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The International Legal Right of Self-Determination: Four Legal Approaches and Their Textual Foundations

Graham Flack, Ajeet Kang, Michele Leighton, and David Preger^{*1}

Highly publicized struggles from Quebec to Kashmir, from Croatia to Tibet, have renewed interest in the international legal foundations for the 'right' to self-determination. For groups claiming this right, it is essential that they demonstrate that its scope extends to them before they will be able to receive international support for their claims against their state. Consequently, it is critical that the scope of this right be assessed.

One of the purposes of the United Nations is "[T]o develop friendly relations among nations based on the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace."² In pursuit of 'universal peace' to date, international law has only recognized the principle of self-determination as an "operative right in the decolonization of non-self-governing territories."³

The following discussion briefly explores alternative concepts of self-determination. The attached table is an effort to facilitate preliminary research into the textual sources for self-determination in international law. As textual sources are only one means of determining the content of international law, it is important to examine alternate sources such as state practice in order to develop a full picture of the international legal 'right' to self-determination.

It is important to note that the goal of self-determination is not necessarily the creation of a new state. Self-determination can take a range of forms, from education guarantees for linguistic minorities to full sovereignty. Ultimately, it is simply the right of a people to determine their future.

This begs the question: who is the 'self', or indeed what constitutes a 'peoples'? The authors have brought together four conceptual approaches in which legal claims to self-determination may be grounded. These approaches, or schools, are as follows:

- Colonial School;
- Historical School;
- Human Rights School; and
- Political School;

The basis and scope for each school is reducible to the definition of 'peoples' relied upon by each school in formulating legal claims to self-

DALHOUSIE JOURNAL OF LEGAL STUDIES

determination. Under the colonial school, self-determination is limited to 'peoples' under colonial rule (as noted above, this is the traditional approach to self-determination). The historical school considers 'peoples' as any historical collectivity whether under formal colonial rule or not. The human rights school defines 'peoples' as oppressed collectivities. The political school (or anti-school) grants self-determination to 'peoples' according to the dictates of *realpolitik*.

Colonial School

The first approach, the colonial school, grew out of the post-1945 consensus that European colonialism would have to end. Its supporters propound a literal reading of the *United Nations Charter* and related texts in limiting legitimate claims of self-determination to colonized 'peoples'. Accordingly, self-determination has less relevance in the contemporary, post-colonial era. As a legal right, it remains applicable only to the few 'peoples' who continue to live under colonial rule.

Historical School

The second approach, the historical school,⁴ extends the right of self-determination to 'peoples' who once constituted a historical collectivity. According to James Anaya, such a claim will be "invoked to restore the asserted 'sovereignty' of an historical community that roughly corresponds to the contemporary claimant group."⁵ This school is significant in so far as it recognizes that peoples historically beyond the reach of colonizers have the right to self-determination.

Human Rights School

The third approach, the human rights school, accords self-determination to oppressed collectivities. Self-determination is seen to exist as part of international law's evolving conception of human rights. This school recognizes that human beings possess an inherent 'right' to determine how they are governed.

The school holds that the United Nations' goal of global peace and stability has been thwarted by contemporary adherence to the often artificial division of territories into states. It contends that only through the granting of self-determination to oppressed 'peoples' can global peace be secured.

Political School

The political school examines the current state of international relations and concludes that legal norms are only relevant to assessing claims for self-determination to the extent that they influence the actions of political actors. *Realpolitik* is seen as the key to assessing the outcome of claims for self-determination. The school could be used to examine the similar claims of 'peoples' in Biafra and Bangladesh and to

SOURCES OF SELF-DETERMINATION

conclude that the differing outcomes (Bangladesh gaining independence and Biafra failing to do so) were not the result of the application of consistent legal principles but of geo-political realities.

Using the Table

The table is a compilation of the major textual sources for self-determination. It indicates whether a source provides support, hinders, or is not applicable to claims made under the respective schools. As the political school denies the fundamental importance of textual sources, an analysis of the school in light of these sources would be irrelevant. Consequently, it has not been included in the table.

If a claim was being made for the right to self-determination for the Québécois under the historical school, the chart shows that Article 1(2) of the *United Nations Charter*⁶ could be used to support such a claim, while Articles 2(1) and 2(4) appear to work against such a claim. It also shows that under customary international law the *Western Sahara*⁷ decision of the International Court of Justice works against such a claim, while the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN*⁸ could be used to support such a claim.

It should be noted that the table only deals with textual sources to claims of self-determination. Non-textual considerations such as state practice are not included. The table contains the major international law documents relevant to self-determination, including the *United Nations Charter*, other treaties (covenants and conventions), and *opinio juris*⁹ as it exists in United Nations General Assembly declarations and resolutions.

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1. The authors would like to thank Professor Hugh Kindred for his innovative approach to international legal studies and for his guidance at the research stage of this project.
2. *Charter of the United Nations*, As signed 1945 and Amended 1965, 1968, and 1973, Article 1(2) [hereinafter *United Nations Charter*].
3. *Western Sahara*, [1975] I.C.J. Rep. 12.
4. The 'historical' and 'human rights' classifications are drawn from S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims," (1990) 75 *Iowa L. Rev.* 837 at 838.
5. *Ibid.*, at 838.
6. *Supra*, note 2.
7. *Supra*, note 3.
8. G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).
9. States acting on perceived international legal norms.

Key: Yes = Supports Claim
 Yes? = Possibly Supports Claim
 No = Hinders Claim
 No? = Possibly Hinders Claim
 N/A = Not Applicable

Textual Sources of Law for the Principle of Self-Determination

	Col.	Hist.	Hum. Rts.
A) TREATIES			
<p>United Nations Charter Article 1(2) (contained in Purposes section)</p> <ul style="list-style-type: none"> • "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" • The French text, which is equally authoritative, speaks of "du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes" (emphasis added) [Translation: the principle of equality and of the right of peoples to arrange their affairs]. 	Yes	Yes	Yes
<p>United Nations Charter Article 2(1) (contained in Principles section)</p> <ul style="list-style-type: none"> • "The Organization is based on the principle of the sovereign equality of all its members." • This may limit the claim for self-determination by establishing the importance of territorial sovereignty. 	N/A	No	No
<p>United Nations Charter Article 2(4) (contained in Principles section)</p> <ul style="list-style-type: none"> • "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations." • Again, this may limit the claim for self-determination by establishing the importance of territorial sovereignty. 	N/A	No	No
<p>United Nations Charter Article 55</p> <ul style="list-style-type: none"> • "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 respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: <ol style="list-style-type: none"> a) Higher standards of living, full employment, and conditions of economic and social progress and development; b) Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation and; c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." 	N/A	N/A	Yes

SOURCES OF SELF-DETERMINATION

<p>United Nations Charter Article 73</p> <p>• *Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:</p> <p>(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;</p> <p>(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; and</p> <p>(c) to further international peace and security* (emphasis added).</p>	Yes	N/A	Yes?
<p><u>International Covenant on Economic, Social and Cultural Rights</u> (GA Res. 2200 (XXI), 21 UN GAOR, Supp. (No.16) 49, UN Doc. A/6316 (1967).) December 16, 1966.</p> <p>• 71 parties to it, including Canada, India, Iraq, and Iran. Israel signatory but not party. Turkey didn't sign.</p> <p><u>International Covenant on Civil and Political Rights</u> (GA Res. 2200 (XXI), 21 UN GAOR, Supp. (No.16) 52, UN Doc. A/6316 (1967).) December 16, 1966.</p> <p>• 69 parties, including same breakdown as above</p> <p>Articles 1(1) of both covenants</p> <p>• *All peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*</p> <p>Articles 1(3) of both covenants</p> <p>• *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations* (emphasis added).</p> <p>• The term including could imply that colonies are only one case in which self-determination applies.</p>	Yes	Yes	Yes
<p><u>International Convention on the Elimination of All Forms of Racial Discrimination</u> (660 UNTS 195.) March 7, 1966.</p> <p>• 120 countries are parties to this Convention.</p> <p>Article 1 (1)</p> <p>• *In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*</p> <p>• Note that there is no explicit reference to 'self-determination' in this treaty.</p>	Yes	Yes?	Yes

DALHOUSIE JOURNAL OF LEGAL STUDIES

<p><u>International Convention on the Suppression and Punishment of the Crime of Apartheid</u> (GA Res. 3068 (XXVIII), 28 UN GAOR, Supp. (No.30) 75, UN Doc. A/9030 (1974).) November 30, 1973.</p> <ul style="list-style-type: none"> • 73 parties (including India and Iraq) and 6 signatories. Turkey, Israel, Iran, Canada, USA, France, UK, FRG, Japan (among others) are not parties. • While binding on treaty members, it is unclear as to whether this could be considered evidence of custom. <p>Article 1 (1)</p> <ul style="list-style-type: none"> • "The States Parties to the present Convention declare that <i>apartheid</i> is a crime against humanity and that inhuman acts resulting from the policies of <i>apartheid</i> and similar policies and practices of racial segregation and discrimination ... are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security." • Arguably, this Article links racial discrimination to the denial of rights of peoples under colonial and alien domination to self-determination. 	Yes	N/A	Yes
B) CUSTOM			
<p><u>Western Sahara, Advisory Opinion</u>, [1975] I.C.J. Rep. 12.</p> <ul style="list-style-type: none"> • "... the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general <i>opinio juris</i> and thus constitute a norm of customary international law. According to this view, this is the precise situation manifested by a long list of resolutions which, following in the wake of resolution 1514, have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self-governing territories" (emphasis added). 	Yes	No	No
<p><u>Declaration on the Granting of Independence to Colonial Territories and Peoples</u> (GA Res. 1514 (XV), 15 UN GAOR, Supp. (No.16) 66, UN Doc. A/4684 (1961).) December 14, 1960.</p> <ul style="list-style-type: none"> • 89 votes in favour, none against, 9 abstentions (Portugal, Spain, South Africa, UK, USA, Australia, Belgium, Dominican Republic, France) <p>Article 1</p> <ul style="list-style-type: none"> • "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation." • The reference to alien subjugation, domination, and exploitation implies self-determination may be applicable beyond the colonial context, particularly when read in conjunction with Article 2 below. <p>Article 2</p> <ul style="list-style-type: none"> • "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." <p>Article 6</p> <ul style="list-style-type: none"> • "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." • This is a limiting factor on self-determination. 	Yes	Yes	Yes
	Yes	Yes	Yes
	N/A	No?	No?

SOURCES OF SELF-DETERMINATION

<p><u>Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty</u> (GA Res. 2131 (XX), 20 UN GAOR, Supp. (No.14) 11, UN Doc. A/6014 (1966).) December 21, 1965.</p> <ul style="list-style-type: none"> • 109 votes for, 0 against, 1 abstention (UK) <p>Article 1</p> <ul style="list-style-type: none"> • "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State ..." • This article forbids external intervention, but is silent with respect to internal rebellion. <p>Article 6</p> <ul style="list-style-type: none"> • "All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations" (emphasis added). • The reference to racial discrimination and colonialism implies self-determination is not limited to the colonial context. 	N/A	No?	No?
<p><u>Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN</u> (GA Res. 2625 (XXV), 25 UN GAOR, Supp. (No.28) 121, UN Doc. A/8028 (1971).) October 24, 1970.</p> <ul style="list-style-type: none"> • Adopted without vote - evidence of consensus among member states of meaning and elaboration of Charter. • "Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence" (emphasis added). <p>*By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*</p> <p>*Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples ... and to render assistance to the United Nations in carrying out the responsibilities entrusted to it ... in order:</p> <ol style="list-style-type: none"> a) To promote friendly relations and co-operation among states; and b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; <p>and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation, constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations" (emphasis added).</p> <ul style="list-style-type: none"> • Arguably this recognizes a positive duty to promote self-determination beyond the colonial context. 	Yes	Yes	Yes

DALHOUSIE JOURNAL OF LEGAL STUDIES

<ul style="list-style-type: none"> • "Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations" (emphasis added). • "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. "Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country" (emphasis added). • Compliance with the principle of self-determination can be read as requisite to respect for territorial integrity. 	Yes	Yes	Yes
<p><u>Declaration on the Establishment of a New International Economic Order</u> (GA Res. 3201 (S-VI), 6 (Special) UN GAOR, Supp. (No.1) 3, UN Doc. A/9559 (1974), May 1, 1974.</p> <ul style="list-style-type: none"> • Adopted without vote. <p>Section 4</p> <ul style="list-style-type: none"> • "The new international economic order should be founded on full respect for the following principles: <ul style="list-style-type: none"> a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States ..." • This emphasizes the tension between territorial integrity and right to self-determination. 	N/A	Yes? or No?	Yes? or No?
<p><u>Final Act of the Conference on Security and Cooperation in Europe</u> ((1975), 14 I.L.M. 1292) August 1, 1975, Helsinki.</p> <ul style="list-style-type: none"> • "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. "By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development" (emphasis added). • Note: this statement is not eligible for registration under Art. 102 of the Charter. Arguably, it has become custom. 	Yes	Yes	Yes