

# RE-THINKING SELF-DETERMINATION: A CRITICAL ANALYSIS OF CURRENT INTERNATIONAL LAW THEORIES

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## I. INTRODUCTION

The year 1991 marked the thirtieth anniversary of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>1</sup> and the beginning of the Decade for the Eradication of Colonialism. It was also the year in which the fragmentation of the Soviet Union became irreversible. And it was the year in which independence movements worldwide, in Croatia, Slovenia, Eritrea and East Timor, accelerated promotion of their claims. The catalyst for all these developments is the principle of self-determination. One could expect therefore that a principle so readily utilized in the international arena would possess a definite meaning. This is not the case. Current international law theory regarding self-determi-

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1. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/L323 (1960).

nation is in a state of uncertainty and confusion. It is inconsistent within itself, and it does not accord with state practice.

The aim of this paper is to demonstrate the need to re-think the principle of self-determination by establishing that an undesirable level of uncertainty exists regarding the usage of the term, and to show that a major cause of the confusion is due to the inadequacy of conventional approaches. These objectives will be achieved by identifying and evaluating conflicting approaches toward the meaning of self-determination, proposing an explanation for why the debate has evolved and suggesting which approach best serves the needs of the international community.

Before analyzing the history of self-determination and how it evolved to encompass the current view, it is important to consider why it has become necessary to re-evaluate the term. As the paper will focus on interpretations of what constitutes self-determination, it is worth commenting at the outset that interpreting words, whether legal or not, is by its nature an imprecise process. One method of analyzing inconsistencies of meaning which arise in legal interpretation was proposed by Professor H.L.A. Hart.<sup>2</sup> Hart developed the distinction between the "core" meaning of a legal concept, and its "penumbra of uncertainty." Self-determination is a term which has a wide penumbra of uncertainty. A number of inconsistent meanings have been ascribed to the term.

The reason this confusion is critical is that it promotes an unstable international environment by failing to provide a consistent measure upon which groups can rely. In this volatile period so ubiquitous a term should possess greater certainty than it presently does. Furthermore, what was once a nice academic debate threatens to jeopardize the potential the concept has for aiding international law dispute resolution. In other words, the functional utility of the term is being undercut by a confusion in the theory. International law is becoming hamstrung by its own limitations. When President Bush hesitates before recognizing as legitimate a call to independence by the people of Lithuania, (a claim framed initially as a right to self-determination), his equivocation is based on the confusions and shortcomings of international law theory. The point has been reached where, borrowing from Hart, the "penumbra of uncertainty" surrounding the con-

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2. The distinction between a 'core of settled meaning' and a 'penumbra of cases' was referred to in H.L.A. Hart, *Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958), and subsequently developed in H.L.A. HART, *THE CONCEPT OF LAW* 129 - 50 (1st ed. 1961).

cept of self-determination is so pronounced that it obscures the term's "core of settled meaning."

This problem assumes greater importance in the light of the increased reliance on the concept by indigenous peoples and ethnic minorities in a variety of unsettled political situations. The Commonwealth of Independent States, bargaining over nuclear stockpiles and struggling to suppress the dormant nationalist fervor of approximately 140 minority groups, probably represents the worst danger. The threat of the breakup of the Canadian federal system presents another. The civil war in Yugoslavia yet another.

It will be argued here that conventional theoretical approaches to self-determination are inadequate insofar as they provide neither a description of, nor a prescription for, the behavior of states in international relations. At a time when an increasing number of claims are being made by indigenous peoples and ethnic minorities, not enclosed within the parameter of classical, colonial boundaries, the disjunction between theory and practice becomes critical.

It is not within the scope of this paper to provide a complete history of self-determination or a complete discussion of its status, which have been comprehensively covered elsewhere.<sup>3</sup> The following two sections will, however, define self-determination in general terms and provide a brief overview of the concept's status. Part III will discuss the scope and content of self-determination. Specifically, the conventional and controversial views of its scope will be set out. State practices, *opinio juris* and textual and jurisprudential issues will be examined to determine which view appropriately defines self-determination. This paper concludes with a proposal to avoid the uncertainty created by the dissonance between state practice and the conventional view of self-determination.

## II. SELF-DETERMINATION - A BRIEF HISTORY

### A. *What Is Self-Determination?*

President Woodrow Wilson, introducing the concept to the League of Nations in 1919, described self-determination as "the right of every people to choose the sovereign under which they live, to be free of alien masters, and not to be handed about from sovereign to

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3. See, e.g., MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* (1982); A. RIGO-SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE* (1973); U. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* (1972).

sovereign as if they were property.”<sup>4</sup>

Subsequently, other writers described self-determination as a right which arises when there is “international recognition of the rights of the inhabitants of a colony to choose freely their independence or association with another state”<sup>5</sup> or when there is a “collective right of a people sharing similar objective characteristics to freely determine their own form of government while further developing their economic, social and cultural status.”<sup>6</sup>

The definition was further elaborated regarding the manner in which the right could be implemented. The right to self-determination can be exercised in one of three ways - integration, free association or independence - but whichever method is chosen, it is clear that it is the *process* itself which is the “essential feature.”<sup>7</sup>

According to Judge Dillard, in a separate opinion in the *Western Sahara Case*, “It is for people to determine the destiny of the territory and not the territory the destiny of the people.”<sup>8</sup> It will be demonstrated therefore that self-determination encapsulates three basic ideas: 1) there has to be a group; 2) that group has to be concerned about its political status; and 3) that group must be able to exercise its own *choice* with regard to its political future.

Having reduced the concept for present purposes to these three elements the next step is to identify areas of inconsistency in relation to the term. Uncertainty exists at two levels. First, there is uncertainty surrounding the status of the concept of self-determination at international law. Is it a principle of politics, a tool of secessionist rhetoric, or has self-determination crystallized into a norm of international law? The second issue relates to the question of how to define the group. To whom does a right of self-determination apply? Does it apply only to groups within colonial boundaries, or all minorities however encased? In other words, what exactly is the scope of the term? The aim of this paper is to concentrate on the latter problem.

### B. History and Status

Self-determination, as a principle of international law, originated

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4. Quoted in Eric M. Amberg, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 842 (1985).

5. *Id.* at 840 (quoting Professor Louis Henkin).

6. John A. Collins, *Self Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 138 (1980).

7. *Western Sahara Case*, 1975 I.C.J. 12, para. 57 (Oct. 16).

8. *Id.* at 114 (separate opinion of Judge Dillard).

following World War I with the development of the mandate<sup>9</sup> system.<sup>10</sup> According to Quincy Wright, the eventual aim of the mandate system was to lead the territory under control to self-determination.<sup>11</sup> In the following two decades, the acceptance of the principle of self-determination was reflected by, inter alia, its incorporation into the Soviet Constitution<sup>12</sup> and, most significantly, into article 1 of the Charter of the United Nations.<sup>13</sup>

In subsequent years, the United Nations' largest representative body, the General Assembly, regularly invoked the concept in a series of resolutions, the most important of which were passed in 1960<sup>14</sup> and 1970.<sup>15</sup> With the emergence of the Group of 77 during the mid-seventies, the concept of self-determination was elevated further on the agenda of the United Nations.<sup>16</sup>

Seeking to secure permanent sovereignty over their natural wealth and resources in a new international economic order, the third world countries emphasized self-determination, anti-colonialism, sovereign equality, non-intervention, and the invalidity of unequal treaties in their international affairs.<sup>17</sup>

9. The mandate derived from Roman law notions under which property of certain people unable to manage their own affairs was placed under the control of a guardian. Sovereignty over the property remained with the ward. Grotius describes this situation as a separation between "lordship" and "ownership." See 2 HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE*, Book I, 207.

10. The mandate system was devised by the League of Nations after the first World War, as a humanitarian method of administering former colonies of the defeated powers. In 1947, most colonies still under mandate were transferred to U.N. control as trust territories. Collins notes a number of other factors which led to the emergence of the mandate concept including: 19th century nationalism; the American and French revolutions; World War I; and the formation of the League of Nations. See Collins, *supra* note 6, at 138 - 40.

11. QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 231 (1930).

12. Article 29 of the Constitution of the Union of Soviet Socialist Republics, adopted in 1917, stated that the USSR's relations with other states were based on, inter alia, "the equal rights of peoples and their right to decide their own destiny." Collins, *supra* note 6, at 140 (citing KONST. SSSR art. 29 (1917)).

13. U.N. CHARTER art. 1.

14. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/L323 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1966).

15. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121 (1970).

16. The Group called on the international community to establish a New International Economic Order (N.I.E.O.). The combined influence of the developing, third world and Soviet interests, acting as a bloc, altered voting patterns in the U.N. General Assembly, and, at a more important structural level, changed the agenda of the Assembly. See generally ROBERT F. MEAGHER, *AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER: A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES* (1979).

17. Amberg, *supra* note 4, at 840 - 41.

The signing of two major Covenants of international law in 1966,<sup>18</sup> and subsequent decisions of the International Court of Justice<sup>19</sup> (ICJ) further endorsed the concept. As a result, self-determination became, according to some, “the pre-emptory norm of international law.”<sup>20</sup>

At the same time, the concept itself remained “highly controversial.”<sup>21</sup> The nature of the controversy revolved around two inter-related issues - what was the status of the concept, and what did it include within its scope? This section will concentrate on the former point, but in order to do so, it is first necessary to identify three methods of approaching the status issue. This clarification is required because assumptions regarding status clearly inform the discussion as to what is included within the concept of self-determination. The definition of the term self-determination will depend, to an extent, on the status ascribed to it. If the notion is viewed as *lex ferenda*, it may be acceptable to tolerate some uncertainties of meaning. If, however, self-determination is *lex lata*, some suggest that it may be only a limited concept which has achieved this status. This paper is based on the premise that the concept is *lex lata*, but that a narrow definition of self-determination is inappropriate. In other words, the notion of self-determination has achieved the status of a norm of international law, and furthermore, the scope of its application is broadening.

There are, broadly, three ways to view the question of status. The first approach attacks the very notion of self-determination. It claims that the concept is vague, ill-defined and lacking in legal content - a concept of “policy and morality”<sup>22</sup> rather than positive law.

18. *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *Covenants*].

19. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) (advisory opinion) [hereinafter *Namibia Case*]; *Western Sahara Case*, *supra* note 7. Compare these decisions with the decision of the Permanent Court of International Justice, some fifty years earlier, in the *Asland Islands Case*, L.N.O.J. Special Supp. No. 3, 3 (1920), where it held that positive international law did not recognize the right of national groups to separate themselves from the state of which they formed a part by a simple expression of a wish, any more than it recognized the right of other states to claim such a separation.

20. POMERANCE, *supra* note 3, at 1 (emphasis added).

21. HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 88 (1988).

22. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 593 (3d ed. 1979). Brownlie notes that this approach, which he does not share, was assumed by western scholars. Collins states that this school of thought views the concept as “legally intangible, ambiguous, problematical, and only partially applicable . . . self-determination is in practice unnecessary and invalid.” Collins, *supra* note 6, at 145.

A second group, characterized by Schwarzenberger, says, "self-determination has great potency, but [is] not part and parcel of international customary law."<sup>23</sup>

The third school assumes that self-determination is part of international law, but considers there to be disagreement as to the content of the concept. Thus, Brownlie in 1979 stated, "The present position is that self-determination is a legal principle . . . . Its precise ramifications in other contexts are not yet worked out."<sup>24</sup>

For present purposes, the view put forward by Brownlie is adopted on the basis of the sources of international law as listed in article 38 of the Statute of the ICJ<sup>25</sup> and interpreted by the court in the *Nicaragua Case*.<sup>26</sup> In the court's view, "the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States."<sup>27</sup>

Evidence of state practice can be found in a range of sources. This includes: 1) the decolonization process of over seventy states since 1946; 2) explicit recognition by the member states of the U.N. of the right to self-determination by particular groups such as the Namibian and Palestinian people; and 3) a growing number of statements by the international community encouraging the acceptance of the validity of claims by peoples ranging from the Yugoslav republics,<sup>28</sup> to the Baltics,<sup>29</sup> to East Timor.<sup>30</sup> Examples of state practice are more comprehensively examined in the context of the scope of self-

23. Quoted in DAVID J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 95 (3d ed. 1983).

24. BROWNLIE, *supra* note 22, at 595.

25. Article 38 provides that the ICJ shall apply international conventions, international custom as evidence of general practice, general principles of law, and, as a subsidiary means, judicial decisions and teachings of qualified publicists. See Statute of the International Court of Justice, art. 38 appended to the U.N. CHARTER, 59 Stat. 1031, T.S. No. 993 (1945).

26. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)*, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua Case*].

27. *Id.* para. 183.

28. As of this writing, the United States (*The Age*, July 4, 1991), Britain (*The Age*, July 5, 1991), Germany (*The Age*, July 5, 1991), the European Community (*The Age*, July 4, 1991) and Australia (*The Age*, July 5, 1991) have indicated their readiness to accept the Slovenian and Croatian claims. See also Mary Curtius, *US, Allies Eye Halting Arms to Yugoslavia; Discuss Recognizing Republics if Federal Army Won't Withdraw*, BOSTON GLOBE, July 4, 1991, at 1.

29. See for example statements by the United States and Australia calling on the former Soviet Union to recognize the Lithuanian Parliament's declaration of independence. *The Age*, March 3, 1991. See also Warren Strobel, *Bush Bolsters Ties to Baltics*, WASH. TIMES, May 13, 1991, at A7.

30. *Question of East Timor*, G.A. Res. 3730, U.N. GAOR, 37th Sess., Agenda Item 97, U.N. Doc. A/RES/37/30 (1982).

determination,<sup>31</sup> their purpose here being merely to demonstrate that such evidence exists.

Since the *Nicaragua Case*, it is clear that the second element of the test from that case, evidence of *opinio juris*, may be deduced from U.N. General Assembly resolutions.<sup>32</sup> Resolutions 1514, 1541 and 2625 indicate a belief within the international community that self-determination is a part of customary international law.<sup>33</sup>

Treaties, a further source of law under the Statute of the ICJ, also confirm the existence of a legal right. The most representative treaties of all time, the U.N. Charter (1947),<sup>34</sup> the Universal Declaration of Human Rights (1948),<sup>35</sup> and the 1966 International Cove-

31. See discussion *infra* part III. A. 1.

32. HARRIS, *supra* note 23, at 99 (quoting the separate opinion of Judge Dillard in the *Western Sahara Case*, *supra* note 7); *Nicaragua Case*, *supra* note 26, para. 188.

33. General Assembly Resolution 1514 (1960), 1541 (1966) and 2625 (1970) all contain passages similar in wording to article 1 of the International Covenants of 1966. G.A. Res. 1514, *supra* note 14; G.A. Res. 1541, *supra* note 14; G.A. Res. 2625, *supra* note 15. The first of these, the *Declaration on the Granting of Independence to Colonial Territories and Peoples*, begins with the general proposition that the subjection of peoples to alien subjugation, domination and exploitation constituted a "denial of fundamental human rights" and is "contrary to the Charter of the United Nations." See G.A. Res. 1514, *supra* note 14. It then states in paragraph two that "all peoples have the right to self-determination" and that "immediate steps" should be taken in Trust, Non-Self-Governing, and all other territories which have not attained independence, to "transfer all powers to the peoples of those territories." *Id.* para. 5. General Assembly Resolution 1541 outlines three possible methods of implementation: 1) independence; 2) free association; and 3) integration. See G.A. Res. 1541, *supra* note 14. The third General Assembly Resolution, the 1970 *Declaration on The Principles of International Law Concerning Friendly Relations and Co-operation Among States*, re-asserted the primacy of the principle of self-determination. See *supra* note 15. It stated that "all peoples have the right to freely determine without external interference, their political status." *Id.*

34. One of the purposes of the United Nations under article 1 of the Charter is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ." U.N. CHARTER art. 1(2) (emphasis added). The content of the term was developed in article 55 which promoted, *inter alia*, higher standards of living, respect for human rights and fundamental freedoms based on the principle of self-determination. *Id.* art. 55. The use of the term self-determination in the Charter at articles 1 and 55 is persuasive evidence for recognizing that such a right existed at international law, although, John Humphrey, the first head of the Human Rights Commission of the United Nations, argues that in 1947 self-determination in the Charter was merely a "political principle" and later it became "something else." See HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 194 (Theodore Meron ed., 1984). The majority in the *Western Sahara Case* disagreed and held that the inclusion of the principle in the Charter was indicative of its status as law. See *Western Sahara Case*, *supra* note 7.

35. G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, 183d plen. mtg., U.N. Doc. A/777 (1948). One of the first actions of the newly created United Nations in 1948 was to begin drafting a Universal Declaration of Human Rights. Although self-determination is not specifically mentioned in that Declaration, many of the rights listed could be interpreted as being elements of a right of self-determination. For instance, under the Declaration everyone has the right to own property (art. 17), to freedom of thought, conscience and religion (art. 18) and to take part in the government of their country (art. 21). More specifically, article 15 provides

nants,<sup>36</sup> whether viewed as a source of obligation derived from mutually binding promises, or as methods of developing law, indicate an acceptance of the concept. The inclusion of self-determination in customary international law is reflected also in two major decisions of the ICJ.<sup>37</sup>

### III. SCOPE AND CONTENT OF THE CONCEPT

Turning now to the question which is the subject of this paper, the major issue to be addressed is, which groups are entitled to exercise a right to self-determination? The critical uncertainty here is whether the right of self-determination attaches to all "peoples,"<sup>38</sup> in a literal sense, or only to those peoples within existing colonial boundaries.

#### A. The "Conventional" View

Broadly speaking, two views can be identified in the literature. Harris, for example, believes that General Assembly Resolution 1514, the first to deal comprehensively with self-determination, contemplates self-determination within existing boundaries. He argues, pragmatically, that this limitation is necessary in the interests of international harmony.<sup>39</sup> Accordingly, ethnic minorities, not within definite colonial boundaries, are not entitled to exercise a right of self-

that everyone has the right "to a nationality" and that no one shall be "arbitrarily deprived" of their nationality - two elements implicit in a right of self-determination. *Id.*

36. See *Covenants*, *supra* note 18. The Covenants are the work of the U.N. Commission on Human Rights, whose brief was to translate the principles embodied in the Universal Declaration into treaty law. These then form the basis of the major international obligation in relation to self-determination. The Covenants came into force in 1976 and ratifications to date number over 90 including Great Britain, the U.S.S.R., the Federal Republic of Germany, the German Democratic Republic and Japan. The United States is a signatory to both Covenants.

37. See Collins, *supra* note 6, at 145. In its Advisory Opinion in the *Namibia Case*, the ICJ referred to the development of the law since 1920 as encapsulated in the U.N. Charter and the General Assembly Resolutions of 1960 and noted that its interpretation of the principles of law could not be "unaffected" by the "supervening half century." *Namibia Case*, *supra* note 19, para. 31. It concluded that in order to "faithfully discharge its functions" it could not ignore these developments which left "little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned." *Id.* In the *Western Sahara Case*, the ICJ endorsed the abovementioned statements from the *Namibia Case* and referred to Resolution 1541 of 1966, which it said "gave effect to the essential feature of the right of self-determination." *Western Sahara Case*, *supra* note 7, para. 57.

38. The major U.N. instruments on self-determination, including the human rights Covenants and the resolutions of the General Assembly, provide that the right is possessed by all "peoples." See *supra* notes 14, 15, and 18.

39. Harris states that "[t]he post-colonial states in particular have taken the view that it would be too disruptive of international stability to allow self-determination within those boundaries for minorities." HARRIS, *supra* note 23, at 96. See also JAMES CRAWFORD, *THE*

determination. Presumably therefore, under a strict reading utilizing this approach many recent claims would fail. These would include for example, claims by the peoples of the republics of the former Soviet Union<sup>40</sup> against Moscow, by Croatia,<sup>41</sup> Slovenia<sup>42</sup> and Macedonia<sup>43</sup> against Yugoslavia, by the Serbian minority of Krajina against Croatia,<sup>44</sup> the Bougainville claim against Papua New Guinea,<sup>45</sup> and the list goes on. Query whether, according to this view, the claims of the peoples of Baltic states who are arguably resident within pre-existing but dormant colonial boundaries would have any validity under this approach.

In Australia, the view which strictly delimits the instances in which self-determination can apply was adopted by the Australian Law Reform Commission (A.L.R.C.), when it reported in 1986 on Aboriginal Customary Law. The A.L.R.C. stated:

[A]dvocates for ethnic, indigenous or linguistic minorities sometimes rely upon the principle or right of self-determination in international law as a basis for claims to political or legal recognition. So far however, the principle has been confined in international practice to situations involving separate ('colonial') territories politically and legally subordinate to an administering power.<sup>46</sup>

The view espoused by the A.L.R.C. will be termed, for present purposes, the "conventional" view.

### B. The "Controversial" View

A different, and more controversial perspective is adopted by, among others, Collins and Nanda. Professor Nanda's thesis is that

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CREATION OF STATES AT INTERNATIONAL LAW 91 - 93 (1979); WILSON, *supra* note 21; POMERANCE, *supra* note 3, at 3; Amberg, *supra* note 4, at 853.

40. For example, 98.3% of the 90.5% of Georgians who voted in a recent referendum supported independence from Moscow. See THE AGE, Apr. 3, 1991. See also Elizabeth Shogren, *Soviet Georgians Flock to Polls to Vote for Secession*, L.A. TIMES, Apr. 1, 1991, at A1.

41. THE AGE, May 31, 1991. See also Andrew Borowiec, *Serbia Plans to Form Small Federation*, WASH. TIMES, Aug. 14, 1991, at A8.

42. THE AGE, Apr. 29, 1991. See also Borowiec, *supra* note 41.

43. THE AGE, Jan. 27, 1991. See also Borowiec, *supra* note 41.

44. THE AGE, Apr. 3, 1991. See also *Balkan Woes*, CHRISTIAN SCI. MONITOR, Apr. 8, 1991, at 20.

45. For a discussion of the Origins of the Bougainville claim see THE AUSTRALIAN, Sept. 4, 1990. See also *Papau New Guinea Prime Minister Namaliu on Bougainville Disturbances*, Xinhua General Overseas Newswire Service, Apr. 11, 1989, available in LEXIS, ASIAPC Library, ALLASI File.

46. A.L.R.C., REPORT NO. 31 RECOGNITION OF ABORIGINAL CUSTOMARY LAW 128 (1986).

the right of self-determination extends beyond the colonial context.<sup>47</sup> Although in order for the group to qualify for the right, they must first satisfy a formal set of criteria. Moreover, Collins states it is only political exigencies which have focused the right of self-determination onto colonial territories. He argues that:

although political events have concentrated the UN's focus on colonial territories and the UN stands firm on the concept of territorial integrity, the principle of self-determination should not be considered strictly as a colonial right.<sup>48</sup>

### *C. Analysis: Which Approach to Self-Determination Is Appropriate?*

It should be clear then that these two approaches, which have been labelled conventional and controversial, are inconsistent. It will be argued here that the latter is preferable; that in certain circumstances, the right to self-determination should be made available to minority groups, as well as states, trusts and non-self governing territories. This proposition is based on the view that the controversial theory of self-determination provides a more accurate explanation of the shift in international state practice, as well as a workable prescription for the future. The discussion in this section will show that state practice and the belief of states regarding that practice is in accordance with the controversial view. Moreover, the conventional view is premised on an inherent logical inconsistency, and is unsustainable from a jurisprudential perspective. The challenge for international law is therefore not to exclude the ever-increasing list of claimants because they do not match precisely with an outmoded theory, but to find methods for assessing and evaluating the validity of claims according to realistic, functional and humanitarian measures.

#### *1. State Practice and Opinio Juris*

The aim in this part of the paper is to outline the lack of correspondence between international legal theory and state practice and consequently show that the exclusion of non-colonially based claims is confusing and no longer appropriate.

Regardless of recent events in Europe and Asia, it is clear that during the last fifty years there has already been a marked alteration in the international community's perception of when the right to self-determination arises. A former head of the Human Rights section of

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47. Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 266 (1981).

48. Collins, *supra* note 6, at 153.

the U.N., John Humphrey, argues that when self-determination was introduced into the U.N. Charter, at the behest of the former Soviet Union, ironically enough, it was clearly with colonial and mandated territories in mind.<sup>49</sup> The 1960 Declaration is in accord with that interpretation, and this, he says, was also the prevailing view in the U.N.<sup>50</sup> Humphrey then goes on, however, to acknowledge that the General Assembly had no such limitation in mind when it sanctioned the International Covenants in 1966. In his view, the General Assembly intended the word 'peoples' to extend beyond the colonial context.<sup>51</sup>

It is important to recall that colonial boundaries were the result of specific historical circumstances. The desire for territorial or economic gain led to the establishment of arbitrary boundaries which often cut across traditional spheres, although as Wilson notes, post-colonial states have in some cases come to accept these boundaries.<sup>52</sup> In many cases, the rearrangement of peoples into newer colonial units produced an alliance of groups which had no reason, other than colonialism, for existing. Currently these alliances, which often take the form of federations, are coming under increasing pressure from resurgent nationalism. Yugoslavia is clearly one of the more tragic illustrations of this problem, where years after redrawing the physical boundaries of the state, the psychological boundaries which define various groups remain as strong as ever. Boundaries, therefore, although "legal" in one sense, did not always reflect "practice," in the sense of what peoples within those artificial parameters continued to value. And whether or not post-colonial states accepted the imposed boundaries, it still begs the question of whether these limitations should be the critical yardstick by which to determine the validity of a self-determination claim.

More significantly, from the perspective of international law the-

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49. Other commentators take a different view. For example, it has been suggested that when the U.N. Charter was drawn up the U.N. Secretariat defined peoples as groups who may or may not comprise states or nations. See J. Matthews, *Revision of ILO Convention No. 107* (May 1988) (unpublished manuscript delivered at International Law Association Conference, Australian National University).

50. J.P. Humphrey, *Political and Related Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW - LEGAL AND POLICY ISSUES 196 (Theodore Meron ed., 1984).

51. *Id.*

52. Wilson says, in 1968, the Organization for African Unity supported the territorial integrity of Nigeria against the Biafran secessionist movement, because to do otherwise "would set a dangerous precedent for the political unity of every African country." WILSON, *supra* note 21, at 87. See also the discussion of the *uti possidetis* doctrine, which prevents the stability of the new regime's borders being endangered in Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. Y.B. No. 40, at 161.

ory, is the confusion or disjunction between law and current events which is demonstrated by the fact that a blanket prohibition on the rights of minorities seeking self-determination does not accord with state practice. Certain minorities have either achieved self-determination, or are in the process of seeking it, often with international sanction and recognition, in spite of the conventional view. In recent times, the instances of groups seeking and sometimes exercising their right to determine their own future are rapidly increasing. International recognition for the claims of the Palestinians,<sup>53</sup> growing support for the recognition of the right to secede<sup>54</sup> by Slovenia and Croatia,<sup>55</sup> the Baltic states and perhaps even world response to the plight of the Kurds indicate that state practice is slowly building to support a shift in view, regardless of the fact that these examples are usually rationalized as exceptions to the general rule.<sup>56</sup> For example, President George Bush has referred to recognition of independence of the Baltic States as being a "special case."<sup>57</sup>

Events in Yugoslavia illustrate the changed state practice with regard to recognized acts of self-determination, even prior to the appearance of the elements which normally constitute statehood.<sup>58</sup> Although it is impossible to be precise about the state of events in Yugoslavia, it appears that as of this writing the U.S.,<sup>59</sup> Britain,<sup>60</sup>

53. See, e.g., Res. ES-7/2: Question of Palestine (1980), reprinted in 18 DUSAN J. DJONOVITCH, UNITED NATIONS RESOLUTIONS: SERIES 1: GENERAL ASSEMBLY 479 (1979 - 80).

54. A right which extends beyond the right simply of self-determination.

55. THE AGE, July 5, 1991. See also Stephen Kinzer, *Europe, Backing Germans, Accepts Yugoslav Breakup*, N.Y. TIMES, Jan. 16, 1992, at A10.

56. For an example see the view expressed in Richard N. Kiwanuka, *The Meaning of 'People' in the African Charter on Humanitarian and Peoples' Rights*, 82 AM. J. INT'L L. 80, 90 (1988), that international recognition for Bangladesh only occurred because of "a set of circumstances that lent a cloak of legitimacy to what would otherwise be impermissible at international law."

57. David Hoffman, *Baker Vows Aid for Soviets, Lists Five Principles for Dealings*, WASH. POST, Sept. 5, 1991, at A34.

58. The 7th International Conference of American States - Convention on Rights and duties of States, Dec. 3 - 26, 1933, art. 1, 28 AM. J. INT'L L. SUPP. 75 (1934). Article 1 lists 4 elements: permanent population, defined territory, government and capacity to enter into relations with other States. Recognition also has an effect on statehood although controversy remains as to whether its role is "constitutive" or "declaratory." See JOSEPH M. SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* (3d ed. 1988).

59. See THE AGE, July 4, 1991. See also John Mashek, *Bush Edges Toward Recognizing Baltics*, BOSTON GLOBE, Aug. 27, 1991, at 12.

60. The British Prime Minister John Major was reported as saying, "it may no longer be possible to hold the country together." THE AGE, July 5, 1991. See also William Drozdiak, *Conflicts Over Yugoslav Crisis Surface in Europe; Debate Pits Principle of Self-Determination Against Preserving National Boundaries*, WASH. POST, July 5, 1991, at A15.

Germany,<sup>61</sup> the European Community,<sup>62</sup> and Australia<sup>63</sup> have indicated their readiness to recognize the declarations of independence by Slovenia and Croatia.<sup>64</sup>

The Baltics provide another example of the practice of states shifting to support claims by minorities for self-determination. What has been the response of the international community to their claims of independence from Moscow? Events have moved with startling rapidity. Just over one year ago one state only, Iceland, had formally recognized Lithuania's claim for independence.<sup>65</sup> Now recognition of independence has been accorded by at least eighteen countries including Australia, plus the U.S. and the European Community. The President of the Russian Republic has issued a decree recognizing the Baltic republics, as did the President of the defunct Soviet Union.<sup>66</sup>

Even prior to these events Lithuania's claim had already attained a certain degree of legitimacy from the international community. The U.S. and Australia, among others, were reported as attempting to pressure the Soviet Union into accepting Lithuania's declaration.<sup>67</sup> The U.S., adopting diplomatic means, postponed an important summit it had planned to hold with the Soviet Union.<sup>68</sup> The Soviet Union's military response to the Lithuanian movement was condemned by the U.S.,<sup>69</sup> Japan,<sup>70</sup> the European Community<sup>71</sup> and Australia,<sup>72</sup> and threats were made to suspend aid.<sup>73</sup> It is clear, therefore, that while Lithuania's right to self-determination had been recognized

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61. See THE AGE, July 5, 1991. See also Drozdiak, *supra* note 60.

62. The European Community was reported to be ready to consider recognition if Belgrade refused to stop hostilities. THE AGE, July 4, 1991. See also Curtius, *supra* note 28.

63. See THE AGE, July 5, 1991.

64. The European Community formally recognized Croatia and Slovenia on January 16, 1992. See THE AGE, Jan. 16, 1992. See also Stephen Kinzer, *Europe, Backing Germans, Accepts Yugoslav Breakup*, N.Y. TIMES, Jan. 16, 1992, at A10. It has also recognized Bosnia and Herzegovina. See *EC Grants Recognition to Bosnia and Herzegovina*, THE WEEK IN GERMANY, Apr. 10, 1992, available in LEXIS, NEXIS Library, CURRNT File.

65. See GUARDIAN WEEKLY, Feb. 17, 1991. See also Debran Rowland, *Lithuanians Mark Independence Day*, CHI. TRIB., Feb. 18, 1991, at 7.

66. See Martin Seiff, *Yeltsin Now Calls the Shots*, WASH. TIMES, Aug. 26, 1991, at A1.

67. See THE AGE, Mar. 3, 1991. See also Daniel Sneider, *Gorbachev Woos and Assails West*, CHRISTIAN SCI. MONITOR, May 9, 1991, at 3.

68. See THE AGE, Jan. 30, 1991. See also Don Oberdorfer & Ann Devroy, *Bush and Gorbachev Postpone Summit*, WASH. POST, Jan. 29, 1991, at A1.

69. See THE AGE, Mar. 17, 1991. See also *U.S. on Secession: Maybe*, N.Y. TIMES, June 28, 1991, A8.

70. See THE AUSTRALIAN, Jan. 22, 1991. See also Martin Seiff, *Violence Laid to Gorbachev's Foes*, WASH. TIMES, May, 3, 1991, at A8.

71. See THE AGE, Jan. 23, 1991. See also Seiff, *supra* note 70.

72. See THE AGE, Jan. 16, 1991. See also Seiff, *supra* note 70.

73. See THE AUSTRALIAN, Jan. 22, 1991. See also Seiff, *supra* note 70.

by only one state, many others have implicitly indicated that, at the very least, they did not accept the Soviet Union's outright rejection of the Lithuanian claim. At the most, the negative response of these states can be interpreted as tacit approval of Lithuania's claim. If so, further support is lent to the argument that examples of state practice are incrementally building toward a re-examination of traditional theory.

The proposal for the establishment of a safe haven for Kurdish refugees from the Iraqi regime, regardless of whether it succeeds or not, also lends support to a change in practice. The territorial integrity of Iraq was affected by the allies' action in establishing the enclave and subsequent recognition of the Kurdish claim for full autonomy by the allies further confirms the allies' support of Kurdish claims for self-determination. Although it is clear that protection of the Kurds does not translate automatically into support for their right to self-determination, the allied intervention ensures that the Kurdish claim is kept alive, and may be a preliminary step necessary for the attainment of that goal. In addition, a U.S. Military Report specifically recognized as an objective the attainment of a permanent, secure and autonomous Kurdish region.<sup>74</sup> The Kurdish example indicates that a "people," subject to alien domination not within defined colonial borders, have been allocated, with the sanction and active contrivance of three significant powers and the U.N., a safe haven or enclave within the territory of another state.<sup>75</sup> A safe haven is clearly one important element towards achieving a successful claim for self-determination.

In principle, acceptance of a right to limited self-government for the Palestinian people has been recognized by Israel.<sup>76</sup> In view of the fact that self-determination is about the process of allowing a group to determine their political future, rather than any one particular result, Israel's acceptance is significant.

Two final examples of the shift in state practice concern the Czech and Slovak Federal Republic (C.S.F.R.) and Eritrea. C.S.F.R. President Vaclav Havel has indicated that the Slovakian people have a

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74. See THE AUSTRALIAN, May 5, 1991. See also *Paper: U.S. May Seek Autonomous Kurdish Region*, CHI. TRIB., May 5, 1991, at 19.

75. See GUARDIAN WEEKLY, Apr. 28, 1991. See also *Paper: U.S. May Seek Autonomous Kurdish Region*, CHI. TRIB., May 5, 1991, at 19.

76. See THE AGE, Jan. 16, 1992. See also Norman Kempster & Daniel Williams, *Israel OKs Talks on Arab Self-Rule*, L.A. TIMES, Jan. 15, 1992, at A1.

right to secede, as long as it is done in a constitutional manner.<sup>77</sup> Similarly, the new Ethiopian government has reportedly adopted a charter recognizing the right of self-determination for all its nationalities, as long as the appropriate referendum is held, and has affirmed the right of the Eritreans in the north of the state to secede.<sup>78</sup>

The aforementioned examples do not confuse the political principle of self-determination with the legal right of self-determination, but recognize the *facts* of self-determination. There is a large and growing body of evidence indicating that the attitudes of the international community towards the right of minorities to assert a claim for self-determination are changing. As the ICJ stated in the *Nicaragua Case*, these facts constitute the most potent evidence of the state of customary international law.<sup>79</sup> If self-determination is to have any contemporary relevance, then, it must be taken to include the situation where ethnic minorities may exercise this right.

## 2. Textual Issues

An analysis of the texts which represent the conventional view of self-determination also reveals that it is based on a circular argument. It asserts that apart from States, trusts and non-self-governing territories or categories listed in Chapter XI of the U.N. Charter, the right is available only to those territories which possess a status similar to that of a non-self-governing territory. Crawford, for example, offers an additional rather vague category of situations, apart from the standard ones, where self-determination may also be relevant:

[Possibly] other territories forming distinct political geographical areas, whose inhabitants do not share in the government either of the region or of the State to which the region belongs, *with the result that the territory becomes in effect . . . non-self-governing.*<sup>80</sup>

Similarly, Wilson believes that the right does not entail a right of secession from a self-governing state, "unless a part of that State has become effectively non-self-governing with respect to the whole."<sup>81</sup>

These arguments beg the critical question. Nowhere do they define *how* or *when* the territory in question becomes non-self-governing. They merely answer the problems by restating it. What does become

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77. See THE AGE, July 9, 1991. See also Mary Battiata, *Separatist Slovaks Becoming More Vocal in 'Family Feud' with Czechs*, WASH. POST, Mar. 19, 1991, at A21.

78. See THE AGE, July 5, 1991. See also Robert M. Press, *Ethiopians Opt for Transition to Democracy*, CHRISTIAN SCI. MONITOR, July 5, 1991, at 1.

79. See *Nicaragua Case*, *supra* note 26.

80. Crawford, *supra* note 39, at 101 (emphasis added).

81. WILSON, *supra* note 21, at 87.

ing “in effect non-self-governing” or “effectively non-self-governing” mean? This is the crux of the whole self-determination issue, the need to formulate a legal method for determining when a particular entity has become “non-self-governing.”

The deficiency of the conventional view is that by failing to formulate specific principles with which to assess a claim, it avoids the most controversial aspect of the right to self-determination. This is not an attack merely on the lack of clarity of the traditional view; the “legality” of a right is not diminished or increased by the uncertainty of its content. The conventional view is clear enough within a limited scope, but it does not provide an explanation or guide for when the right does arise beyond the traditional categories, categories which no longer cover the varieties of groups seeking to exercise the right.

### 3. *Jurisprudential Issues*

Assuming then that the conventional view of self-determination theory is no longer appropriate, on the basis both of developing state practice and inherent logical inconsistencies, it is interesting to consider how and why it has for so long been accepted. Furthermore, why has that acceptance been accompanied by continual academic controversy? The confusion of international opinion in this area is an example of what one jurisprudential approach would call a “crisis” in the “interpretive” community’s “structure of beliefs.”<sup>82</sup> This theory asserts that change in law comes about when the exceptions to a general rule are too numerous to rationalize. A “crisis” in the law results which can only be resolved by the reconciliation of the exceptions under a new rule, which thus moderates or changes the original rule. This reconciliation can only occur through an alteration in the community’s belief structure and this happens when a sufficiently persuasive argument is formulated to explain the exceptions. In this manner, the law gradually evolves and retains the illusion (often fostered in law schools) of being simultaneously “static and yet dynamic.” For example, Katz explains the process by reference to Thomas Kuhn’s theory of scientific change:

Discovery commences with the awareness of an anomaly . . . . It then continues with a more or less extended exploration of the area of the anomaly. And it closes only when the paradigm theory has been ad-

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82. See, e.g., M.F. Katz, *After the Deconstruction: Law in the Age of Post-Structuralism*, 24 U. W. ONTARIO L. REV. 51, 57 - 58 (1986).

justed so that the anomalous has become the expected.<sup>83</sup>

Academic opinion regarding self-determination is currently in a state of "crisis." The profusion of debate reflects a period in which there is an "extended exploration of the anomaly." Berman refers to aspects of the debate as "the paradox of self-determination."<sup>84</sup> The mass of writing on the subject is evidence of the unsettled state of the law. Crawford's usage of the word "possibly" to qualify the application of self-determination to territories outside conventional theories only highlights the uncertainties. The recapitulation of the general rule, and attempts to explain or rationalize exceptions under the general rule, are unconvincing. They do not accord with either legal *or* political reality. There is a growing list of examples where a right to self-determination has been recognized regardless of its failure to fit conventional theoretical requirements. This list of examples includes the Baltic States, Croatia and Slovenia, and recent Israeli statements regarding a Palestinian right to limited self-government, to name a few. At this stage, it is sufficient to point out that politically and legally certain entities have successfully asserted their right to self-determination while others continue to do so. What is needed in order to resolve the "crisis" is a reformulation of the original rule. Otherwise, the factual exceptions cannot be reconciled.

It has been suggested here that there is an uncertainty in international law theory regarding when the right of self-determination applies; that this confusion has rendered the term incapable of application to the wide variety of situations it is being called upon to mediate; and, that reformulation of the conventional approach is necessary to reconcile factual exceptions. The controversial approach to the interpretation of self-determination more accurately reflects current state practice, and should therefore be formally recognized as the appropriate international law standard.

#### *D. Issues for the Future*

Adoption of the controversial approach to self-determination will undoubtedly be accompanied by a range of new and complex issues. For example, the most serious of these problems is the potential effect a successful bid for self-determination by a group in one state, may have on a neighboring state which also contains the same grouping.

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83. See *id.* at 56 (citing THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 90 (1967)).

84. N. Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51, 52 (1988).

In this context, the Chinese have expressed concern over the effect that independence for Kazakhstan may have over the large Kazakh minority in the Xinjiang province.<sup>85</sup> Serbs in the Croatian region of Krajina will also pose a problem for any independent Croatian state.<sup>86</sup>

Inter-ethnic rivalries *within* newly independent Soviet republics also create serious problems for international stability. It is difficult to keep abreast of the ever burgeoning list of minorities claiming rights, often against an entity which itself has just successfully asserted its right to self-determination. The Ossetians in Georgia, the self-proclaimed Dnieper Republic in Moldova and the Crimean autonomous republic in the Southern Ukraine<sup>87</sup> are examples of just a few claims by minorities within former minority entities.

Apart from a proliferation of claims which could result from the adoption of the controversial view, the other major issue concerns the area of implementation. How quickly and effectively can international and domestic constitutional law theory respond to the urgent need to construct new forms of power sharing to accommodate the proliferation of demands? Remembering that self-determination is not necessarily synonymous with complete independence, the "shape" of new forms of federal structures will be extremely important. The formation of the Union of Soviet Socialist Republics and its rapid replacement by the Commonwealth of Independent States with as yet undefined responsibilities in significant areas of economic and defense control illustrates the need for some creative legal thinking on the effect of self-determination on the constitutional structure of states.

Or will self-determination translate into the forms of power redistribution being experimented with in relation to indigenous peoples in Canada, New Zealand and to a lesser extent Australia? For example, will Canada proceed with a proposal by the notably conservative Canadian Bar Association to introduce a separate system of justice for native Canadians? Will the New Zealand experience of placing land claims in a separate tribunal and allowing first offenders in the criminal justice system to be punished in consultation with Maori leaders constitute new forms of effective self-government?

These and a host of other issues accompany a shift in international law to the more controversial approach to self-determination.

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85. See Lena H. Sun, *China Fears that Fever of Soviet Ethnic Conflicts Could Cross Border*, WASH. POST, Sept. 20, 1991, at A16.

86. See Laura Silber et al., *Serbian Leaders' Dispute Threatens UN Peace Plans*, FINANCIAL TIMES, Feb. 4, 1992, at 2.

87. See THE AGE, Sept. 7, 1991. See also Walter Laqueur, *Independence May Enslave Millions*, L.A. TIMES, Sept. 8, 1991, at M5.

It is suggested here, however, that these questions should be incorporated into the criteria to be applied in assessing a claim, or resolved at the domestic level, rather than automatically preventing the right from being exercised. Otherwise, the term self-determination is in danger of losing any useful currency it may have once possessed as a principle of international law.

#### IV. CONCLUSION

It has been argued here that conventional theoretical approaches to self-determination are inadequate insofar as they provide neither a description of, nor a prescription for, the behavior of states in international relations. To be useful to the field of international dispute resolution, international law theory should be functional, as well as analytical. This is particularly true when we are witnessing an increasing number of claims by indigenous peoples and ethnic minorities, not enclosed within the parameter of colonial boundaries, but who nevertheless wish to exercise their right to self-determination, a right which is part of international customary law. To date, the right is denied on the basis that the group does not "fit" the theory. The resulting dissonance between state practice and the conventional law on self-determination has led to an unacceptable level of uncertainty in the application of the law. A way out of this uncertainty has been proposed, utilizing existing tools of the discourse, to improve and refine the current paradigm.