of Alsace-Lorraine and those under several treaties concluded with Soviet Russia. Kunz, supra note 165 at 147.

177  The collective option also covered minor children.
plebiscite without an option of nationality "an oppression of the dissident minority," then the collective option was, by the same standard, an oppression of married women.\textsuperscript{178}

The drafting history of the articles of the Treaty of Versailles on the Schleswig plebiscite shows that Denmark's note to the Peace Conference's Commission on Danish Affairs proposed a right of option but made no reference to wives.\textsuperscript{179} A collective option covering wives appeared in the Commission's draft articles only after the articles had been reviewed by the jurisconsults,\textsuperscript{180} and was unchanged in the Commission's report to the Supreme Council of the Allies.\textsuperscript{181}

The alternative of an individual option for married women, which would have given them the same right to opt for another nationality, was not unknown to international law. The 1871 Treaty of Frankfurt had brought out the disagreement between French and German international

\textsuperscript{178} A series of decisions by the Austrian administrative courts demonstrates the additional frustrations for women caused by a strict interpretation of this collective option. In one case, a woman whose husband had not been heard of in the three years since the end of the war was denied the right to opt for Austria on the ground that so long as she had not been legally divorced, her change of nationality could only be effected through her husband. Kugler v. (Austrian) Federal Ministry of the Interior, reported in J.R. Williams & H. Lauterpacht, eds., Annual Digest of Public International Law Cases, Being a Selection from the Decisions of International and National Courts and Tribunals given during the Years 1919 to 1922 (London: Longmans, Green and Co., 1932) 220 (Case No.153). For two other Austrian decisions to this effect, see ibid. at 221 (Note to Case No.153). The editors venture that these three decisions seem to be in conformity with the collective option in article 78 of the Treaty of S.L. Germain.

In another case, the court held that even the husband's express consent to the option of his wife was not sufficient if he himself had not exercised the right to opt. Austrian Administrative Court, Decision of 29 April 1924, No.13.529 A, vol. XLVIII (1924), pp.176,177, cited in ibid. at 221 (Note to Case No.153).

\textsuperscript{179} Procès-verbaux no.5 of the Commission on Belgian and Danish Affairs, March 6, 1919, Annex III, art.II (Danish note), reproduced in Miller, My Diary at the Conference of Paris, supra note 63 at vol. 10, 84 at 91.

In light of the doctrinal disagreement over whether a general right of option signified a collective option or an individual option for married women (see note 182 below and accompanying text), it is difficult to know what the Danish position meant and whether the Commission saw itself as departing from Denmark's wishes or specifying them for greater certainty.

\textsuperscript{180} Procès-verbaux no.6 of the Commission on Belgian and Danish Affairs, March 8, 1919, Annex I, reproduced in ibid. at vol. 10, 93, 108 (draft report by M. Laroche in French, adopted subject to review by jurisconsults). Ibid. at Annex II, pt.7, reproduced at 116 (Report on the Danish Claims respecting Slesvig, English revision of the draft) (pt.7 mentions only children under 18 and is agreed). Procès-verbaux no.7 of the Commission on Belgian and Danish Affairs, March 10, 1919, Annex III, art.4, reproduced in ibid. at vol. 10, 118, 133-134 (Articles Proposed for Inclusion in the Preliminaries of Peace, after review by jurisconsults) (art.4 mentions wife).

\textsuperscript{181} Report (with Annexes) presented to the Supreme Council of the Allies by the Committee on Danish Affairs, art.4 reproduced in ibid. at vol. 10, 211, 218 (mentions wife).
legal doctrine as to whether a treaty that provided generally for a right of option should be interpreted as giving the wife an individual right of option, and there was some criticism of the collective option in the peace treaties in the post-war French international legal literature. In a 1921 article on nationality in the peace treaties, for example, Niboyet asked rhetorically whether the collective option had not sacrificed the rights of the woman and made a mockery of her consent.

For women, the issue of the collective option would logically have been part of the larger issue of the dependent nationality of married women. As of 1910, the nationality of the wife followed the nationality of the husband in all legal systems in the world, with the exception of a few South American states. Upon her marriage to a foreigner, a woman automatically lost her own nationality under the laws of her state and automatically acquired her husband’s nationality under the laws of his state. After the war, women’s organizations campaigned actively for changes to the domestic laws on nationality and for an international treaty that would guarantee women’s equality with men in matters of nationality. The issue had, however, not become a

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183 E.g. Calbairac, supra note 182; Niboyet, supra note 182.

184 Niboyet, supra note 182 at 208.


186 Historical Background and Commentary, supra note 185 at 3-4.

187 Shortly after the war, the IWSA drafted a provisional international convention on the nationality of married women, based on the general principle that married women should have the same right as men to keep or change their nationality. Reprinted in ILA, 32nd Conference Report, supra note 84 at 45. See also Macmillan, “Present Tendencies,” supra note 174 at 143 (ICW, WILPF, IWSA), 152-153 (provisional draft international convention).

Women were active at the 1930 Hague Codification Conference, which was reluctant to go much beyond the practical problems of women’s statelessness and dual nationality caused by conflicts between
priority by the time of the Peace Conference. The delegation of women from the ICW and the Conference of Women Suffragists from Allied Countries and the United States, which appeared before the Peace Conference Commission on the League of Nations, strategically chose not to


In contrast, the work of the Inter-American Commission of Women led to the 1933 Montevideo Convention on the Nationality of Women, 26 Dec. 1933, (1934) 28 AJIL Supp. 61, which provided that there should be no distinction based on sex as regards nationality. J.B. Scott, “The Seventh International Conference of American States” (1934) 28 AJIL 219.

It should be noted that not all international women’s organizations supported independent nationality for married women. See Hudson, supra at 118; Makarov, supra note 185 at 155, n.4 (International Union of Catholic Women's Organizations).

This is not to say that women had not taken up the issue prior to the Peace Conference. The ICW had advocated independent nationality for married women since 1905. Macmillan, “Present Tendencies,” supra note 174 at 143. Women’s groups ranging from the National Union of Women Workers to the Mothers’ Union had petitioned the British Imperial Conference of 1918. Bhabha, supra note 6 at 15; Macmillan, Nationality of Married Women, supra note 174 at 9 (quoting the Memorial of Women's Societies throughout the British Empire). In 1918, a deputation of women sought unsuccessfully to meet with the British Home Secretary to discuss the issue of women's nationality. Bhabha, supra at 17.

Wartime, however, strained the commitment of women’s groups to the idea that a woman’s allegiance could not be commanded by the law of nationality. A few years after the war, Chrystal Macmillan would write: “It is insulting to a woman to assume that she can transfer her allegiance without her consent.” Macmillan, “Present Tendencies” at 144. Yet, during the war, the leaders of the British women's movement were not above the insult of this assumption. For example, Sylvia Pankhurst was angered by the executive decision of the Women’s International League, which arose from the International Congress of Women held at The Hague in 1915, to exclude the British-born wives of aliens for fear of controversy. Mitchell, supra note 71 at 286. See also ibid. at 285, 323-326. Under the British Aliens Restriction Act, the names of 12,000 women who were aliens by marriage were entered into an Official Register. N. Hiley, “Counter-espionage and security in Great Britain during the First World War” (1986) 101 Eng. Hist'l Rev. 635 at 646.

In Henrietta Leslie’s novel Mrs. Fischer’s War, which opened as a play in 1931,

Mrs Fischer is married to a German who has lived in England for many years, never bothering to become naturalised. On a family holiday in Germany, his previously repressed feelings of loyalty to his country of birth inspire him to leave his family and volunteer to fight in the German army. His son, on returning home, joins the British army. Mrs Fischer is bereft not only of her husband and son, but as a “German” by marriage she becomes a social outcast in England...

present a more controversial *International Charter of Women's Rights*, which included equal nationality rights for married women.\(^{189}\) At the International Congress of Women held in Zurich during the Peace Conference, the right for a married woman to change or retain her nationality was included among the resolutions,\(^{190}\) but the resolutions of the Congress to the Peace Conference generally made little impression on the leaders in Paris.\(^{191}\)

Although the possibility of an individual option for married women seems not to have been discussed at the Peace Conference, such discussion is found in the international legal literature of the period. The three sections that follow examine the implications of this discussion for women's identity.

2 **Woman Follows Man**

The justification particular to the collective option hinged on the requirement that the right of option be exercised by way of declaration and perfected by emigration within a certain period of time. An inhabitant of Schleswig made Danish by the transfer of the territory from Germany to Denmark, for example, could declare for his old German nationality, but was then obliged to transfer his place of residence to Germany within twelve months of the declaration.\(^{192}\)

For certain publicists, a wife's duty to follow her husband, Christian in origin and secularised and codified over time,\(^{193}\) justified the collective option. In *The Bible*, Ruth says to her

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\(^{189}\) Miller, *Lobbying the League*, supra note 61 at 22.

\(^{190}\) Wiltsher, *supra* note 16 at 202.

\(^{191}\) See Addams, *Peace and Bread*, quoted in note 122 above. See also Bussey & Tims, *supra* note 66 at 33; Randall, *Improper Bostonian*, *supra* note 82 at 268.

\(^{192}\) Treaty of Versailles, *supra* note 30 at art.113. For the other plebiscites, see Treaty of Versailles, *supra* note 30 at art.91 ("may"); Treaty of St. Germain, *supra* note 35 at arts.78-79 ("must").

\(^{193}\) On the Christian origins of the rules on women's nationality, see ILA, 32nd Conference Report, *supra* note 84, especially at 31; ILA, 33rd Conference Report, *supra* note 84 at 24. The French *Civil Code* from 1804 onward offered an example of the codification of the requirement that a wife live with her husband. Donner, *supra* note 170 at 207.
mother-in-law Naomi, "Whither thou goest, I will go; where thou lodgest, I will lodge: thy people shall be my people ...". On this patriarchal expectation, it was a practical impossibility for a wife to opt differently from her husband, so there was no reason to give her a right to opt.

Gaston Calbairac, writing several years after the plebiscites, made the point that the hypotheticals used to demonstrate this practical impossibility reflected their authors’ inability to imagine situations resulting from a change in sovereignty in which women might be able to choose a nationality different from their husband. On the hypothesis that the wife had an individual option, Calbairac showed that even if the husband did not opt, the wife could opt and perfect her option without breaking up the household, if her husband were to move abroad for unrelated reasons. Conversely, if the husband did opt, the wife could emigrate with him but retain her nationality by not making the declaration of option. In addition, a married woman who was legally separated would always be in a position to exercise an individual option. Even if it were a practical impossibility for the wife to exercise a separate right of option, Calbairac maintained, this was not a valid reason for depriving her of that right.

3 Family and International Community

The justification of the collective option also drew on the justification for the dependent nationality of married women more generally in international law. In the international legal

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194 Ruth 1:16.
195 Calbairac, supra note 182 at 88, citing Fiore, Droit International Privé, vol. I (1890) at para.396 and De Folleville, Naturalisation, nos. 288-289.
196 Ibid. at 87-88.
197 Ibid. at 88-89. Under French law, which Calbairac uses in these examples, the wife's choice would not be frustrated by the operation of the laws on the nationality of married women because French law did not effect a change in the wife's nationality when the husband changed nationality during the marriage.
198 Ibid. at 90.
199 Gettys, supra note 172 at 273, relying on Phillipson, supra note 182 at 298 (foundation for the collective option in general international law) and Niboyet, supra note 182 at 297-298 (with reference to the collective option in the peace treaties); Szlechter, supra note 170 at 338.
discourse on the nationality of women, as in the discourse on the vote, the issue of women's equality was enmeshed not only with images of women, but with the relationship between these images and images of the international legal order, where these images and their relationship to one another were produced or heightened by the war.

The general discourse on the nationality of women was structured, as Germany would put it to the League of Nations in 1932, by the irreconcilable opposition between "[t]he traditional idea of the civil unity of the family derived from the nature of the marriage union and the union of the family, and also founded on religious principles" and "the idea of self-determination for women based on principles of individualism."\(^{200}\) As applied to nationality, the traditional idea of the unity of the family consisted of two separate propositions.\(^{201}\) The first proposition was that all members of a family should have the same nationality, the second that the husband determined that nationality. Whereas the first proposition did not depend on gender, the second relied on a patriarchal notion of the family, entrenched in the law of the period, which gave the husband a privileged status and the power to make decisions affecting the family.

Section (a) shows that arguments about whether a family should have the same nationality involved the projection of competing visions of the relations between states onto the relations between husband and wife. Section (b) shows conversely that the projection of the paterfamilias onto the state made mutually reinforcing the patriarchal argument that a wife should have the same nationality as her husband because her duty of obedience to her state would otherwise threaten her duty of obedience to her husband, and the xenophobic argument that a wife should have the same

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nationality as her husband because her loyalty to her state, on the expectation that she was resident in his state, would otherwise create an island of disloyalty within the state.202

a Love and War

The proposition that a family should have the same nationality harkened back to nationalism and war, while its critiques looked ahead to internationalism and peace. Those who subscribed to the proposition tended to view international relations as a perpetual power struggle between states. On this view, the attachment of nationality would project the rivalries, tensions and hostilities between states onto a marriage between nationals of different states. Trinh Dinh Thao quotes Varambon’s description of the household with two nationalities:

a rivalry of nation to nation, interests opposed between persons united, different affections, diverse fatherlands, enemy wishes for countries perhaps at war, and this between persons who have sworn to love one another, between whom everything is common and who must never leave one another.203

This tendency of a marriage between people of different nationalities to reproduce the antagonism between states was a reason to give spouses the same nationality. Moreover, the conflict between spouses that would otherwise result would, in turn, give rise to conflicts between states as the protectors of the respective spouses.204

203 Thao, supra note 185 at 15, quoting from Varambon, Revue pratique de Droit Français, vol. 8 (1859) at 50 (presenting this argument as still enjoying currency).
Contrast this with the vision of marriage between nationals and non-nationals in Calbairac, who argued that the wife should be free to choose her own nationality. Calbairac proceeds from the modern phenomenon of internationalism, which he defines as

the interpenetration of peoples, economic interests, intellectual resources. It is the substitution for nations, for states among which the antagonism of financial interests succeeds the antagonism of belligerents, of a community of individuals, of interests, of ideas which emanate from the most diverse points of the world. Internationalism is the ensemble of relations that exist from individuals to individuals belonging to different States, economic, intellectual and moral relations, that end by creating a sort of international mentality.

Internationalism is thus seen as creating a new environment and state of mind that lend themselves to the success of mixed marriages, that enable a man and a woman to give themselves more completely to one another. In the new dawn of internationalism, man and woman come to one another as individuals, free of the old inter-state antagonism. In turn, their very coming together enhances internationalism, knitting individuals closer together and fostering the empathy necessary

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205 Calbairac distinguishes between these mixed marriages and the mixed marriages caused by permanent or long term emigration for economic reasons. This distinction largely tracks class, with the former tending to unite members of a new transnational elite and the latter being between workers in urban industry or the countryside. An exception is marriages between French women and American soldiers during World War I, which he attributes to internationalism. Calbairac, supra note 182 at 9-11.

Calbairac’s distinction between the mixed marriage as blueprint for utopian world relations and the more familiar mixed marriage takes on the dimension of “good” and “bad” mixed marriages in other arguments for the independent nationality of married women. See Thao, supra note 185 at 106 (women nationals who made “good” marriages to allied soldiers should not be punished by losing their nationality) and 36-40 (women nationals who made “bad” marriages to immigrant workers from different cultures should be protected from the laws of the husband’s state by the retention of their own nationality); Bhabha, supra note 6 at 17 (quoting the IWSA journal Jus Suffragii on the need to protect the large number of British women throughout the Empire who became the wives of men of coloured races).

In the case of women who made a “bad” marriage to a non-national, the argument that they should be protected through the retention of their nationality projected assumptions of the time about superior and inferior states onto the needs of the woman in a mixed marriage. A similar point is made about the international legal initiatives to outlaw “white slavery.” D.J. Guy, “‘White Slavery,’ Citizenship and Nationality in Argentina” in Nationalisms and Sexualities, supra note 2 at 201 (Women as pretexts for defining one nation’s sovereignty against another’s).

206 Calbairac, supra note 182 at 12.

207 Ibid. at 13-14.
to it. War will find only a weak echo in the relationship of mixed marriage, and that relationship will, conversely, discourage war.

Thus, behind the issue of whether a family should have the same nationality lay a vision of the state in the world; and behind the accepted proposition that a family should, lay the legal and psychological assumption that we are irreducibly of a world of states which are forever competitors, rivals and even enemies.208

What permitted international lawyers of the time to derive the further proposition that the husband determined the nationality of the family from the proposition that the family should have the same nationality was the prevailing patriarchal notion of the family. In his manual on private international law, published in 1923, René Foignet wrote:

It is in conformity with the spirit of marriage that spouses have the same nationality. From that moment, it is natural that the nationality of the husband spread to the wife.209

To this, Macmillan objected:

do the supporters of this form of "unity of the family" really mean any more, by this expression, than "supremacy of the husband"? If they were to argue that a woman who marries a man and goes to live in his country should take her husband's nationality, and that a man going to settle in his wife's country should, in the same way, automatically take his wife's nationality, the masculine bias of his point of view would be less suspect.210

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208 The same assumption informed the argument that independent nationality for married women was undesirable because it would increase the numbers of dual nationals. See Women's Equality and Nationality in International Law, supra note 185 at 25-26.

209 [translation mine]. R. Foignet, Manuel élémentaire de droit international privé, 7th ed. (Paris: Librairie Arthur Rousseau, 1923) at 83. The brevity of Foignet's treatment may be due to the fact that his manual is aimed at students in law and candidates for diplomatic and consular careers, but the intended readership does not redress the jump in logic between the first and second sentences.

To be fair to Foignet, his assumption may reflect a wife's legal duty under the Civil Code to obey the husband and follow him in all his changes of residence. See note 193 above. Suffice it to say that other French international lawyers maintain that the Code does not apply this duty of obedience to the wife's nationality because the Code accepts that the husband's nationality can change over the course of the marriage without the wife's also changing. The Code's duty of obedience thus reinforces but does not require the patriarchal assumption.

Discussing the collective option in the peace treaties, Niboyet speculated that similarly patriarchal attitudes had led the drafters to prevent the breakup of households by providing a collective option, although this could have been prevented without sacrificing women's equality.\footnote{Niboyet, supra note 182 at 268.}

b Father and Fatherland

The proposition that the family should have the same nationality could, conversely, be derived from the patriarchal model of the family reflected in the proposition that the husband determined that nationality. As patriarch, the husband was the sole authority in the family. If the wife were the national of a state other than her husband's, her duty of obedience to that state, represented by her nationality, would threaten her duty of obedience to her husband. On this reasoning, a wife's acquisition of her husband's nationality was necessary to remove a rival for her obedience.\footnote{See Makarov, supra note 185 at 166, citing E. Audinet, La nationalité française, Revue, 1928, at 30 and Pelletier, La nationalité de la femme mariée (1925) at 9.}

Proponents of the unity of the family applied similar reasoning to the wife's loyalty to the state. The presence in the state of wives who were non-nationals, the assumption being that wives would live in their husband's state, would contribute to the creation of veritable "islands of foreigners" within the state, whereas the state required the loyalty of all those within its borders. It followed that married women must become nationals so as to destroy the presence of these rival sovereigns.\footnote{Makarov, supra note 185 at 167, citing Pelletier La nationalité de la femme mariée (1925) at 52 ff.}

While the patriarchal and the xenophobic arguments may seem separate but parallel, they are connected by the analogy between patr familias and state historically found in international law.
Patriarchy thus naturalised the idea of the state as unmenaced by foreigners, and xenophobia reinforced the idea of the husband as unchallenged in the family. In causal terms as well, it may have appeared likely that the state’s interest in security was served if loyalty to husband and state reinforced one another.

4 Vice and Virtue

In the international legal discourse of the period on the nationality of women, gender and nationalism also combined in opposing pairs of good and bad female stereotypes. As de Beauvoir observed, since “group symbols and social types are generally defined by means of antonyms in pairs, ambivalence will seem to be an intrinsic quality of the Eternal Feminine. The saintly mother has for correlative the cruel stepmother, the angelic young girl has the perverse virgin.”

Although one pair of these female stereotypes was used to justify dependent nationality for married women and the other pair to justify independent nationality, the purveyors of one were as chauvinistic as the purveyors of the other.

The one pair of these female stereotypes - the faithless daughter and the dutiful daughter-in-law - symbolised the view of some supporters of the dependent nationality of married women that women, but not men, could express loyalty or disloyalty to the state through the act of marriage. A state was justified in withdrawing its nationality from a woman who married a non-national because by plighting her troth to a foreigner, she had deserted her own country. A state was justified in extending its nationality to a non-national woman who married a national because by pledging obedience to a national, she had embraced his country as well. Thao traces this nationality

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215 de Beauvoir, supra note 18 at 254.
regime as it appeared in articles 12 and 19 of the French Civil Code to France's desire, born of the Revolution, to withdraw favour from individuals who showed their willingness to abandon France and to reward individuals who cast their lot with France.\textsuperscript{216}

A state’s withdrawal of nationality from a woman who married a foreigner could thus be portrayed as punishment for “bad” women and its extension of nationality to a foreign woman who married a national as reward for “good” women. The combined effect of this gendered disciplinary system of dependent nationality and the analogy of state to paterfamilias was to symbolise the woman who married a non-national as the faithless daughter rightly disowned and the non-national woman who married a national as the dutiful daughter-in-law fittingly accepted.

The opposing pair of good and bad female stereotypes - the virtuous daughter cruelly banished from the family and viper-like daughter-in-law clasped to its bosom - embodied an equally chauvinistic opposition to the dependent nationality of married women. The virtuous daughter showed that dependent nationality punished some “good” women, while the viper-like daughter-in-law showed that it rewarded some “bad” women. The following example of a virtuous daughter was used in the 1922 US Congressional debate on independent nationality for women and recounted, in equal detail, in some authors of the period: she was

the daughter of an admiral in the American Navy who was wealthy in property acquired entirely by her family residing in the United States. In the war she had one brother in the American Army and one brother who had enlisted in the French Army before America entered the war. While she was a mere school-girl in Switzerland she had married a German who proved to be of no worth and no character. He frittered away all her property, of which he could get possession, and gave her abundant cause for divorce. For this reason she was obliged to take up a separate abode in Switzerland, where she instituted divorce proceedings against her husband.

\textsuperscript{216} Thao, supra note 185 at 73-76. Articles 12 and 19 of the French Civil Code were widely copied (Makarov supra note 185 at 118), although this need not mean that their rationale was thereby adopted.

In a 1915 judgment, the Supreme Court of the United States similarly used the idea that a woman’s marriage expressed her relationship to the state to reconcile the American law of dependent nationality for married women with the principle of consent to nationality. The Supreme Court held that against the legal background of dependent nationality, a wife must be seen to have consented to her husband's nationality because she voluntarily entered into marriage with notice of the consequences. MacKenzie v. Hare, supra note 204. See also McClintock, supra note 1 at 358.
Because he was an officer in the German Army, these proceedings were stayed for the entire period of the war. During the war she went to Hungary, and there busied herself in relief work for the wounded prisoners of the allied armies. The American Alien Property Custodian, in the execution of his duty, seized and held the remainder of her property, consisting of a trust fund in the United States. Reduced from wealth and luxury to absolute poverty, this woman, who had never ceased to be an American at heart, returned to America penniless to appeal to the chivalry of the American Congress to restore her citizenship...  

The sense of injustice created by this example comes not just from the woman's patriotism. It also comes from her depiction as the daughter and sister of a family which, father an admiral in the American Navy and brothers eager to fight for freedom, virtually is the United States, and as the wife of a man who, as a German army officer, virtually is the enemy. The appeal to chivalry is further strengthened by her schoolgirl naiveté and her husband's caddishness. If the point of the example were only that a woman's loyalty to her state may survive her loss of its nationality, then the evidence of her patriotism would have sufficed and the details of her family would have been superfluous. The inclusion of these details suggests that the example also intended to create an image of the virtuous daughter to oppose to the image of the faithless daughter, to invoke Cordelia against his Goneril and Regan.

The other image of this pair, the viper-like daughter-in-law, is alluded to by a number of international legal scholars writing after World War I. The fear was that foreign women who married nationals and thereby became nationals themselves might be opportunists or - worse - spies. As actual examples of opportunists, Thao cited a well-to-do German woman who enticed

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217 R.N. Crane, "Naturalization and Citizenship of Married Women in the United States" (1923) 5 J. Comp. Leg'n & Int'l L. (3d Series) 47 at 50. Cited also by Thao, supra note 185 at 41-42: Calbairac, supra note 182 at 251-252.

218 Indeed had he not been a German officer, the problem would have resolved itself because the divorce proceedings would not have been held up by the war.

219 Calbairac, supra note 182 at 250; Thao, supra note 185 at 54-55, 88. On the myth of the spy-seductress, women spies and spy mania during World War I, see J. Wheelwright, The Fatal Lover: Mata Hari and the Myth of Women in Espionage (London: Collins & Brown, 1992) at c. 2, 6-7. For an account of women spies in World War I by a former member of the British Naval Intelligence Department and the Secretariat of the War Cabinet, see G. Aston, Secret Service (New York: Cosmopolitan Book Corp., 1930) at c.12. More generally, historian Christopher Andrews gives a darkly comic account of spy mania in England before and
a French shoeshine man to marry her by agreeing to pay him a modest pension, and a wealthy and refined young Hungarian woman, devoted to the arts, who married a 74-year-old illiterate stonecutter of French origin.\textsuperscript{220} As Macmillan ruefully observed, the spells of "spy fever," as she called it, in Britain had made bellicose patriots\textsuperscript{221} - Thao called them warmly "hommes aux sentiments généreux et patriotes"\textsuperscript{222} - the allies of feminists in the campaign for women's equal right to choose their nationality.

In comparison, Niboyet's discussion of the risk posed by German husbands who acquired French nationality under the articles of the \textit{Treaty of Versailles} on Alsace-Lorraine\textsuperscript{223} is relatively restrained:

This disposition, the intentions of which were evidently pure, can be described as deplorable. There are in effect spouses, in particular German husbands, among whom one can even count former officers of the active army who have become French uniquely because they had married Alsatian women or other women who became French under the treaty. France thus inherited citizens who are sometimes dangerous which it would have been very easy to leave to their old nationality.\textsuperscript{224}

Niboyet's tone is more measured than that often taken in the equivalent discussion of women: his concern centres on men whose past actions have marked them as loyal to Germany, and his characterisation of the danger posed by spouses is qualified.

The examples of the American admiral's daughter and the moneyed young Hungarian woman who married a French stonecutter promoted independent nationality for married women through prevailing ideas of patriotism and womanly virtue, rather than the goal of equality. The comparison indirectly suggested by these examples was between "good" and "bad" women, rather

\textsuperscript{220} Thao, \textit{supra} note 185 at 55.
\textsuperscript{221} Macmillan, \textit{supra} note 188 at 144.
\textsuperscript{222} Thao, \textit{supra} note 185 at 100.
\textsuperscript{223} Under the \textit{Treaty of Versailles}, Alsace-Lorraine was treated as a special case.
\textsuperscript{224} Niboyet, \textit{supra} note 182 at 314.
than between women and men. In criticism of the French legal regime of dependent nationality for married women, the comparison between "good" women who suffered under this regime and "bad" women who prospered was sometimes even made directly. In one such comparison, the one neighbour, a woman of German origin, married a Frenchman and received maternity benefits, whereas the other neighbour, a French woman, married an immigrant worker and was reduced to charity. In another, a young woman employed in the public service was unable to continue in her position because she had married a former soldier in the allied armies, whereas the electoral rolls continued to list another young woman who during the war cohabited with a stranger suspected of harbouring anti-French sentiments.

III Conclusion

The plebiscites held in Europe after World War I are traditionally seen as a turning point in the history of self-determination in international law: although few in number, they symbolised the commitment of the Paris Peace Conference to the principle of self-determination and gave it tangible and lasting effect. Part I of this chapter showed that the plebiscites should also be seen as a turning point for women in the history of self-determination. By voting in these plebiscites, women participated in the exercise of self-determination for the first time.

As seen in Part I, the interpretation given to self-determination by the Peace Conference in the plebiscites offered another instance where self-determination as an idea and a set of legal concepts to be interpreted served as a vocabulary for marginalized groups to challenge their exclusion from international law and its depiction of them. Despite an increasingly rich feminist history of the women's suffrage and women's peace movements, women have remained invisible

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225 Thao, supra note 185 at 95-96, quoting Sauterand.
226 Ibid. at 105-106, quoting from the introduction of a French legislative initiative.
in international legal accounts of self-determination after World War I. Part I sought to make visible the participation of women suffragists and pacifists at the Peace Conference and the ways in which they used the principle of self-determination both to frame the demand that they be given the vote in the plebiscite and to articulate their identity as women relative to the competing narratives of nationalism and internationalism in post-war international law.

More immediately, the espousal of the principle of self-determination by the leaders at the Peace Conference was a way for women suffragists to introduce women’s equality into democracy domestically and internationally, and for women pacifists, who were pioneers in the advocacy of self-determination and plebiscites, to further democracy and women’s equality in international law. At its broadest, women’s demand for the right to vote in the plebiscites expressed their view of the relationship of gender to nationalism and internationalism, war and peace. Whereas suffragists stressed women’s role in war as a reason that they had earned the vote, pacifists argued that women were a moral and social force for peace and their votes would humanise governments.

In contrast to women’s right to vote in the plebiscites, the collective option denied married women the right to opt for another nationality following the determination of sovereignty by the plebiscites. As with other challenges to international law by marginalized groups through the interpretation of self-determination, international law thus responded only partially. The chapter showed that in the discourse on the collective option and the nationality of married women more generally, the rhetoric of women’s equality combined in a variety of complex ways with the rhetorics of gender and international law. Here, the inter-related narratives of gender and international law that supported the collective option and the dependent nationality of married women proved impossible for women to overcome.

227 Compare Kennedy, supra note 78.
Chapter 7
Women and Self-Determination in United Nations Trust Territories

... we look to you as our Gods, and hope that we shall not be disappointed.

Petition to the UN Trusteeship Council from Six Persons on behalf of the Men and Women of Bagangu-Akum concerning the Cameroons under British Administration

As seen in connection with the East Timor case in Chapter 4, the idea and the institution of "trusteeship" have traditionally been the terrain on which the meaning of self-determination for colonial peoples has been worked out. This chapter shows that the evolution of the idea of trusteeship expressed in the international trusteeship system established by the United Nations Charter after World War II has also been important as the terrain on which the relationship between women's equality and self-determination evolved.

Institutionally, the UN international trusteeship system was structured much like a trust in Anglo-American law. In this system, territories were placed under international trusteeship by agreement. Each trust territory was administered by one or more states in accordance with the objectives of international trusteeship in the UN Charter and the terms of the particular trusteeship agreement. The administration of a trust territory was supervised principally by the UN Trusteeship Council, through a combination of the examination of reports from administering states, the consideration of petitions and the dispatching of periodic visiting missions.

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3 See Chapter 4(III)(A) above.
The international trusteeship system resembled a trust not only in its institutional design, but also in the conceptual analogy drawn between international trusteeship and the guardianship of a minor. In this respect, the international trusteeship system, and the broader system of non-self-governing territories established by the UN Charter, continued the idea of the "sacred trust" found in the League of Nations international mandate system. The international mandate system applied the idea of the "sacred trust" to colonies detached from enemy states after World War I and considered to be "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world." Under article 22 of the League of Nations Covenant, the well-being and development of such peoples formed a "sacred trust of civilisation" and was to be entrusted to those "advanced nations who, by reason of their resources, their experience or their geographic position" could best undertake the responsibility. Article 73 of the UN Charter more broadly required UN members responsible for non-self-governing territories to administer those territories in the best interests of the inhabitants. The UN systems of trust territories and non-self-governing territories broke with the imperialist assumptions of the League of Nations, however, by requiring the development of self-government or independence for all territories, whereas the League system of mandate territories had envisaged independence only for those territories it classified as sufficiently advanced. In fact, all but one of the territories placed under trusteeship were former mandate territories that, under the classification of mandate territories, were not entitled to independence.

If this interpretation of trusteeship in the UN Charter marked a certain turning away from the European hegemony of the League Covenant, its interpretation came to be identified with a turning toward the principle of self-determination of colonial peoples. In 1960, the Declaration

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4 Charter, supra note 2 at c.XI.
on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514)\(^6\) proclaimed the right of all colonial peoples to immediate self-determination. The International Court of Justice wrote in its 1971 advisory opinion on Namibia that the Declaration had left "little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."\(^7\)

In this familiar history of self-determination in international law, the concept of trusteeship found in the chapters of the UN Charter on the international trusteeship system therefore has a dual significance: its original interpretation represented a move away from the European world-view on self-determination in the League Covenant and its reinterpretation in light of the Declaration on the Independence of Colonial Peoples represented a move toward Third World priorities on self-determination. This chapter argues that for women, the relationship between women's equality and self-determination meant that the interpretation of trusteeship created another double transition. The first transition was from European male hegemony to European female hegemony. Like the terms of the peace treaties that gave women the right to vote in the plebiscites, the definition of trusteeship in the UN Charter incorporated women's equality into self-determination. Women delegates and NGOs at the San Francisco Conference had succeeded in having references to human rights inserted into several articles of the UN Charter,\(^8\) among them the article on the objectives of the trusteeship system. Whereas


the only references to human rights in article 22 of the League Covenant on the mandate system were to freedom of conscience and religion, which were subject to the maintenance of public order and morals, and the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, article 76 of the UN Charter made encouragement of respect for human rights and fundamental freedoms for all without distinction as to sex a basic objective of the trusteeship system. In this sense, women's equality, as it was understood by the European women who participated in the UN at the time, was advanced by the interpretation of self-determination in international law. Women could use the administration of trust territories and the Trusteeship Council's supervision of their administration to promote women's equal rights in these territories. Indeed, it was the UN Commission on the Status of Women's consideration of women in the trust territories that led it to focus on the abolition of traditional practices such as dowry, bride-price, sati (widow burning) and child marriage.

In a second transition, away from the domination of European liberal feminism, the progress of the Commission on the Status of Women's discussion on women in the trust territories, together with the development of the right of self-determination of peoples in the Declaration on the Granting of Independence to Colonial Peoples, resulted in a transition from self-determination as a means to further women's equality to women's equality as a means to further self-determination. From using the trusteeship system to promote women's equality in the trust territories, the Commission on the Status of Women moved to a discussion of self-determination as a necessary condition for women's equality. By insisting on the immediate granting of independence to colonial peoples, the Declaration on the Independence of Colonial


9 There was no equivalent provision for non-self-governing territories.
Peoples and the later Declaration on Friendly Relations\textsuperscript{10} sought the end of trusteeship, the interval in which women's equality could be secured through the international trusteeship system.\textsuperscript{11} Instead, these declarations left women's rights to the newly independent state. In this second transition, the Commission on the Status of Women also experienced a crisis of confidence about its stand on the abolition of traditional practices.

Following a brief overview, in Part I of the chapter, of the trust territories and the Trusteeship Council's procedures for supervising their administration, Parts II and III trace the lines of these two transitions in the relationship between women's equality and self-determination in the discussions of the Trusteeship Council and the Commission on the Status of Women respectively. Through a case study on polygamy, Part II illustrates how the international trusteeship system responded to European women's attempts to impose a model of gender equality that emphasised equal civil and political rights and sought to end traditional practices.


\textsuperscript{11} As will be seen in Part II of this chapter, the argument in the Commission on the Status of Women that the exercise of self-determination must take precedence over women's equality assumed that the newly independent states would promote women's equality. In a poem entitled "Letter to a Feminist Friend," the Malawian poet Felix Mnthali wrote:

\begin{verbatim}
No, no, my sister, ...
When Africa
at home and across the seas
is truly free
there will be time for me
and time for you
to share the cooking
and change the nappies -
till then,
first things first
\end{verbatim}


Experience has shown, however, that the subordination by women of their struggle for equality to the nationalist struggle has not always been rewarded by the new nationalist government in the form of women's equal rights. See sources cited in note 14 below.
Part II then uses the annual reports submitted to the Trusteeship Council by the states administering trust territories, and the periodic reports submitted by UN visiting missions to the trust territories to examine the relations between women and men promoted by the trusteeship system. Part III follows the discussion of women in the trust territories by the Commission on the Status of Women, from the early advocacy of gender equality through equal civil and political rights and the abolition of traditional practices to the later contestation of this strategy and vision of gender equality.

Parts II and III of the chapter show more broadly that the idea and institution of trusteeship in the UN Charter were central to the complicating of the feminist project in international law; in particular, to its modern fragmentation along the lines of politics, race and culture. In the period under examination, from the late 1940s to the early 1970s, the representation of women in the trust territories became increasingly contested in international law. Women in the trust territories were variously identified with individuals, women and peoples; they encoded competing ideas of equality, gender and decolonisation.

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13 This chapter focuses on the period 1947-1972, during which the Commission on the Status of Women considered annually, for the latter half biannually, reports prepared by the Secretary-General on the status of women in trust and non-self-governing territories. The materials considered in the chapter are (1) Commission on the Status of Women annual reports for 1950-1972, i.e., 4th-24th sessions; (2) Secretary-General reports for 1950-1972 on the status of women in trust and non-self-governing territories, which summarise information from other UN sources, primarily reports submitted by the states administering these territories; (3) petitions to the Trusteeship Council brought by women in trust territories for 1947-1953 and by or about women in trust territories for 1953-1972; (4) Trusteeship Council resolutions associated with the petitions; (5) Visiting Mission reports for 1950-1972, chosen as in (2).

As objects, women in the trust territories could be constructed in universal terms, abstract principles and absolute priorities. Part IV demonstrates that as subjects, women in the trust territories reflected the variation, concreteness and indivisibility of their identities as individuals, women and peoples. This final part of the chapter looks at their own interventions in international law through their petitions to the Trusteeship Council. These petitions, some sixty in all, are remarkable, first and foremost, as a neglected archive of women's voices from the trust territories. These petitions, like most petitions to the Trusteeship Council, provoked little or no action, but they are important, secondly, because they problematise the dominant images of women's identity created by the Trusteeship Council and the Commission on the Status of Women.


17 The discussion of petitions by women in the trust territories to the Trusteeship Council in Part IV is intended primarily to bring to light the interventions of these women in the interpretation and application of self-determination and to contrast the images of their identity presented by them through these local narratives with those created by the grand narratives of the UN trusteeship system and Commission on the Status of Women. Compare J.F. Lyotard, The Postmodern Condition: A Report on Knowledge, trans. G. Bennington & B. Massumi (Minneapolis: University of Minnesota Press, 1984) at 27 (contrasting the "grand narratives" of the Enlightenment to the "petit recits" of women, children, fools and primitives). Given the limited nature of the discussion, I bracket a consideration of the petitions in light of two important bodies of literature. The first is the theoretical literature on the meaning to be given to native speech under colonialism. Compare e.g. H.K. Bhabha, “Signs Taken for Wonders: Questions of Ambivalence and Authority Under a Tree Outside Delhi, May 1817” (1985) 12:1 Critical Inquiry 144 with G.C. Spivak, “Can the Subaltern Speak?” in C. Nelson & L. Grossberg, eds., Marxism and the Interpretation of Culture (Urbana: University of Illinois Press, 1988) 271; “Subaltern Talk” (Interview) in D. Landry & G. MacLean, eds., The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak (New York: Routledge, 1996) 287.

The second body of literature, which would be relevant to the background of these petitions, is the historical literature on this period and the earlier period of colonialism, in particular on the policies of the relevant states.
I Overview

In all, there were eleven United Nations trust territories, seven in mainland Africa and four island territories in the Pacific. By the early 1960s, the trust territories in Africa had all attained self-government or independence, choosing either to join a neighbouring state or to become a new state. The other trust territories attained independence over the next decades, the Trusteeship Council suspending operation in 1994 with the independence of the last remaining trust territory.¹⁸

In Africa, Britain administered Togoland, which pursuant to a UN-supervised plebiscite was united with the Gold Coast to form the new state of Ghana in 1957; Cameroons, which was divided in 1961 in accordance with UN-supervised plebiscites in which the northern population chose to join neighbouring Nigeria and the southern population chose to join the neighbouring Republic of Cameroon; and Tanganyika, which after achieving internal self-government became independent in 1961 and later united with Zanzibar to form the United Republic of Tanzania. There was also a French administered Togoland, which in 1960, following a UN-observed election won by a pro-independence party, became the state of Togo; and a French administered Cameroons, which became the Republic of Cameroon in the same year. The other two trust territories in Africa were Somaliland under Italian administration, which, together with the British Protectorate of Somaliland, became the Republic of Somalia in 1960 after an elected legislative assembly had drawn up a constitution for independence; and Ruanda-Urundi under Belgian administration, which following UN-supervised elections held separately in Ruanda and Burundi split into Rwanda and Burundi in 1962. In the Pacific, New Zealand administered Western Samoa until its independence in 1962, pursuant to a UN-supervised plebiscite. Australia, New Zealand and the United Kingdom jointly administered Nauru which became progressively self-governing from 1965 until its independence in 1968. Australia also administered New Guinea, united

administratively with Papua in 1971 to form Papua New Guinea, which achieved self-government in stages and became independent in 1975. The final trust territory was the Pacific Islands under United States administration, which ended when Palau, the last of the trust territory’s four administrative units, became independent in 1994.

In practice, the Trusteeship Council supervised the administration of these trust territories in three ways. The primary means of supervision was its consideration of the annual reports prepared by the administering authorities according to a questionnaire formulated by the Trusteeship Council. It also accepted and examined petitions in consultation with the administering authority. The UN Charter and the Trusteeship Council’s rules of procedure placed almost no restrictions on petitions. Petitions had to concern “the affairs of one or more Trust Territories or the operation of the International Trusteeship System as laid down in the Charter,” and petitioners could be “inhabitants of Trust Territories or other parties.” There were few formalities; a petition might be as simple as a letter or telegram sent to the UN Secretary-General or handed to a visiting mission. The final means of supervision was the periodic visiting missions to the trust territories. Missions were normally composed of two members of the

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21 Charter, supra note 2 at arts.87(a), 88.
22 Ibid. at art.87(b). See generally Zuijdijk, supra note 15 at c.3.
23 Rules of Procedure of the Trusteeship Council, UN Doc. T/1/Rev.6, Rule 76 (rules as amended up to and during 29th session). (Although a revised version of the Rules has since been issued (UN Doc. T/1/Rev.7 (1995)), this version was in force during most of the relevant time period.) The chief restriction was that petitions could not normally be by way of appeal from the judgment of a competent court or deal with matters within the competence of the courts, unless a violation of the UN Charter or the Trusteeship Agreement was alleged. Ibid. at Rule 81.
24 Ibid. at Rule 77.
25 Ibid. at Rule 79.
26 Ibid. at Rule 82.
27 Ibid. at Rule 84.
Trusteeship Council representing administering states and two representing non-administering states, and were accompanied by staff and representatives from the local authority. These annual missions rotated between the groups of trust territories in East Africa, West Africa and the Pacific, such that each trust territory was visited once every three years. In addition to reporting generally on conditions in the trust territories, a mission might respond to specific questions asked by the Trusteeship Council.28

II UN Trusteeship System

A Women and Self-Determination in the Trusteeship System: A Case Study

I am Foin Ndi of all Kom village. I hold undisputed sway over this Bikom Foindom, in other words Bikom (Kom) State. I am the 9th of the dynasty of Kings in Kom. My authority in tribal life, morally, socially, economically and politically is derived from three things - (a) I am the custodian of the tribal lands, I am the rainmaker to aid the crops to grow, and thirdly I am the link between the tribes' dead, the living and the unborn members of Kom.

... I had and I must still have servants [i.e., wives29] in the Kwiiton compound. Without them I am unable to fulfil my duties ... My compound ... must be cared for as was the custom at the origin. But I do not press that when we have become civilised and adopted modern ways of life, the current changes must not come.30

The case of the Fon of Bikom31 illustrates the tendency of the United Nations international trusteeship system to treat women's equality in the trust territories as one site of a larger struggle with local leaders over the interpretation of self-determination in trusteeship. In this case concerning a tribal king in the British administered Cameroons, a 1947 petition to the UN Trusteeship Council from an equal rights organisation of Catholic women protesting his polygamy

30 Petition from the Fon of Bikom concerning the Cameroons under British Administration (T/Pet.4/36), UN TCOR, 6th Sess., Annex Vol. 2, Agenda Item 5 (1950) 89 [hereinafter Fon Petition].
31 1950 Visiting Mission Report, supra note 29 at 36-38, paras.244-257.
was primarily addressed as a problem not of women's equality, but of the place of culture in the
interpretation of self-determination. For the British administration, the Trusteeship Council and
the 1950 UN Visiting Mission to Trust Territories in West Africa, ending the practice of
polygamy was part of the task of preparing the population of the trust territory for the exercise of
the right of self-determination by curing them of their cultural backwardness. For the Fon of
Bikom and the Kom Improvement Association, of which he was patron, respect for the practice of
polygamy was part of the cultural autonomy which the right of self-determination guaranteed. On
the original UN Charter ideal of readying a people for the exercise of self-determination by
absorbing them into the global project of democracy, equality and modernisation, the treatment of
women was a measure of progress. On the counter-ideal of a people's exercise of self-
determination as the expression of their distinctiveness, the treatment of women was a symbol of
tradition.

Despite this fundamental difference between the United Nations and the Fon of Bikom over
the interpretation of self-determination, both will be seen to have accepted an idea of voluntariness

32 Although a few women served on the Trusteeship Council early on as government advisors or
alternates or as the representatives of UN specialised agencies, there appears to have been no woman
government representative until 1962 (Marthe Tenzer, Belgium). See UN TCOR, Lists of Delegations
Members of Council. See also M.E. Galey, "Women Find a Place," in Winslow, supra note 8 at 11, 11
(under 5%).
33 The first woman to take part in a visiting mission was Angie Brooks (Liberia), who participated in the
1964 UN Visiting Mission to Trust Territories of the Pacific Islands. Galey, supra note 32 at 17.
34 States administering trust territories also recognised women's role as keeper and symbol of tradition.
E.g., Commission on the Status of Women, Information Concerning the Status of Women in Trust
Territories Contained in Annual Reports by the Administering Authorities, 4th Sess., UN Doc. E/CN.6/138
(1950) 14 (United Kingdom regarding Tanganyika); Commission on the Status of Women, Information
Concerning the Status of Women in Trust Territories (Report by the Secretary-General), 8th Sess., UN Doc.

The corollary of this recognition was the recognition of women as the social group most resistant to
progress. E.g., Commission on the Status of Women, Information Concerning the Status of Women in Trust
Territories, 7th Sess., UN Doc. E/CN.6/210 (1953) 12 (French Cameroons); Commission on the Status of
(1960) 6 (Trusteeship Council on New Guinea).
that allowed them to distinguish acceptable from unacceptable polygamy, but without engaging the meaning of women's equality in any real sense.

The case originates in a 1947 petition to the Trusteeship Council by the St. Joan's Social and Political Alliance, a Catholic women's organisation with an active and long-standing interest in promoting the equality of colonial women. The petition consisted of an article from *The Catholic Citizen*, a publication of the St. Joan's Social and Political Alliance. Its title - "Our African Sisters" - suggests the community felt by the women of St. Joan's Social and Political Alliance with women in the trust territories. The article reprinted from *The Franciscan Missionary Herald* a lurid account of the forcible taking of a thirteen-year-old girl to be the wife of the Fon of Bikom. The day after the Fon's men spotted her grinding corn outside her father's hut, branded her with a red mark on her forehead and stripped her naked,

... Papa arrayed in his tribal splendour, sets off for the King's Compound. The girl, nothing but a string of large native seeds round her neck, comes sobbing behind. They come to the King's Compound; guards in Native costume with erect spears, stand on guard. The King, a man of about eighty years, sits on a Native throne, a leopard under his feet. About one hundred of his six hundred wives stand round him in a semi-circle - naked - as is the privilege and custom of the "King's Own." The father steps forward, bends his knees so that although bent forward, he is still on his feet, claps his hands three times, then standing upright, drags his daughter forward, throws her on the ground in front of the King, who steps forward, puts his right foot on top of the girl's body which means "I accept this piece of Cargo." The

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35 Founded in 1931, the St. Joan's Social and Political Alliance had as its objects in unenfranchised countries (1) to band together Catholics of both sexes in order to secure for women the parliamentary vote on the same terms as it is, or may be, granted to men; and (2) to secure the political, social and economic equality between men and women and to further the work and usefulness of Catholic women as citizens. In enfranchised countries, its object was limited to (2). Internationally, the St. Joan's Social and Political Alliance was especially involved in the areas of the nationality of married women and the position of African women. *League of Nations, Handbook of International Organisations* (1938), quoted in C.A. Miller, *Lobbying the League: Women's International Organizations and the League of Nations* (D. Phil. Thesis, University of Oxford, 1992) at 295.

36 The St. Joan's Social and Political Alliance had been interested in the status of "native" women since the 1930s. It had carried out research on the subject, which it had contributed to the relevant committees of the League of Nations. Miller, *supra* note 35 at 63. In particular, the St. Joan's Social and Political Alliance had frequently made representations to the Mandate Commission of the League. *Petition from St. Joan's Social and Political Alliance, London, W.1 (T/Pet./General/2), UN TCOR, 1st Sess., Annex 7a, Agenda Item 9, Supplement (1947) 153.*
girl is then taken away by one of the older wives and this poor child will probably be a mother at fourteen years.

Do not think this is just an isolated case. This is the everyday custom of the “Bekom” tribe of the British Cameroons. The King sends out his “Chinda” and this is what happens with girls, young children and cattle.37

The St. Joan’s Social and Political Alliance made no comment on this account - presumably persuaded that none was necessary - but its general position is found in a previous petition to the Trusteeship Council. In this previous petition,38 the Alliance expressed confidence that the Trusteeship Council would be vigilant for sex discrimination, which was inconsistent with the trusteeship system objective of “respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” With this petition was a proposal for the questionnaire that the UN Charter required the Trusteeship Council to formulate as the basis for administering authorities’ annual reports. The picture of equality that emerges from the Alliance’s proposed questionnaire39 is equal legal status for women, notably in matters of contract, property and inheritance, as well as the eradication of such traditional practices as child marriages, forced marriages, polygamy, dowry or bride-price, inheritance of widows40 and lending of wives.

Other general petitions from the St. Joan’s Social and Political Alliance to the Trusteeship Council, submitted after the petition on the Fon of Bikom, were fairly successful in pressing for the implementation of their view of women’s equality. In response to a petition proposing that enquiries about child marriages and compulsory marriages be included in the terms of reference for all visiting missions to trust territories,41 the Trusteeship Council informed the St. Joan’s Social

37 Petition, dated 28 November 1947, from St. Joan’s Social and Political Alliance (T/Pet.4/2), UN TCOR, 3rd Sess., Agenda Item 6, Supplement (1948) 286.
39 Ibid. at questions 5-11, 16-18.
40 Ibid. at question 11.
41 Petition from St. Joan’s International Social and Political Alliance (T/Pet./General/20), UN TCOR, 4th Sess., Agenda Item 4, Annex (1949) 376.
and Political Alliance that it had included such questions in the provisional questionnaire of the
Trusteeship Council and gave the replies of administering authorities regular attention. Another
petition from the St. Joan's Social and Political Alliance, on the need for immediate measures to
promote the progressive abolition of customs violating the physical integrity of women in the trust
territories, resulted in a Trusteeship Council resolution to draw the administering authorities' attention to the question (already included in the Trusteeship Council’s questionnaire) and to take it up during its annual examination of conditions in the relevant trust territories.

In the concrete case of the Fon of Bikom, however, the British administration, the Trusteeship Council and the 1950 Visiting Mission to Trust Territories in West Africa approached the problem of polygamy more managerially, as part of a larger strategy for implementing Western ideas of democracy, equality and modernisation in the trust territories prior to the exercise of self-determination. In its observations on the St. Joan’s Social and Political Alliance petition, the British government began by characterising the nun who wrote the original story as most likely carried away by an active imagination and a literary fancy. It concluded that she had probably “for the sake of vividness ... dramatised Bikom custom, using a certain amount of literary license to make it appear that she was describing an actual incident.” The British government further implied that the encounter with heathen customs might have been too much for a devout Christian: “It is not surprising that this extraordinary state of affairs, which provides a striking illustration of

43 Petition from St. Joan’s International Social and Political Alliance (T/Pet./General/22), UN TCOR, 12th Sess., Annexes, Agenda Item 5, UN Doc. T/L.368 (1953) 83.
45 Observations submitted by the Government of the United Kingdom on the petition, dated 28 November 1947, from St. Joan’s Social and Political Alliance (T/Pet.4/2), UN Doc. T/178 para.1 [hereinafter UK Observations].
the strange customs which persist particularly in parts of the Cameroons, is shocking to Christian sentiment."46

As explained in its observations on the St. Joan’s Social and Political Alliance petition, the general British policy was not to abolish polygamy and other traditional marriage practices outright. During the 1903s, Catholic missionaries in the Bameda Division attempted to end the polygamy of the Fons by actively encouraging their wives to leave their compounds and to then marry missionary converts. These attempts were largely unsuccessful, since many of the women later returned to the Fons’ compounds of their own accord. The Catholic missionaries therefore concluded that the custom was best modified by “the effect of continuous disapproval of any form of coercion into marriage, deterrent action taken by the Administration if and when cases of coercion are discovered and by the spread of education and Christianity.”47 The British administration were similarly persuaded that a sudden break with this long-established custom would only harm the Fons’ wives themselves and those families entitled to have daughters in the Fons’ compounds.48 Among the people, complete and immediate abolition could lead to strong objection and the superstition that punishment would follow in the form of a dreadful supernatural calamity.49 The general British policy was therefore “to achieve a gradual modification of custom and at the same time to ensure that individual hardship or cruelty is prevented.”50 The British administration pursued only cases of coercion amounting to offences such as child stealing, assault or false imprisonment,51 while leaving further modification to the “continued efforts of the

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46 Ibid. at para.9.
47 Ibid. at para.7.
48 Ibid. at para.9.
49 Ibid.
50 Ibid. at para.10.
51 Ibid. at para.3.
missionaries supplemented by the influence and advice of government officers."\textsuperscript{52} In particular, it appointed a woman education officer to work with women in their homes.

The British response to the St. Joan's Social and Political Alliance petition was thus twofold: polygamy was generalised to a problem of culture and acceptable polygamy was distinguished from unacceptable polygamy by the notion of coercion. The responses of the Fon of Bikom, the Kom Improvement Association and the women of Kom mirrored the British response. The petitions of the Fon of Bikom and the Kom Improvement Association, which described itself as "an organization set up by the Kom people, with the Fon as patron, to seek to exalt and improve Kom in every way possible,"\textsuperscript{53} characterised the St. Joan's Social and Political Alliance allegation as an unjustified interference with Kom custom and an affront to the community as a whole. The 1950 United Nations Visiting Mission to Trust Territories in West Africa, to which the petitions were publicly presented, described their tone as "one of polite but firm resentment that the name and dignity of their 'king' had suffered as a result of what they regarded as incorrect and unjustified allegations and interference with their accepted customs."\textsuperscript{54} Even had there been six hundred wives, the Fon asked in his petition, with reference to the British District Officer (DO) who had come to verify the reported number of wives:

what fairness is there for the said DO to order an exodus of my X. wives without a refund of dowry? Are these the fundamental principles of the four freedoms and the ends to which the UNO came into being to achieve? Wherein comes the clash of cultures, taking for granted that such a thing existed? Where lies the need for the D.O. who is not Bikom and who knows very little of the cultural progress of Bikom, to force me to abandon my way of life and take his which is entirely unknown to me and not wished for?\textsuperscript{55}

\textsuperscript{52} Ibid. at para.10.
\textsuperscript{53} Petition from the Kom Improvement Association concerning the Cameroons under British administration (T/Pet.4/35), UN TCOR, 6th Sess., Annex Vol. 2, Agenda Item 5 (1950) 88 [hereinafter Kom Improvement Association Petition].
\textsuperscript{54} 1950 Visiting Mission Report, supra note 29 at 37, para.250.
\textsuperscript{55} Fon Petition, supra note 30.
In its petition, the Kom Improvement Association equated the insult to the Fon with an insult to "every Kom citizen."\(^{56}\)

While protesting the challenge to their cultural legitimacy, the Fon of Bikom and the women of Kom, in their petition, employed the same notion of consent as the British administration to establish that the Fon’s practice of polygamy was legitimate. Following the British administration’s investigation of the story in the St. Joan’s Social and Political Alliance petition, the Fon was reported to have willingly returned his only prepubescent wife to her family.\(^{57}\) Both the annual report of the British administration in 1948 and the report of the 1950 Visiting Mission to Trust Territories in West Africa recorded the Fon’s assurances that any of his wives was free to leave the compound, that in fact many had left, and that the remaining wives were there of their own free will. He further undertook only to accept new wives on the basis of their consent.\(^{58}\) Similarly, the petition by the "women of Kom" reads:

1. We the undersigned women of Kom including some of the Fon’s wives protest against the wrong news concerning our husbands. We are very happy to live with our husbands. We do not grudge sharing husbands. We live with them happily.
2. We, the Fon’s wives live happily with the Fon according to our native law and custom.\(^{59}\)

The 1950 Visiting Mission to Trust Territories in West Africa, which the Trusteeship Council had charged with pursuing the case of the Fon of Bikom,\(^{60}\) differed from the British administration in the style of its response. Somewhat breathlessly, the Visiting Mission described

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\(^{56}\) Kom Improvement Association Petition, supra note 53.

\(^{57}\) UK Observations, supra note 45 at para.3. In his petition, the Fon noted that he was also considering libel action in connection with the newspaper story: “Gentlemen I resent very strongly the ... libel and I will seek redress through litigation.” Fon Petition, supra note 30.


\(^{60}\) Petition from St. Joan’s Social and Political Alliance concerning the Trust Territory of the Cameroons under British administration, TC Res. 38, UN TCOR, 3rd Sess., UN Doc. T/215 (1948) 3.
“its strenuous ascent of the mountain near whose summit the Fon of Bikom and his people reside”\textsuperscript{61} and the reception it received:

The aged Fon, now weak and ailing and living most of his days in the semi-darkness of his compound, knew full well the principal purpose of the Mission’s visit. So did his people. He and they, and even the women of the Fon’s compound, were ready with carefully prepared memoranda ...\textsuperscript{62}

The Visiting Mission cautioned that Western standards should not be brought to bear on the customs and culture of African peoples, and that these customs must be recognised as deeply rooted. It also identified polygamy as a form of social security for the women under existing economic conditions. Inserted between these two observations, however, was the comment that “unwholesome” customs should be altered through education. In the end, the Visiting Mission concluded, “the harmful effects of the practice, and its inability to adapt itself to the needs of a progressive society” outweighed the moral and material importance of polygamy in African culture and necessitated its progressive, but rapid, disappearance.\textsuperscript{63} Its recommendations were in substance the British policy of speeding the disappearance of polygamy through establishing and publicising the right of women and girls to refuse to enter into a forced marriage and to be released from such a marriage, as well as their right to withdraw from a polygamous marriage should they no longer wish to continue as additional wives.\textsuperscript{64}

Although the comments of some Trusteeship Council members on the 1947 report on the Cameroons under British administration supported outlawing child marriage,\textsuperscript{65} the Trusteeship

\textsuperscript{61} \textit{1950 Visiting Mission Report}, \textit{supra} note 29 at 37, para.249. In contrast to this story of adventure in far-away places, the Visiting Mission elsewhere in the report described a view as having a familiar beauty: “The panorama seemed to resemble the Lake District of England, so varied is the countryside in its topography and climate.” \textit{Ibid.} at 3, para.3.

\textsuperscript{62} \textit{1950 Visiting Mission Report}, \textit{supra} note 29 at 37, para.250.

\textsuperscript{63} \textit{Ibid.} at 38, para.256.

\textsuperscript{64} \textit{Ibid.} at 38, paras. 254-257.

Council’s resolution on the St. Joan’s Social and Political Alliance petition condemned the customs of compulsory marriage and child marriage “as set forth” in the petition, noted the administering authority’s policy and expressed confidence that the administering authority would take all appropriate measures to end such practices. The resolution also requested both the administering authority and the next visiting mission to the territory to pursue the situation. The Trusteeship Council resolved to take no action on the three Kom petitions, merely noting that the misunderstanding had arisen from factors beyond its control.

In the case of the Fon of Bikom, the original petition by the St. Joan’s Social and Political Alliance implicitly raised an issue of women’s equal rights. In comparison, the Fon of Bikom and the Kom Improvement Association, on the one hand, and the administering authority, Visiting Mission, and Trusteeship Council, on the other, treated it as an issue of the interpretation of self-determination: whether the goal of self-determination stood for respect for cultural difference or necessitated its gradual modification. In this interpretive conflict, Kom women figured as object rather than subject. At the same time, the Fon of Bikom and the United Nations shared an idea of women’s consent. The Fon’s assurances that the women in his compound were there of their own free will and that he would only accept new wives on this condition, and the consent expressed by the women of Kom in their petition showed that both he and the United Nations understood a wife’s initial and continuing consent as necessary to a polygamous household. Yet even if a wife’s consent could have been meaningfully ascertained in this patriarchal context, there was no evidence

66 TC Res. 38, supra note 60.
67 Question of the alleged libellous nature of the petition from St. Joan’s Social and Political Alliance as raised in certain petitions concerning the Cameroons under British administration, TC Res. 186, UN TCOR, 6th Sess., Supp. No. 1, UN Doc. T/588 (1950) 52.
that either the British administration or the Visiting Mission had gone beyond the public assurances of consent offered.69

B Visiting Missions and Administering Authorities: Equality

To the extent that the United Nations trusteeship system actively promoted the equality of women, the reports of the administering authorities and the Trusteeship Council visiting missions reveal its model of gender equality as Western relations between women and men, which were far from equal. What emerges from these reports is their inability to see either the possibility that gender equality might look different from Western relations between women and men or the possibility that the model they sought to impose encoded the gender hierarchy of their own Western societies.

Belgium’s discussion of the Muhutu and Mututsi women in its reports to the Trusteeship Council on Ruanda-Urundi is perhaps the most obvious instance of a failure to consider that women in the trust territories might traditionally enjoy equal social standing.70 On the one hand, the excerpt from Belgium’s report on Ruanda-Urundi considered by the Commission on the Status

69 It is unclear whether the Visiting Mission spoke privately with the Fon’s wives or other Kom women. 1950 Visiting Mission Report, supra note 29 at 37, para.250-253.

70 At least on the face of the reports, this is not uniformly true of administering authorities. See, e.g., Australia’s successive reports on New Guinea in Commission on the Status of Women, Information Concerning the Status of Women in Trust Territories Contained in the Annual Reports Made by the Administering Authorities, 4th Sess., UN Doc. E/CN.6/138 (1950) 12 (“customs indicate that the worlds of men and women are in a sense different, but that each is important in its own way”); Commission on the Status of Women, Information Concerning the Status of Women in Trust Territories (Report by the Secretary-General), 9th Sess., UN Doc. E/CN.6/260 (1955) 8 (defending “bride-price” as the exchange of approximately equal gifts between kinship groups and not the purchase of wives); Commission on the Status of Women, Information Concerning the Status of Women in Trust Territories (Report by the Secretary-General), 18th Sess., UN Doc. E/CN.6/427 (1964) 3-4 (explaining why modernisation is eroding the equal but different status of women); Commission on the Status of Women, Information Concerning the Status of Women in Trust and Non-Self-Governing Territories (Report by the Secretary-General), 24th Sess., UN Doc. E/CN.6/560 (1972) 6-7 (now seeming to register traditional inequities alongside the ones brought by modernisation: “one sees women hard at work cultivating the subsistence gardens or carrying heavy loads of foodstuffs in string bags slung from their forehead, while on the new highways men drive the lorries of the cash economy”).
of Women at its fourth session in 1950,71 recorded that Muhutu "[w]omen, and especially mothers, are held in high esteem. Whereas in certain parts of Central Africa, a woman is regarded as a mere beast of burden, in Ruanda-Urundi, she is almost the equal of her husband ..."72 As for the Mututsi woman,

she was hardly able to leave the conjugal rugo [a group of huts within an enclosure] and could not perform any laborious task. When obliged to accompany her husband on a journey, she was carried in a hammock. In some cases she enjoys great political or social influence.

On the other hand, the report stated, with apparent satisfaction, that "[a]ttendance at school, clinics and religious services has brought Mututsi women out of their retirement."73

The Belgian description of the Mututsi women considered by the Commission on the Status of Women at its seventh session in 1953 suggested irritation at their seeming indolence: "The proud and haughty Mututsi women as a general rule never left the family compound; they did no manual work except for a little basket-making. They supervised the work of others."74 This report noted more generally that the indigenous women of Ruanda-Urundi showed little inclination to give up their customary role of wife and mother, but insisted that this "apathy" was not a reason to neglect the question.75

By the tenth session of the Commission on the Status of Women in 1956, however, the Belgian report on Ruanda-Urundi reflected a sense of progress:

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71 This discussion draws only on those portions of the administering authorities’ reports reproduced in the Secretary-General’s reports on women in trust territories submitted to the Commission on the Status of Women. It should be noted that there tends to be a lag between the original report and the Secretary-General’s summary of the information for the Commission.


73 Ibid.


75 Ibid. at 14.
In the past, although women were not barred by law from any occupation by reason of their sex, it was unusual for them to show any desire to depart from their traditional roles as wives and mothers. Attendance at hospitals, clinics and religious services is daily helping to liberate Mututsi women from their traditional seclusion. Education in the schools has awakened the minds and intelligence of girls.\(^{76}\)

In an account of women in the Pacific Islands considered by the Commission at its thirteenth session in 1958, the United States implicitly presented as progress the gradual disappearance of social structures favouring women. The American administration’s report stated that although the adoption of the Western European family structure by the Chamorros of Saipan had made the father the nominal head of the family, the mother continued to exercise the real power and authority. It reported, however, that in the western islands, the matrilineal descent pattern appeared to be moving toward a patrilineal pattern.\(^{77}\)

If states administering trust territories were often hopelessly Eurocentric in their approach to relations between women and men in these territories, they tended to be equally oblivious to the gender hierarchy in the European model which they sought to implant. In a report by France on its administration of the Cameroons, considered by the Commission on the Status of Women at its seventh session in 1953, modern Western housewifery was presented as the key to the liberation of the territory’s women: the French administration “sends domestic science teachers into the villages and, by means of social workers penetrates into the African home; it tries to liberate women from the burden of centuries of male domination.”\(^{78}\) On one interpretation, the meaning of this statement might be that modern home economics lightened women’s daily duties and freed time for


other activities, a point which a 1951 visiting mission made about the social welfare centres in Ruanda-Urundi. The more likely interpretation is, however, that Western domesticity was seen as a good in itself. In fact, the same visiting mission noted that “The programme of the social welfare centres ... is designed to give indigenous women a new interest in life ... by creating a desire for better homes.”

The report on the French Cameroons also gives a glimpse of what the French administration imagined gender equality would look like. It recorded that despite young girls tending to be less receptive to civilisation than young men, “young men with diplomas are more and more frequently able to find wives who, if not quite up to their husbands’ level, are at least not far below it.” The examples given of those fortunate matches where “both husband and wife are educated” were teacher and nurse, and journalist and typist.

III UN Commission on the Status of Women

From its very inception, the United Nations Commission on the Status of Women sought to promote the equal rights of women in the trust territories through the Trusteeship Council. At its


80 Particularly given the British perception of continuity between its colonial policies and its policies as an administering authority (In observations on its 1947 report on the Cameroons under British administration, the British representative argued that the Charter and Trusteeship Agreements were based very largely on British policy in the colonies. Report of Trusteeship Council, UN GAOR, 4th Sess., Supp. No.4, vol. 7, UN Doc. A/933 (1949) 10), Anne McClintock’s criticism is apposite:

Through the rituals of domesticity, increasingly global and more often than not violent, animals, women and colonized peoples were wrested from their putatively “natural” yet, ironically, “unreasonable” state of “savagery” and inducted through the domestic progress narrative into a hierarchical relation to white men.

A. McClintock, supra note 14 at 35.

81 1951 Report on the Trust Territory of Ruanda-Urundi, supra note 79 at para.205. Compare Observations of the Administering Authority on the Report of the Visiting Mission, UN Doc. T/1164 and Corr.2 at 48 (“The Mission was unable to decide whether the enthusiasm which the women showed [in the social welfare centres] was genuine or to order.”).

first session in 1947, before the Trusteeship Council had even been established, the Commission proposed that it should consult and collaborate with the Trusteeship Council. In 1949, the Commission requested the Secretary-General to submit annual reports on the status of women in trust territories and non-self-governing territories. The Secretary-General’s reports became the Commission’s main source of information on women in these territories and the basis for its resolutions on the subject. Commission staff also kept members of the Commission informed of developments in the Trusteeship Council. In 1951, the Economic and Social Council adopted a resolution, at the request of the Commission, inviting member states to nominate and the Trusteeship Council to consider appointing women to serve as members of visiting missions.

Another of the Commission’s interests in the Trusteeship Council’s procedures was the inclusion of particular questions on the status of women in the Trusteeship Council questionnaire that served as the basis for the administering authorities’ reports to the Trusteeship Council, and the transmission to the Commission of all information received in response to these questions.

The initial approach of the Commission on the Status of Women to women in trust and non-self-governing territories was much like the liberal feminist approach of the St. Joan’s Social and


Political Alliance and other international women's organizations. Based on the idea of women as equal individuals, this approach emphasised equality of civil and political rights and the abolition of traditional practices that violated women's physical integrity.

In the early 1950s, the Commission on the Status of Women focused its attention on the political rights of women in trust and non-self-governing territories. For example, a 1953 ESC resolution requested the General Assembly and the Trusteeship Council, in collaboration with states administering trust or non-self-governing territories, to take all necessary measures to develop the political rights of women in these territories and requested the Secretary-General to report to the Commission on the Status of Women on the steps taken.

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88 See above at Part I(A).
89 See Petition from the International Alliance of Women, Wembley, England (T/Pet./General/1), UN TCOR, 1st Sess., Annex 7, Agenda Item 9, Supplement (1947) 152; Petition, dated 28 March 1947, from the British Commonwealth League, London, England, concerning the terms of the draft convention on social policy drawn up by the International Labour Organisation (T/Pet./General/3), UN TCOR, 2nd Sess.: 1st Part, Agenda Item 4, Supplement (1947) 200; Petition, dated 18 April 1947, from the Open Door International, Egehoj, Charlottenlund, Denmark, concerning the terms of the draft convention on social policy drawn up by the International Labour Organisation (T/Pet./General/4), UN TCOR, 2nd Sess.: 1st Part, Agenda Item 4, Supplement (1947) 201; Petition, dated 23 April 1947, from the Open Door International, Belgian Branch, Brussels, Belgium, concerning the terms of the draft convention on social policy drawn up by the International Labour Organisation (T/Pet./General/5), UN TCOR, 2nd Sess.: 1st Part, Agenda Item 4, Supplement (1947) 203; Petition, dated 18 April 1947, from the National Union of Women Teachers, South Kensington, London, England, concerning the terms of the draft convention on social policy drawn up by the International Labour Organisation (T/Pet./General/6), UN TCOR, 2nd Sess.: 1st Part, Agenda Item 4, Supplement (1947) 204; Petition, dated April 1947 from the Open Door Council, Buckinghamshire, England, concerning the terms of the draft convention on social policy drawn up by the International Labour Organisation (T/Pet./General/8), UN TCOR, 2nd Sess.: 1st Part, Agenda Item 4, Supplement (1947) 206; Petition, dated 22 May 1947, from the Women's International Democratic Federation, Paris, France, concerning the terms of the draft convention on social policy drawn up by the International Labour Organisation (T/Pet./General/9), UN TCOR, 2nd Sess.: 1st Part, Agenda Item 4, Supplement (1947) 207; (all of which concern the failure to specify sex as a ground of discrimination in the ILO draft Convention on social policy in non-metropolitan territories); Petition from the International Abolitionist Federation (T/Pet./General/24), UN TCOR, 15th Sess., Annexes, Agenda Item 4, UN Doc. T/L.547 (1955) 97.
The Commission’s consideration of the Secretary-General’s reports on women in trust and non-self-governing territories also led it to advocate strongly the abolition of such traditional practices as dowry, bride-price, sati and child marriage. In 1952, the Economic and Social Council adopted a Commission on the Status of Women resolution inviting the Trusteeship Council, in collaboration with the administering authorities, to take immediately all appropriate measures to promote the progressive abolition of customs which violated the physical integrity of women. The Commission reiterated this recommendation on an almost yearly basis. A 1954 GA resolution was more specific; in territories where women were subject to customs, ancient laws and practices regarding marriage and the family inconsistent with the principles of the UN Charter and the Universal Declaration of Human Rights, the resolution urged the administering states to take all appropriate measures to abolish such customs, including complete freedom in the choice of a spouse, abolishing the practice of the bride-price, guaranteeing the right of widows to the custody of their children and their freedom to remarriage, and eliminating completely child marriages and the betrothal of young girls before the age of puberty. In 1962, the General Assembly adopted a Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages which in its preamble recalled the 1954 GA resolution and reaffirmed that states responsible for the administration of trust and non-self-governing territories should take all appropriate measures to abolish customs, ancient laws and practices relating to marriage and the family which were

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92 Galey, “Women Find a Place,” supra note 32 at 19; Blue Book, supra note 8 at 22, para.84.
inconsistent with the principles of the UN Charter and the Universal Declaration of Human Rights.  

With the adoption of the Declaration on the Independence of Colonial Peoples in 1960, the priority of the Commission on the Status of Women shifted discernibly from achieving women’s equal rights through the UN decolonization process to advocating immediate decolonisation. Representatives from socialist countries on the Commission argued that improvement in the status of women in trust and non-self-governing territories was linked to the immediate granting of independence to these territories; that is, that the exercise of the right of self-determination of colonial peoples was a condition of colonial women’s equal rights rather than the other way around. Seeing the achievement of self-determination and women’s equality as simultaneous rather than sequential, the representative of Guinea presented Guinea’s rejection of foreign domination as simultaneous with its women’s rejection of male domination. The view that the exercise of self-determination was a necessary condition for women’s equality was later reflected in a 1975 GA resolution calling on states “to promote vigorously the wider participation

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98 In the early years, Western and pro-Western members from Latin America, Asia and the Middle East dominated the Commission on the Status of Women. There were few Eastern European members, and the first African state, Ghana, was elected to the Commission in 1962. In 1966, when membership reached thirty-two, more African and Asian states joined. Galey, “Women Find a Place,” *supra* note 32 at 15.


100 UN Doc. E/CN.6/SR.416 (1965) 5. See also UN Doc. E/CN.4/SR.446 (1966) 11 (UAR representative commenting that the movement for the emancipation of Egyptian women had been closely bound up with the struggle for national independence).
of women in ... the elimination of colonialism, foreign occupation, racism, racial discrimination and apartheid ... contributing in this way to the creation of the most favourable conditions for the complete elimination of discrimination against women.”

This view dominated the drafting, beginning in 1977, of a declaration on women’s participation in the struggle against colonialism, racism, racial discrimination, aggression, occupation and all forms of foreign domination.

During this period, the Commission on the Status of Women also experienced a crisis of confidence over its stance on traditional practices, dropping the subject after a 1964 seminar at which African women asked that they be allowed to deal with the matter.

After 1962, the representation of African states on the Commission led to a questioning of the Westernisation of women in the trust territories. In the Commission’s discussion of the report on New Guinea in 1966, the representative of Ghana commented that the noticeable adoption of Western habits of child care, dress and etiquette in New Guinea was both interesting and disturbing. She stated that many of the developing countries were coming to realise that the adoption of Western habits, based on European history and tradition, was not always in the best interests of the indigenous people.

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101 Equality Between Men and Women and Elimination of Discrimination Against Women, GA Res. 3521 (XXX) (1975), reprinted in Blue Book, supra note 8 at 207. See also Women’s Participation in the Strengthening of International Peace and Security and in the Struggle Against Colonialism, Racism, Racial Discrimination, Foreign Aggression and Occupation and All Forms of Foreign Domination, GA Res. 3519 (XXX) (1975), reprinted in Blue Book, supra note 8 at 203.

102 See Women’s Participation in the Strengthening of International Peace and Security and in the Struggle Against Colonialism, Racism, Racial Discrimination, Aggression, Occupation and All Forms of Foreign Domination, GA Res. 32/142 (1977), reprinted in Blue Book, supra note 8 at 227 (requesting the Commission on the Status of Women to prepare a declaration on the subject in preparation for the 1980 World Conference of the United Nations Decade for Women) and the subsequent debates in the Commission on the Status of Women. In particular, see UN Doc. E/CN.6/626 (1980) 8 (Byelorussian SSR), 11 (Hungary), 17 (Ukrainian SSR), 19 (USSR), 22, 24 (GDR).

103 Galey, “Women Find a Place,” supra note 32 at 19.

IV Petitions

In contrast to the separate identities of individual, woman and people produced by separate institutional dialogues within the United Nations, the sixty or so petitions by native women and native women’s groups reflect the coexistence of these identities. Consider the preamble of an early petition from the Comité féminin de l’Union des Populations du Cameroun:

Considering that women have the same rights as men, and can no longer be kept on one side when it is a question of the political, economic, social and cultural interests of their country;

Considering that the women of the Cameroons are the victims of a policy of contempt aimed at keeping them always in a state of inferiority;

... Considering that women are suffering under all kinds of disabilities, for instance, the ban on the sale of provisions at places of work to ensure a supply of food for the workers at mealtimes, the need for women doing part-time work at home to procure seamstresses’ licenses, the ban on the women of Bamoun selling their maize outside the district, and market raids of all sorts;

Considering that the policy of racial discrimination treats the women of the Cameroons as contemptible creatures who have no right to get served in butchers’ shops in the market, in stores or anywhere else before white women and their servants;

This part brackets the problems of representation, voice and language in the petitioning procedure. See note 17 above. In terms of representation, the subject matters of the petitions suggest that they came from the indigenous political elites; for example, women complaining of police brutality toward them during a political event or women’s branches of national political parties. Moreover, there are occasionally references to women’s fears about approaching a visiting mission with a petition. E.g. 1951 Report on the Trust Territory of Ruanda-Urundi, supra note 79 at para.89.

While the petitions are authentic in the sense that they are actual texts, it is difficult, even for the Trusteeship Council, to know whether their voice or language is authentic. For example, a petition by the Association of the Women of Eséka protested their chairperson’s allegedly having been forced by the Chief Subdivisional Officer to sign a letter to the United Nations denouncing Um Nyobe. Petition from the Association of the Women of Eséka (T/Pet.5/254), UN TCOR, 15th Sess., Annexes, Agenda Item 4, UN Doc. T/L.523 (1955) at 21. On Um Nyobe, see Introduction, above, notes 23-25 and accompanying text. Quite apart from the possibility of coercion, the style in which the petition is originally written may have been influenced by the form which a United Nations petition was imagined to take. As well, the Trusteeship Council sometimes based its deliberations on a summary of the original petition. Rules of Procedure, supra note 23 at Rule 85.

The argument of this part is that the identity of women in the trust territories could not be essentialised as the Trusteeship Council and the Commission on the Status of Women had done. The following discussion of the petitions from women and women’s groups in the trust territories should therefore not be taken as suggesting that there was a unique women’s viewpoint that the Trusteeship Council and the Commission on the Status of Women missed nor that the viewpoints expressed in the petitions might not be shared by men in the trust territories.
... Considering that the women of the Cameroons have the right and duty to take part in the work of emancipating our country.\textsuperscript{107}

The petition is remarkable stylistically because it uses the form and the abstraction of a UN resolution, yet weaves in the daily humiliation of seeing white women's servants get the choicer cut of meat at the butcher's, the details of everyday life that rub in the importance of the higher-sounding concepts. Its requests range similarly from equal rights for women - including their economic empowerment through freedom of trade and provision of agricultural machinery to liberate them from hoeing in plantations and extracting palm oil by pounding - to needs such as maternity homes and midwives, to the end of racism and the unification of the Cameroons.

This early petition by the Comité féminin de l'Union des Populations du Cameroun is the only one that appears to include a request for the formal equality demanded by liberal feminists. The few other petitions that deal with equal rights are concerned with achieving substantive equality for women.\textsuperscript{108} One from the Chairperson of the local branch of UDEFEC of Hikoajom in the French Cameroons claims that “All women ... have the right to vote. However, they have never been able to vote and have no way of making their opinion known.”\textsuperscript{109} A petition from the women teachers of Togoland complains about the lack of equal opportunity for girls to continue their education or learn a trade. At the same time, this petition is concerned with the special needs of women, complaining about medical care for pregnant women, nursing mothers and infants,

\textsuperscript{107} Petition from the Comité féminin de l'Union des Populations du Cameroun concerning the Cameroons under French and under British administration (T/Pet.5/60-T/Pet.4/32), UN TCOR, 6th Sess., Annex Vol. 2, Agenda Item 5 (1950) 278.

\textsuperscript{108} On the other extreme, there are no petitions by native women that rely in substance on traditional culture. There are, however, petitions not directly related to women that appear to rely for their authority on the traditional status of the woman petitioner or petitioners. See, e.g., Petition from the Queen Mother Doe Motte of Ho (T/Pet.6/139), UN TCOR, 7th Sess., Annex, Agenda Item 5, UN Doc. T/L.101 (1950) 24; Petition from Mesdames Adjoavi Edoh, Atissou Amouzou and others (T/Pet.7/336), UN TCOR, 12th Sess., Annexes, Agenda Item 5, UN Doc. T/L.359 (1953) 72 (on behalf of the grandmothers, mothers and wives of the village of Agbétiko, regarding a dispute over succession to the chieftainship).

\textsuperscript{109} Petition from the Chairman of the Local Branch of UDEFEC of Hikoajom Concerning the Cameroons under French Administration TC Pet.5/L.52 (1955) 5.
requesting that scholarships be created for girls to study nursing and midwifery abroad.¹¹⁰ A number of petitions contain requests for better education and medical facilities, most emphasising the different needs of girls and women.¹¹¹

The different identity of women and men is reflected in a petition from Mrs. A. Emaimelei on behalf of the women of Palau. The petition requests that women be appointed to the judiciary in Palau for the reasons that there is a good deal of immorality and drunkenness¹¹² and women magistrates would have more influence with women delinquents; male magistrates are responsible for the delays in enforcing the custom that provides for widows; and admission of women to the judiciary would pave the way to their participation in local government.¹¹³

The petitions on women's rights and needs are also shot through with the injustice of colonialism as manifested in the discrimination against native women relative to European women.


¹¹¹ Petition from the women of Awatime (T/Pet.6/129-T/Pet.7-109), UN TCOR, 7th Sess., Annex, Agenda Item 5, UN Doc. T/L.101 (1950) 24 (competent European women teachers should be sent to teach more advanced sewing to girls and doctors be sent to train girls in nursing); Petition from the Union démocratique des femmes camerounaises of the centre at Loum (T/Pet.5/384), UN TCOR, 16th Sess., Annexes, Agenda Item 5, UN Doc. T/L.613 (1955) 69 (inadequate school and dispensary); Petition from Mrs. Fatema Barjeeb, Galcaio (T/Com.11/L.4), UN TCOR, 12th Sess., Annexes, Agenda Item 5, UN Doc. T/L.345 (1953) 43 (need special room in hospital for women, midwife, special school for girls, women teachers); Petition from Mrs. Suzanna Mbetumou (T/Pet.5/894, sect.3), UN TCOR, 21st Sess., Annexes, Agenda Item 5, UN Doc. T/L.825 (1958) 39 (village dispensary and social worker inadequate, need nurses who can treat barren women); Petition from the Société des femmes de Bomp (T/Pet.5/894, sect.11), UN TCOR, 21st Sess., Annexes, Agenda Item 5, UN Doc. T/L.825 (1958) 39 (dispensary offers inadequate maternity care); Petition from Miss Chanapo (T/Pet.4/192), UN TCOR, 26th Sess., Annexes, Agenda Item 4, UN Doc. T/L.975 (1960) 14 (lack of hospitals, no medicines for women in maternity ward, high cost of hospital treatment, virtual absence of public latrines in Victoria division, women required to obtain market permits in order to trade); UN Doc.T/C.2/SR.421 (maternity centres); Petition from the Queen Mother Doe Motte of Ho (T/Pet.6/139), UN TCOR, 7th Sess., Annex, Agenda Item 5, UN Doc. T/L.101 (1950) 24 (need for maternity hospital with mobile clinic, lower hospital fees); Petition from the Editorial Board of the newspaper Femmes camerounaises (T/Pet.5/618), UN TCOR, 17th Sess., Annexes, Agenda Item 4, UN Doc. T/L.635 (1956) 70 (payment of market fees by widows).

¹¹² Mrs. Emaimelei was also the author of a petition from the Women of Palau concerning prohibition of the manufacture of alcohol. Petition from the Women of Palau concerning prohibition of the manufacture of alcohol (T/Pet.10/3), UN TCOR, 8th Sess., Annexes, Agenda Item 4, UN Doc. T/L.143 (1951) 21.

¹¹³ Petition from Mrs. A. Emaimelei on behalf of the women of Palau (T/Pet.10/9), UN TCOR, 12th Sess., Annexes, Agenda Item 5, UN Doc. T/L.369 (1953) 87.
A Togoland woman stated that she earned less as a bank cashier than European women doing the same work, and that the Administration did nothing to provide employment for educated young Togoland women.¹¹⁴ A number of petitions from women in the French Cameroons point to the differences between maternity care for European and African women.¹¹⁵ One also protests "the use of family allowance funds for the purchase of motor-coaches for white children while their coloured brothers collapse from fatigue as they walk along the roads under the scorching sun."¹¹⁶

Reflecting the identity of women as part of the people seeking self-determination, a number of petitions by native women and women's organizations, in particular from Italian Somaliland and French Togoland, allege that their lawful political activities have been hampered or punished by the authorities, thereby violating individual rights such as freedom of association or freedom from arbitrary arrest and detention.¹¹⁷ Even as part of the people, women may present the facts

¹¹⁴ Petition from Miss Esther Télé Tekoé (T/Pet.7/471), UN TCOR, 18th Sess., Annexes, Agenda Item 5, UN Doc. T/L.703 (1956) 104.
¹¹⁵ Petition from Miss Annette Eleanore Biyaga (T/Pet.5/368), UN TCOR, 16th Sess., Annexes, Agenda Item 5, UN Doc. T/L.613 (1955) 68; Petition from Mrs. Martha Ngo Mayag (T/Pet.5/502), UN TCOR, 19th Sess., Annexes, Agenda Item 4, UN Doc. T/L.747 (1957) 33; Petition from the Editorial Board of the newspaper Femmes camerounaises (T/Pet.5/618), UN TCOR, 19th Sess., Annexes, Agenda Item 4, UN Doc. T/L.747 (1957) 35; Eighteen petitions raising general problems in the Cameroons under British Administration and the Cameroons under French Administration, TC Pet.4 & S/L.24 (1958).
¹¹⁷ Petition dated 19 and 27 June 1951 from Togoland women (Section féminine de l'Unité togolaise) (T/Pet.7/227, T/Pet.7/227/Add.1), UN TCOR, 9th Sess., Annexes, Agenda Item 4, UN Doc. T/L.220 (1951) 46 (electoral irregularities); Petition dated 8, 12, and 24 July 1951 from Mr. Augustino de Souza and from the Section féminine de l'Unité togolaise (T/Pet.7/237, T/Pet.7/237/Add.1, T/Pet.7/237/Add.2), UN TCOR, 9th Sess., Annexes, Agenda Item 4, UN Doc. T/L.220 (1951) 48 (policemen club a group of women on the pretext that they are violating municipal prohibition on public meetings); Petition from Somali Women in Gardo (T/Pet.11/179), UN TCOR, 11th Sess., Annexes, Agenda Item 5, UN Doc. T/L.269 (1952) 22 (members of Women's Branch of Somali Youth League arrested at party at the League's club and threatened with exile if they were seen in the club again); Petition from Fatima Haj Omar and others (T/Pet.11/344), UN TCOR, 12th Sess., Annexes, Agenda Item 5, UN Doc. T/L.340 (1953) 24 (complaints by leaders of women members of the Somali Youth League including break-up of peaceful demonstration in which they were involved, police inaction in face of forcible entry by members of pro-Italian party into house of woman League member); Petition from Miss Beatrice Dweggah (T/Pet.7/388), UN TCOR, 15th Sess., Annexes, Agenda Item 4, UN Doc. T/L.528 (1955) 43 and Petition from Mrs. Céline Antoinette Mansah (T/Pet.7/389), UN TCOR, 15th Sess., Annexes, Agenda Item 4, UN Doc. T/L.528 (1955) 43 (two women claim to have been arrested during a discussion on mass education at Juvento information centre at Lome and arbitrarily detained); Petition from Mrs. Christine Shalman
somewhat differently: a nursing mother is detained at the police station, a woman with a baby of eight months on her back is arrested on her way to a meeting, the women detained include the very young and very old, pregnant and sick women.

The distinct identity of women within a people seeking self-determination is also suggested by a series of petitions by women from the French Cameroons. Several petitions present the special victimisation of women by the colonial administration among the reasons for independence. The petitioner

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118 Petition from Mrs. Céline Antoinette Mansah (T/Pet.7/389), UN TCOR, 15th Sess., Annexes, Agenda Item 4, UN Doc. T/L.528 (1955) 43.

119 Petition from Mrs. Emilie D. Mensah (T/Pet.7/396), UN TCOR, 15th Sess., Annexes, Agenda Item 4, UN Doc. T/L.528 (1955) 47. In its observations, the Administering Authority dismisses the charges as imaginary, remarking in particular that it is not customary for a woman to attend a public meeting carrying a baby of eight months on her back. T/OBS.7/23, section 5, summarised with petition.

120 Petitions from the Great Somalia League Women’s Association, Dusa Mareb (T/Pet.11/782 and 816), UN TCOR, 26th Sess., Annexes, Agenda Item 4, UN Doc. T/L.989 (1960) 48; (imprisonment of women, request to demonstrate peacefully).

121 Petitions from the Union Democratique des Femmes Camerounaises, local branch of Tumko Manjo concerning the Cameroons under French Administration, UN Doc. T/Pet.5/88 (1956); Petition from Mrs. Rebecca Tchiassou concerning the Cameroons under French Administration, UN Doc. T/Pet.5/L.274 (1957); Petition from Mrs. Victoire Tchamambo concerning the Cameroons under French Administration, UN Doc. T/Pet.5/L.283 (1957); Petition from Mrs. Justine Neumhie concerning the Cameroons under French Administration, UN Doc. T/Pet.5/L.334 (1957); 78 Petitions raising general problems concerning the Cameroons under French Administration, UN Doc. T/Pet.5/L.455 (1958); Petition from the Libong Local Committee of the “Union Democratique des Femmes Camerounaises” concerning the Cameroons under French Administration, UN Doc. T/Pet.5/1223 (1957); Petition from Mrs. Monique Tang concerning the Cameroons under French Administration, UN Doc. T/Pet.5/1232 (1957). See also Petition from the Nyagatere Women’s League concerning Ruanda-Urundji, UN Doc. T/Pet.3/L.114 (1961); Petition from Mrs. Theresia Nana, President of the Women’s Committee of One Kamerun, in Tiko (T/Pet.4/156), UN TCOR, 23rd Sess., Annexes, Agenda Item 5, UN Doc. T/L.903 (1959) 22.

122 Petition from Mrs. Victoire Tchamambo concerning the Cameroons under French Administration, UN Doc. T/Pet.5/L.283 (1957).
complained that “White women everywhere, including the French, receive support when they fight for a cause, but in the Cameroons we have no one to rely on as we struggle for freedom.” She went on to state that Cameroonian women were “fettered and led about like goats” by the French and, as a result, pregnant women often miscarried, adding that French women were the only women to receive jobs created by new businesses. “We believe,” she concluded her petition, “that representatives of the great Powers will neither abandon us nor condemn the weaker sex.” In contrast, the members of the Gazelle Women’s Club at Vuuamami in New Guinea told a visiting mission that

they feared trouble and chaos would result from attaining self-government too quickly. They felt that the Administering Authority should try to unite people, for without unity self-government was premature. Besides this they asked that the Government help to build more women’s club houses. They wanted better housing and equipment such as stoves, sewing machines, toilets, etc., so that people would be in a better position to help themselves. Several club members complained that men were spending too much money on liquor to the detriment of their families.124

Even in petitions that advocate independence on non-gendered grounds, the self is usually identified as “we, the women.” One petitioner requested an annulment of the 1955 decree outlawing the Union democratique des femmes camerounaïses, United Nations-supervised elections and the proclamation of Cameroonian unity and independence by the winner. Writing as “we, the Cameroonian people and the women of the Cameroons,” she argued that “…whereas it is we women who populate the earth with men it is you U.N. who take a decision which causes their bloodshed.”125

123 Another petition complains that judicial authorities strip women in the marketplace, seeing this as further proof that “in the eyes of the French government the Cameroonian women are goats at pasture.” Petition from Mrs. Justine Neumbe concerning the Cameroons under French Administration, UN Doc. T/Pet.5/L.334 (1957).


125 Petition from Mrs. Rachel Ndambouen concerning the Cameroons under French Administration, UN Doc. T/Pet.5/1465 (1959). See also Petition from Mrs. Rebecca Tchoufe concerning the Cameroons under
V Conclusion

In Chapter 6, we saw that the history of women's equality may be intertwined with the history of self-determination in international law. The interpretation of self-determination may advance women's equality as it did with women's suffrage in the plebiscites. In that chapter, while women were divided over their identity as women and its relationship to nationalism and internationalism, they were not divided over their goals of women's suffrage and independent nationality for married women. In this chapter, however, women's equal rights were built into the interpretation of self-determination through trusteeship in the UN Charter, but this victory by women during the drafting of the Charter was revealed as a victory for European women at the expense of the agency of women in the trust territories. Through the petitions of international women's organizations to the Trusteeship Council and the resolutions of the Commission on the Status of Women, European women sought to impose their liberal feminism on women in the trust territories. In this sense, they were allies of the international trusteeship system at large, which objectified women by projecting onto them competing versions of nationalism and gender. While later discussions in the Commission on the Status of Women introduced the idea of self-determination as a condition of women's equality, this inversion simply objectified women in nationalism differently. In the final part of this chapter, I used the petitions submitted to the Trusteeship Council by women in the trust territories themselves to highlight both their agency and the complexity of their subjective identity.

French Administration, UN Doc. T/Pet.5/1466 (1959); Petition from Miss Rose Aghemetekpon concerning Togoland under British Administration and Togoland under French Administration, UN Doc. T/Pet.6 and 7/L.65 (1956).
Chapter 8
Indigenous Women and Self-Determination

This final chapter on women and self-determination focuses on the case of Sandra Lovelace
v. Canada, decided by the United Nations Human Rights Committee in 1981. The Lovelace case
involved a provision of the Canadian Indian Act that deprived an Indian woman who married a
non-Indian man of her status as an Indian, but had no counterpart for an Indian man who married a
non-Indian woman.

Seen from the perspective of a woman's equal right to belong to the "self," Lovelace raises
the same issue as the collective option used for the plebiscites in the 1919 peace treaties and its
underlying principle of dependent nationality of married women. In fact, the Indian Act followed
the principle of dependent nationality consistently. The Act did not just deprive an Indian woman
who married a non-Indian man of her Indian status, it granted Indian status to a non-Indian woman

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1 As stated in Part (III) of the Introduction on methodology, Lovelace does not technically raise an issue
of self-determination, but the case examines an issue of the "self" also found in the interpretation of self-
determination. Moreover, I argue that the broader context of the case should be understood as the right of
self-determination, in that many indigenous peoples in Canada assert a sovereignty that would give them
the right to independence.

2 Sandra Lovelace v. Canada, Communication No.24/1977 (formerly Communication No.R.6/24), UN
18, UN Doc. A/36/40 (1981) 166 [hereinafter Lovelace]. See also Lovelace v. Canada, Communication
No.24/1977, UN Doc. CCPR/C/OP/1 (1984) 10 (admissibility), 37 (interim decision); Response of the

3 In Canada, the federal Indian Act defines and employs the controversial legal category of "Indian." The
Constitution Act, 1982 uses the term "aboriginal" to refer to indigenous peoples including the Métis and the
Inuit. Accordingly, the terms "Indian" and "aboriginal" will be used in connection with these legal texts. In
general contexts, the international legal term "indigenous" is used.

At the same time, it is important to keep in mind that indigenous women are not homogeneous, whatever
the common experience wrought by colonialism and the legal designation "Indian" or "non-Indian." Their
linguistic and cultural affiliations may be, for example, Salish, Tlingit, Blackfoot, Blood, Cree, Sioux, Métis,
Iroquois or Ojibway.

4 See Chapter 6(II), above.
who married an Indian man. As with the collective option, a woman’s status was determined by her husband’s.

From another perspective, the issue of Sandra Lovelace’s Indian status, like the issue of the Fon’s wives in the United Nations trust territory of the British Cameroons, was the site of a larger struggle over culture in the process of self-determination. Under the international trusteeship system, the struggle was one of resistance to the ideas of democracy, equality and modernisation cultivated in the trust territories by the United Nations in preparation for decolonization. This resistance tended to be led by men in the trust territories. We will see that in contrast, the struggle reflected in Lovelace was to restore indigenous cultures already lost to colonialism; in particular, to restore pre-colonial relations between women and men. This aspiration to return to traditional relations of equality between women and men - to return to matriarchal relations in some indigenous cultures - was a vision of self-determination embraced by many indigenous women.

From yet a third perspective, Sandra Lovelace’s choice to litigate the gender discrimination in the Indian Act rather than give priority to the campaign for indigenous self-government, which sought to end the state’s power under the Indian Act to determine status, parallels the competing priorities of women’s equality and self-determination that dominated discussions of women in trust and non-self-governing territories during the 1960s in the United Nations Commission on the Status of Women.

By bringing to bear these three perspectives gained from Chapters 6 and 7, this chapter demonstrates that the relationship between women’s equality and self-determination in Lovelace is more complex than the main commentaries on the decision tend to suggest. Part I summarises the case, and Part II presents one of the leading commentaries on Lovelace. This commentary by Anne

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5 See Chapter 7(II)(A), above.
Bayefsky\(^7\) consigns the complexity of Lovelace to the analytical preliminaries and explains the decision as about women's equal rights. Part III suggests that Bayefsky's commentary thereby represents Lovelace's identity as a woman as separate from her identity as a Maliseet Indian, whereas Lovelace's vision of equality and her vision of the matriarchal traditions eradicated by colonialism are related in her arguments to the Human Rights Committee.\(^8\) Andrea Bear Nicholas, another Maliseet woman, later wrote: "our struggle as Aboriginal women cannot be separated, even for a moment, from our struggle as a people."\(^9\) In this difference between the divisibility of women's identity in the abstract, as in Bayefsky's gloss on Lovelace, and the indivisibility of identity expressed by indigenous women themselves, Lovelace reproduces the difference between the either-or approach taken to the priorities of women's equality and self-determination in the trust territories by the Commission on the Status of Women and the concrete engagement with these concerns in the petitions of women in the trust territories themselves to the United Nations Trusteeship Council.\(^10\)

Part IV of the chapter argues relatedly that reading Lovelace as a decision about women's equality loses one of the common threads running through the cases on the interpretation of the self and the right of self-determination in Parts II and III of the thesis; namely, that the Human Rights Committee, like these other international legal authorities, has established a middle ground in an attempt to reconcile identities.

\(^7\) A.F. Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace" (1982) 20 Can. Y.B. Int'l L. 244.

\(^8\) For the story of Sandra Lovelace and the other women from her reserve who were in the forefront of the campaign to change the discriminatory rules on status in the Canadian Indian Act, told by them in a series of conversations, see J. Silman, ed., Enough is Enough: Aboriginal Women Speak Out (Toronto: The Women's Press, 1987).


\(^10\) See Chapter 7(III-IV) above.
I  Summary of Lovelace

Sandra Lovelace was born and registered as a "Maliseet Indian." Under section 12(1)(b) of the Canadian Indian Act, Lovelace lost her Indian status when she married a non-Indian man in 1970.11 Her loss of status meant that she could not convey Indian status to her children. Her marriage also deprived her of membership in the Tobique band.12 This, in turn, meant that she was no longer legally entitled to live on the Tobique Reserve in New Brunswick,13 where she had been living with her parents at the time of her marriage.14 The loss of her right to possess or reside on reserve lands included the loss of the right to inherit a possessory interest in the land from her parents and the right to be buried on the reserve.15 At the time of the case, Sandra Lovelace was living on the reserve, but had no right to remain there.16 Moreover, she did not have her own place to live and, as a non-status Indian, would not have been able to borrow money for housing from the Band Council.17 In his dissent in A.G. Canada v. Lavell, the 1973 Supreme Court of Canada judgement which found that section 12(1)(b) did not violate the right of equality guaranteed by the Canadian Bill of Rights, Mr. Justice Laskin summarised the effect of section 12(1)(b) on Indian women who married non-Indian men as "statutory banishment."18

In Lovelace, the Human Rights Committee considered possible violations of four groups of rights under the Covenant: general provisions against discrimination (articles 2, 3, 26), the right to choose one's residence (article 12), rights aimed at protecting family life and children (articles 17, 23 and 24) and the rights of persons belonging to ethnic, religious or linguistic minorities (article

11 Lovelace, supra note 2 at para.1.
12 Ibid. at para.9.3.
13 Ibid.
14 Ibid. at para.9.6.
15 Ibid. at para.9.9.
16 Ibid. at para.9.7
17 Ibid. at para.9.6, 9.9.
It found that Canada had violated the minority rights guaranteed by article 27 because Sandra Lovelace had been denied the legal right to live on the Tobique Reserve.

II Commentary

The Human Rights Committee's decision in Lovelace has been seen as a victory for women's equality: women over Indians, liberal feminism over the illiberal community, individual over collective rights. From this perspective, article 12(1)(b) of the Canadian Indian Act raised the same issue for women as the collective option in the 1919 peace treaties and the underlying principle of dependent nationality of married women: women's right to choose their membership in the self on the same basis as men. Sandra Lovelace simply brought the campaign for women's equal rights, begun by white women in the civilised world, to a pocket of primitive patriarchy.

This reading of Lovelace requires some effort to establish because the Human Rights Committee did not base its views, or based them only weakly, on any of the Covenant provisions on sex discrimination. In Anne Bayefsky's commentary on Lovelace, the most developed and...
most often cited reading of the decision, Bayefsky argues essentially that we should take *Lovelace* as a decision about women’s equality because the Committee *wanted* to say and *should have* said that there had been a violation of *Covenant* article 2(1) on non-discrimination, but wrongly concluded that it had no competence to do so.

Bayefsky’s argument relies on the fact that the *Covenant* was not yet in force for Canada at the time of Sandra Lovelace’s marriage and loss of Indian status by application of article 12(1)(b) of the *Indian Act*. The Human Rights Committee therefore found that it could not rule on the original cause of her loss of status, that is, the *Indian Act* as applied to her at the time of her marriage, but only on any continuing effects of its application. According to Bayefsky, the Committee limited its decision to article 27, the article of the *Covenant* on minority rights, because it overcautiously concluded that it also could not consider whether any continuing effects might violate the articles on sex discrimination. Bayefsky implies that had the Committee not felt itself constrained in this way, it would have said what it really wanted to say - and, to her mind, should have said - about the continuing violation. Since the Committee needlessly tied its hands, Bayefsky hints, *Lovelace* can be taken for what it actually meant and ought to have said: that the case was about sex discrimination. She chides the Committee as follows:

> It might, therefore, *have been more accurate* for the Human Rights Committee to have decided that Lovelace was denied the right to enjoy her culture and to use her language in community with other members of the band, in a discriminatory fashion or because she was a woman. In other words, there was a violation of Article 2(1) in relation to the right embodied in Article 27. The Committee, however, was of the view that only by confining the violation to Article 27 could it avoid the problem that loss of Indian status occurred prior to the Covenant coming into force for Canada. It is to be hoped that its use of the Covenant to describe the derogation of rights that results from section 12(1)(b) of the Indian Act *will be more exact* in the upcoming case.

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24 *Lovelace, supra note 2* at para.7.3.
26 [emphasis mine] Bayefsky, *supra* note 23 at 263. The “upcoming case” alluded to by Bayefsky is presumably the communication by Paula Sappier Sisson. See *Response by Canada, supra note 2* at para.4.
Bayefsky thus uses the problem of timing to read the Committee’s decision in Lovelace as about women’s equality. Her rhetoric of accuracy and exactitude implicitly gives us licence to correct for the Committee’s excessive caution in confining itself to article 27 by adding article 2(1), which guarantees respect for all rights in the Covenant without distinction as to sex.

III Lovelace’s Arguments

In this part, I suggest that Bayefsky’s reading of Lovelace is problematic because it assimilates Sandra Lovelace’s complaint to women’s struggle for equality and discards Lovelace’s attempts to portray the patrilineal provisions of the Indian Act as both discriminatory and inauthentic to those indigenous peoples, like the Maliseet, who were matrilineal. Bayefsky reproduces the arguments of the Canadian government and Sandra Lovelace on whether indigenous peoples were traditionally patrilineal in a section of her commentary summarising the proceeding, but cordons them off as a factual dispute in another section entitled “Historical Survey.” By assigning the meaning of women’s equal rights to the Human Rights Committee’s decision, Bayefsky associates Sandra Lovelace’s identity as a woman with the normative and, paradoxically, with the real; and Lovelace’s vision of a lost matriarchy with the factual and, paradoxically, with the fictional. In so doing, Bayefsky lent support to the indigenous criticism of Sandra Lovelace and other women from the Tobique Reserve as “white washed women’s libbers.”

There is no record of this case in the UN Human Rights Committee’s publications. See also L.S.N. v. Canada, Communication No.94/1981, UN Doc. CCPR/C/OP/2 (1990) 6 (subsequently withdrawn).

27 In Sawridge, supra note 6, the Trial Division of the Federal Court of Canada accepted the evidence of the Crown’s anthropologist that lineality itself as a criterion for membership in an aboriginal group “is merely an artificial construct that confines the notion of ‘membership’ to a particular theoretical abstraction.” At 215. According to Dr. Alexander von Gernet, the decision as to “which one of a profusion of practices should serve as the ‘traditional’ culture of a twentieth-century society” is inappropriate for an anthropologist to make. At 214.

28 “Introduction” in Enough is Enough, supra note 8 at 13.
of the chapter, I argue that Bayefsky’s reading is more problematic because she labours to give the Committee’s decision a meaning that the Committee itself seemed to have avoided.

In its arguments in Lovelace, the Canadian government gave two main justifications for article 12(1)(b) of the Indian Act. The first was that the Indian Act codified patrilineal family relationships traditional among Indians. On the second justification, the special privileges granted to Indian communities, in particular the right to occupy reserve lands, created the need for a definition of Indian. The threat to reserve land from non-Indian men who married Indian women was, in nineteenth century farming societies, and is still much greater than that from non-Indian women who married Indian men.29

The Canadian government’s justification based on tradition and its justification based on protection involved different ideas of who was “really” an Indian. According to the justification based on tradition, the Indian Act used the same definition of Indian as Indians themselves did; the Indian Act traced Indian status through the father’s line just as Indian tradition was patrilineal.30 It followed that status Indians and “real” Indians were the same. Moreover, the Canadian government accepted that Indian tradition, or self-definition, was not static and that any change in the law could only be made in consultation with the Indians.31 Alternatively, the logic of protection was that given the need to protect scarce resources and preserve Indian society and culture, not all “real” Indians could live on reserves. On this justification, status Indians were the subset of “real” Indians that were entitled to do so.

While Sandra Lovelace argued that the Indian Act was contrary to the equality provisions of the Covenant, she also disputed the Government’s contention that the Act reflected an Indian

29 Lovelace, supra note 2 at para.5.
30 The Council of the Six Nations factum in Lavell (supra note 18) supported this position. K. Jamieson, Indian Women and the Law in Canada: Citizens Minus (Minister of Supply and Services Canada, 1978) at 87.
31 Lovelace, supra note 2 at para.5.
tradition of patrilineal legal relationships. Maliseets, such as Sandra Lovelace, were traditionally matrilineal, as were many other indigenous peoples. Bet-te Paul, one of the women from the Tobique Reserve who encouraged Sandra Lovelace to bring her case to the Human Rights Committee, described the traditional matrilineal Maliseet society that she discovered when she began digging:

it was matrilineal....there was a special relationship between the elder women and the young girls. Also, the elder women were the ones to hold places in council and to guide the men. We had chiefs, but the elder women were behind the men; they were listened to and held in high respect....The married women looked after the families, and had a say in anything that concerned the community...

...The blood comes from the mother, not the father, which is exactly the opposite of what the Indian Act imposed on us.

In her inquiry into the role of women in Maliseet society and how that role had been changed by colonialism, Andrea Bear Nicholas concludes that the dispersal of decision-making among both men and women in traditional Maliseet society

is certainly confirmed by any knowledge of our culture and history. It shows up in our language, which has no gender. It shows up in our terms of kinship which, for the most part, are precisely the same for maternal relatives as for paternal relatives, indicating a means of reckoning lineage and relationships that is neither patriarchal nor matriarchal, but bilateral. According to our recently deceased elder, Dr. Peter Paul, our people showed a strong tendency toward matrilocality insofar as a husband often took up residence in or near the family of the wife.

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32 Ibid. at para.6.

For a description by an Ojibway Elder of the woman's role in Ojibway culture, which was patrilineal, see A. Solomon, "The Woman's Part" in L.E. Krosenbrink-Gelissen, Sexual Equality as an Aboriginal Right (Saarbrücken: Verlag breitenbach, 1991) at 142-143 ("the woman was 'the centre of everything'").
34 Enough is Enough, supra note 8 at 226.
35 [Footnotes omitted] Nicholas, supra note 9 at 229.
For the Maliseet, the *Indian Act* legislated not indigenous custom, but European patriarchy.

As the following conversation between Sandra Lovelace and another Maliseet woman illustrates, the Maliseet tended to internalise the patriarchy of the *Indian Act* over time.

SANDRA [LOVELACE SAPPIER]: [The chiefs] said things like, “You’ve made your bed [by marrying a non-Indian], now sleep in it”; “My (white) wife is an Indian because the law says she is.”

KAREN [PERLEY]: They believed, the government says you’re Indian, so you’re Indian. Therefore the government tell us we’re not Indian, so we’re not Indians.

SANDRA: Then we’d start arguing. Heavy arguments! (laughter) “I was born an Indian,” that’s what I’d tell them.

KAREN: If they believed that, where is the reason in all of it? Sometimes your own flesh and blood would say, “You’re not an Indian any more. That’s the law; that’s the Indian Act.” See how law-abiding Native Indian people are? (laughter) So we’d have these chiefs telling us, “It’s our right to discriminate.”

SANDRA: A few supported us...But most of them are chauvinist. They’d say, “You’re only a woman, so what do you know? Go watch your babies, clean your house.” That’s the attitude.36

Whereas Lovelace’s argument that the *Indian Act* discriminated against women measures any definition of the self against the external standard of equality in the *Covenant*, her allusion to the matrilineal tradition of some indigenous peoples is internal to indigenous peoples’ definition of themselves historically.37

If Sandra Lovelace’s assertion that the *Indian Act* could not be justified as codifying Indian tradition is seen as an identification with indigenous peoples and their process of self-determination, it complicates her position relative to those indigenous peoples who argued that self-determination should take priority over women’s equality. Seven years before the Human Rights

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36 *Enough is Enough*, *supra* note 8 at 239-240. See also Nicholas, *supra* note 9 at 235-236. This was also true for other indigenous peoples. Borrows, *supra* note 2 at 26-27; Krosenbrink-Gelissen, *supra* note 33 at 83.

37 This is not to say, of course, that her strategy was consistent with indigenous culture. See e.g. T. Isaac & M.S. Maloughney, “Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government” (1992) 21 Man. L.J. 453, 464 (using white law means co-opted by white society); Borrows, *supra* note 2 at 43-44 (adversarialism inimical to First Nations professions of consensus, harmony and respect); Moss, *supra* note 20 at 299 (threat of imposition of externally developed norms even if they coincide with current cultural norms).
Committee's decision in *Lovelace*, Jeanette Corbière Lavell and Yvonne Bédard, Ojibway and Iroquois Indians respectively who had lost their status when they "married out," had failed in their equality challenge to section 12(1)(b) under the Canadian *Bill of Rights*.\(^{38}\) In the *Lavell* case, the vast majority of indigenous organizations\(^{39}\) intervened against Lavell and Bédard, for reasons of either strategy or discrimination.\(^{40}\) *Lavell* also resulted in the formation of the Native Women's Association of Canada, which has since played a major part in advocating equality for indigenous women on the Canadian political and legal scene.\(^{41}\)

Indigenous women also differed among themselves as to whether their struggle for equality should take priority over the larger movement for indigenous self-government and, furthermore, what form that equality and its guarantees should take. For Sandra Lovelace and the women from the Tobique Reserve who were in the forefront of the campaign to change the discriminatory rules on status in the Canadian *Indian Act*, equality had to come before self-government.\(^{42}\) Others maintained that equality could not be disaggregated from the political environment for indigenous beliefs and existence in Canada. Mary Ellen Turpel, for example, objected to any reform to the

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\(^{39}\) *Lavell* and Bédard were supported by a few women's organizations, the Native Council of Canada, and Anishnarvbeapkwek of Ontario. The position of the Attorney General of Canada was supported by the Indian Association of Alberta, the Union of British Columbia Indian Chiefs, the Manitoba Indian Brotherhood Inc., the Union of New Brunswick Indians, the Indian Brotherhood of the Northwest Territories, the Union of Nova Scotia Indians, the Union of Ontario Indians, the Federation of Saskatchewan Indians, the Indian Association of Quebec, the Yukon Native Brotherhood, the National Indian Brotherhood (forerunner of the Assembly of First Nations), the Six Nations Band and the Treaty Voice of Alberta Association. *Lavell*, supra note 18 at 504.


\(^{41}\) See note 64 and accompanying text below.

\(^{42}\) *Enough is Enough*, supra note 8 at 244 (Sandra Lovelace Sappier), 247 (Shirley Bear). This is not to say, of course, that they do not support self-government. See *e.g.*, *ibid.* at 224 (Juanita Perley).
Indian Act as tampering with an ethically unacceptable piece of colonial legislation. She has asked rhetorically: “Before imposing upon us the logic of gender equality (with White men), what about ensuring for our cultures and political systems equal legitimacy with the Anglo-Canadian cultural perspective which dominates the Canadian State?”

In this light, Sandra Lovelace’s allusion to matrilineal tradition complicates the criticism that she and the other Tobique women adopted the white feminists’ goal of equality over the indigenous goal of self-determination. Eva (Gookum) Saulis, another Tobique woman, gives an example of white women’s misunderstanding of the equal and complementary places of men and women in indigenous society:

[In] old pictures of an Indian family moving from one place to another; you’d see a man walking ahead with his bow and arrow and the woman walking behind with small children, hauling that travais. It looks like she’s doing all the work.

I heard remarks about that by white women, “I don’t want to be your squaw. I don’t want to work hard like that.” But there is a reason why that man walked ahead. It’s because he had to protect his family against animals and enemies. It wasn’t that the woman walked behind him because she had to do everything. Like when the woman had to look after the family, it was because the men went away to provide for them by trapping or working in the woods. “Being a squaw” wasn’t a worse or unequal thing. Everything had a purpose.

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45 Enough is Enough, supra note 8 at 216. On differences between feminist and indigenous women’s perspectives, see, e.g., Monture, Reclaiming Justice, supra note 44 at 116-119, Thunder in My Soul, supra note 44 at 229-235; “Peekiskwetan,” supra note 44 at 159-60 (Winona Stevenson).
The attention to what the Tobique women see as the traditional relationship of equality and complementarity between indigenous men's and women's roles is shared with Mary Ellen Turpel and other indigenous women.\textsuperscript{46}

Taken together, Sandra Lovelace's arguments to the Human Rights Committee suggest an attempt to present her identity as a woman within the context of colonialism. In an influential essay on the \textit{Mashpee} trial in the United States which turned on whether the Mashpee Indians qualified legally as a tribe, anthropologist James Clifford wrote:

Their history was a series of cultural and political transactions, not all-or-nothing conversions or resistances. Indians in Mashpee lived and acted between cultures in a series of ad hoc engagements....the trial itself [was an episode, a turn] in the ongoing engagement.\textsuperscript{47}

Lilianne Ernestine Krosenbrink-Gelissen has similarly chronicled the politics of opposition, alternately to the white women's movement and the national indigenous associations, through which the Native Women's Association of Canada negotiates its identity.\textsuperscript{48}


\textsuperscript{48} Krosenbrink-Gelissen, \textit{supra} note 33 at c.5-6.
IV Decision

So far, I have suggested that reading Lovelace as a decision about women’s equality implicitly identifies Sandra Lovelace with women over indigenous peoples, despite the predicament of identity reflected in Lovelace’s arguments. In this part, I show that such a reading is made more troubling by the Human Rights Committee’s apparent avoidance of the binary choice between women’s equality and self-determination.

On the most straightforward reading, the Human Rights Committee in Lovelace identifies Sandra Lovelace with an ethnic, religious or linguistic minority under article 27 of the Covenant. A minority within the meaning of article 27 is independent of any definition in domestic law; in this case, the category of “Indian” under the Canadian Indian Act. Abstracted from the Committee’s reasoning in Lovelace, the test for membership in a minority group has both an objective and a subjective element, where the latter involves the desire of the individual as opposed to the self-understanding of the group. A minority within the meaning of article 27 would normally encompass “[p]ersons who are born and brought up on a reserve, who have kept their ties with their community and wish to maintain those ties.” On the Committee’s logic, the base definition of a minority is objective (whether being born or socialised as part of an ethnic group) and individual members have only the possibility of ceasing to belong to the group.

Being an ethnically Maliseet Indian who had only been absent from her home reserve for the few years of her marriage, Sandra Lovelace was found to be a person belonging to a minority. As such, she was entitled to the right to enjoy her culture and use her language in community with the other members of that minority. Since the Tobique Reserve was the only place where the relevant community exists, she had effectively lost the right to her culture and language.

49 Lovelace, supra note 2 at para.14.
50 In this respect, Lovelace recalls earlier definitions of minorities in international law. See P. Thornberry, International Law and the Rights of Minorities (Oxford: Clarendon Press, 1991) at 164.
The rights in article 27 are not, however, absolute. What this means is that while the notion of status Indian was not a valid definition of the Indian minority, it might nevertheless be a valid restriction on who could enjoy the right to live on a reserve. The Canadian government could not decide who was or was not indigenous, but it might be able to justify restricting the enjoyment of any or all of the rights in article 27 to those indigenous persons whom it chose to call status Indians. Consistent with the Canadian government’s protection justification for the Indian Act, status Indians would simply be the subset of Indians entitled to occupy reserve lands.

To be a valid restriction on minority rights, the restriction “must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole.” It was open to the Committee to find that the gender bias of the restrictions was inconsistent with the provisions of the Covenant on nondiscrimination, but it declined to do so, concluding as follows:

The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

While the Committee did refer to the equality provisions of the Covenant, in its conclusion as well as its statement of the test, its analysis did not turn on discrimination on the basis of sex. Instead,

51 Compare Jamieson, supra note 30 at 13; Turpel, “Snares,” supra note 43 at 6 (disagreeing with protection as the purpose of the Act) with Krosenbrink-Gelissen, supra note 33 at 83 (stating that the constituency of National Indian Brotherhood did perceive the need for protection from an influx of white men on reserves).
52 Lovelace, supra note 2 at para. 17.
53 As seen in Part II of this Chapter, Bayefsky’s view seems to be that the Human Rights Committee did not consider the nondiscrimination provisions (articles 2, 3 and 26) in relation to the continuing effects because it concluded that the problem of timing prevented it from doing so. To the contrary, it can be argued that the Committee did not see itself as precluded from considering these provisions, but either found it unnecessary to do so or hinted at their applicability in conjunction with article 27.
its conclusion depended on the naturalness and strength of Sandra Lovelace’s membership. The Committee seemed to reason that the Canadian government might be able to justify denying the right to live on a reserve to indigenous persons - even where no comparable linguistic and cultural community existed elsewhere - but not to those indigenous persons with a high degree of need for and cultural attachment to the community.

The Human Rights Committee’s 1988 decision in *Ivan Kitok v. Sweden* reinforces the impression that the Committee saw its conclusion in *Lovelace* as a function of the minority self alone. In *Kitok*, Sweden, like Canada, had statutorily defined a subgroup of the ethnic minority and confined to that subgroup the exercise of rights essential to the minority culture. The legislation at issue divided the Sami population of Sweden into reindeer-herding and non-reindeer-herding Sami, with reindeer herding being reserved for Sami who were members of a Sami village (*sameby*). According to the Swedish government, the purpose of the legislation was to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. The parties agreed that effective measures were needed to ensure the livelihood of the Sami whose primary income came from reindeer farming and the future of reindeer breeding, which played an important part in Sami culture. The Committee recognised that legislation designed to protect the rights of the minority as a whole might justifiably restrict an individual member’s enjoyment of his culture, and cited the *Lovelace* test of “a reasonable and objective justification” and “necessary for the continued viability and welfare of the minority as a whole.” There is no indication in *Kitok* that the opposite results reached in *Lovelace* and *Kitok* are anything other than an application of article 27. Sandra Lovelace and Ivan Kitok are similarly

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55 *Ibid.* at para.9.8
described: both were ethnically indigenous, had maintained ties with their community and wanted to become full members of it. The distinguishing feature seems to be that Lovelace had suffered the complete deprivation of her right to live on a reserve, whereas Kitok was permitted, albeit not as of right, to graze and farm his reindeer, and to hunt and fish. The Committee singles out Kitok’s opportunities to reindeer farm, hunt and fish in concluding that there has been no violation of article 27.

Examined through the lens of the minority self, the Human Rights Committee’s decision in Lovelace has a consistency that it does not have when seen through the lens of equality. Similar to Anne Bayefsky, Manfred Nowak suggests that Lovelace involved a violation of article 3 in conjunction with article 27, but that “problems were raised by Canada’s discriminatory Indian legislation, which stemmed from the period prior to entry into force of the Covenant.” Even granting the Committee’s test for limitations on minority rights, Nowak comments that the

56 Ibid. at para. 1.
57 Ibid. at para. 9.7.
58 Ibid. at para. 9.8. This distinction may appear shaky, given that in practice Sandra Lovelace continued to live on the reserve. However her position was more precarious than his. Although Canada stated that the Band Council had made no move to remove her from the reserve, she maintains that this was only because dissident members of the tribe who supported her cause had threatened to resort to physical violence in her defence. Lovelace, supra note 2 at paras. 9.6-9.7. Kitok, in contrast, had a declaration of the Board of the Sami village of Sörkaitum in his favour. Kitok, supra note 54 at para. 4.2.

Moreover, Sandra Lovelace would not have been given any financial assistance with housing, whereas Kitok had the economic benefit of hunting and fishing free of charge in the community’s pastures. Lovelace, supra note 2 at para. 9.6; Kitok, supra note 54 at para. 4.2.

59 Kitok, supra note 54 at para. 9.8.
60 Nowak, supra note 23 at 70, n.23.
61 Nowak takes exception to the Committee’s statement

Restrictions on the right of residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12(1) of the Covenant set out in article 12(3).

Lovelace, supra note 2 at para. 15. His position that the minority rights in article 27 represent lex specialis relative to the general freedoms of religion, association and so on set out in the Covenant. As lex specialis, article 27 is already outside those general freedoms and so cannot be subject to their limitation provisos. Limitations on article 27 can only come from other Covenant rights (i.e. not the general freedoms already implicated in article 27) and general limitation clauses. Nowak, supra note 23 at 505.
relevance of the break-up of Lovelace's marriage is unclear. But if the Human Rights Committee in Lovelace understood the minority self partly in terms of maintaining ties with the minority community and understood the limitations on the self even more strongly in terms of emotional need for and cultural attachment to that community, then the break-up of Sandra Lovelace's marriage becomes germane. As the Committee observed, "after the dissolution of her marriage her main cultural attachment again was to the Maliseet band." Whatever one may think of the Committee's test or its assumptions about emotional vulnerability, the pertinence of her divorce seems clear.

By basing its views in Lovelace on the notion of a minority in international law, the Human Rights Committee avoided the tension between the equal rights of women and the right of self-determination of peoples. When Lovelace was analysed in terms of equality or self-determination (whether as the restoration of traditional ways or as the autonomy to decide), membership in the self was precisely the problem. From the Committee's perspective of minority rights, Sandra Lovelace's membership in the minority was taken to be a fact and the issue was whether her rights as a member of the minority could be limited.

V Conclusion

By further showing how the interpretation of the self and the right of self-determination has developed in international law through a series of encounters with marginalised groups, this chapter continued the historical project of Parts II and III of the thesis. In Sandra Lovelace v. Canada, a Maliseet woman successfully challenged the loss of her Indian status as a result of her marriage to a non-Indian man. While Sandra Lovelace appealed primarily to the discourse of

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62 Nowak, supra note 23 at 505.
63 Lovelace, supra note 2 at para.17.
women's equality, her claim that the patrilineality of the Canadian *Indian Act* did not codify indigenous tradition reflected the discourse of indigenous self-determination as the restoration of a historical indigenous culture in which women and men had different yet equal roles.

The Human Rights Committee's decision in *Lovelace* also supports the contention of Parts II and III of the thesis that international legal authorities confronted with the normative tensions in the concepts of the self and self-determination have developed an intermediate interpretation that seeks to meet the challenge of cultural and gender differences through some combination of the recognition of identity and the expansion of participation. In *Lovelace*, the Human Rights Committee did not find a denial of equality, but a denial of minority rights. Moreover, its analysis shifted the focus from the definition of minority to the question of when the government could restrict minority rights, and thereby from the fundamental recognition of identity to the working out of the rights of identity.

Within Part III of the thesis, the chapter sought to indicate some of the similarities and differences in how women's equality is implicated in the interpretation of self-determination. The three chapters of Part III also trace how the campaign of women at the 1919 Peace Conference to read women's equality into the principle of self-determination gave way to the shifting priorities of equality and self-determination in the international trusteeship system, which gave way to the choice made outright by Sandra Lovelace. In Canada, the conflict between the equality of indigenous women and the achievement of self-determination for indigenous peoples later led the Native Women's Association of Canada, an organisation claiming to represent women across indigenous peoples, to demand funding and a separate seat at the table during discussions on a constitutional package that included a right to indigenous self-government. In *Native Women's Association v. The Queen*, NWAC argued that the invited indigenous
organisations did not represent native women and that native women were therefore entitled to recognition as a distinct self with a right to participate. 64

Finally, this chapter used the Lovelace case to highlight the ethical nature of interpretation. The standard commentary on Lovelace illustrates how by reading and speaking about international legal texts, international lawyers may participate in the limitation of identities. In this commentary, Sandra Lovelace's story of gender and colonialism is lost, and the meaning and potential of the Human Rights Committee's decision on minority rights is left unexplored.

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64 NWAC sought a court order prohibiting the government from making any further distribution of funds to the invited four national indigenous organizations until the government provided NWAC with equivalent funding and rights of participation. In support of the order of prohibition, NWAC argued that the government's failure to recognise NWAC as a distinct group for the purposes of funding and participation violated its rights to freedom of expression and equality rights under the Canadian Charter. NWAC lost at trial. Native Women's Association of Canada v. Canada, [1992] 2 F.C. 462 (F.C.T.D.). On appeal, the Federal Court of Appeal found that NWAC was a bona fide, established and recognised national voice of and for aboriginal women (supra note 40 at 110) and that the four invited and funded groups were male-dominated and did not represent aboriginal women's interests. (ibid. at 120) The Court of Appeal granted a declaration that the government had violated aboriginal women's rights to freedom of expression contrary to sections 2(b) and 28 of the Charter. An appeal to the Supreme Court of Canada was allowed, and the declaration set aside. The Supreme Court was persuaded neither by the constitutional arguments nor by the supporting evidence on representativeness. Native Women's Association of Canada v. Canada, [1994] 3 S.C.R. 627, 119 D.L.R. (3d) 224.
Conclusion

This thesis has approached self-determination as the expression of a changing relationship between interpretation, identity and participation in international law. In the thesis, "interpretation" was used to signify the theory of international law, the model of law and legal reasoning, applied to determine what self-determination means. "Identity" and "participation" functioned as both descriptors and values in interpretation. As a descriptor, "identity" referred to international law's construction of the identity of a group and to challenges to the dominant construction. As a value, "identity" alluded to a change in interpretation intended to reconstruct a group's identity on a basis more responsive to such challenges. "Participation" described the inclusion of affected groups in the interpretation of self-determination, whether their actual participation in the process or the interpreter's imagined engagement with their perspectives. The value of "participation" referred to a change in interpretation that read the importance of participation into key international legal concepts.

I A Better Understanding

By approaching self-determination as a relationship between interpretation, identity and participation in international law, the thesis has sought first to show how, as James Boyd White has written, the enterprise of interpretation is a radically ethical one, by which self and community are perpetually reconstituted, and how our nature and our culture, our circumstances and our imagination, place limits on our powers to remake our languages and communities in new forms.¹ The thesis has examined what international lawyers and judges do when they interpret self-determination: whose identity is implicated in the interpretation of self-determination and how, who

can participate in its interpretation and how, what possibilities are created or foreclosed in its interpretation and how. As such, this approach is generalisable to all of international law. Indeed, it may be seen as systematising certain types of critiques already found in international law. For example, some feminist critiques of international humanitarian law have also focused on identity and participation. Judith Gardam has combined criticism of the construction of women in international humanitarian law as either mothers or symbols of chivalry with criticism of the absence of women from decision-making in this area of international law.

But looking at self-determination as a relationship between interpretation, identity and participation is revealing not just because looking at any area of international law in this way is revealing. Looking at self-determination in this way also complicates the familiar critique that international law remains a law about states. The thesis has shown how the interpretation of self-determination has created and controlled an amazing diversity of communities in international law. Its interpretation has produced exotic images of Islamic communities, nomadic tribes, the colonised, ethnic nations and indigenous peoples, and of women within these groups. United Nations visiting missions in their reports on the trust territories, for instance, have harked back to the Arabian Nights and the tale of Stanley and Livingstone in deepest Africa. In Western Sahara, Judge Gros accused the International Court of Justice of romanticising the world of the

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4 I. Parghi, "Beyond Colonialism? Voice and Power in the UN Trusteeship System" (research paper, Faculty of Law, University of Toronto, 1997) [unpublished].
nineteenth century Sahara desert. Writing at the height of national liberation movements in the Third World, Charles Chaumont imagined that violence and death would testify to the existence of a people in international law. The act of interpreting self-determination thus tells a story in international law about these groups at the margins of a state-centric legal system; it creates their identity, their past and their right to choose the sovereignty under which they will live. That same act of interpretation controls the ability of these marginal groups to contest this story or to tell a different story in international law about themselves and their rights.

Part I began by demonstrating how in the post-Cold War international legal literature on secession, interpretation constructed identity and participation. In Chapter 1, we saw how the interpretive first step of classifying self-determination as legal rule or legal principle helped to determine whether and how a conversation about the meaning of self-determination could take place in international law and who could take part in that conversation. Chapter 2 outlined how the two main approaches to the interpretation of self-determination, the “categories” approach which treated self-determination as a set of discrete rules and the “coherence” approach which appealed to a larger unifying principle or purpose, traded off identity and participation. The categories approach did not seek to reconcile the identities of the different groups entitled to independence; it assigned them instead to different rules. At the same time, the categories approach tended to regard these different rules as clear-cut and therefore beyond contestation. The coherence approach accepted the need for interpretation, and therefore the possibility of contestation, but insisted on unifying identity through an overarching principle or purpose.

Chapter 3, the final chapter on the literature, suggested that while an author’s theory of interpretation constructs the possibilities for identity and participation, an author’s images of


identity and participation may, conversely, construct his theory of interpretation. In other words, an author's choice of which theory of interpretation to apply to self-determination may not follow automatically from his general theory of interpretation, but may be affected by his image of the pathology of groups claiming self-determination and his image of the threat that a dialogue with them poses for the discourse of international law.

II A New History

In contrast to the logical and linear accounts of self-determination in the literature - James Crawford has called them "programmatic" and Nathaniel Berman has dismissed their abstraction as inadequate to the complex production of meaning in a concrete case - Parts II and III aimed to restore the specificity of the cases and historical events that figured in these accounts. This second aim of the thesis was not to prove that the standard accounts of self-determination did not capture the richness and detail of the key cases and events - which no summary could do - but to suggest that there was something that these accounts systematically missed. And this something was the actual role of marginalized groups in the development of a right of self-determination in international law.

Parts II and III indicated how the major interpretations of self-determination in international law by international courts, tribunals and other authorities, the interpretations which exposed its underlying structures and values, emerged from encounters with groups that were outsiders in international law by virtue of their culture, gender or both. Furthermore, Parts II and III traced how through their interpretation of self-determination, these outsiders challenged the

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images of themselves and their participation in international law. That is, their arguments for a particular interpretation of self-determination often contained a broader critique of the culture or gender biases of international law. Thus, in *Western Sahara*, African states debated the meaning to be given to the nineteenth century concept of *terra nullius*, lands open to colonisation by European states, in twentieth century international legal interpretation. During World War I, women campaigning for the vote domestically and in any plebiscites to be held internationally turned President Wilson's famous wartime speeches on the principle of self-determination to their advantage.

III New Possibilities

Third, Parts II and III suggested that while the standard accounts of self-determination were not wrong in relying on *Western Sahara*, the Yugoslavia opinions, *East Timor* and other precedents for certain propositions - the right of colonial peoples to independence, the absence of a right to secede - these accounts missed a pattern in the precedents. Namely, the interpretation of self-determination by international courts, tribunals and other forums tended to respond, if only partially, to the challenges of cultural and gender difference. To see this pattern, it was necessary to go beyond the theory of interpretation used in any one case. For example, the International Court of Justice in *Western Sahara* relied on a combination of the liberal humanist tradition in international law and the sociological functionalism then in jurisprudential vogue, while the EU Arbitration Commission in *Opinion No.2* on Yugoslavia appears to have been inspired by theories of state, sub-state and trans-state identities developed around the concept of European citizenship in the *Maastricht Treaty*. By looking at the interpretation of self-

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9 See Chapter 4(I)(A)(1), above.
10 Chapter 6(I)(B)(1), above.
determination as the relationship between interpretation, identity and participation, however, Parts II and III discerned a pattern of attempts to respond to the challenge of difference through some combination of the values of identity and participation.

In Western Sahara, the Court’s conception of *terra nullius* as excluding Western Sahara depended on its retrieval of a liberal humanist tradition in international law, and its conceptions of “legal ties” and “legal entity” reflected weakly a sociological functionalism, which emerged more strongly in some of the individual opinions. Yet all these interpretations in Western Sahara may be seen as motivated by the need to universalise international law through the recognition of identity. The possibility of using the concept of nationality to give effect to a trans-state identity in international law, raised by the EU Arbitration Commission in its *Opinion No. 2*, suggests the same need. ILO *Convention No. 169* recognises the identity of indigenous peoples functionally, similar to Western Sahara, while the United Nations draft declaration on the rights of indigenous peoples gives effect to indigenous peoples’ own understandings of their identity and history by crafting a right of self-determination that rests on overlapping normative justifications. Women’s right to vote in the plebiscites after World War I, the incorporation of women’s equal rights into the concept of trusteeship in the UN *Charter* and the definition of a minority used by the UN Human Rights Committee in *Lovelace* all respond to women’s efforts to be recognised as equal individuals.

If the recognition of identity through interpretation appears in the cases as one response to the need to universalise international law, *Western Sahara, East Timor* and the UN draft declaration on the rights of indigenous peoples suggest that the expansion of participation appears as the other. In Western Sahara, this response is visible in the Court’s reliance on General Assembly resolutions on self-determination, which reflect a democratic majority of UN member states, but are not a traditional source of international law. In Western Sahara, the
application of the doctrine of intertemporal law by Algeria in its arguments and Judge de Castro in his separate opinion may be seen as another technique for expanding participation in international law because the doctrine of intertemporal law privileges recent, broader-based international law over older, European-made international law. Yet another such technique in Western Sahara is Judge Ammoun’s presentation of the Court’s conception of terra nullius as fusing European and African traditions of thought, thereby gesturing toward a legitimacy derived from broader participation in the evolution of this conception. In East Timor, Judge Vereshchetin’s reinterpretation of the “sacred trust” to include the administering authority’s duty as agent, as well as trustee, for the people of a dependent territory is a particularly clear example of the legitimation of international law through the right of affected groups to participate in its interpretation. Another clear example is the Chair’s reinterpretation of the process of the UN Working Group on Indigenous Populations from a process of international standard-setting by a body of experts to which states and indigenous peoples contributed information as observers, to a process of mediated negotiation between states and indigenous peoples as equals.

IV Further Explorations

In his critique of the failure to recognise the rights of indigenous peoples in the international adjudication of territorial disputes, Michael Reisman argues that Western Sahara is part of “the same pattern of devaluation of indigenous claims” as the more recent judgments of the International Court of Justice in Gulf of Fonseca\(^\text{11}\) between El Salvador and Honduras and the Territorial Dispute\(^\text{12}\) between Libya and Chad.\(^\text{13}\) Although the Court In Western Sahara


said "some of the politically correct things," it avoided giving meaningful effect to Morocco's and Mauritania's precolonial territorial claims to Western Sahara based on indigenous theories of law. The advisory opinion in *Western Sahara* thus manifested the same prejudice as the judgments in *Gulf of Fonseca* and the *Territorial Dispute*, which refused to even consider indigenous rights. While the thesis has not examined *Gulf of Fonseca* and the *Territorial Dispute* and will therefore not engage with Reisman's analysis of them, it will suggest briefly why *Western Sahara* may have paid more than lip service to cultural difference.

In the first place, the thesis has argued that in cases such as *Western Sahara*, arguments based on cultural identity and the Court's engagement with these arguments should be seen, in John and Jean Comaroff's terms, as the potential transformation of hegemony into ideology, where

> [h]egemony consists of constructs and conventional practices that have come to permeate a political community; ideology originates in the assertions of a particular social group. Hegemony is beyond direct argument; ideology is more likely to be perceived as a matter of inimical opinion and interest and hence is more open to contestation. Hegemony, at its most effective, is mute; ideology invites argument.

The "politically correct things" said by the Court in *Western Sahara* are therefore important because they reflect the Court's perception that international law must be reconstituted in an age of ideology. In comparison, the Court, as Reisman describes it in *Gulf of Fonseca* and the *Territorial Dispute*, appeared satisfied to apply international law as constituted.

Second, the thesis has attempted to show that the international community is created through the interpretation of international law. For this reason, there is a significant difference between the recognition of indigenous identity in *Western Sahara*, through the Court's

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14 Ibid. at 354.
16 A chamber of the International Court of Justice heard the *Gulf of Fonseca* case.
interpretation of *terra nullius*, "legal ties" and "legal entity," and the denial of indigenous identity in *Gulf of Fonseca* and the *Territorial Dispute*. Moreover, even if Reisman were inclined to dismiss the significance of the Court’s restrictive interpretation of *terra nullius* in *Western Sahara* in this community-creating sense, its interpretation is also significant in the sense that it has practical application in the adjudication of indigenous claims to land.

Finally, while Reisman identifies a pattern of cultural bias in *Western Sahara, Gulf of Fonseca* and the *Territorial Dispute*, the pattern he describes is not uniform. His criticism that the Court in *Western Sahara* declined to incorporate indigenous theories of law into international law is not the same as his criticism that the Court in *Gulf of Fonseca* refused to read the relevant treaty as having incorporated indigenous rights, or his criticism that the Court in the *Territorial Dispute* refused to apply international legal rules on territory that on the facts would have incorporated indigenous rights. Reisman’s criticism of *Western Sahara* implies that it failed to particularise international law through the recognition of indigenous theories of law, whereas his criticism of the other two cases seems to be that they could have accommodated a consideration of indigenous rights within a universal international law. These are quite different responses to cultural difference, and Reisman’s eventual recommendations on how to recognise indigenous rights in international legal adjudication are directed more toward the latter failure. His recommendation “to apply international law in its contemporary acceptance” makes reference to the Court’s interpretive technique in earlier cases of “actualizing” international law by reading contemporary values into older provisions. But Reisman does not pursue the fact that what he criticises in *Western Sahara* - the Court’s empty political correctness in acknowledging but not giving effect to indigenous theories of law - stems precisely from the Court’s awareness

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17 Reisman does, however, footnote Judge Dillard’s “more functional, transcultural” approach in *Western Sahara*. Reisman, *supra* note 13 at 355, n.25.
that one of its functions is this integration of contemporary normative expectations and demands with older legal formulations. In Western Sahara, Morocco and Mauritania are not the only indigenous peoples; the population of Western Sahara is also indigenous. The trade-off for giving effect to Morocco's and Mauritania's precolonial territorial claims based in indigenous theories of international law would have been to dismiss the identity, interests and wishes of the colonial population. The thesis showed the International Court of Justice in Western Sahara struggling with how to reconcile the value of identity reflected in the historical referents of terra nullius, "legal ties" and "legal entity" with the value of participation expressed in the General Assembly's expectation of self-determination as "the need to pay attention to the freely expressed wishes of the people." For this reason, if for no other, the treatment of cultural difference in Western Sahara is distinguishable from its treatment in Gulf of Fonseca and the Territorial Dispute.

If Western Sahara does, as I have suggested, evince values not found in Gulf of Fonseca and the Territorial Dispute as Reisman describes them, then his critique points to the need to pursue the inquiry of this thesis in at least two directions. I will only state them here. First, if the development of self-determination in international law through Western Sahara and other instances of interpretation does show a pattern of response to the challenge of cultural and gender difference through the values of identity and participation, then are these values present in other related areas of international law, and if not, why?

A second direction of inquiry deals with drawing out, applying and assessing the idea of interpretation hinted at in the practice of self-determination, as I have described it. In the Introduction, I discussed a spectrum of possible interpretive responses to diversity in international law. If we draw out the response that I have tentatively identified in the thesis, it may correspond to a concept of interpretation that is neither objective nor subjective. Briefly
stated, once we accept that interpretation is incapable of yielding a result that is true in some absolute sense and that it necessarily involves an element of subjective choice, our attention shifts to the need to persuade others of the result. Because we must persuade others, it becomes important who the community is and who we imagine it to be. The importance of identity is that it persuades by enabling others to see themselves and their stories in interpretation, without interpretation being reducible to any one world view. Theories vary as to why participation matters to persuasion. If dialogue is simply the airing of conflicting interests, then participation is valuable because it facilitates the consideration of all relevant interests and thereby promotes a compromise satisfactory to all relevant groups. Then again, if dialogue is actually capable of altering participants' understandings of their own and others' positions, then participation will promote a result grounded in some broader understanding.

If we shift from the excavation of possibilities to the reconstruction of interpretation, we can see that the possibilities that may already exist in the interpretation of self-determination are similar to prescriptions for the interpretation of self-determination found in Anthony Carty's *The Decay of International Law*? and in recent work by Nathaniel Berman and Martti Koskenniemi. In its use of Habermas's ideal of discourse that aims to reach understanding, Carty's work emphasises process and participation, while Berman's "Legalizing Jerusalem" and Koskenniemi's writing dwell on the substance of incorporating conflicting identities, which

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Berman calls "fantasies," into interpretation. On Berman’s cultural approach, which he espouses for descriptive reasons as well, the international legal framework for Jerusalem must give place to competing fantasies of nationalism.  

The contextuality Koskenniemi advocates for self-determination, including "greater openness towards locally and regionally idiosyncratic arrangements," is further theorised in new work that draws on Martha Nussbaum’s *Love’s Knowledge*. To the extent that this thesis has pointed to evidence that self-determination may actually have been interpreted in ways that correspond to Carty’s, Berman’s or Koskenniemi’s prescriptions for its interpretation, these prescriptions already have a foothold in international law. The story and history of possibilities told in the thesis may thus help further these retheorisations of interpretation. At the same time, these retheorisations are part of the next stage of assessing critically the story and history of possibilities in the interpretation of self-determination.

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