



Summer 6-1-1998

The Right of Self-Determination in the Twenty-First Century

Hurst Hannum

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 Wash. & Lee L. Rev. 773 (1998).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol55/iss3/8>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The Right of Self-Determination in the Twenty-First Century

Hurst Hannum*

I. Introduction

One can address the right of self-determination from a number of different perspectives. For example, the exercise of this right in the past decade has had a dramatic effect on theories of international organizations, the role of force, and conflict resolution. Claims of self-determination led in part to the destruction of the former Yugoslavia, and the specter of secessionist movements has magnified the attention given to the rights of minorities and indigenous peoples.

In the following discussion, I will link self-determination to human rights in two different ways. First, I explore self-determination as a human right, addressing issues of content and definition. Second, I discuss the impact of self-determination claims on other human rights.

II. Self-Determination as a Human Right

Self-determination *is* a human right. Although there are many hortatory references to self-determination in General Assembly resolutions and elsewhere, the only legally binding documents in which the right of self-determination is proclaimed are the two international covenants.¹ The first paragraph of common article 1 states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²

Although the quoted language fails to answer several questions, at least some aspects of the right have become clear through subsequent reflection and

* Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University.

1. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3.

2. International Covenant on Civil and Political Rights, *supra* note 1, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 1.

interpretation. The first clarification is that self-determination is a right that belongs to collectivities known as "peoples," not to individuals. Thus, the Human Rights Committee has consistently made clear that claims that the right of self-determination has been violated cannot be raised under the First Optional Protocol, which applies only to individuals.³ I think that the Committee is probably wrong to exclude self-determination claims automatically from the scope of individual complaints, but its jurisprudence has been consistent on this point.

It also is clear that self-determination is a right that belongs to peoples, but not to minorities.⁴ This truism may only shift the debate to definitions and semantics, but the distinction between minorities and peoples remains an article of faith for states and international bodies concerned with monitoring human rights.

There are numerous problems in defining both "peoples" and what they are entitled to "determine." Without reviewing the entire history of self-determination, let me just outline how the concept has passed through at least two distinct phases and is now entering a third one.⁵ Initially, meaning perhaps the middle of the nineteenth century when the phrase "self-determination" came into common usage, self-determination was not a right but was a principle. It was a principle that first allowed disparate people who spoke the same language, such as Germans and Italians, to group themselves together and form a new state. This "grouping," of course, did not occur without coercion and, in some cases, a good deal of violence. A bit later, at the end of World War I, the principle of self-determination provided a guiding principle or rationale for dismembering the defeated Austro-Hungarian and Ottoman empires.

As a political principle, but not a right under international law, self-determination in this period was subject to many limitations. The most obvious limitation, consistent with *realpolitik* concerns, was that the successful exercise of self-determination required the support of the victorious powers if there had been a war or the support of major powers even absent a war. Philosophically, "external" self-determination or independence would be rejected if the resulting state would not be economically and politically viable. Self-serving political restrictions made the principle of self-determination applicable to Europe, for instance, but not to colonial empires; thus to Poland, but not to Ireland.

3. See, e.g., Human Rights Committee's General Comment 23 on art. 27 (50th Sess. 1994), reprinted in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev. 3 (1997), ¶ 3.1, at 39.

4. See *id.*

5. For further discussion of the phases, see generally Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).

Following a somewhat confused period between the two world wars, the adoption of the United Nations Charter in 1945 marked the beginning of the second phase. This second phase began, as did the first phase, by identifying self-determination as a principle rather than as a right.⁶ Self-determination was proclaimed in a manner that did not necessarily require the dismemberment of colonial empires; if it had included such an understanding, Britain, France, and Belgium simply would not have adhered to the Charter. Yet, at the same time, use of the word "peoples" must have implied that self-determination meant more than simply a reaffirmation of the sovereign equality of states.

This situation gradually changed, and I think that one of the great contributions of the United Nations to international law was in promoting the shift from proclaiming a principle of self-determination in the Charter to recognizing a *right* of self-determination some twenty years later. The problem is that, during this transition, the United Nations continued to refer rhetorically to the right of all peoples to self-determination, when what it really meant was the right of colonial territories to independence.⁷ And those are two very different concepts.

Self-determination from 1960 on, at least as articulated by the United Nations, had nothing to do with ethnicity, language, or culture. Although there were some exceptions – the division of British India, Rwanda-Urundi, and a few others – the accepted mantra was that colonial territories would become independent. It did not matter how many "peoples" were found within them, although obviously each contained many different peoples, nations, and ethnic groups. Thus, in general, territories, not peoples, enjoyed the right to independence.

It was also clear during this period that, although there were other theoretical options – for example, Hawaii and Alaska exercised their right to self-determination by becoming part of the United States – the international preference was for independence. This result could, and often was, achieved with only minimal preparation or even consultation with the colony concerned, although any option other than independence, such as free association or full integration, required the full and informed consent of the people involved.⁸

6. See U.N. CHARTER arts. 1(2), 55 (discussing "respect for the principle of equal rights and self-determination of peoples").

7. See, e.g., *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) (discussing independence of colonial countries and peoples).

8. See *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For Under Article 73e of the Charter*,

Thus, in the second half of the twentieth century, a territorial right to independence for former colonies replaced the nineteenth century principle of allowing ethnic, linguistic, or religious groups to form various kinds of political units that might or might not become independent states. In the post-colonial period,⁹ what I would identify as the third phase of self-determination, some are attempting to join those two principles in order to create a new right in international law: the right of every people – defined ethnically, culturally, or religiously – to have its own independent state.

Although this new position has its adherents, it is clear that international law has not yet recognized such a new paradigm. One reason for this is that, because practically all of the world's surface is now divided among sovereign states, self-determination defined as the right to create a new state would necessarily imply a right to secession. However, no state, no foreign ministry, and very few disinterested writers or scholars suggest that every people has the right to a state, and they implicitly or explicitly reject a right to secession.¹⁰

This is the current state of international law, whether one is talking about popular groups like Tibetans or unpopular groups like Tamils in Sri Lanka. There simply is no right of secession under international law, nor has there been even preliminary agreement on the criteria that might be used in the future to determine when secession should be supported. Of course, there is no prohibition in international law against secession, either. If a country disintegrates as the result of a civil war, international law poses no barrier to recognition of the two or more succeeding states. That is, however, a quite different position than recognizing the *right* of a group to secede from an existing state.

Cementing the world's frontiers forever is an overly conservative position, however, and I would like to suggest at least two exceptions to the no-right-to-secession rule that I articulate. The first exception would recognize a right of secession when there have been massive and discriminatory human rights violations that approach genocide. The violations need not constitute genocide under the technical definition of that term, but I do believe that they must be both massive and discriminatory. So-called "cultural genocide," for example, in which a culture may be radically affected by modernization or by a surrounding dominant culture but not otherwise subjected to human rights

G.A. Res. 1541 (XV), U.N. GAOR, 4th Comm., 15th Sess., Supp. No. 16, at 29-30, U.N. Doc. A/4684 (1960).

9. There are today only 17 non-self-governing territories recognized by the United Nations, most of which are small islands controlled by the United Kingdom or the United States.

10. See, e.g., Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, 77 FOREIGN AFF., Mar./Apr. 1998, at 13, 16.

violations, would not justify secession. Rather, this category seeks to provide a remedy in those rare situations in which there is an explicit attempt to destroy a culture or people. One could argue, although one would have to look at the facts very closely, that the repression of Kurds in Iraq and conceivably Tibetans might be among the situations that would fall into this exception.

The other and more difficult exception might arise when a group, community, or region has been systematically excluded from political and economic power or when a minimum level of minority rights or a reasonable demand for self-government has been consistently denied. I want to emphasize that this exception would not apply when a central government refuses to agree to whatever the minority or the region wants. Rather, it would apply only when the central government has been so intransigent that, for example, it refuses to allow the minority to speak its own language, it excludes minority members from participation in the parliament, or it refuses to accede to demands for minimal local or regional power-sharing.

Leaving aside these two possible exceptions to the rule, I now return to the basic proposition that self-determination today does not mean either independence or secession. If that is correct, is there any reason that we still talk about self-determination as a human right? Is there anything left of it? I would suggest that there is. What is left – the contemporary content of self-determination – reflects the right's position in the two covenants and offers an opportunity to ensure that it continues to have meaning and validity into the next century.

Here, too, I am suggesting what the law should be, rather than describing what I think it is at present. First, we should keep in mind that self-determination, except in the narrow context of decolonization, is not absolute. This point should not be surprising, because there are very few absolute rights. Recognizing that one has a right to self-determination does not imply that one can always exercise the right to its maximum extent any more than exercising the right to free expression means that one is absolutely free to say whatever one wants under all conceivable circumstances.

I suggest that we can find meaningful content to self-determination by looking at two other human rights, or at least aspects of two human rights, on which there is a much greater degree of consensus than is the case if one focuses on self-determination *per se*. These related rights are as follows: (1) the protection of the cultural, religious, linguistic, and ethnic identity of individuals and groups; and (2) the right of individuals and groups to participate effectively in the economic and the political life of the country.

Protecting the identity of groups is not very popular in the United States or in some other countries, such as Sweden. It is clear, however, that, particu-

larly during the past decade, greater attention is being given to the issues of minority and indigenous rights, reflecting what I believe is a consensus on the importance of preserving one's identity both as an individual and as a member of a group. Related to this is a growing consensus that diversity and pluralism are, in themselves, worthwhile goals to pursue. Thus, there is room to include protection of identity in a contemporary understanding of self-determination.

The second aspect, participation, is derived to some extent from economic development discussions, in which the right of popular participation in decision-making was identified as a way of ensuring that assistance received by states would better serve the purpose for which it was intended. This concept was extraordinarily subversive, because, once one effectively participates in economic decision-making, a need to participate effectively in all sorts of other decision-making processes almost inevitably follows.

More recently, the belief that a new democratic era has arrived has reinforced this notion of participation.¹¹ Participation, however, goes beyond democracy.¹² Determining what is and what is not effective participation is, of course, difficult. Ensuring participation opens up a whole range of possibilities, ranging from representation in the central government to different forms of federalism, consociationalism, and autonomy. As a principle, however, it is not inherently less manageable than due process or fair trial, even if the answer to whether the people in a particular region or group participate effectively in governing themselves, both through the central government and locally, is not always immediately apparent. The idea of effective participation identifies another component of self-determination that should not be overly threatening to the states that are expected to implement it.

A final suggestion in defining self-determination for the twenty-first century is to impose a limit or a price on its exercise by requiring that any ethnic group that succeeds in establishing a new state based on principles of ethnicity, religion, language, or culture should be willing to grant to other groups within the new state the same right of self-determination and secession that it has just exercised. Pursuant to this principle, Serbs would have had a right to secede from Croatia and Bosnia-Herzegovina, and Crees would be able to leave an independent Quebec. Such a principle might cause potential

11. Compare, e.g., Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992), and Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992), with Robert D. Kaplan, *Was Democracy Just a Moment?*, ATLANTIC MONTHLY, Dec. 1997, at 55, 55, and Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF., Nov./Dec. 1997, at 22.

12. I remain disturbed by the fact that the Clinton Administration decided to rename the Bureau of Human Rights the Bureau of Democracy, Human Rights and Labor. This suggests that neither democracy nor labor is included in human rights or that democracy and labor are somehow more important than human rights. Both are dangerous positions to maintain.

secessionists to think more carefully about the consequences of their actions and would give newly trapped minorities a way out without resorting to violence.

Even with, or perhaps because of, the exceptions and the nuances I outline, self-determination as a human right remains relatively vague. Unfortunately, it is unlikely that any existing human rights mechanism or even a new mechanism will be of much assistance in defining the right in the foreseeable future, because few states are willing to allow an international forum to judge a situation that might, if a claim to self-determination and secession is upheld, result in the destruction of the state itself. Some things are too important to be left to lawyers, and I think that self-determination might be one of those issues.

III. Impact of Self-Determination Claims on Other Human Rights

The situation in Kosovo and recent statements by the U.S. House of Representatives and Secretary of State Madeline Albright demanding that Serbia recognize the "legitimate rights" of the people of Kosovo raise several questions: What are those rights? Do they have anything to do with human rights? Does the United States support the political goal of an independent Kosovo or a Kosovo united with Albania? Do Kosovo Albanians have a right to autonomy? Do they have a right to return to the status they enjoyed in Yugoslavia in 1989, even though we certainly are not returning anything else to its 1989 position? The obvious danger is that, whenever self-determination is involved, a destructive confusion of political goals, basic human rights norms, and humanitarian issues may make it more difficult to deal with any of these aspects successfully.¹³

The other potential impact of self-determination claims is to encourage violent conflict. Although it is a truism, it needs to be reiterated that more human rights are violated during wars than at any other time. If policymakers do not arrive at a better understanding of how to respond to claims for self-determination, such claims are likely to increase. It is very likely that the number of violent conflicts will increase as well, and increased conflict will have a direct impact on the entire gamut of international human rights.

At the same time, I think that if we reverse the lens and look at "ordinary" human rights first, and if we can imagine that all the human rights that we want to have protected are protected, violence is much less likely to ensue. Disputes over self-determination will not disappear, but they will be resolved

13. For further discussion of these issues, see Hurst Hannum, *Whose Rights in Kosovo, and Just What Rights? It is Unclear What is Being Demanded of Serbia*, BOSTON GLOBE, Apr. 5, 1998, at D2.

by countries such as Canada, the United Kingdom, and Belgium, as opposed to being decided by countries such as Russia or Yugoslavia. If one creates a genuinely democratic rights-respecting regime, it is less likely that people will want to leave it. If, however, they do leave it, it is also more likely that any separation will occur peacefully.

This approach suggests that, even when self-determination is purportedly the issue, it is better to try to address denials of human rights before trying to address the denial of so-called self-determination. As a practical matter, a nongovernmental organization or human rights activist is more likely to be able to influence a government by focusing on respect for human rights than by entering the quagmire of self-determination and secession. I think that one is also more likely to protect what we would all agree *are* human rights – for example, physical integrity, use of language, and protection of culture – without confusing those rights with political goals. Even if we may share some of the latter goals, it is essential to keep them distinct from the universally recognized and legally articulated provisions of international human rights law.

IV. Conclusion

For better or for worse, self-determination will not disappear as an issue that has the potential to create serious conflict in the future. Self-determination is not a new issue, however. Self-determination claims did not start at the end of the Cold War, as numerous conflicts in Africa and Asia remind us. But we do need to guard against the usurpation of the slogan and the symbol of self-determination and its use as a purely partisan political tool by both governments and disaffected groups. Because self-determination is such an emotional concept, appeals by "ethnic entrepreneurs" are always likely to create an atmosphere in which violence and greater violations of human rights are more, rather than less, likely. This position may be relatively conservative, but I believe that it is a solid human rights position.

As the immortal Mick Jagger said, "You can't always get what you want/You can't always get what you want/But if you try sometimes/You just might find/You get what you need."¹⁴

14. ROLLING STONES, *You Can't Always Get What You Want*, on LET IT BLEED (Decca Records 1969).