A State of One's Own: Self-Determination and the Legal Discourse of Identity

By

Alice Mayen Marshment

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ABSTRACT

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Alice Mayen Marshment,  
LLM, 2001, Graduate Faculty of Law, University of Toronto

This thesis argues that the right to self-determination as presently understood in international law is unsupportable in theory and unattainable in practice. It suggests that much of the current confusion surrounding the right stems from the flawed belief that it possesses a core of settled meaning, and that accordingly it is capable of being accommodated within the existing normative framework of international law. This thesis argues, however, that such accommodation simply is not possible because self-determination is fundamentally about identity, about the self. It examines three competing and contradictory conceptions of the self - the population of a sovereign state, the nation and the individual – and argues that none can claim to be the exclusive or authentic self, because identity, multiple and shifting, does not admit of stable and uncontested definition. This thesis suggests ultimately, that self-determination should be conceptualized, not as a right but as a discourse.
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This thesis is dedicated to my mother who taught me that girls can do anything – and one day just might.
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"Given that individuals may be legitimately subjected to collective decisions, on what basis is a particular individual legitimately subjected to the authoritative decisions of a particular political community? In other words, how are particular political communities constituted and delimited such that the individual is legitimately subjected to the decisions of one community and not another?"¹

Self-determination, arguably the most important legal right of the 20th century, has been described both as a concept increasingly at war with itself², and as a dangerous idea destined to result in unparalleled misery³. Unquestionably the right has assumed a position of tremendous significance in legal and political discourse. It stands at the apex of international human rights law, enshrined as Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). From Kosovo to Quebec, Scotland to East Timor, the demands for self-determination have come thick and fast, accompanied in

¹ Brad R. Roth, Governmental Illegitimacy in International Law (Oxford: Clarendon Press, 1999) 21
³ Self-determination is a phrase ‘...loaded with dynamite [that] will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist, who failed to realize the danger until too late.'³ Robert Lansing,
many instances by violence and despair. Accordingly self-determination has come to be associated in the minds of many with the various ethnic conflicts currently being waged around the globe, and much of the debate surrounding the right has been directed toward distinguishing those conflicts where self-determination is considered to be viable and legitimate, from those where it is not.

Underpinning such a vision of self-determination is the belief that there exists a core of settled meaning to the right. That although there may be a 'penumbra of uncertainty' in Hart's terminology, surrounding self-determination, ultimately it possesses an essence sufficiently concrete for it to be accommodated within the normative framework of international law. Further, this vision contends that the law is both a feasible and an appropriate vehicle through which to engage with and resolve the pressing social and political problems to which self-determination is considered the answer. It is this perception, that self-determination not only admits of a stable and uncontested definition, but does so to such a degree that it is rendered amenable to legal institutions and processes, that this thesis seeks to challenge.

This thesis asks the question: 'what constitutes the self for the purposes of self-determination?' and uses this as a means by which to explore the conflicts and contradictions that characterize self-determination discourse, a discourse rooted in the question of political community. Only by freeing ourselves from the artificial rigidity of


our current conceptual framework, this thesis maintains, can we hope to move beyond the impasse that typifies contemporary debate and begin to comprehend the meaning and role that self-determination assumes in the modern world.

Self-determination, this thesis argues, is problematic first and foremost because it is effectively perceived as an answer, or even the answer, to the question of how to authoritatively determine the boundaries of authentic political community. In truth, however, self-determination does not provide an answer (let alone the answer) to this complex conundrum; rather it engenders further questions, questions that go to the very heart of the human experience. It is the contention of this thesis, that the right of self-determination as it is currently employed in legal and political discourse is essentially unsound: unsupportable in theory and unattainable in practice. Contrary to that which is seemingly assumed by the existence of a right of self-determination, there simply are no ‘natural’ or ‘authentic’ political units into which the population of the world can be uncontroversially divided. As Franck notes, “...there is no evidence to support the claim of any particular political configuration...to be ‘natural’ order of things, to reflect some ineluctable human destiny.” Attempts to achieve such a feat through the invocation (and sometimes it seems mere incantation) of the right to self-determination, are consequently destined to perpetual failure.

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5 Thomas M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice (1996) 89 AJIL 359 365
This thesis suggests that greater clarity would be forthcoming as regards all aspects of self-determination were it to be recognized that self-determination is not a concept as such, but rather a discourse. Its value lies not in prescription but in discussion, it elucidates but does not, ironically, determine. Self-determination is important because consideration of its meaning and application necessarily involves engaging with the question of human identity. Identity plays a pivotal role in the construction of the human experience – it is more than merely a reflection of who we are; it creates as it reflects, both uniting and dividing us. Complex, contradictory, fluid and dynamic, identity is always both chosen for one and by one, simultaneously individual and collective, continuous yet changeable, a phenomenon equally, if not more, elusive than that of self-determination itself.

The reason for this is that self-determination is not a thing, it is not even a process, it is, as mentioned above, a discourse; albeit one that has from time to time taken on concrete political and legal dimensions, most notably that of decolonization. Specifically self-determination is a discourse about the appropriate manifestations of the body politic; but, just as democracy does not democratically determine the demos, there is no a priori determination of the body politic for the purposes of self-determination. Consequently it also functions as the language spoken in an ongoing dialogue about political geography.

Self-determination then, is the device with which the questions ‘who are we’ and ‘who are we’ are debated with the objective of enabling and enriching human flourishing. It is a conversation in which the importance of community for the well being of the
individual is recognized and indeed celebrated (sometimes venerated even), but it fundamentally is not and cannot be the last word on the way the world is. In part, this is because of the fallaciousness of the idea that seems to underlie at least some understandings of self-determination, namely that the world can be divided into political entities on a ‘once-and-for-all’ basis, after which everyone will live happily ever after. The assumption that this can be done by appealing to notions of identity – the core of self-determination – is even more problematic since not only does it require the articulation and normative formulation of the idea of identity, (arguably an impossible task) but it depends for its success upon the (entirely unproven) cogency and desirability of fixing or legislating identities for now and all time.

Many of the manifest tensions inherent in the law and literature on self-determination are largely attributable to the (continually unsuccessful) attempts by international law to mediate between these clearly contradictory and conflicting sources of identity. This process of mediation can be detected, to varying degrees, in two dominant movements that self-determination has encountered; contraction and oscillation, and it is with reference to these two themes that this thesis will be structured.

Moreover, it is clear that self-determination suffers from a considerable degree of circularity. This circularity relates to attempts to define the right for the purposes of applying it as a legal rule. Self-determination has been plagued by uncertainty and ambiguity as regards its appropriate content, those entitled to exercise it and the circumstances necessary for recourse to be had to it. These questions of what, who and
when have proved impossible to resolve precisely because of the inherent circularity they involve. Which is to say that the answer to any one of these questions is, contingent upon there already being an answer to one or both of the others.

For instance, while one might suppose that the question of what is logically prior to the question of who (you have to know what is being claimed in order to know who is or should be entitled to claim it) this, in fact, is not the case with self-determination. Here the substance of the claim varies according to the subjects claiming it. For example, if self-determination is thought to involve (or involve the possibility of) secession from existing states, then the question of who is entitled to claim self-determination is likely to receive a much more restrictive answer from the international community than that which would be given were self-determination to be taken to mean more limited political autonomy such as the provision of minority rights.

The first movement, that of contraction, is exemplified by the history of self-determination, and is addressed in Chapter Two. In this Chapter the development of self-determination it chartered: from its inception as a political postulate, through its endorsement as a political principle, to its current status as a legal right. It is argued that as self-determination has evolved, its potential meaning and application have become circumscribed; each phase representing a more limited understanding of what is engendered by the term. However, as Chapter Two demonstrates, this process of contraction has not brought certainty and constancy to self-determination, which, like the
concept of identity it relates to, continues to be haunted by a lack of clarity, consistency and settled meaning.

The second movement of mediation addressed in this thesis is that of oscillation, and it concerns the second of the three questions outlined above, namely that of the appropriate subjects of self-determination. In international legal discourse this question has assumed the form of deciding who or what constitutes the 'people' to whom self-determination applies. Of the many competing and contradictory versions of the self currently advanced in legal and political theory, this thesis has chosen to address those of the sovereign state (Chapter Three), the nation (Chapter Four) and the individual (Chapter Five).

These three conceptions have been selected because they represent the current position of international law and the two most commonly posited alternatives to this position respectively. Contemporary self-determination discourse is in the process of attempting to mediate between these three interpretations of the self, but it is clear that these notions of the self and of identity derive from fundamentally opposing geneses. Accordingly they pull in similarly opposing directions as far as their implications for the meaning and application of self-determination are concerned. Fundamentally, moreover, not one of them has any greater claim to authenticity then any of the others.

Indeed the very idea that identity can be adjudged more or less authentic is itself specious. Authenticity in this context depends for its coherence on the idea that identity is
possessed of a singular, discrete meaning and furthermore that multiple and overlapping identities do not and cannot exist within one person or people. It is the contention of this thesis, however, that there really is no 'authentic' self, (and by implication no less authentic or inauthentic selves either) and that identity is almost always multiple and overlapping. If, as will be argued, there is no authentic self, the idea that there is or could be an authentic community within which this self must necessarily reside is equally unfounded. To attempt to organize the geo-politics of the world in a manner that respects and reflects such authentic identities is thus a conceptual as well as a practical impossibility. This of course does not make the blood spilt in the pursuit of the ideal of self-determination any less real; but it does mean that the current conflicts based on assertions to the right of self-determination can never be ended by appealing to it.

One significant problem with trying to conceptualize the self is that of the seemingly inevitable 'us and them' dichotomy it engenders. As Allott explains, part of being who we are is about not being who the other is; it is an exclusivist and exclusionary understanding of identity. There is then, an obvious tension within the liberal polity as regards all claims based on collectivity; and group rights are received with hostility by many who seek to remain true to liberal ideals, ideals rooted in notions of individual, rather than collective, autonomy. Self-determination, whether conceived of in terms of secession or other forms of autonomy, is thus disruptive not only to states as international actors, but to the fundamental ideals and assumptions of liberalism, torn as it

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is between a desire to embrace (or at least tolerate) difference (which in practice often necessitates recognition of and respect for collective identities) and a need to affirm the primacy of the individual and their autonomy.

Mursweick has written that the ultimate aim of self-determination is the preservation of (the identity of) a people\textsuperscript{7}. The desire to preserve identity stems from a desire to preserve who we are, but preserving who we are means knowing who we are and so the question becomes – who are we and also who are we? Self-determination is thus about the power to control, to determine, to decide, to define. For international law the question is who gets to be on the world stage and from that what does being involve at international law. From the perspective of international human rights, self-determination concerns the centrality of identity to the human experience and is essentially a prerequisite to the achievement of dignity and human flourishing. But how do we know who we are? Why does who we are matter so much to what we do? Is there really such a thing as a true or authentic identity that we should strive to have represented by our international and indeed national institutions?

Deciding what constitutes the self in self-determination depends in large measure, as noted above, on what the ‘determination’ is held to be. Thus there exists the problem of circularity, contingency and the continued (seemingly endless in fact) deferral of meaning. Much of this is attributable to the seemingly widespread desire to formulate

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some kind of blueprint for the purposes of applying the right to contemporary problems. Attempts to do this are, however, destined to fail. International law can never authoritatively define the 'self' for the purposes of self-determination because there is no universally accepted understanding of the 'self' in legal, political or moral theory on which it can uncontroversially rely. In consequence international law is forced to draw on competing, conflicting and contradictory conceptions of the self, conceptions that focus alternatively on ascriptive criteria (i.e. language, religion, history, ethnicity) characterized here by the phenomenon of nationalism, and choice-theory, characterized here by the phenomenon of democratic entitlement.

These two visions of the self can never be reconciled since they derive their meaning and authority from fundamentally opposing belief structures. On the one hand, the view from ascriptive criteria assumes that people’s identities are composed of characteristics external to their own wants and desires, whereas on the other hand, choice theory posits a conception of identity wholly determined according to individuals’ own internal preferences. Furthermore, this incompatibility is far from unique; it is, in fact, illustrative of the inherent impossibility of adequately formulating a definitive definition of the self. Once this is acknowledged, and it is understood that the question of the self simply is not amenable to resolution, it becomes clear that international law, in its attempts to find answers to the questions raised by the right of self-determination, will only ever be able to play a mediating role in the struggle between these competing and conflicting definitions of the self underlying right.
Unable to provide closure on this issue, international law will instead find itself perpetually engaged in a process of mediation, privileging one conception over the other depending on the results in particular cases. Crucially, it will never be able to achieve finality on this question. Such finality simply is not possible. What discussion of the right reveals instead, is the deep ambivalence liberal theory possesses with respect to notions of collective identity and the problems this presents for understanding and responding to the conflicts and not-quite-conflicts plaguing the modern world. While the right of self-determination does not provide all the answers, if indeed it provides any (and I would suggest it does not) it nonetheless provides a forum for consideration of vitally important questions. The mistake is to suppose that it can do more than this, and to become disillusioned and despondent when it fails to live up to the unattainable expectations demanded of it.
A History of Self-Determination

It is today almost beyond question that there exists an internationally recognized legal right to self-determination, as a veritable plethora of international legal texts on the topic attest to.¹ According to the Supreme Court of Canada "The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law ..."². Self-determination has been recognized by the International Court of Justice (ICJ), as constituting one of international law's 'essential principles'³, and it has even been suggested by a leading scholar that the right has attained the status of a peremptory norm of international law⁴.

Nonetheless, self-determination's precise meaning and ambit as a legal rule or principle are far from clear, and the extent to which it can be legitimately invoked in furtherance of various political objectives remains controversial. This continuing

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¹ The precise texts in question will be discussed below, but include the Universal Declaration on Human Rights (UDHR) 1948, the twin Covenants on International Human Rights (1966) and decisions of the International Court of Justice (ICJ) such as those handed down in the Western Sahara Case (1975) and Portugal v East Timor (1995)
² Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 161 D.L.R (4th) 435
³ Judgment of International Court of Justice in East Timor (Portugal v Australia) ICJ Reports 1995, 90
⁴ "...the conclusion is justified that self-determination constitutes a peremptory norm of international law." Antonio Cassese, Self Determination of Peoples (Cambridge: Cambridge University Press, 1995), 140
controversy is to be expected, however, given the history of self-determination in international law and politics. As this Chapter argues, the development and evolution of self-determination from that of a political postulate to a legal norm reveals itself to be principally a story of transformation and as such of conflict and struggle for authoritative meaning. That there should as yet be no such authoritative meaning, despite the arguable existence of distinct phases of meaning in the past, is again unsurprising, indeed arguably inevitable. Self-determination has been able to have relatively discrete meanings in the past, because of the historically situated nature of its invocation; it was conceived of in response to specific events, events that no longer have purchase in today’s world.

This Chapter considers three phases that self-determination has passed through in its historical evolution; those of rhetorical device or political postulate, political principle and positive legal rule, and argues that in the course of this evolution, the potential meaning and application of self-determination has been systematically narrowed in an effort to control and direct it. The history of self-determination is, in addition to one of transformation, also a history of retreat; with each successive incarnation its circle of potential meaning has contracted.

Viewed from the perspective of the history of international law as a whole, self-determination is of relatively recent origin⁵. As late as 1920 its status as a legal right

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⁵ Some authors, such as Franck, posit the existence of self-determination in pre-modern times, but this view shall not be adopted here; see Thomas M. Franck, *Fairness in International Law*
continued to be denied, although its existence as a political principle had long been acknowledged, as can be seen from the following extract from the 1920 Report of International Commission of Jurists on Legal Aspects of the Aaland Islands Question. This central issue in this case concerned whether or not self-determination, in the form of a plebiscite, could be applied to a group of islands off the coast of Finland and Sweden, so as to allow the inhabitants to decide whether to remain part of Finland or join with Sweden. It was argued by Finland - under whose jurisdiction the Islands existed at the time – that the matter was purely domestic and as such was not open to consideration by an international tribunal such as the Council of the League of Nations. This position was effectively endorsed by the Commission of Jurists:

"Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish..."6

As regards the status of self-determination as a rule of law, the commission continued:

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6 and Institutions (Oxford: Clarendon Press, 1995) 92 The origins of the modern system of international law itself can be traced back to the Renaissance, although some of the principles behind it can be found in political relations dating from as early as 2100 BC and the treaty concluded between the city states of Mesopotamia. See Malcolm N. Shaw, International Law (4th edition) (Cambridge: Cambridge University Press, 1997) 12 - 33
“Although the principle of self-determination of peoples plays an important part in modern political thought ...the recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations”

Even after the signing of the United Nations Charter in 1945 it was far from certain that a right of self-determination had formally passed into international law, despite its specific mention in the text of the Charter. Perhaps because self-determination was not explicitly referred to in the Universal Declaration of Human Rights (UDHR) 1948, its status remained ambiguous throughout the 1950s, despite the Charter references, which could be construed, and often were, more as statements of intent than actual binding legal norms.

Subsequently, self-determination has been subject to many competing and often contradictory interpretations, to the extent that one lawyer has described it as constituting: “...one of those unexceptionable goals that can be neither defined nor opposed".

Notwithstanding this characterization, it is suggested that consideration of the history of the right does reveal there to be a consistent theme throughout its development, even if

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8 Self-determination is enshrined as a right of all peoples in Art.1 (2) and Art.55 of the UN Charter
that theme, namely transformation, is itself inconsistent. The evolution of the right has, moreover, had a profound impact on the international legal community, challenging some of its most fundamental precepts, including state sovereignty and territorial integrity.

For the purposes of exposition and exploration, the history of self-determination can be conceptualized in terms of three (not very distinct) phases, representing its incarnations as a rhetorical device, a political principle and a positive legal rule. The last phase is arguably subdividing into pre and post-cold war dimensions, but the latter is as yet in its infancy. In looking at the history of self-determination in practice (both its political and legal dimensions/phases) it will be seen that throughout the development of the right – both in its internal and external versions – it is intimately connected to the idea of states and notions of statehood. By this it is meant that self-determination provides both a justification for organizing the world into states as they are now (so long as internal self-determination prevails) and a challenge to the legitimacy of so doing (when external self-determination is preferred).

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10 The extent to which it is a rule rather than a principle is debated in the literature (see discussion of Cassese and Crawford in Karen C. Knop, The Making of Difference in International Law: Interpretation, Identity and Participation in the Discourse of Self-Determination, S.J.D Thesis, University of Toronto, 2000, 39), but is of limited significance for the purposes of this short exposition.
Internal self-determination supports states insofar as it is concerned with their internal composition and the extent to which they respect principles of western liberal democracy. Provided that democracy is flourishing, no inquiry is made into how or where the borders of the states themselves are located. In contrast, external self-determination starts from the assumption that the current allocation of states is fundamentally flawed and seeks to re-arrange things accordingly. Self-determination is therefore, at once statehood's greatest ally and biggest foe.

This tension between the internal and external versions of self-determination - a tension that runs throughout its history - accounts in large part for the continuing ambivalence and uncertainty surrounding the right and helps to explain many of the problems associated with its application today. In particular it can be seen that the reluctance with which the right has been adequately detailed reflects the desire to contain it so far as possible and to prevent it from assuming dimensions and directions potentially incredibly disruptive of the international order, such as secessionist aspirations. The degree to which such strategies have proved, or are indeed capable of proving, successful remains open to debate.

Phase One: Political Postulate

In its first incarnation self-determination can be seen to have emerged in Western European political thought as a consequence of Enlightenment thinking regarding responsible government or, perhaps more accurately, government responsible to the people. As such, it took inspiration from the writings of Locke and Rousseau, both of whom considered the legitimacy of government to be dependent on the degree to which it was commensurate with the consent of those subject to it. On this view, a government is legitimate and able to command respect and obedience, only to the extent that its rule is consented to by the people over whom it has control. Granted, such consent is generally assumed to be given tacitly in the form of an implied social contract that one enters into simply by virtue of being born and remaining within the physical boundaries of the political community; but there remains an element of free choice, even if it is largely theoretical.

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12 The following discussion is based primarily on Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal, (Cambridge: Cambridge University Press, 1995). See also Thomas D. Musgrave, Self-Determination and National Minorities (Oxford: Clarendon Press, 1997) at 1 – 14, for a reiteration of the demos v ethnos view of the development of self-determination in Western and Eastern/Central Europe respectively; and Franck, supra note 5, for the view that self-determination had a pre-modern incarnation.
This idea, of the necessity for there to be some congruence between the desires of the people and the government they enjoy, was, at the level of rhetoric at least, one of the driving forces behind both the American Declaration of Independence in 1779 and the French Revolution of 1789. The supporters of both revolutions prided themselves on their commitment to the innate autonomy of individuals - consent being premised on a belief in and respect for individual choice - and their rejection of the *ancien régime*. Such a belief in autonomy was clearly inconsistent with an international system such as that prevailing at the time, one founded upon monarchical dynasties under which people were regarded essentially as the property of empires, allowing them to be traded across territories like pawns in a game of chess.\footnote{[People ought not to be] bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game.” Woodrow Wilson’s speech of 11 February 1918 as cited in Antonio Cassese, *Self-Determination of Peoples* (Cambridge: Cambridge University Press, 1995) 20} From the beginning, therefore, self-determination presented a challenge to the accepted political authority and institutions; albeit that in practice this challenge proved to be a somewhat limited one.

The reason for the limited nature of the challenge posed by self-determination at this point in its history is that, as articulated by the post-revolutionary French government, self-determination was essentially nothing more than a method of determining the transfer of territory among or between states. At the level of theory it differed from the previous arrangements regarding such transfers by linking them to the wishes of the people who lived in the territories through the mechanism of a plebiscite. In practice, however, the
idea was applied very selectively, the idea that it might be of universal application was never contemplated and for this reason it is not entirely unwarranted to suggest that at this stage it could not really be regarded as constituting even a political principle. Not only were the validity of the plebiscites wholly dependent upon their favouring French expansionism, but their very existence operated only in relation to existing European states; the idea that people under colonial rule should be afforded the same (indeed any) degree of participation in the determination of their political status was simply inconceivable. Moreover, to the extent that self-determination was applied at all, it admitted only of changes to the borders of recognized states; it did not present any challenges whatsoever to the existence of the state system as such.

While the concept of self-determination was therefore emancipatory in origin, it was so almost exclusively at the level of rhetoric. Crucially, it did not challenge the existing power structures of Western Europe, nor the arbitrary division of the world into states according to the interests of Western elites. Rather, its strategic employment acted as a justification for reallocating territory among existing states in a manner that favoured those who invoked it; largely France. Arguably, any coincidence between French interests and those of the people living in the territory annexed by France was just that – coincidence.
Phase Two: Political Principle

Even at the level of political rhetoric, however, the idea of self-determination had a powerful appeal, and despite its limited application in the context of post-revolutionary France, it gained support, among both academics and statesmen, throughout the 19th and early 20th centuries\(^\text{14}\). Unsurprisingly, it found greatest favour in those states not rooted in the \textit{ancien regime}; namely Russia and America. In the years leading up to the First World War, both Lenin and Woodrow Wilson were ardent supporters of self-determination, albeit with radically differing understandings of what such support involved. Accordingly, while both claimed to be advancing the same principle, the substantive content each advocated differed considerably\(^\text{15}\), a reflection of the vast ideological gulf that existed (and continues to exist) between Russia and the United States.

For Lenin – considered by many to be the first serious proponent of the right at the international level\(^\text{16}\) - self-determination was conceived of as a general criterion for the liberation of peoples. It was capable of being invoked by three classes of people:

\(^{14}\) For example, Mazzini invoked the concept in his quest for Italian Unification. See Thomas D Musgrave, \textit{Self-Determination and National Minorities} (Oxford: Clarendon Press, 1997) 6

\(^{15}\) In essence Lenin championed the external variant of self-determination, whereas Wilson supported the internal one.

\(^{16}\) Antonio Cassese, \textit{Self-Determination of Peoples} (Cambridge: Cambridge University Press, 1995) 14
ethnic or national groups, sovereign states following the aftermath of military conflicts and anti-colonial movements. Violent secession was considered an appropriate response in the case of the latter, but the principle was always held to be subordinate to the emancipation of the proletariat through revolution, rendering it essentially of instrumental value.

In contrast, Wilson’s vision of self-determination was rooted in Rousseauian ideas of social contract, as discussed above. Its focus was on the rights of people, by which was understood nations or nationalities, to determine the boundaries of their own political communities. According to this version, self-determination was essentially the logical corollary of popular sovereignty, entailing self-government within existing state structures. That it would be almost inevitable (perhaps even a necessary corollary) that self-determination would be invoked in support of challenges to international boundaries seemingly did not occur to Wilson, although the possible implications of the right were clearly appreciated by his Secretary of State, Robert Lansing, who wrote of it that it was a phrase:

‘...loaded with dynamite [that] will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be
discredited, to be called the dream of an idealist, who failed to realize the danger until too late.\(^\text{17}\)

Following the end of World War I, and pursuant to the signing of the Treaty of Versailles of 1919, self-determination as envisaged by Wilson appeared to have triumphed, at least in as much as it had assumed a prominent role in European politics. It was declared by the Allies to constitute a guiding principle of the Paris Peace Conference (of 1919) and under its auspices certain countries that had formerly been subsumed within the defeated Ottoman Empire were given by the Allies the opportunity to decide their political future by means of a series of plebiscites.\(^\text{18}\) Again, however, to the extent that this principle formed the backdrop to the negotiations at Versailles, it did so in a highly partial fashion. Never was there any suggestion that self-determination was intended to be of universal application\(^\text{19}\) – how could there have been at a time when the European powers were still in the midst of the scramble for Africa? Rather, self-determination was intended to govern only the defeated Ottoman and Austro-Hungarian empires and their


\(^{18}\) For example, Upper Silesia, the Southern part of Eastern Prussia, Saarland and Northern Schleswig

\(^{19}\) See for example this memorandum from the British Foreign Office in November 1918 in A. Zimmermen *The League of Nations and the Rule of Law, 1918-1935* (1936) 199, 200: “It would clearly be inadvisable to go even the smallest distance in the direction of admitting the claim of the American Negroes, or the Southern Irish or the Flemmings or Catalans, to appeal to an Inter-State conference over the head of their own government”, cited in Musgrave *supra* note 17 at 27
colonies; with the latter being turned into Mandate territories under the administration of the League of Nations.

The move from political rhetoric to political principle did not, therefore, entail any substantial re-evaluation of the philosophical assumptions regarding the appropriate holders of the right. Self-determination was still considered to apply only to states and, moreover, only those states deemed acceptable by the great powers. To consider the principle at this stage to have constituted anything more than political posturing is arguably unwarranted. Certainly its ad hoc and limited application was such that it could not be considered a ‘right’ in any legal sense,\(^\text{20}\) and it was deliberately omitted from the Covenant of the League of Nations despite Wilson’s efforts to include it.\(^\text{21}\) In fact, it took in excess of thirty years and another world war before self-determination was able to make the transition from political principle to legal norm. The first steps in the transition occurred with the signing of the United Nations Charter in 1945.\(^\text{22}\)

\(^{20}\) See Aaland Islands Case (1920)

\(^{21}\) The draft version of Art. 3 of the Covenant proposed by Wilson “...specified that the principle of self-determination would be the basis for making any further territorial adjustments as might become necessary as a result of changes in social or political relationships.” From David Hunter Miller, The Drafting of the Covenant (1928) Vol.2 12 as cited in Musgrave, supra at 30. The final version of the Covenant, however, made no reference to this and instead “…emphasized respect for the territorial integrity and existing political independence…” of existing states, supra note 17 at 31

\(^{22}\) It should be noted here that the first international treaty explicitly to refer to the concept of self-determination was the Atlantic Charter in 1942. Although paid relatively little attention in the literature, this agreement (which as its name suggests) concluded by Britain and America proclaimed self-determination as a general standard governing territorial changes as well as a principle concerning the free choice of rulers in every sovereign state
Phase Three: Legal Right

Conceived of as the blueprint for a new world order, the UN Charter of 1945 was explicitly premised upon respect for human rights, although it was not at all clear that such rights would extend to include one of self-determination. Several states, most notably Belgium, actively opposed its inclusion within the Charter and it was only at the insistence of the USSR that it found its way into the Charter at all. In the face of such hostility, it is unsurprising that references to self-determination occur only twice in the Charter; in Articles 1(2) and 55:

*Article 1 (2):* The purposes of the United Nations are: 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.

*Article 55:* With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on

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23 See Preamble to the UN Charter 1945: “We the peoples of the United Nations Determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...”

24 Cassese *supra* note 16 at 39-40
respect for the principle of equal rights and self-determination of peoples, the united Nations shall promote [higher standards of living; solutions of economic-social problems; and universal respect for and observance of human rights]

Even at this early stage controversy and confusion surrounded the precise scope and application of the provision. In the first place, articulating the substantive content of the norm proved illusive and it was (and arguably still is) considerably easier to state with confidence what was not included under its aegis than what was. Among the many consequences not entailed by the right were: secession for national or ethnic minority groups, political independence (as opposed to self-government) for colonial peoples, freedom for people to determine internal political leaders of sovereign states and the ability of nations to merge. In practice, therefore, the right or principle, such as it was, essentially amounted to the granting of self-government to territories controlled by Western states. Moreover, since it was originally conceived of as a goal of the United Nations Organization it did not impose direct or immediate legal obligations upon states. Indeed, according to Cassese, its value as originally conceived was primarily instrumental: it was necessary and desirable to the extent that it contributed to the fostering of universal peace, but it was liable to be set aside in the event that it should conflict with that aim. In no way could it be considered a peremptory norm of

25 Cassese supra note 16 at 41
international law – a rule whose obligations bind all states, not merely those party to the relevant treaty.

Over time the application of the norm slowly expanded to include not just the UN as a collective body, but each member state individually, and as it did so it became subject to conflicting interpretations as to its correct meaning and force. Broadly speaking, three alternative approaches can be detected. Socialist countries, led by the USSR, propounded the concept as a source of liberation for countries under the yoke of colonialism and/or racist regimes, emphasizing its external aspect and linking it to the international law doctrines of sovereign equality and territorial integrity.

A similar approach was adopted by third world countries, for whom illegal occupation of territory by alien oppressors was included as an evil to be addressed by self-determination. In contrast, the Western states were initially resolutely opposed to all such moves to expand the concept beyond its original narrow parameters. However, in the face of a growing anti-colonial movement that invoked self-determination, it was realized that continued outright opposition was untenable and instead Western States began to focus attention on the internal aspects of the right - aspects that were regarded as constituting the 'quintessence of democratic freedom' - in attempts to universalize this entitlement.

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26 Cassese supra note 16 at 44-46
27 ibid at 46
Given the hostility towards the concept displayed by Western European powers and the ambivalent stance adopted by the United States, it should not be surprising that when it came to the signing of the Universal Declaration of Human Rights (UDHR) in 1948 self-determination was conspicuous by its absence. Though this may appear to constitute a somewhat retrograde step, by the time that the UDHR came to be translated into binding legal treaties in the form of the Twin International Covenants on Human Rights (the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966) self-determination had assumed center stage – enshrined in Article 1 of both Covenants:

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.\(^{28}\)

In addition, at the behest of Third World states, and against the wishes of both the West and the USSR, albeit for different reasons, the right was extended to cover not only colonial peoples and minorities, but all ‘peoples’ generally. Western states objected to this expansion of those potentially able to invoke the right, on the basis that it would encourage secessionist aspirations among minority groups and thus threaten to destabilize international relations. Moreover, as the wording of the Covenant makes clear the right
was not considered to be confined to the political realm, but rather encompasses the ability of people to ‘...freely pursue their economic, social and cultural development’;\(^{29}\) including the ability to ‘...freely dispose of their natural wealth and resources...’\(^{30}\)

Following its inclusion in the twin Covenants (both of which were ratified in 1955, although neither entered into force until over a decade later in 1966), self-determination emerged as a general principle, or indeed rule, governing and legitimizing the decolonization process. The attempt by Western states to promote the internal dimension of the right and, by implication, to marginalize the external aspect, had thus been to a degree overtaken by events. Self-determination became essentially synonymous with decolonization, a fact that is evident from the practice of the United Nations General Assembly generally, and in particular from two resolutions passed by it in 1960: Resolution 1514 (XV), Dec. 14 1960 entitled “The Declaration on the Granting of Independence to Colonial Countries and Peoples’, and Resolution 1541 (XV), Dec...\(^{31}\)

Resolution 1514: The General Assembly... Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is

\(^{28}\) International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966, Article 1 (1)

\(^{29}\) ibid

\(^{30}\) ibid Art. 1 (2)

\(^{31}\) According to Musgrave, Resolution 1514 declared independence to be the only method of achieving self-determination, supra note 14 at 72
contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation

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

As can be seen, Resolution 1514 (XV) drew word for word on Article 1 of the Twin Covenants in its exposition of the right of self-determination. In addition, and together with Resolution 1541 (XV), standards were for the first time laid down for the actual implementation of the right. This included specifying: its application – all colonial peoples; its ambit – purely external and capable of being exercised only once; and its limitations – applicable only to entire populations of states, not in other words, open to claims by ethnic or national groups within states created by colonial powers.

Furthermore, both resolutions made clear that such independence as was granted was contingent upon the acceptance of existing state borders (following the principle of uti possidetis (juris)).\(^{32}\) Indeed, the necessity of respecting the territorial integrity of existing states has been a consistent theme throughout the history of self-determination. Thus, while the use of self-determination in the decolonization process unquestionably

\(^{32}\) *ibid* para. 6 reads: "Any attempt aimed 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"
revolutionized the existing international community, it did so within a framework as unthreatening as possible to its underlying structure. New subjects of international law may have been created, but they were still states and their existence as such depended on their acquiescence to territorial boundaries determined according to the political expediency and administrative convenience of the imperial powers.

Despite the circumscribed nature of the right granted in the resolutions on Self-Determination passed by the UN General Assembly, almost all of them were actively opposed by Western states. One notable exception, however, is that of Resolution 2625 (XXV) of 1970, entitled ‘The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’.

Although Resolution 2625 (XXV) clearly accepted that decolonization constituted a central method of realizing self-determination, it did not regard it as constituting the exclusive means of so doing. This is evident from the wording of paragraph 1 of the Resolution which lists various methods by which self-determination may be achieved, including through the ‘...establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people...’. In addition to this expansion of the right to include options other than the creation of independent sovereign states,

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33 Membership of the United Nations increased from 51 in 1945 to 127, by the end of the 1960s as a result of decolonization
Resolution 2625 (XXV) for the first time raised the possibility of moving self-determination beyond the decolonization context by explicitly linking the legitimacy of the exercise of self-determination to the existence of democratic governance within the resulting state:

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 [in the UN Charter] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color [emphasis added].

This shift in emphasis occasioned by Resolution 2625 (XXV) reintroduced the idea (championed by Woodrow Wilson) that self-determination was to be understood as an ongoing right involving representative government, rather than as a one-time only exercise of independence exhausted by its successful invocation. As such the Resolution can arguably be viewed as ushering in the beginnings of the fourth age of self-determination – that of democratic governance. According to theorists of the fourth age, the demise of colonialism did not signal the retirement of the concept of self-determination from international law and politics, as some have suggested, but rather

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34 Resolution 2625 (XXV) 1970 para 2
35 Ibid para 7
represented the dawning of a new era. This era, however, seems to operate only with respect to the internal arrangement of states, with the end of colonialism representing the end of external boundary shifting with regard to states. (From the external perspective, self-determination means freedom from outside interference, and respect for the political and territorial integrity of existing states, and thus militates against the formation of new geographical identities. This theme is developed further in Chapter Five).

Subsequent to Resolution 2625 (XXV), however, decisions of the International Court of Justice (ICJ) have affirmed both the acceptance of self-determination in the international legal canon and its effective restriction to cases of decolonization.

In the first judgment to discuss self-determination as a legal right - The 1971 Advisory Opinion on the status of Namibia, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (henceforth *Advisory Opinion on Namibia (1971)*) - the Court held that “the ... development of international law in regard to non-self-governing territories...made the principle of self-determination applicable to all of them.” According, it clearly linked the right to the granting of independence to those territories that had formerly been colonies.

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Similarly, in its 1975 Advisory Opinion on the Western Sahara the ICJ reiterated the applicability of the right to all non-self-governing territories and further expanded upon its constituent components by stating that, in the course of fulfilling it, it was necessary to "...pay regard to the freely expressed will of the peoples." Indeed, according to Judge Nagendra Singh, such freely expressed will constituted "...the very sine qua non of all decolonization," and decolonization was regarded as being effectively synonymous with the exercise of self-determination, as Shaw explains:

[The attitude of the court] appeared to be to regard decolonization as the basic framework and self-determination as the most important relevant principle.... The principle of decolonization is composed to a large extent of the principle of self-determination while self-determination has operated in international law primarily in the sphere of decolonization.

The most recent decision from the ICJ on the subject of self-determination is that relating to the situation in East Timor. In its 1995 judgment the Court found the right to

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37 Advisory Opinion on Namibia (1971) ICJ Reports 1971, 31 (para.52)
38 Advisory Opinion on Western Sahara (1975) 16 ICJ Reports 31
39 ibid 33, (para 59)
40 ibid 12 at 68, cited in Musgrave supra note 14 at 33
41 ibid
be ‘...one of the essential principles of contemporary international law’ and deemed it to have achieved ‘...an *erga omnes* character...’ being in fact ‘...irreproachable.’"  

The apparent clarity with which the Court referred to self-determination in the East Timor case, however, belies the fact that since the collapse of the Soviet Union in 1989 the meaning of the right in international law has lost much of its doctrinal coherency. By this it is meant that with the end of decolonization and the triumph of liberal democracy as the exclusive voice of the international community, the pre-existing political motivations for the existence of the right (which mostly concerned attempts to limit the appeal of communism to the third world) have dissipated, and the many ambiguities, uncertainties and contradictions inherent in the right have resurfaced with greater urgency.

The following three Chapters consider alternative attempts to resolve this crisis of meaning through the articulation of conceptions of the *self* to whom the right applies. As will be argued below, however, none are able to succeed in this endeavor, by virtue of the inherent ambiguities, uncertainties and contradictions that characterize the phenomenon of identity upon which conceptions of the *self* ultimately rest.

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43 *Case Concerning East Timor (Portugal v Australia) (1995) ICJ Reports 4* at 16 paragraph 29
The \textit{Self} as the Population of a Sovereign State

Under current international law, before a group can lay claim to the right of self-determination (regardless of what that right may be thought to entail) it is required that they first cross the threshold step of being characterized as a 'people'.\textsuperscript{1} Exactly what constitutes a 'people' for the purposes of self-determination remains, however, the site of considerable controversy and contestation. In particular is the question of what peoples are in general and how they are to be distinguished from other collectivities\textsuperscript{2}.

The following three Chapters address this crucial issue of meaning by considering three alternative ideas regarding how it is that a 'people' should be understood in international law. As noted in Chapter One these are: the population of a sovereign state, the nation and the individual. International legal theory has repeatedly oscillated between these competing conceptions of the \textit{self}, and indeed continues to do so; finding nowhere the much sought after permanence and stability necessary to render the right uncontestable. It is suggested, moreover, that this oscillation is an inherent feature of self-determination discourse because of the relationship between conceptions of the \textit{self} and

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{1} Judgment of the Supreme Court of Canada in \textit{Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada}, [1998] 161 D.L.R (4th) 385 at paragraph 123
\item\textsuperscript{2} David Makinson, \textit{A Logician's Point of View} in James Crawford (ed) \textit{The Rights of Peoples} (Oxford: Clarendon Press, 1988) at 72
\end{itemize}
\end{footnotesize}
conceptions of identity. Which is to say that since the latter does not admit of uncontested
definition, neither does, nor indeed can, the former.

In this Chapter the position of positive international law is examined. This is a
position that adopts a restrictive approach to the interpretation of peoples and the self,
conceiving of them in purely territorial terms and seeking to confine the ambit of self-
determination to the sphere of decolonization. It is argued in this Chapter that such an
approach is patently defective in that it fails to accord sufficient, indeed any, weight to the
relationship between self-determination and identity, with the result that the analysis
offered is partial and incomplete; useful only to the extent that it demonstrates this truth.

It is unfortunate that while international law has been relatively clear in choosing
to bestow the right of self-determination upon 'peoples' rather than any other
collectivity\(^3\), it has been rather less clear in developing a principled specification of who
such peoples might be. It is in no small measure thanks to this manifest failure that the
current incoherence regarding the right to self-determination persists\(^4\).

The situation is not helped by the silence on the topic from various UN bodies,
兮odies from whom some degree of illumination and guidance may ordinarily have been
expected. In particular, the behavior of the United Nations Committee on Human Rights

\(^3\) See the many international legal texts referring to the self-determination of peoples, such as the
UN Charter, the ICCPR and the ICESCR.
\(^4\) Undoubtedly it is not the only reason, there is always the problem from circularity discussed
above, but it certainly a major contributor
(HRC) has been less than helpful with regard to clarifying the appropriate bearers of the right, a truth readily acknowledged by McGoldrick in his detailed consideration of the work of the committee.\(^5\)

McGoldrick notes that when it comes to the question of what constitutes a people, the Committee has "...not even attempted to provide a definition or any governing criteria."\(^6\) To the extent that it has said anything about who might be the proper subjects of the right, it has confined itself to rejecting the suggestion that the right is exercisable by individuals \textit{qua} individuals. That this is so was made abundantly clear in the case of \textit{Lubicon Lake Band v Canada}\.\(^7\)

In this case the HRC refused to consider a communication submitted by an individual under the Optional Protocol to the ICCPR on the grounds that "...the author, as an individual, cannot claim under the Optional Protocol to be a victim of a violation of the right to self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon \textit{peoples} as such [emphasis added]".\(^8\)

Despite the difficulty of the question 'what constitutes a people for the purposes of self-determination', consideration of it is nonetheless unavoidable, for, in the absence of

\(^6\) ibid 250
resolution of this issue the successful and legitimate invocation of the right will remain unknown and indeed unknowable. However, it is the contention of this thesis that such resolution will never in fact be forthcoming and thus neither will there be, nor indeed can there be, such uncontroversial application of the right as seems to be desired by so many. Rather, there will always be conflicting interpretations of the meaning of self-determination, interpretations between which international law will be compelled to mediate as it attempts to resolve crises as they arise.

The difficulty is, however, that this ad hoc approach will always leave international law open to accusations of unprincipled and opportunistic behaviour (which, of course, will be true, but which will also be inevitable given the nature of ad hoc activities). In addition, such an approach will encourage the proliferation of ever more alternative conceptions of the self, the ‘truth’ of which cannot be measured against any universal barometer of objective legitimacy and which will for that reason stand or fall according to the political consequences their adoption would entail. That this is so can be seen from the way that international law has sought to interpret the self in self-determination; namely, by regarding it as territorially based.

To some extent it is possible to account for the conceptual and normative incoherence surrounding what constitutes the self in international law by appreciating the historical circumstances of the right’s initial entry into international legal discourse. By this it is meant that at the time of the drafting of the various texts first concerning self-
determination, - e.g.: the UN Charter (1945) and the Twin Covenants (1966) - there was a significant degree of political consensus with respect to what the right was intended to achieve and who was intended to benefit from it. In other words, it meant self-government for non-self-governing territories - colonies - and the people benefiting were colonial populations. Or to put it another way, the three questions of 'who, what and when' were answered by the following: states (the borders of which were predetermined by Western Empires; not only for themselves but throughout the world), independent sovereign statehood (understood in the classical positive international law sense) and when the criteria for decolonization were met (such as they were)(").

Accordingly, there was no need for the clarification of self-determination, such as is so acutely necessary today. Provided that all concerned understood decolonization to be the intended result of the exercise of the right, articulating the right through the language or rhetoric of 'peoples' was unproblematic. Of crucial importance is the fact that on this understanding there was already a fixed boundary to the exercise of self-determination: a territorial one. The question of what groups constituted a 'people' was therefore circumscribed by the necessity of conforming to colonial administrative boundaries. Only when the (arguably inevitable) expansion of the right began to be seriously advocated and the inadequacy of the territorial limitation exposed, did the lack of a cogent conceptual framework become problematic.

10 See, for example the minutes of the meetings prior to the adoption of the International Covenant on Civil and Political Rights
Historical developments subsequent to the dismantling of colonialism, including the development of the awareness of the rights of indigenous populations in Canada and Australia in particular, and the adoption of the language of self-determination to further advance those rights, forced a reconceptualisation of each one of these three elements (the who, what and when), beginning with the notion of the self.

In considering how international law has sought to define and contain the appropriate subject(s) for the right of self-determination, a useful starting place is the judgment of the Supreme Court of Canada in its 1998 Quebec Secession Reference. This case concerned the legal implications for the Canadian government should the people of Quebec at some point return a referendum vote in favour of seceding from Canada. Having embarked on a discussion of the constitutional implications of the reference and deeming itself competent to address the substantive issues raised, the court turned to consideration of the nature of self-determination as articulated in international law. It noted that international law confers the right upon ‘peoples’, but that a precise and uncontroversial definition of ‘peoples’, had yet to be forthcoming. Nonetheless the

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11 Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 161 D.L.R (4th) 385

12 See: Article 1 (2) of the United Nations Charter: “[the purposes of the United Nations are:] “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”, Article 1 (1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights “All peoples have the right of self-determination...”

13 Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 161 D.L.R (4th) 385 at paragraph 123
court was confident of at least some degree of consensus regarding those to whom the term might refer:

It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. *To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative*, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, *and would frustrate its remedial purpose.*14 [emphasis added]

According to the court, therefore, whatever else a 'people' might be held to encompass for the purposes of self-determination, to equate it solely with the entire population of a sovereign state was unjustified. This was held to be so for two reasons. First, because the right as understood by the court is not synonymous with the right of states to be free from external interference in their domestic affairs15, which is what it would effectively, amount to were the population-of-a-sovereign-state interpretation adhered to. Arguably self-determination does include this right, but is also much more than this. The second reason advanced by the Court was that such a restriction would

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14 *Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada*, [1998] 161 D.L.R. (4th) 385 at paragraph 124
15 Such a right being found in Article 2 (4) or (7) of the United Nations Charter 1945
prevent the right from being able to address the interests of sub-state groups; something the court implicitly regarded as being part of its (self-determination’s) mandate.

Having stated all of this, however, the court seemingly felt it unnecessary to further elaborate on the possible groups entitled to the right. The apparent rationale for this was as follows. The Supreme Court took the view that, regardless of the correct definition of a ‘people’ in international law, and regardless of whether the population of Quebec constituted such, falling within that classification alone was not sufficient to ground an internationally recognized right to unilateral secession. Since the right of Quebec to secede from English Canada was the sole issue in the case as far as the court was concerned, further consideration of issues pertaining to the question of the self in self-determination was deemed redundant. 16

The reasoning adopted by the Supreme Court of Canada in this case displays a degree of confusion with regard to self-determination, as it seems both to support and to challenge existing ideas about the right in international law. On the one hand it supports the status quo by making clear that external self-determination (secession) constitutes a measure of last resort17. On the other hand, however, the Court arguably challenges orthodox interpretations of the right by accepting the idea that there may legitimately exist

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16 Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 161 D.L.R (4th) 385 at para 125
17 “A right to external self-determination arises in only the most extreme of cases”, ibid para 126
a contingent right of external self-determination in those situations where internal self-
determination – that which it regards as self-determination’s usual form – is not enough.\textsuperscript{18}

As just mentioned, the Court appeared to be operating on the assumption that what
is routinely meant by self-determination in international law is ‘internal’ self-
determination\textsuperscript{19}, whereas that which has historically been most commonly understood by
self-determination is ‘external’. Internal self-determination as stated in the judgment,
consists of:

\begin{quote}
a people's pursuit of its political, economic, social and cultural development
within the framework of an existing state.\textsuperscript{20}
\end{quote}

It is therefore, a version of self-determination that does not countenance any
investigation into the appropriateness or legitimacy of the external borders of existing
states. As the above quote makes clear, all issues of self-determination fall to be resolved

\textsuperscript{18} "While international law generally regulates the conduct of nation states, it does, in some
specific circumstances, also recognize the "rights" of entities other than nation states - such as the
right of a people to self-determination" \textit{ibid} para 113

\textsuperscript{19} "The recognized sources of international law establish that the right to self-determination of a
people is normally fulfilled through internal self-determination" \textit{ibid} at para 126

\textsuperscript{20} ibid
"...within the framework of an existing state".²¹ This position is, of course, entirely in keeping with orthodox interpretations of self-determination, in which, as previously mentioned, the right has generally been understood to be that which is entailed by 'external self-determination'; often, but not always, resulting in independent statehood.²²

The definition of 'peoples' that has resulted from this external understanding of self-determination, has been restricted solely to those groups that make up the population of a sovereign state; namely, colonies and populations under foreign domination and control. Indeed, one of the rare areas of apparent consensus with regard to the right is its undisputed application to colonial populations – technically those resident in trust territories and non-self-governing territories under the United Nations Charter. For international law, therefore, the definition of 'peoples' is territorially based, and it has forcefully resisted attempts to challenge the idea that territory is a precondition for, rather than a consequence of, a successful claim for self-determination²³.

Yet still controversy persists. Makinson for example, considers it to be axiomatic that 'peoples' cannot simply be equated with states; the two, he insists, are necessarily conceptually distinct²⁴. The former denotes a kind of collectivity or group of human

²¹ ibid
²² See G.A Resolution 2625 (XXV), Oct 24 1970, Art. 1 for elaboration regarding the various forms that external self-determination may assume.
²³ This is evidenced by international law’s continued adherence to the principle of uti possidetis, which preserves existing state boundaries, thus leaving those groups currently without territory, such as the Palestinians, unable to claim self-determination
beings; the latter stipulates a type of governing or administrative apparatus. Yet to regard the two as essentially amounting to the same thing for the purposes of self-determination is precisely the interpretation of international law adopted by Higgins\textsuperscript{25}. Higgins maintains that the bearers of the right as originally conceived in the Charter were sovereign states. She writes that the context in which the references to the right appear in the Charter demonstrate that what was being provided for were ‘...the rights of the peoples of one state to be protected from interference by other states or governments.’\textsuperscript{26}

Although the wording of the Charter may have spoken of the rights of ‘peoples’, it was, in fact, the equal rights of states that was being provided for, a fact made evident, she states, by the coupling in the text of “self-determination” with “equal rights”\textsuperscript{27}.

According to this narrative, therefore, the ‘people’ in whom the right of self-determination inheres are those constituting the populations of pre-existing sovereign states. In particular, this understanding neatly dovetails with the interpretation of self-determination that restricts the application of the right to former colonies; a position adopted by the international legal community. As will be shown below, the international legal texts dealing with self-determination, the judgments of the International Court of Justice (ICJ) and many of the resolutions from the United Nations General Assembly have all reinforced the link between self-determination and decolonization and the consequent


\textsuperscript{26}ibid

\textsuperscript{27}ibid
perception that the only ‘peoples’ entitled to exercise the right are the populations of former colonies.

According to the UN Charter, self-determination is effectively held to apply to both the populations of trust territories (those territories originally held under the League of Nations mandate system, such as British controlled Palestine and South African controlled Namibia) and the populations of non-self-governing territories – territories “…whose people have not yet attained a full measure of self-government)\(^{28}\). This interpretation has been reinforced by decisions of the ICJ such as that of *Advisory Opinion on the Western Sahara Case 1975*.\(^{29}\)

One argument in favour of this restrictive approach is that self-determination can only ever be applicable to colonial situations, because prior to colonialism the right did not exist and its emergence into international law was as a direct and specific response to the practice of colonialism. Accordingly the right has meaning in the context of decolonization and decolonization alone.

\(^{28}\) Technically the United Nations Charter did not refer to self-determination for such territories, preferring instead to speak of self-government. However, subsequent decisions of the ICJ, for example in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion [1971] - have made clear that regardless of this omission, a right of self-determination existed for these entities.

\(^{29}\) See Chapter Two on the history of self-determination for further discussion of this issue
The approach of international law is notable, not merely for its restrictive consequences vis-à-vis those entitled to invoke the right of self-determination, but also for the way in which it neatly (or not so neatly) sidesteps, or at any rate attempts to sidestep, the question of identity. Yet as this question lies at the heart of the self-determination debate, attempts to circumvent it naturally suffer from artificiality and incompleteness.

Critically, conceiving of the self as always and only the population of an already existing state (a territorial interpretation, in other words) dispenses with the need for critical evaluation regarding what constitutes the proper unit of the polis for the purposes of the exercise of legitimate political authority. It essentially denies the case for re-examining the current apportionment of political authority throughout the world - that is of the existence of states as they are presently arranged - by removing the possibility of any alternatives from the debate. Of course, it hardly needs stating why it is that international law is so keen to restrict the scope of groups qualifying as ‘peoples’ in this way; its adherence to the principle of territorial integrity is unremarkable and support for self-determination in international legal texts is itself almost always hedged by repeated assurances of the need for, and inviolability of, territorial integrity.30

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30 e.g. G.A. Res. 2625 (XXV), October 24, 1970 Para. 2: “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...”
This perception, that identity is somehow superfluous to understanding, let alone establishing, a right to self-determination, or, if not necessarily superfluous then at least secondary to the question of territory, is not merely the preserve of self-interested state actors, however; it is a position also held by some academics, most notably Brilmayer. According to Brilmayer, much of the current impasse afflicting self-determination can be attributed to the false dichotomy set up in the literature between, on the one hand the right of peoples to self-determination and, on the other hand, the right of states to maintain their territorial integrity. In fact, she argues that these two seemingly contradictory principles are not mutually exclusive, but rather complementary.

This, according to Brilmayer, is a truth readily discernible once it is recognized that secessionist aspirations (which are usually, though not always, Brilmayer asserts, the avowed aim of self-determination claims – the two are treated by her as essentially synonymous) are overwhelmingly rooted in a desire to correct past historical injustices with respect to territory. Accordingly, claims to self-determination should not be dominated by the (implicitly semantic) characterization of whether the group making the claim can be regarded as a ‘people’. Rather, such claims should stand or fall primarily on the degree to which it can be successfully maintained that the group in question has a claim to a particular piece of land; land currently denied to it by the wrongful actions of the state of which that group finds itself part.

On this account, the issue of identity, discussed by Brilmayer in terms of ethnicity, serves not as an independent determinant of the validity of self-determinations claims, but rather provides an explanation as to why such historical grievances continue to possess contemporary salience (enough, in fact, to warrant violent secessionist movements). Which is to say that ethnicity both "...identifies the people making the disputed territorial claim"\textsuperscript{32} and motivates people/generations far removed from the original territorial historical injustice to identify with those were unjustly treated in the past. Essentially therefore it binds the present to the past and to the future in one continuous line of collective victimhood, and in Brilmayer's words, "...answers the question 'why do people still care about something that occurred such a long time ago?'...[Giving] current claimants their standing to protest, not in a technical, but in an emotional sense."\textsuperscript{33} A contemporary example of this phenomenon is that of the Serbs and Bosnians in the Former Republic of Yugoslavia and the Palestinians and Israelis in Israel.

There is here an obvious problem with this approach, and it involves determining exactly how far back one must go to establish ownership with respect to land wrongfully acquired. In practice moreover, evaluating historical wrongs is arguably of little use given that there seem to be so many of them perpetrated by everyone concerned. As Wippman remarks: "In many secessionist disputes...historical grievances are so ancient and so

\textsuperscript{32} \textit{ibid} 178
\textsuperscript{33} \textit{ibid} 192
plentiful on all sides that they cannot be disentangled in any meaningful way." \(^{34}\) Consider, for instance, the conflict in the Former Yugoslavia, where there is a seemingly intractable series of claims and counter claims with respect to who are the true victims and aggressors. The extent to which such difficulties serve to invalidate the entire analysis is by no means assured and certainly open to dispute, but their very existence is further evidence of the problems surrounding this argument.

An additional difficulty with Brilmayer's account is that reference is continually made to the 'groups' or 'peoples' seeking self-determination/secession, without any attempt to analyze the composition of such groups or in any meaningful way explore the ties that bind them. Indeed, one of the supposed advantages of this interpretation is that it obviates the need to investigate the entire notion of what constitutes a 'people'; such characterization being deemed of secondary importance to the issue of the extent to which the land they (whoever 'they' may be) lay claim to can be regarded as legitimately/morally theirs.

However, there are two important features missing from this narrative. In the first place it lacks a convincing account of who the separatists are, in other words, how it is that they perceive their collectivity. Secondly there is no explanation as to what it is about this identity that fuels their desire to form a separate state. In short, what is lacking is an understanding of the motivation behind their rejection of the prevailing political authority.

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Past historical wrongs, while no doubt contributing to a sense of moral righteousness on the part of those affected (or those who perceive themselves to be so affected by virtue of possessing a shared identity with those directly affected in the past) are, or should be considered to be, insufficient to ground the demand for international legal recognition of difference in the form of the creation of new sovereign states.

One possible basis for redrawing the international boundaries of political authority could arguably be found in the consent/ popular sovereignty theory of government. According to this premise, legitimate political authority is derived from the consent of the governed and as such is subject to revocation in its absence. However, this idea, which finds its origins in the Enlightenment and the French and American revolutions, is explicitly rejected by Brilmayer, who contends that, while consent may constitute an important part of democratic rhetoric, actual consent is not in fact a necessary component of political legitimacy. Liberal democratic theory simply does not recognize a generalized right to 'opt out' of society by the simple withdrawal of consent from the prevailing political system.

The position adopted by Brilmayer is, in contrast, that tacit consent is and should be inferred towards any government of a state that exercises legitimate power over its

35 This is the popular sovereignty theory of governmental legitimacy popularized by Locke and Rousseau; see for example John Locke, *Two Treatises of Civil Government* (London: Everyman) 1924
territory. The central question then becomes what constitutes legitimate power, as opposed to how one defines the apposite boundaries of political authority.

What is noticeable in both the classical positivist account of self-determination in international law (the colonial narrative) and that advanced by Brilmayer is, as noted above, the apparent redundancy of the question of identity, specifically collective identity, in the process of determining the appropriate composition of units of political authority. It is an account that starts from the premise that certain groups of people may or may not have a historically verifiable claim to specific tracts of land on the basis of corrective justice and proceeds to evaluate that claim without inquiring into the status of the claimants. In both instances the identity of the group is essentially imposed from without: the group is deemed to have suffered a wrong perpetrated against them, and it is this collective suffering that unites them and gives them their shared identity.

That victimhood is judged the constitutive element in forging collective identity is particularly evident with respect to the idea of colonial identity. The establishment of colonial borders, and the subsequent decision to turn these administrative boundaries into international ones following the dismantling of the European Empires in the third world,

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36 Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, (1991) 16 Yale J. Int. L at 184
particularly Africa, has been the subject of sustained criticism\textsuperscript{37}. Central to this has been the accusation that the Western powers, rode roughshod over the pre-existing population composition of the territory, cutting across tribes and ethnic groups for the purposes of administrative convenience. The ‘peoples’ of these states were artificial constructs, the creations of their colonial rulers and they thus had no commonality other than the fact of their collective subjugation to alien domination\textsuperscript{38}. As a ‘people’ they existed only in response to the phenomenon of colonialism, their unity forged in the fires of resistance.

This ‘false’ colonial identity is then contrasted with a supposedly pre-existing ‘true’ and ‘natural’ identity of the colonial populations (and one possessed to a greater or lesser degree by all persons/people everywhere), such as to posit the existence of the notion of an ‘authentic’ identity. It is worth questioning, however, the extent to which this characterization is in fact preferable to the territorial conception of self-determination, wherein identity is effectively sidelined. Whereas the territorial conception almost completely denies the relevance of identity, the colonial version elevates it to a position of near unparalleled importance, and lends support to the, highly contestable, essentialist view of human identity wherein it assumes the status of a naturally occurring phenomenon.

This is not to suggest that colonialism can in any way be supported, far from it. It does, however, represent an acknowledgment of the complex and contradictory phenomenon that is self-determination, and of the equally complex and contradictory position of identity within it. Whereas international law seems intent on trying to deny this conceptual nexus between self-determination and identity, the approach of this thesis is to deny the existence of any exclusively ‘valid’ or ‘authentic’ identity, whether it be pre-colonial, colonial or post-colonial. As this Chapter has shown, however, attempts to render self-determination neutral as regards competing conceptions of identity only tell half the story, and, perhaps more importantly from the standpoint of international law, are unable to provide guidance as regards the future direction of the right.

38 See Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 161 D.L.R (4th) 435 at 440 para. 132-3
The second conception of the self towards which international law is currently oscillating is that of the self as the nation. This idea is not new in political or legal theory, the concept of national self-determination informed much of the debate at the peace negotiations at Versailles in 1919 - according to Musgrave, it was declared by the Allies to be its guiding principle. Yet in spite of this, the idea of national self-determination has been effectively, if not consistently, rejected by international law; as Orentlicher states "International law has long been ambivalent in its treatment of national identity as a basis for statehood [and]...has in recent decades embraced a cosmopolitan, liberal vision of states...[one that is necessarily incompatible with nationalism]". Thus, while the idea of national self-determination has never entirely exited the political scene as such, it has remained at the margins of international legal theory for the latter part of the 20th century. This is in no small measure due to its having been largely discredited by its association with German Fascism in the 1930s and 1940s, during which time Hitler appealed to national self-determination to justify his programme of European expansionism, contending that the German people had been deprived of their rightful territory or homeland.

Recently, however, following the collapse of the Berlin Wall and the disintegration of the Former Republic of Yugoslavia (FRY) the idea of national self-determination has gained renewed salience. Events such as these have lent credence to the view that nationalism and national identity are naturally occurring phenomena, which, while possible to suppress at least superficially, are in reality impossible to eradicate, and which must accordingly be acknowledged and addressed, if not necessarily accepted. Nonetheless, there are many difficulties, both conceptual and practical, with an understanding of the self in which the term ‘peoples’ is taken to include, or indeed is regarded as synonymous with, nations; notwithstanding the issue of circularity and meaning-contingency discussed in Chapter One.

If the term ‘people’ is to be understood as meaning ‘nation’, it is clearly necessary to be able to define what a nation is. This Chapter, then, considers the question of what constitutes a nation. Nations, however, do not admit of easy explanation, and can only properly be understood by examining the phenomenon of nationalism with which they are intimately connected. Accordingly, this Chapter looks at three alternative versions of nationalism: the primordialist, the situationalist and the constructivist. It is argued that of these only the last offers a convincing account of the phenomenon of nations and nationalism, and that it is not an argument sympathetic to national self-determination.

This constructivist interpretation of nationalism does not support the case for national self-determination because it does not endorse the idea that the nation is either the natural or the most appropriate locus of human identity. It does not, therefore, support
the contention that nations ought to function as the sole legitimate repositories of political authority in the world.

Be that as it may, examination of the idea of the nation is useful in that it reveals to us the degree to which narratives of identity involve a symbiotic relationship between individuals and the collectivities they belong to. It also demonstrates that identity is almost entirely an artifice, a device we construct to help us navigate the world, and not, as is so commonly assumed, part of the natural order of things.

Arguably, the most obvious, and perhaps the most problematic, aspect of national self-determination claims from the perspective of classical international law is their inherent potential for state shattering as a consequence of their successful invocation. The reasons for this are not difficult to fathom. A legal order premised on the unassailable inviolability of independent sovereign states is necessarily going to be antagonistic toward a principle the aim of which is to challenge the legitimacy of, and ultimately to redraw the boundaries of, those states. From the perspective of international human rights, however, the challenges posed to the current political geography of the world are not in and of themselves a reason for rejecting the principle of national self-determination; although the human rights abuses that are often attendant upon the dissolution of states should not be overlooked. By far the more interesting question from a human rights approach, and the one to be explored here, concerns the theoretical viability of seeking to redraw the boundaries of political authority so as to make the national and the political coincide. It is suggested that ultimately such a project is destined to fail for both practical and theoretical
reasons; reasons intimately connected to the role of identity in understanding self-determination.

National self-determination, in the words of Ernest Gellner, is first and foremost a political principle, according to which it is held that the political and national unit should be congruent.2 Objections to this theory of political legitimacy are many and varied. Buchanan, offers two examples of why national self-determination simpliciter – the idea that every nation, simply by virtue of being a nation, has the right to some substantial degree of self-government, including the possibility of independent statehood - is unsupportable.3 He does, however, distinguish this form of national self-determination from remedial national self-determination; which he regards as permissible in certain circumstances. The difference between the two is that secession in the case of remedial national self-determination is regarded as a justifiable response to past historical injustices, such as the right to recover independent statehood that was unjustly removed or as a defense against genocide.4 It is accordingly less objectionable, since not only does it come into play in relatively discrete circumstances, but it does not presume the validity of the arguments in support of pure national self-determination. Which is to say that remedial national self-determination is concerned more with the justice or injustice of

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2 Ernest Gellner, Nations and Nationalism (Ithaca: Cornell University Press, 1983) 1
4 ibid 286 (n3)
particular situations, than with affirming nationality as the definitive constituent of one’s identity.

As regards the two objections, these can be termed the problems of infeasibility and incompatibility. National self-determination is regarded as infeasible because, according to Buchanan, followed to its logical conclusion it has the potential to produce morally indefensible outcomes. Such outcomes would result from the fact that, according to Gellner, there are many more potential nations on earth than there is physical space to accommodate them in viable sovereign states.\(^5\) Thus there would be an arbitrary and unjustifiable division between those nations fortunate enough to have their own states and those nations (equally deserving on the face of it), unable to so have.

The incompatibility objection relates to the fact that granting self-determination exclusively to nations is, it is argued, wholly arbitrary in character and violates the principle of equal respect for persons. To the extent that this principle is a fundamental tenet of liberalism (and it forms the bedrock of the variety of liberalism espoused by Dworkin\(^6\)) national self-determination is incompatible with liberal philosophy.

Simply stated then, Buchanan’s objection to national self-determination from the perspective of liberalism is twofold. First, it imposes as a matter of public judgment, a

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\(^5\) "...there is a very large number of potential nations on earth and a much (much) smaller number of viable states", Ernest Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983)

rank-order among sources of allegiance and identification that is incompatible with equal 
respect for persons, given the fact of pluralism; and second, it ignores the dynamic aspect 
of pluralism. To these two objections I would add a third, namely that the idea of national 
self-determination, whether simpliciter or remedial, is not only undesirable, but also 
unachievable because of the very nature of nationalism as both a theoretical construct and 
a practical postulate. Which is to say that the very principle depends for its plausibility on 
the ability to define, with some considerable level of sophistication and consistency, 
exactly what it is that constitutes a nation so that it is possible to differentiate it from all 
other collectivities. Crucially, however, any authoritative definition is noticeably absent 
from the literature, and, moreover, this is necessarily so since, as will be discussed below, 
the very nature of nations and nationalism renders any such authoritative definition 
wholly beyond the realms of possibility.

Beginning, then, with the problem of definition, it is often assumed, not least on 
the part of those arguing in favour of national self-determination, that nations are organic 
and natural entities, existing since time immemorial and deserving of an equally 
auspicious future. Indeed, a not inconsiderable amount of the attraction of the principle 
lies in its apparent simplicity and the appearance of inevitability it projects, somewhat 
along the lines of 'you can't fight nature'. This view of nationalism, one that Brown 
terms primordialism, is characterized by the belief that nations are fundamentally a matter 
of instinct. They defy rational explanation and are all the stronger and more powerful for

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7 David Brown, *Contemporary Nationalism: Civic, Ethnocultural and Multicultural Politics* 
(London: Routledge, 2000) 5
it, occupying a position in the hearts and minds of their members that is unintelligible by reason alone.

According to the primordialist conception of nations, nations are '...natural organic communities [that] define the identities of [their] members.' For this reason they are entitled to self-determination; almost as a natural right. On this view the question as to what is constitutive of nationhood is answered by reference to objective criteria in the main. While it is true that self-identification remains an important element of how it is that one belongs to a nation, when it comes to deciding whether people fall into one nationality or another, ascriptive criteria such as shared language, culture, history and territory take priority. Problematically, however, there is no universally accepted understanding as to which of these various elements is most indispensable for assigning nationality, or whether they are all of equal importance. Consequently, there is no definitive set of criteria capable of forming some sort of checklist against which claims to nationhood can be measured. Indeed, the existence of such criteria is itself an unobtainable objective. Primordialists such as O'Connor seem to operate on the assumption, however, that although it may not be possible to articulate with precision the component parts of a nation, nonetheless they 'know one when they see one'.

On the primordialist view, moreover, the only nations that are authentic, and thus deserving of special treatment in the form of self-determination, are ethnic as opposed to civic in character. Members of the same nation feel a bond that is akin to that experienced
by members of the same family; indeed, the family metaphor is entirely apt, since nations on this view are essentially (very) extended families. That which is considered to unite people of the same nationality is a common ancestry; or rather a perception of common ancestry since feelings of nationalism are not conditional on the existence of literal blood relations between members. That which is of central importance to the kinship metaphor therefore, is not any actual shared ancestral connection, but rather collective belief in the truth of such a common ancestry. It is largely immaterial whether or not there is any basis in truth for such a belief; what matters is that the people involved believe there to be. As Connor succinctly states "...a nation is a group of people characterized by a myth of common descent." What binds a nation is not a real history, but a sentient or felt one.\textsuperscript{10}

It should be evident that psychology plays a not inconsiderable role in primordialist understandings of nationhood; a phenomenon the essence of which is thought of as intangible, and crucially inexplicable from a rational perspective. As Connor states "[nationalism operates at the level of a] psychological bond that joins a people and differentiates them from all other people in a most vital way."\textsuperscript{11} One significant problem with this view of nationalism, however, is that while one may concede its value as a description of perceptions of identity, as a method of explaining how and why it is that such perceptions of identity exist and continue to exert such a hold over so many people

\textsuperscript{8}ibid 6
\textsuperscript{9} Walker Connor, Ethnonationalism: The Quest For Understanding (Princeton: Princeton University Press, 1994) 75
\textsuperscript{10} ibid
\textsuperscript{11} ibid
in a manner seemingly so completely divorced from rationality, it is patently inadequate. How does the collective false consciousness it engenders arise and what is it that sustains it to such a degree?

In addition, to suggest, that it simply is not possible to explain the bond engendered by nationalism and to claim that it can be understood only from an emotional and non-rational perspective, does little to strengthen the case for invoking it as an organizing principle of international law. Such a contention, moreover, relies on an overly simplistic understanding of the nature of human identity; essentially it conceives of identity as unidimensional and static.

The tacit assumption behind primordial theories of nationalism that ethnicity is the defining characteristic of every person's identity, is seriously open to contestation, not to mention the potential ramifications of accepting such a deterministic view of the human self. This conception of nations rests on the proposition that everyone in the world can be separated into discrete ethnic groups and that individuals belong exclusively to one such group. Curiously, however, scant evidence is offered in support of this proposition, the truth of which is less than self-evident. Indeed, the idea that a person's identity is susceptible to being reduced to one critical element is highly dubious.

If the primordialist analysis of nationalism is deficient because it depends for its credibility on unsubstantiated assertions regarding the emotional draw of nationalism, then the situationalist account as epitomized by Gellner arguably suffers from almost the
opposite problem: an excessively functionalist understanding of nationalism’s appeal. According to the situationalist account, the key to understanding nationalism is to acknowledge its inherent rationality and explicability. It is viewed essentially as a resource, strategically employed by individuals acting collectively so as to serve their common interests.

On the situationalist understanding of nationalism, in so far as the existence of national identity assists/furthers the wants/desires/needs of those persons who make up the nation, then it is employed and defended. But, as the interests of people vary, so too do their allegiances, and nationalism is possessed of no intrinsically greater claim to loyalty than any other form of social grouping, since its value, on this understanding, is entirely instrumental. One may question, therefore, why it is that nations have succeeded in engendering such loyalty where class, gender and race have not? From the functionalist perspective the answer can only be that identifying with the nation is more beneficial as regards furthering the interests of particular groups.

Probably the most renowned example of the functionalist account of nationalism is that put forward by Gellner. His analysis places the advent of modern western industrialization at the core of the entire nationalist phenomenon. The nation according to Gellner, far from being a natural and organic community arising spontaneously, is in fact an entirely modern artifact that can best be understood as a rational response to the modernization of western European society that began in the mid 18th century.
In short, the argument is that nationalism as currently understood is the product of a historically specific combination of factors revolving around the transition of western economies from ones based on agriculture to ones rooted in industry. According to Gellner, this process of industrialization necessitated the existence of a mobile and literate population capable of communicating with one another. To have such a population, however, there needed to exist a common entity around which previously disparate groups of people could/would cohere; and that entity was found, or rather constructed, in the apparatus of the modern nation state. Only the state was deemed capable - through the creation and promulgation of a universal culture- of transcending the old social strata and forging a new, unified society with a common language that would provide the literate, mobile workforce demanded by an industrializing society. The element of nationality was seized upon because of its ability to unify, to perpetrate the myth of commonality. To suggest, therefore, that nations as such require international legal support and recognition in the form of being able to self-determine, is to ignore the fact that they are essentially artificial constructs, with no greater claim to ‘authenticity’ than any other collectivity.

The reason for the existence of nations on the situationalist account, as mentioned above, is that they fulfill a specific purpose occasioned by the advent of modernization. Gellner argues that the entire raison d'être of nations is attributable to the role they played historically (and indeed continue to play) in facilitating industrial/economic development. He maintains, furthermore, that the very idea of the nation is itself parasitic on the idea of the state, the latter being the product of societal transition from
agrarianism to industrialization. In other words, nations were inconceivable prior to the advent of states and their primary function is to sustain the apparatus of the state, a role they fulfil by the creation and promulgation of a universal culture capable of ordering and cohering society. On this view, nations are predominantly cultural entities, which is of considerable importance when, as Gellner insists, culture in the modernized world ceases to be merely “…the adornment, confirmation and legitimation of a social order…” and becomes the “…necessary shared medium [of society].” Culture is therefore the defining element of nations; it is more than a part of what it means to be a nation – it is quite literally what it is to be a nation.

Gellner’s account of nationalism illustrates why it is that nationalism fails to convince as an appropriate determinant of political legitimacy on even a purely practical level. Neither the objective nor the subjective definitions of what constitute a nation, despite each isolating undeniably important features of nationalism, are capable of resolving the question of whether one particular collectivity counts as a nation for the purposes of self-determination. The objective view of the nation (the belief that two men are of the same nation “…if and only if they share the same culture, where culture…means a system of ideas and signs and associations and ways of behaving and communicating”) is open to the criticism that culture is an inherently fluid and shifting phenomenon, and one therefore unsuited to use as the basis for global political geography.

\[12\] supra note 2 at Chapter 3
\[13\] ibid 35
\[14\] ibid 2
\[15\] ibid 7
Similarly, the subjective view of nations, (according to which mutual recognition on the part of the individuals involved is the determining factor), is, as Gellner states, unhelpful. It casts the net of potential nations too wide so as to include many groups that would never be thought of, by themselves let alone any one else, as coming within the category of nations, however that category may be defined. Thus, for example clubs, gangs, teams and parties\textsuperscript{16} could all qualify as nations if self-identification were to be the sole relevant criterion and clearly this is unwarranted.

If one conceives of nations in the situationalist way, viewing them in an essentially instrumental fashion as imagined communities\textsuperscript{17} that are themselves the product of nationalism, then it is clear that national self-determination possesses neither merit nor foundation. If it is the case, as Gellner claims\textsuperscript{18}, that nations are the product of nationalism rather than the other way around, then clearly the claim that nations function as the sole naturally legitimate repository of political authority becomes difficult, if not impossible, to sustain. There is and can be nothing natural and inevitable about nations if it is accepted that their entire existence is in fact parasitic upon the prior construction of a

\textsuperscript{16} \textit{ibid} 54
\textsuperscript{18} "The great, but valid paradox is this: nations can be defined only in terms of the age of nationalism. It is not the case that the 'age of nationalism' is a mere summation of the awakening and political self-assertion of this, that or the other nation. Rather, when general social conditions make for standardized, homogenous, centrally sustained high cultures, pervading entire populations and not just elite minorities, a situation arises in which well-defined educationally sanctioned and unified cultures constitute very nearly the only kind of unit with which men willingly and often ardently identify". \textit{Supra} note 2 at 55
national culture; the function of which is to facilitate and advance the economic development of industrialized societies through the creation and promulgation of shared experiences.

Of course, primordialists would contest these assertions, arguing that in order for nationalism to connect with people in the way it does, it must necessarily reflect some authentic past belonging to the group that is said to constitute the nation. National identities, so the argument goes, though they may be manipulated and exaggerated, nonetheless cannot be fashioned whole out of the ether. Accordingly, to suppose that national/ethnic identity is somehow a form of false consciousness not deserving of recognition and political representation (not deserving of self-determination in other words) is not only naïve, it is dangerous. It is naïve because it assumes that (ethnic) nationalism can be eradicated through the application of reason on the grounds that such sentiments are not ‘real’, and it is dangerous because viewing nationalism in this way renders one unable to predict when or how it will manifest itself in political movements; thereby depriving one of the ability to offer any meaningful solutions to the conflicts engendered by such sentiments. What you cannot understand you cannot hope to address.

It is clear then, that neither the primordialist nor the situationalist accounts of nationalism provide wholly convincing explanations of this phenomenon. And, while in many ways the functionalist understanding of nationalism is superior - at least from a liberal perspective – to the primordialist analysis, it nonetheless suffers from incompleteness. This does not mean that nationalism is incapable of being understood
and explained, however. It simply means that neither the primordialist nor the functionalist accounts are adept at doing so. According to Brown, the most compelling and persuasive explanation rests with a third understanding, that which is called constructivist.

Simply stated the constructivist position is that "...national identity is constructed on the basis of institutional or ideological frameworks which offer simple and indeed simplistic formulas of identity and diagnoses of contemporary problems, to otherwise confused or insecure individuals."19 Thus, it essentially contends that the seemingly innate attachment experienced by many people with respect to ‘their nation’ is neither natural (pace Connor et al) nor entirely functionalist (pace Gellner), but instead is best understood as a form of ideological consciousness that filters rather than reflects reality.20 Accordingly nationalism’s hold on popular consciousness is more a product of peoples’ desire for socialization, a desire mediated through real and imagined connections to others, than it is either an innate function of personhood or a rational cost/benefit response to the world.

The benefit of this third way of looking at nationalism is that it provides a far more nuanced and subtle method of analyzing the phenomenon; one that recognizes the significance of national identity in the lives of many people but does not simultaneously capitulate to the idea that such identity need be the central, unalterable, defining characteristic constitutive of the human self. Crucially, from the perspective of self-

determination, a constructivist understanding of nationalism does not support the contention that nations are the legitimate and ‘authentic’ repository of political authority. If anything, constructivism underlines the essentially fictitious nature of nationalism, not necessarily dismissing its validity, but certainly denying its right to a privileged position in international law.

As the above discussion makes clear, nations do not lend themselves to unproblematic definition, but even were they to do so, the two objections articulated above by Buchanan would still apply and would, it is submitted, still function to discredit the idea of national self-determination. Returning to the argument from infeasibility, Buchanan’s contention is not simply that there are too many potential nations on earth for it to be viable for each of them to have their own independent sovereign state (which is Gellner’s thesis\(^ {21} \)), but that nations as they currently exist throughout the world are so entwined with one another that, in the absence of any authoritative international institution capable of allocating territory peacefully, to legitimate the idea of national self-determination would have the consequence of exacerbating existing territorial disputes.

\(^ {20} \) ibid

\(^ {21} \) According to Gellner “...there is a very large number of potential nations on earth. Our planet also contains room for a certain number of independent or autonomous political units. On any reasonable calculation, the former number (of potential nations) is probably much, much, larger than that of possible viable states.” Supra note 2 at 2. Exactly how he reaches this conclusion is not explained, and it is a vision of self-determination that does not admit of sub-statist recognition of national identity within existing geo-political frameworks. See Chaim Gans, National Self-Determination: A Sub- and Inter-Statist Conception, 13 Can. J.L. & Juris. 185, for further discussion of this issue.
and ethno-national conflicts. Expectations would thus be engendered, the satisfaction of which could not be achieved without incurring what Buchanan considers to be (and I am inclined to agree) unacceptable moral costs. National self-determination as a principle is accordingly normatively suspect.

Buchanan’s second objection, the incompatibility thesis, is slightly more sophisticated in its reasoning, and challenges the supposed superiority of nations as human collectivities, invoking the fundamental liberal tenet of equal respect for all persons. The central premise here is that there is nothing intrinsically exceptional about nations qua nations that makes them the appropriate bearers of the right to self-determination over and above the claims of all other groups and collectivities. Advocates of national self-determination ignore the dynamic pluralism that is characteristic of contemporary liberal philosophy, and indeed society, when they elevate national identity to the status of exclusive locus of ‘authentic’ identity.

This elevation is, moreover, unwarranted and indeed regressive in a world in which not only do people possess many and varied identities over the course of their lifetimes (consider a person’s self-identification as a ‘student’, a ‘doctor’, a ‘retiree’) but where such identities are themselves fluid and shifting; sexuality constituting a particularly salient example of this. Furthermore, there simply is no uniformity with regard to the priority different people attach to their multiple identities. The principle of

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national self-determination, in contrast, is premised on exactly such a hierarchical perception of identity, with national identity at the apex. According to Buchanan this constitutes a form of discrimination in that it is "...an insult to the equal status of every citizen whose primary identity and allegiance is other than national and to all who have no single primary identity or allegiance."24

In response to those who contend that the importance of nations lies in their ability to transcend and indeed encompass other allegiances and identities by making them integrate and cohere, Buchanan submits that such a role is not the exclusive preserve of nations. As he says, "...if by an 'encompassing cultural group' one means a group that serves as the primary source of self-identification for individuals and that provides a coherent structure to unify and integrate whatever other self-identifications individuals may have, then we cannot assume that only nations are encompassing cultural groups."25

Those who defend national self-determination generally do so on one of two grounds, either that it is a basic right or that it is a derivative one. As a basic right the argument is that cultural membership is a necessary condition for individual autonomy because one's culture provides a meaningful context for choice and without a meaningful context for choice autonomy is impossible, or at least valueless. This is the thesis most

23 See Dworkin, supra note 6
25 ibid 297
forcefully advocated by Kymlicka, Margalit and Raz and it is one that has been equally forcefully rejected by Waldron; who contends that meaningful choice requires only that one have access to coherent cultural materials, and that such materials may originate in any number of different cultures.

One may also question, why, even if it is accepted that national self-determination provides the best protection for the survival of nations (because of the necessity for nations to have their own states), this is thought only to be of relevance for nations and not other groups such as ‘tribes’; the survival of which may be equally dependent on their having their own state.

If, in contrast to the above basic right position, one adopts a derivative view of the justification for national self-determination such as that advanced by John Stuart Mill, to the effect that democracy is essential for individual liberty and only possible when the boundaries of governments and nationalities coincide, one must make the case that multinational states are inherently undemocratic. Depending on one’s conception of democracy it may questioned whether countries such as America are by virtue of their multinationality alone, less democratic than those such as France.

Buchanan concludes that unless liberals are willing to accept two fundamentally illiberal propositions; first, that nations have a unique moral status lacking in other groups/collectivities such that everything else, including individual autonomy ought to be subordinated to them, and second, that it is, in fact, practicable for every nation to have its own state because smaller nations will simply and inevitably be assimilated into larger ones, then the idea of national self-determination as such cannot succeed.
National self-determination, from a liberal perspective, is thus almost impossible to defend, notwithstanding Tamir’s concerted efforts to do so. Her argument, that liberalism and nationalism not only need not be mutually exclusive, but can actually exist in harmony, is ultimately unconvincing, because, as Yack states in his review of *Liberal Nationalism*, it succeeds in “…taming nationalism’s illiberal features only by defining the nation in an unrealistic and apolitical way: as a voluntary society for individual cultural expression.” Nationalism, however, is inherently, inescapably political; especially in the context of national self-determination. To assert, therefore, as does Tamir, that national identity is merely a question of personal preference, a right to be respected so far as it does not conflict with other rights individuals possess, is, as Yack states, to “…obscure [its] distinctive feature…as a form of communal identity”.

The nation, however defined, simply cannot be divorced from community. It is the belief that the community should take precedence over the individual, that it constitutes an autonomous entity deserving of legal personality, that is the defining feature of claims to national self-determination. And, this therefore brings us back to the problem of what a nation is. As has been argued above, however, there is no such thing as a nation; other than as a political, social and cultural construct, one that is furthermore, continually in a state of flux.

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Nations, however conceived, are not easily accommodated within the normative framework of international law. In fact, as this chapter has sought to demonstrate, this is a feat impossible to achieve. “...[T]here are no natural, legal units,” and so nations cannot claim to constitute one. Moreover, to the extent that we invent legal units for the purposes of applying legal norms, the idea that nations would be the appropriate units for the application of the legal norm of self-determination, is unsupportable; notwithstanding the unsuitability of self-determination as a legal norm in the first place. As was suggested in Chapter One, identity is far too complex and multifaceted to be contained within the boundaries of legal rules. It is ambiguous and amorphous and blurry at the edges. In addition, even were it possible to legislate identity in the manner seemingly envisaged by proponents of national self-determination, whether this would be at all desirable is another matter entirely.

This Chapter has been concerned with demonstrating not only the practical impossibility of seeking to redraw the boundaries of the world according to supposed national identities, but also the conceptual undesirability of so doing. Recognizing claims to national self-determination involves accepting the validity of the nation as an objectively ascertainable collectivity. In the absence of any objective criteria for determining the existence of nations, however, the result of enforcing national self-

27 Ibid 172
28 John Waterbury, Avoiding the Iron Cage of Legislated Identity, in Self-Determination and Self-Administration, Arthur Watts & Wolfgang Danspeckgruber (eds) (Boulder, Col: Lynne Reinner Publishers, 1997) at 375
determination will be the arbitrary privileging of certain groups over others, and, with regards to identity, the arresting of the development of those groups that are recognized.

Conceding that national self-determination is both unviable and undesirable, an alternative conception of the self, one more consonant with liberalism has lately come to the fore. This latest version contends that individuals, not groups, constitute the appropriate repository of political authority as regards the right of self-determination. As the following Chapter argues, however, there are as many difficulties with this new position as with the one it seeks to replace.
The legal concept of the right to self-determination is generally considered to embody two alternative (and perhaps competing and contradictory) ideas: those of internal and external self-determination. This Chapter takes the first of these, internal self-determination, and looks at the implications that this individualist approach to the right has for understandings of the self. This is the third conception of the self towards which international law is currently oscillating: that of the self as the individual. It is a conception of the self intimately connected to an understanding of self-determination as being internal rather than external in content¹.

This Chapter argues that the individualist interpretation of the self that is engendered by internal self-determination is no more satisfactory in terms of appreciating the phenomenon that is self-determination, than either the territorial or the nationalist conceptions discussed in previous Chapters. Further, this Chapter contends that the individualist conception, premised as it is on the idea that identity is essentially a matter of choice, fails to acknowledge the degree to which individual identity is in truth

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¹ The individualist interpretation is not the sole possible response to internal self-determination, it is possible to conceive of collective internal self-determination as sub and inter-statist interpretations of the right attest to. See for example Chaim Gans, *National Self-Determination: A Sub- and Inter-Statist Conception*, 13 Can. J.L. & Juris. 185,
enmeshed with collective identity, and the importance of collectivities and communities in the human experience.

Throughout the history of self-determination it has been the external version that has received most attention and this has led many to assume that this is self-determination's sole meaning. Recent years, however, have witnessed a revival in the idea of internal self-determination. Internal self-determination then, largely neglected for the better part of the twentieth century, has gained renewed interest and vitality following, and in response to, the collapse of communism and the end of the cold war. Its substantive content is embodied in the idea of the 'democratic entitlement', the term coined by Franck to describe the contemporary phenomenon outlined above, according to which respect for the ideals of liberal democracy functions as a prerequisite for the legitimacy of government.\(^2\)

Interestingly, internal self-determination, unlike the external variant, is a concept that serves to buttress the legitimacy of existing states as much as, if not more than, it challenges them. This is because, while internal self-determination unquestionably makes significant inroads into state sovereignty - it is after all premised on the belief that the internal political arrangements of states are a matter of international concern and that states may legitimately be called to account with regards to them - if adhered to, it

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actually insulates states from claims for *external* self-determination that may potentially be advanced by various groups within their borders. Such insulation is accomplished by virtue of the fact that respect for the principles of democracy and human rights - the cornerstones of internal self-determination - greatly reduces (arguably to the point of non-existence), any moral weight of sub-state claims for autonomy in the eyes of the international community.

Alongside, and in response to, the development of the theory of democratic entitlement, there has begun to be a reconceptualisation of the *self* in international law. In answer to the question, 'what is a 'people' when determination is something other than emancipation from colonial rule (specifically what is a people when self-determination is a right to democratic entitlement) has come the response: 'we are all the people; each one of us individually'. Indeed, it is Franck's belief that, in addition to entering an age of universal democratic legitimacy, we are also witnessing the dawn of the age of the individual.\(^3\) Individualism and the democratic entitlement can thus be viewed as complementary aspects of a new narrative of self-determination; two sides of the same coin almost: the first articulating the meaning and content of the right, the second defining those entitled to exercise it.

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\(^3\) Hence the title of his latest work, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 2000)
Simply stated, the democratic entitlement as propounded by Franck and others (principally Fox⁴) is the right to political participation in the form of electoral democracy.⁵ It is the idea that democracy – which effectively translates as representative democratically elected government in this context - is a human right, and as such is required to be protected and promoted by national and international law. At its core lies the liberal commitment to the consent of the governed as providing the only acceptable basis for political legitimacy. Only those governments, and by extension, those states, that respect this principle are deemed to be legitimate in the eyes of the international community. Democracy thus assumes the status of a determinant of validity of the exercise of political authority.

The idea that there should be conditions attached to the recognition of governments over and above those laid down in the Montevideo Convention 1933⁶ runs counter to the precepts of classical international law, one of the most important of which

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⁵ Thomas M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995) 84
⁶ In theory, if a state meets the criteria for statehood as laid down in Art. 1 of the Montevideo Convention on the Rights and Duties of States 1933 then it is entitled to recognition by the international community. The four relevant criteria are: a) a permanent population, b) a defined territory, c) government and d) capacity to enter into relations with other states.
has been the assumed inviolability of state sovereignty. Nonetheless, Franck and Fox argue that the development of international human rights norms in the latter part of the twentieth century led to what can be considered virtually a paradigm shift in the relationship between states and individuals. Accordingly, the rights of the latter have now superseded those of the former to the extent that state sovereignty no longer takes precedence in all circumstances. Instead, the need to respect and promote international human rights has become the international community's most pressing concern, as evidenced by recent humanitarian interventions in countries such as Bosnia and Rwanda. The right to participate in the selection of one's government is but the most recent of such human rights to be given legal recognition, and it is the universal elevation of individual human rights norms to the status of *jus cogens* that has facilitated the emergence of participatory democracy as a condition of political legitimacy.

As regards the link between the democratic entitlement and self-determination, Franck argues that self-determination is the "...historic root from which the democratic entitlement grew". It is the oldest of the three generations of rights to political participation (the other two being freedom of expression and the right to vote) and its

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7 See Art. 2(7) UN Charter: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...'
9 *Jus cogens* is the term given to a rule of international law that constitutes a peremptory norm of general international law and from which no derogation is permitted. See Art.53 of the Vienna Convention on the Law of Treaties 1969.
value is said to lie in the fact that it endows the democratic entitlement with the "...gravitas of historically pedigreed legitimacy"\textsuperscript{11}.

Nevertheless, it is not Franck's contention that self-determination is, or should be thought of, as an early version of the democratic entitlement; the two are separate, albeit intimately related and indeed contingent, concepts (the latter being in some sense derived from the former). Ultimately, however, the two are concerned with different things: self-determination relates to the collective right of a people to govern themselves, whereas the democratic entitlement is focused on the personal right of individuals to be involved in the decision-making process about who should govern them. Crucially, the difference between the two concepts is that while "...democracy invokes the right of each person to participate in governance self-determination is about the social right of a people to constitute a nation state"\textsuperscript{12}.

Where the right to internal self-determination and the democratic entitlement connect is by virtue of the fact that, according to Franck, the right of democratic entitlement has its origins in the processes by which peoples were consulted in the original exercises of self-determination. Which is to say that the roots of the democratic entitlement lie in the international plebiscites of the inter-war years. Franck argues that

\textsuperscript{10} Thomas M. Franck, \textit{Fairness in International Law and Institutions} (Oxford: Clarendon Press, 1995) 91
\textsuperscript{11} supra note 4 at 91
\textsuperscript{12} \textit{ibid} 92.
this process of consulting people in order to determine where to draw the boundaries of political authority, is the historic antecedent of the modern democratic entitlement.\footnote{\textit{ibid}}

Popular consultation is therefore central to the very idea of self-determination as conceptualized by Franck. Interestingly, however, such consultation takes place within the already demarcated boundaries of pre-existing territorial spheres, i.e. sovereign states, whose claim to the land occupied by them is not subject to contestation by the exercise of the right. Yet, as the idea of popular consultation was originally applied in the inter-war years, it did not accord this measure of deference to the pre-existing political geography of Post World War I Europe. In fact, the entire rationale of engaging in the process of popular consultation was in order to renegotiate the borders that then existed so as to provide a more accurate reflection - so it was thought - of the ethnic/national composition of those who lived there. History has, of course, not been kind to the results of such map drawing, but the point remains that the popular consultation inherent in the idea of self-determination at the latter’s inception did not pre-suppose the unassailable sanctity of state borders. Only later, when self-determination took on a new role as the theoretical justification for the dismantling of empires that occurred in the decolonization era, did the exigencies of international relations demand fidelity to existing territorial arrangements.

This aspect of self-determination, that which recognizes the challenges it inescapably presents to the \textit{status quo}, is seemingly ignored by Franck, who writes that
the plebiscites at Versailles, rudimentary though they were, nonetheless represented consultations that "...assumed the authority to determine in specific instances what, in the terminology of labor relations law, constituted 'the appropriate bargaining unit'."\textsuperscript{14} In other words, the very act of conducting such plebiscites defined the \textit{self} for the purposes of self-determination, and, moreover, authoritatively and legitimately so. Thus, while Franck concedes that before such consultations could take place it was necessary to establish exactly who it was that was to be consulted\textsuperscript{15} - a process that focused on supposed national ties between individuals - his primary concern remains the manner in which people are able to exercise their right to representative government; as opposed to the composition of the government that they will be represented by, or the people comprising the electoral franchise.

It is clear therefore that for Franck the existence of free choice is the key element in both self-determination and the democratic entitlement. This position is echoed by the experience of decolonization, during which free choice in the determination of government became the right's predominant feature. As the decision of the International Court of Justice in the \textit{Western Sahara Case} made clear, the essence of self-determination lies in the need to pay regard to the freely expressed will of the people.\textsuperscript{16} The question as to exactly which people's freely expressed will needs paying attention to was not

\textsuperscript{14} \textit{ibid} 94
\textsuperscript{15} \textit{ibid} 93
\textsuperscript{16} \textit{Western Sahara Advisory Opinion} [1975] ICJ Reports 12
addressed. It was simply assumed that the relevant polis for the purposes of exercising the right to self-determination was already in existence. Which is to say that it was taken for granted (by the Court and international legal scholars, if not by those whose lives were at issue) that the administrative borders drawn up by the colonial powers would remain in place. The much-vaunted free will of the people was not, therefore, entirely free at all. It was in fact highly circumscribed by virtue of it’s being exercisable only within the confines of a pre-determined polis, the boundaries of which could be said to owe little, if anything, to exercises of free will.

This is one of the main difficulties with substituting the idea of democratic entitlement for that of self-determination in the canon of international human rights law – it assumes too much, or at least accepts too much. Central to the democratic entitlement thesis is the idea of legitimacy of political authority. But how is such legitimacy to be measured? Unlike classical or indeed contemporary understandings of self-determination, the theory of democratic entitlement and the idea of self-determination it engenders is not concerned with the composition of the political unit; that is taken as a given. Rather, political legitimacy is wholly gauged by reference to the opportunities available for involvement in electoral decision-making. It is essentially collective determination of destiny exercised at the level of the individual.

Perhaps most crucially, the democratic entitlement as a theory is divorced from traditional conceptions of self-determination by its refusal to endorse the idea of self-determination as a group or collective right, one of the few consistent features of the right
since its inception. Self-determination, as it has generally been thought of, is a right that belongs to, and is exercisable by, collectivities—however defined—that share various and varying common characteristics. In contrast, the right of democratic entitlement belongs to individuals; it is a right to political participation on a personal level. In Franck’s words, the right to electoral democracy, is a right to “...meaningful participation by the governed in the formal political decisions by which the quality of their lives and societies are shaped.”17

Furthermore, although it is the total sum of individual voices that collectively determine their political destiny, they do so as an aggregate of individual wills. In other words, the fact that individual rights are realized through the medium of collective action does not bestow upon that collectivity thus constituted any degree of special significance. The collectivity does not possess any identity of its own, it exists merely as the repository of many individual identities, identities which are not formed or altered, or indeed affected in any way it would seem, by virtue of membership within it. This new model of quasi-self-determination thus severs the nexus between identity and political destiny by positing a world of super-liberal autonomous agents. On this view the only reason why a person might wish to identify themselves with a group is if they believe that such identification will best realize their individual values, preferences and life choices. Group rights thus conceived, are of purely (or at least primarily) instrumental value, existing only so far as they promote or facilitate pre-existing (and superior) individual rights.

17 supra note 4 at 84
There are, however, a number of difficulties with this approach. First, it assumes a voluntarist understanding of group membership; something that may or may not be true in any given case. Second, and related to this, it effectively denies the possibility of there being any intrinsic worth to group membership. Through its insistence on the underlying ‘sameness’ of humanity it effectively denies the possibility that group identity is, or can be, more than merely the sum of its (individual) parts. It effectively removes the element of identity from group identity, through insistence on the primacy of the role of the individual. Moreover, the right to political participation thus conceived allows one to determine whom one is represented by, but does not enable any choice as regards who one is. In other words, it defines people as always constituting the liberal polity, and does not engage with the question – central to understanding the phenomenon of self-determination – of the self at the level of identity and the necessity of collective identity in the formation/realization of individual identity and human happiness.

In addition, as Orentlicher has observed, there is a paradox at the heart of the democratic entitlement concerning its apparent reconciliation of popular and territorial sovereignty. As she puts it “…international law’s embrace of democracy does fairly raise the question, does the internationally protected right to governance by the consent of the governed include the right to determine the boundaries of political commitment?”

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Which is to say that, taken to what is arguably its logical conclusion, does not the idea of the democratic entitlement engender a right to disrupt the existing political geography of the world? If the free will of the people is paramount then ought not they be able to speak up as to how they wish to constitute themselves? The difficulty with such arguments, of course, is that they validate the idea of group rights and group identity; both of which are inimical to proponents of the democratic entitlement. It is true that Franck does not deny that there may be value in communities and community membership, but he nonetheless prioritizes the individual.

*Self-Determination and the Age of Individualism:*

It is clear from Franck’s writing that the individual and individual autonomy are of the utmost importance. For him, membership in ‘affinity’ groups is desirable and to be promoted only in so far as it contributes to the happiness and well-being of the individual. Self-determination, concerned as it has been historically with the need to respect and promote the interests of collectivities, is considered to have served its purpose (in developing the idea of representative democracy as a right through the plebiscites of the inter-war years, and through its emancipatory role in the ending of colonialism) and, according to Franck has been supplanted by the democratic entitlement. Contemporary appeals to self-determination are thus regarded as regressive and dangerous; motivated by ignorance and illiberalism, as can be seen through his use of the term ‘post-modern
tribalism' to describe the secessionist movements currently sweeping the globe from Scotland to Quebec\textsuperscript{19}.

Furthermore, the idea of identity with which such movements are concerned is also treated with suspicion. It is Franck's contention that while identity remains central to human existence, the role it assumes in people's lives and what it represents is undergoing revolutionary change. No longer is a person's identity simply a given, something predetermined by one or more of any number of variables over which they have no control. Rather, the question of 'who am I?' or 'who are we?' is open to multiple interpretations and indeed answers – there being no singular defining characteristic of a person's identity; an identity which is ultimately to be decided by the individual concerned. Such a decision may, moreover, change throughout the course of a person's lifetime so that they possess not only multiple but also shifting and evolving identities, possibly complementary, possibly contradictory, but almost always, he asserts, of their own choosing. For the first time ever, therefore, individuals are now in a position to be able to construct their identities for themselves, instead of simply being the passive recipients of ones that have been preordained.

According to Franck, what this means is that there is now "... a growing consciousness of a personal right to compose one's identity"\textsuperscript{20} and that this has led or is

\textsuperscript{19} Thomas M. Franck, Postmodern Tribalism and the Right to Secession in Peoples and Minorities in International Law, Catherine Bröllmann, René Lefeber, Marjoleine Zieck (eds)
leading to a situation whereby self-determination is in the process of being transformed
"...from a plural to a singular entitlement, from a right of people to one of persons". This paradigm shift in the way that self-determination is understood has occurred in response to what has been referred to as the end of history, and which is essentially concerned with the loss of certainty occasioned by the fall of the Berlin Wall and the collapse of Communism. These momentous events precipitated a global identity crisis that Franck has described as resulting in "...a kind of collective schizophrenia and loss of centered identity", and had a particularly pronounced impact on the issue of self-determination, as previously accepted ways of thinking about who one was and where one belonged underwent radical reevaluation.

No longer is it the case that states are able to command unquestioning support from their citizens, nor can they continue to function as the primary source of identification for many people. As Franck observes, such a "...simple unidimensional system for defining identities and loyalties [has come] under pressure", challenged from above in the form of increasing globalization, and from below by virtue of localized affinity groups. Consequently states are no longer able to claim to be the exclusive locus of individuals' sense of belonging.

(Dordrecht: M. Nijhoff, 1993) 27
Thomas M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, AJIL July 1996, 359 at 359
ibid 360
supra note 20 at 370
ibid 360
In this brave new world where nothing is given and everything is open to challenge, the question of who one is assumes a new meaning. It becomes a question not so much of the past and the present, as of the future. Not ‘who am I?’ but ‘who will I be?’ Key to Franck’s deconstructive analysis is the idea that if we free ourselves from the false strictures of historically determined identities we can begin to imagine ourselves anew, and implicitly imagine ourselves as we wish to be and not, as has been the case throughout history, as others wish us to be. Such a process may then reveal to us that “...our identities have been much more mutable than we imagined”. This is a truth that, according to Franck, has often been obscured in the past, a past in which answers to the question ‘who am I?’ have always been found externally – located in those persons and institutions to whom loyalty was owed; most famously the Church and the King, and most recently the State.

Today, he argues, identity is assuming a far more personal, internal dimension, such that it is on the cusp of becoming a choice not a dictate. In the past multiplicity of loyalty has been an unexceptional occurrence, however it has been one that has existed within a well-defined hierarchy of loyalty priority. According to Franck, throughout the history of Western Europe loyalty was owed to various institutions: first to the Roman Emperor and its Germanic successors, then to a religious institution such as the Pope and his Church in Rome, and finally in the 16th and 17th centuries to the state. The new

25 ibid 362
26 ibid 370-71
form of multiple identity as envisaged by Franck, however, differs markedly from the old in that it is a freely chosen identity. It is the right of persons "...to compose their own identity by constructing the complex of loyalty references that best manifest who they want to be."27 According to Franck, moreover, this "...trend towards self-identification [suggests]... that some significant and growing part of humanity is seeking community with others based on commonalities that are neither genetic nor territorial."28 We are on the brink of witnessing a new era of "freely imagined identities".29

Multiple and shifting, the perception of identity is changing and diversifying, presenting a profound challenge to the established order of international political and legal society. Conceiving of the self in self-determination in terms of the individual has been influential in altering perceptions of what the right involves. For example, Waterbury contends that inherent in the very idea of self-determination is the idea that there is "...some set of protean group interests historically disembodied and immutable, whereas reality...is far more malleable and inconstant"30. In particular, as mentioned above, it recasts the right from one that is almost always potentially disruptive to the existing international order, into something far more benign and less threatening. Perhaps then, it is unsurprising that Waterbury considers the current arrangement of (nation) states

27 ibid 383
28 ibid 380
29 ibid at 383
to be equally as meritorious as any and all other organizations of political community. This is because the crucial question in his view is the role of the individual in shaping his or her own destiny. Consequently, the parameters within which such shaping occurs are largely irrelevant, notwithstanding the assumed existence of a liberal polity receptive to the exercise of individual rights.

The idea that self-determination does not necessarily pose challenges to the existing political geography of the world is also present in Franck's conceptualization of the right. By focusing attention almost exclusively on the individual, this version of self-determination circumvents any discussion regarding the proper composition of the polity within which the individual is supposed to flourish – liberal or otherwise. Superficially it seems to rest on the relativistic assumption that no one form of political organization is superior to any other, provided, of course, that every one respects and promotes the rights and needs of individuals. In practice, however, such relativism is far from the case since both the democratic entitlement and the age of individualism are implicitly premised on the existence of western liberal democracies where respect for individual autonomy is assumed.

Effectively, that which is being argued by Franck and Waterbury, is that identity, as an inherently fluid and malleable concept, should not be artificially restricted or imposed upon people. Waterbury maintains that it is common for individuals to move
between identity affiliations, even to the extent that ethnic identity is not nearly so entrenched as is often imagined. Moreover, the idea that one's identity is irrevocably determined by one's origins is, for him, something of an absurdity, since he sees no reason why something that is essentially a matter of fate should operate as the central or even a central component of one's identity.

This belief in the plasticity of identity also extends to collective identity, as evidenced by Waterbury's assertion that "[Communities] are in a constant process of dissolution and redefinition." Groups emerge and disappear in response to circumstance, almost organically, and this process should not be impeded by the erection of invented and inflexible legal barriers that freeze group identities at given moments in time, thereby causing membership within them to atrophy. Rather, the world should be organized so that individuals are able to associate in whichever collectivities they choose (choice and also consent being of prime importance) and recognition should be afforded to the fact that such groups as may be formed are in no way natural. Above all "...the crucial element is democratic practice...for such practice is a better guarantee of renewable consent than are the units erected on claims of historical injustice and group righteousness."

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31 ibid 376
32 ibid 377
33 ibid 387
There is much to be commended in Waterbury’s analysis of identity, and he is right to be critical of the dangers inherent in both attempting to impose identities upon people, and in denying those identities the opportunity to evolve. Nonetheless, to conceive of the self as pertaining exclusively to individuals, is to ignore, or, if not to ignore then certainly to diminish, the importance of community and collectivity in the achievement of human happiness. Individuals, even in Western democratic societies, are not entirely the product of their own desires. To paraphrase Marx, we create our own identities, but neither in the time nor circumstances of our own choosing.

Contrary to that supposed by advocates of individualism and the democratic entitlement, we are not entirely free to decide who we are and who we want to be. Our decisions will always be informed by and, to varying degrees, determined by, the world into which we are born. As Yack states, “...even if cultures do not determine our choice of cultural affiliation, that does not necessarily mean that we are free to chose our cultural and national identities for ourselves. Cultural identification is a social process based on how others perceive us, as well as on how we perceive ourselves.”

Accordingly, the individualist/democratic entitlement interpretation of self-determination suffers from its unrealistically atomistic characterization of the human experience and the formation of identity.

Furthermore, this understanding of the *self*, deprives self-determination of its inherently revolutionary potential, since, as noted above, conceiving of the *self* as the individual, supports rather than challenges, the *status quo ante*. It is, however, the argument of this thesis that the revolutionary potential inherent in self-determination is critical in understanding both its appeal and its inability to be contained within a legal normative framework. An analysis such as this, that ignores this truth, cannot but be deficient in the critique it provides and the solutions it suggests.
Conclusion: Dialogue Not Directive

Self-determination, it may well be argued, is in danger of becoming all things to all people, and losing any value it may possess in the process. Certainly as this thesis has sought to demonstrate, agreement is a commodity in short supply with respect to virtually every aspect of the right. Contraction, circularity and oscillation continue to hamper efforts to define self-determination. These problems persist, because, fundamentally, there is no consensus regarding the content of the right, its appropriate subjects, or the circumstances under which it is legitimately invoked. This thesis has argued that as long as these critical facets of self-determination remain constantly subject to contestation, the development of a normative legal framework within which to assess various self-determination claims will remain unachievable.

This thesis has, in addition, sought to demonstrate that all three of the above-mentioned features, rather than stemming from any erroneous interpretation of self-determination, are in fact the inevitable result of attempting to position self-determination within the narrow confines of international law. It has argued that self-determination is a phenomenon that can only usefully be understood as a discourse, and has endeavored to show this by reference to the second of the above-mentioned problems afflicting the right, namely that of the appropriate subject. Subjecthood, the question of who is entitled to
self-determine, is of critical importance, not only in relation to efforts to invoke the right (for which it is clearly a prerequisite), but also because, in attempting to define the *self* for the purposes of self-determination, we are forced to consider the meaning of the *self*, and so to engage with the complex and contradictory phenomenon that is identity.

The central argument of this thesis has been that self-determination, properly understood, concerns identity; indeed that it is inseparable from it. Specifically, the argument is that self-determination concerns the legal construction and regulation of identity on a global scale. This thesis has argued furthermore, that such a project is inherently problematic. The value of self-determination lies in the dialogue, discussion and debate it precipitates, a discourse that speaks to some of our most deeply held beliefs and assumptions and reveal the fragility of many of the foundations upon which we construct our lives.

At the same time, it has been the contention of this thesis that, because of its inseparable association with identity, self-determination defies categorization. It is impossible to define its meaning or scope with certainty and constancy, because it is impossible to achieve such certainty and constancy with respect to identity. Despite this, as Chapter Two on the history of self-determination illustrates, from its inception self-determination has been subject to repeated attempts to achieve precisely this certainty and constancy. In the course of its evolution from political postulate to political principle and then to legal right, the potential meaning and application of self-determination has been
systematically narrowed in an effort to control and direct it. The history of self-determination is, in addition to being a history of transformation, also therefore a history of retreat. With each successive incarnation its circle of potential meaning has contracted.

In its first phase as a political postulate, self-determination was inseparable from the Enlightenment thinking whence it originated, and this association with ideas concerning individual agency, and autonomy, imbued it with a revolutionary character not lost on the protagonists in the American and French revolutions. Even accepting that self-determination existed at this point almost entirely at the level of rhetoric, it is still the case that its rejection of the *ancien régime* opened up hitherto unimaginied possibilities regarding the relationship between the ‘people’ and their rulers. At this formative stage therefore, the potential scope of self-determination was, in theory at least, almost limitless.

In the years following the First World War, however, when self-determination entered its second phase as a political postulate, its revolutionary quality started to recede. Which is to say that the process of definition and along with it, restriction, began. Although Lenin maintained that self-determination could only be understood as a radical force for change, more specifically as a universal liberator of working class people, the far more widely embraced Wilsonian version of self-determination confined its ambit to that of remapping the boundaries of European states according to their supposed ethnic composition. The idea of mass social change so integral to self-determination’s birth at
the end of the 18th century, had, by the beginning of the 20th century, for the most part been eviscerated.

By the time that self-determination had assumed the status of an internationally recognized legal right in 1945,\(^1\) the parameters of its possible meaning and implication had contracted even further. As Chapter Two has outlined above, the right to self-determination has been interpreted in international law in such a way as to restrict its meaning and application, so far as possible, to the granting of independent statehood to former colonies. Attempts to enlarge the scope of its application beyond this have been vigorously resisted by States\(^2\) and rejected by the International Court of Justice\(^3\), and yet, as conflicts the world over attest to, such challenges to the limited nature of the right continue apace.

The incoherence presently surrounding self-determination is, this thesis contends, the product of attempting to impose artificial limitations on its inherent potential capacity for revolutionary outcomes. The reason why self-determination is inescapably revolutionary is that, as Allott argues, for a situation of self-determination to arise, it must, by definition, be the case that all alternative avenues of exploration regarding the

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1 It is accepted here that the incorporation of a right to self-determination in the wording of the United Nations Charter 1945 represented its passing into the canon of international law – see Chapter Two for further discussion of this issue

2 See Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 161 D.L.R (4th) 435

3 See for example, Western Sahara Advisory Opinion [1975] ICJ Reports 12 and Case Concerning East Timor (Portugal v Australia) [1995] ICJ Reports 90
formation of identity have been exhausted. To appeal to self-determination as a means of resolving issues of identity effectively says that methods of addressing those issues within existing social structures are inadequate. More than that, it demands a wholesale re-evaluation of those social structures with a view to changing them.

According to Allott, self-determination is "...a conventional name for a complex social phenomenon"\(^5\), one that is concerned with the desires people have concerning the ways in which wish to live and interact with one another. Encompassed within its rubric are three competing dynamics: desire, power and ideas. The combination of these struggles generate, in Allott's view, high levels of psychic and social energy; and do so to an exceptionally high degree because of the ultimate nature of the ideas they involve. Allott's argument, therefore, is that the struggle over desire, power and ideas is at heart a struggle over the meaning and implications of identity.

What does it mean, though, to say that self-determination involves a struggle over identity? It is suggested here that it relates to the fact that human experience is a perpetual investigation into who we are and why we are; something Allott describes as an 'unending process of self-identification'.\(^6\) This lack of finality, indeed the lack of any possibility of finality, is a central feature of self-determination (notwithstanding the apparent denial of this fact in the law and much of the literature) since the question of the

\(^5\) ibid
\(^6\) ibid 204
self is not amenable to resolution. Similarly, there is no answer to the question ‘what constitutes a 'people' under international law’ that is not susceptible to legitimate contestation, because there is no answer to the question of what is constitutive of a person's identity, that is not equally open to contestation.

With regards to how identity is formed, Allot posits that human identity is fundamentally ‘identity through difference’⁷. It depends for its cogency on the existence of something against which it can be defined: I know who I am because I am not who you are; you are other, whatever that may be. This means that every claim to self-determination is also and at the same time, an act of other re-determination.⁸ And, according to Allott, it is no coincidence that this conception of identity (identity as dependent on otherness), originated in post-Kantian philosophy at a time when the idea of the nation as a subjectively determined entity was in the ascendant.⁹ Accordingly, while self-determination presents itself as being about the self, it is also, inescapably, about the ‘other’ - identity cannot be understood except in relation to something else, it is in this respect entirely non-essentialist.

This argument is, to some extent, echoed by Hall¹⁰ who, writing in about English national identity, posits that the idea of Englishness has always been understood by

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⁷ ibid 179
⁸ ibid
⁹ ibid note 1
¹⁰ Stuart Hall, The Local and the Global, in McClintock, Mufti and Shohat (eds) Dangerous Liaisons: Gender, Nation and Postcolonial Perspectives (Minneapolis: University of Minnesota Press, 1997) 174
reference to the other, as he puts it: “To be English is to know yourself in relation to [others]. You know that you are what everybody else on the globe is not.”\footnote{ibid} Identity, however, is not that simple in practice. Indeed, it has been the argument of this thesis that self-determination as a legal right is unrealizable because it necessitates the imposition of a coherent, consistent, narrative of identity, and that this simply is not possible.

Nonetheless, as Chapters Three, Four and Five demonstrate, there has been no shortage of attempts to impose upon self-determination, just such a narrative with respect to the meaning of the self. As we have seen in Chapter Three, international law, in its drive for normativity, has adopted a territorially based understanding of the self in self-determination, associating it exclusively with decolonization. This has had profound implications for the meaning and construction of identity in international law generally; since it has required the articulation of why former colonies constitute peoples and other collectivities such as nations and indigenous populations, do not. The justifications proffered have, for the most part, been less than convincing.

It remains important, however, to understand the rationale underlying the idea of colonial identity, as former colonies are still the only undisputed legitimate recipients of the right to self-determination. Accordingly, other collectivities pursuing claims to self-determination often attempt to bolster their claims by analogizing their situation with that
of former colonies. Nevertheless, the legal construction of identity is inherently problematic, as consideration of the three competing rationalizations for both the existence and privileging, of the category of colonial identity reveal.

First, one could argue that the populations resident in former colonies at the moment of decolonization constitute peoples for the purposes of self-determination, because the community was forged in the fires of collective resistance. The identity is one born of struggle, engendered by the rise of political consciousness. Alternatively, one might regard the experience of collective victimization as constitutive of the colonial identity, suggesting an external and objective understanding of the formation of identity. A third possibility is simply to look to the existing population of given territory whose future is up for determination, and to regard whoever is encompassed within that geographical boundary, to be the legitimate repository of self-determination. On this understanding, a people - colonial or otherwise - is simply a ‘community of fate’.

If positive international law lacks coherence with regard to the construction of the self, however, then this is also true of the two most prevalent alternative narratives of the self: those of nation and of the individual, as considered in Chapters Four and Five respectively. As the these Chapters demonstrate, both of these narratives suffer from significant weaknesses, and themselves depend upon unsustainable and oversimplified

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assumptions regarding identity. Consequently, to propose that either one constitutes the definitive self, is no less problematic than to rely on the normative framework provided by international law.

Identity, who and what we are, is of such fundamental importance to our lives that we expect it to be stable, to center us, to provide us with a reference point so that we may understand the world around us. This is so whether our identity is conceived of as ascriptive or freely chosen. Identity is supposed to give us something to return to, to be possessed of a degree of certainty and permanence. Indeed we arguably take our identity for granted to such an extent that only when it is threatened or questioned do we actually consider what it involves. And, when we do, we find that it possesses none of the qualities we had assumed; that in fact it is highly problematical.

Given this, the idea that law is the appropriate vehicle through which to negotiate the highly complex phenomenon that is self-determination, is highly questionable. The existence of so many competing and conflicting theories on identity means that the law will forever be relegated to the position of referee: forced to mediate between these alternative understandings without ever being able to uncontroversially affirm any of them.

It is impossible for the law to think about identity in the manner required by the phenomenon’s complexity, because the law operates at a highly attenuated and abstracted

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13 *ibid* 74
level. Its approach to multifaceted situations is to categorize and label and compartmentalize. Clearly, however, this does not succeed in the context of identity, and neither, therefore does it succeed with regard to self-determination. And yet, it is difficult to see how it would be possible, at this late stage, to remove the law from the sphere of self-determination and return the right, the concept, the idea, wholly to the realm of the political.

It has not been the aim of this thesis to suggest alternative solutions to the current difficulties occasioned by self-determination, the idea that such solutions exist even in the abstract is itself questionable. Rather, the aim has been to show, through consideration of competing conceptions of the self, why it is that self-determination struggles to be accommodated within the normative framework of international human rights law, and furthermore, why it is that this struggle will never cease.
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