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REEVALUATING SELF-DETERMINATION IN A POST-COLONIAL WORLD

Joshua Dilk*

The demise of colonialism has given rise to the acceptance of a system of international human rights law. However, the painful and drawn out genesis of this system has left it littered with the detritus of the past. While the nexus of State and UN action is constantly being defined, this process, rather than expanding the rights of those under the UN’s mandate, reveals the stagnation and attendant paternalism that characterized the old imperial order. Decolonization spread Western legal norms to the former colonies, but entrenched in historical prejudices held by the colonizers.

One of those norms: the concept of self-determination, which was enshrined and elaborated in the UN Charter, the ICCPR, and the ICESRC, was viewed as a tool to emancipate the Developing World. But the tool turned in the hands of its users. Application of self-determination has, subsequent to de-colonization, served the leaders of the international order and failed to break the cycle of warfare and degradation that plagues the de-colonized world. Gone is Woodrow Wilson’s concept of Self-Determination as a means to protect ethnic or minority “peoples.” In its place, international efficacy led the colonial powers to transpose “colonial rule” with self-determination cloaked in the rhetoric of human rights.

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1 JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 34 (2000).
2 Id. at 23.
5 CASTELLINO, supra note 1, at 23; See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV), at 66, U.N.
In the 1960 Declaration on the granting of independence to colonial countries and peoples, the UN stated that one of its goals was ending colonialism and that “all peoples have the right to self-determination...[to] freely determine their political status and...pursue their economic [and] social...development.”\textsuperscript{6} In the same declaration the UN then simultaneously denied these freedoms to minority groups within the former colonies by reaffirming the UN’s commitment to territorial integrity.\textsuperscript{7} This precept, scholastically labeled \textit{uti possidetis}, robbed the former colonial world of their right to truly exercise state-building in anything but a pre-ordained Western conception of the idea. The result is disaster across Africa in the form of corrupt authoritarian regimes, genocide, starvation, and the continuation of the same basic failures of human existence that characterized the colonial era.

Part of the blame for the continued political instability rests in the UN’s haphazard application of the right of self-determination and its attendant corollary, \textit{uti possidetis}. This paper addresses this inconsistency and contrasts it with different applications of it outside Africa. In Zimbabwe, Nigeria, and the Sudan, the UN’s stance led to civil war, while in Eritrea it eventually led to full independence \textit{in violation} of \textit{uti possidetis}. Rather than suppressing the paternalistic and imperialist attitudes of the past, UN practice seems determined to maintain it.

Self-determination needs to be reappraised in a fully post-colonial world. Rather than understand the right in terms of former colonial territory, now that colonialism has ended, self-determination needs to be reexamined in terms of ethnic minorities as originally voiced by Woodrow Wilson at the Versailles Conference.\textsuperscript{8} While every ethnic group should not be able to carve out a microstate for themselves, a right for ethnic minorities to possess alternative state options ranging from regional autonomy, federation, and only in limited situations, the ability to secede and create a new country should be systematically recognized.

Former UN Secretary-General Boutros-Boutros Ghali was adamant that the UN had not closed the door to future statehood but noted that “if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for

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\textsuperscript{6} The 1960 Declaration, \textit{supra} note 5, at 67.
\textsuperscript{7} \textit{Id.}, (declaring that “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.”)
\textsuperscript{8} See Wilson, \textit{supra} note 4, at 159-62.
all would become ever more difficult to achieve."9 While this statement is facially true, it masks the underlying question of whether existing states could reinvent themselves such that their rebirth could signal a better day for their citizens. Unless a reexamination of self-determination occurs, this seems unlikely and will continue to force peoples and nations in trouble to choose the certainty of post-self-determination confusion and conflict over the other equally unpalatable option of doing nothing at all.

SELF-DETERMINATION: HISTORICAL CONTEXT

Although morphed into a concept inseparable from the Developing World, Self-Determination's origins lie in the Western European Liberal tradition.10 Anti-Monarchists and those considering new models of political government saw the necessity of governance by the consent of the governed as vital to any enlightened society.11 The American Declaration of Independence captured this idea in its Preamble:

whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.12 [emphasis added]

Self-Determination was a means to secure a government that was legitimate in the eyes of its people because it derived from them. One author has posited that that this 'democratic entitlement' has historically underlied self-determination and, as will be seen, continues to do so to the present day.13 The French Revolution in 1789 adopted the American ideology and asserted that international legitimacy derives from domestic acceptance of the current government.14 Both of these events predicated self-determination on the existence and implicit acceptance of the State's sover-
eignty. Self-Determination, for them, could not exist without a clearly defined territory, people, government, and the capacity to deal with other states.\textsuperscript{15} Twentieth century politicians and theorists reinterpreted this idea after the Second World War making it into a more malleable form that remains in force today.

After World War I, self-determination became a means for protecting ethnic minorities and strengthening nationalism in the hopes of preventing another conflict. Wilson, the American President, advocated providing oppressed peoples 'the right of democracy.'\textsuperscript{16} This euphemism for self-determination had four components: 1) the right of people to determine their government; 2) the restructuring of European states (particularly Austria-Hungary) according to nationalist desires; 3) a method of changing the territorial boundaries of the corresponding nation to benefit the inhabitants of a specific location by; and 4) a settling of conflicting colonial territorial claims.\textsuperscript{17}

Although some of these components did nothing but support the status quo (particularly component 4) in that the victorious powers used self-determination as a means to advance their colonial enterprise at the expense of the vanquished, Wilson's conception of self-determination was forward-looking in that it sought to address those groups of people who were ignored on the international scene. Unfortunately, the problems that plagued Wilson's interpretation of self-determination: definitional ambiguity, legislative obstinacy, haphazard application and geo-politics, continue to do so today.\textsuperscript{18} In addressing post-World War II problems with the application of self-determination, one addresses problems analogous to those extant in Wilson's time.

A panoply of international treaties, charters, and declarations spanning five decades elaborate the UN's position on self-determination.\textsuperscript{19} This

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  \item \textsuperscript{15} ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 16 (Cambridge Univ. Press)(2005) (noting that these are standard characteristics a territory must possess in order to be considered a State, along with some form of international recognition). See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, (Clarendon Press)(1979) (providing a more thorough analysis of recognition).
  \item \textsuperscript{16} See Wilson, supra note 4.
  \item \textsuperscript{17} CASSESE, supra note 14, at 20-21.
  \item \textsuperscript{18} Id. at 22-23.
drawn out elucidation of the concept creates confusion as to its interpretation, especially when considered in light of the global history of the past half-century. One of the purposes of the UN, according to its Charter, is to develop "friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples. . . ." While this founding purpose seems noble, it is not defined. In fact, the only other mention of this principle, also lacking in explication, is in Article 55 where there is an oblique reference to self-determination as the ambit within which the UN should promote economic, social, and cultural growth.

It is clear, when examining the other articles, that language dealing with self-determination was a sop for the US and UK when it was incorporated. They are vague statements devoid of any implementing language or guidelines from which to work. When compared to Article 2, which imposes negative restraints on State and UN action, or in Chapter V, which defines the role and scope of the Security Council, the Charter uses explicit terms and describes specific mechanisms for its operation. Without more, the UN lacked any clear mandate to speak to the right of self-determination. It needed a definitional evolution; such change came, not from the West, but from the Developing World and the USSR.

The subsequent 1960 Declaration was an attempt by non-Western countries to end colonialism and spark a socialist revolution. It was also an honest effort to define what the UN Charter left undefined. Although part of the UN's purpose was to "reaffirm faith in fundamental human rights," the UN felt that reifying this credo was necessary to take aim at a
widely practiced breach of those rights. The 1960 declaration instead relied upon Article 1 of the UN Charter and stated "that the subjugation of peoples to alien subjugation and domination constitutes a violation of fundamental human rights. . .and that all people had a right of self-determination." While the 1960 Declaration provided greater specificity as to whom the right of self-determination applied, it did so within a Statist rubric that ignored the variety of ethnic and cultural minorities within the Colonial State.

The 1960 Declaration provided positive obligations on Imperial states to protect their colonial populations and to take measures to emancipate them. By doing so, the drafters restricted self-determination to the victims of "alien subjugation, domination, or exploitation," or, in other words, those colonized by European powers. The effect, however, was that while colonial populations had the right of self-determination, they were considered as one homogenous group; minorities within this group were ignored. The 1960 Declaration, rather than expanding the definition of those possessing the right of self-determination, restricted it to a narrowly defined class, albeit one that is paradoxically hard to define.

This served the interests of the major powers in that de-colonization could proceed without paralytic complexity. For example, and as will be elaborated on later, restricting the number of groups who could invoke self-determination made it possible for Nigeria to gain independence as a unified, singular entity and not a balkanized former colony with over 1,000 ethnic sub-states. In this way, colonial powers could more easily undertake de-colonization efforts without having to get lost in the complexities of African socio-political reality. Importantly, this document also limited the scope of self-determination that colonized peoples could take. Article 6 of

26 U.N. Charter, supra note 3, pmbl.
27 The 1960 Declaration, supra note 5, at art. 2.
28 Id. arts. 4, 5, 7.
29 See The 1960 Declaration, supra note 5 arts. 1, 2(Article 2 is dependent on Article 1 in that 'people's', as defined in Article 1, informs Article 2 as to who that term describes); Shah, supra note 23, at 33.
the 1960 Declaration reinforces *uti possidetis*; a continuing trend that will be discussed later in the paper.\(^{31}\)

The ICCPR and ICESCR entered into force in 1976 and, although couching their language in universalities, continued to conflate territoriality with an identifiable ‘people’ and to ignore minority groups within the state.\(^{32}\) Common Article 1 of both treaties states that “[a]ll 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.”\(^{33}\) Yet despite the aspirational tone of the language (i.e., ‘all peoples’), the third paragraph of these treaties delimits just what ‘all peoples’ means: those people living in Non-Self-Governing or Trust Territories.\(^{34}\) But this answer generates a further question: within the context of a Non-Self-Governing or Trust Territory, what does ‘all peoples’ refer to?

The answer to this question reveals the definitional ambiguity inherent in this problem. Both the UN Charter and the Covenants outline their purposes in aspirational universal language in Article 1.\(^{35}\) They then constrain their meaning by applying this universal principle only to colonial territories. At the surface, ‘all peoples’ refers to colonized people. Article 27 of the ICCPR, the mechanism that restricts the earlier aspirational language, states that

\[
\text{[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.}\]

This contradiction in the ICCPR confirms one thing: ‘Peoples,’ as described in Article 1, have their right of self-determination protected,

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\(^{31}\) The 1960 Declaration, *supra* note 5, at art. 6 (preventing those exercising their right of self-determination in the face of colonial occupation from breaking up the territorial integrity of the pre-existing colony).

\(^{32}\) *See* CASTELLINO, *supra* note 1, at 73.

\(^{33}\) ICCPR & ICESCR, *supra* note 3, at art. 1, ¶ 1.

\(^{34}\) *Id.* at art. 1, ¶3; Shah, *supra* note 23, at 35.

\(^{35}\) *See* U.N. Charter, *supra* note 3, at art. 1, ¶2 (“[F]riendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples. . .”); ICCPR & ICESCR, *supra* note 3, at art. 1, ¶1 (“[A]ll 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.”)

\(^{36}\) ICCPR, *supra* note 3, at art. 27.
while ‘minorities’ have their individual right to practice their culture protected, but cannot self-determine their future.\textsuperscript{37} India, for example, took this position in its reservation to the language of Article 1. They stated that self-determination applies only to ‘peoples under foreign domination’ and that self-determination does not apply to “a section of a people or nation—which is the essence of national integrity.”\textsuperscript{38}

The Human Rights Committee has reinforced this position as well. In the \textit{Mikmaq Case}, the Committee ruled that the advocate for the Mikmaq peoples in Canada could not bring an Article 1 claim for lack of standing.\textsuperscript{39} The Committee also ruled that since self-determination was a collective right, the claims brought by the advocate failed in that they were unable to specify a violation that affected individuals within the tribe.\textsuperscript{40} The Mikmaq were not a ‘people’ as understood within Article 1 and thus had no standing to bring claims alleging a deprivation of their right to self-determination. The Committee implies that were the Mikmaq to bring their claim under Article 27, which protects the rights of minorities, it would have had more weight but still would not have created a right to self-determination.\textsuperscript{41} Article 1, then, while seemingly far-reaching in its effect, is limited by Article 27.\textsuperscript{42}

\textsuperscript{37} \textsc{Cassese, supra} note 14, at 61; \textsc{Pomerance, supra} note 24, at 18 (quoting Rosalyn Higgins’ position that “Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power.”).

\textsuperscript{38} \textsc{United Nations, Human Rights, Status of International Instruments}, UN Doc. ST/HR/5, 1987, 9 (noting that India held this position due to its precarious position due to its having recently become independent with a large collection of powerful ethnic groups. Fears over Kashmiri self-determination also factored heavily in its mind.)

\textsuperscript{39} \textit{Mikmaq Tribal Society v. Canada}, U.N. Doc. Supp. No. 40 (A/39/40), 200 ((Sept. 30, 1980) (asserting that the tribal leader was not representative of a people and could not show that the Mikmaq people had suffered violations under various human rights treaties.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{See, Id.}

\textsuperscript{42} \textsc{Cassese, supra} note 14, at 62 (stating that minorities are often difficult to define. For many, these groups possess: 1) numerical inferiority to another defined majority; 2) are a defined group of people with a discernibly different culture; 3) exist within a state; 4) are in a non-dominant position in that state; 5) exists in the face of a majority that is attempting to preserve its culture in the face of the minority’s; and, 6) possesses a culture at risk of destruction in the face of the majority); \textsc{Castellino, supra} note 1, at 57-59 (discussing how the difference between majorities and minorities is thus extremely subtle and boils down to which group has state-sponsored authority); \textit{see Declaration on the Rights of Persons Be-
This presents a problem that one author aptly summarized when he stated that self-determination is described as the right of peoples, not minorities, but that:

...[S]elf-determination and minority rights are locked in a relationship which is part of the architecture of the nation State, since whenever a State is forged, the result is the creation of minorities... 43

The question of what separates peoples and minorities is a fundamental question when examining self-determination. Without a clear definition, it is impossible to consistently apply this right. Sadly, we are still searching for said definition. A 1977 study by the UN Special Rapporteur, Francesco Caportorti, defined minorities as:

A group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language. 44

This description is useful when minority groups are dramatically smaller than their counterparts in a country. 45 However, in ethnically diverse countries such as Nigeria, this description would apply to nearly any ethnic group in the coalition government. 46 Of the 55 million people living in Nigeria at independence, roughly half of that number belonged to the three ruling ethnic groups in Nigeria: the Hausa-Fulani, the Ibo, and the Yoruba. The other half of the country’s population was composed of over 1000 ethnic groups of varying size and complexity spread throughout the


45 See, for example, Mikmaq Tribal Society, supra note 39;

country. This decentralization quickly leads to confusion and, in Nigeria’s case, civil war. Apart from demarcating the divide between the two labels, Captorti’s description implies that self-determination exists only for the ‘people’ that are in charge of the country. Understood this way, defining a ‘minority’ as other than the ‘people’ in charge preserves the status of the ‘people’ at the continuing expense of the ‘minority’.

The major UN conventions and treaties dealing with human rights have introduced concepts and practices that are at odds with one another. ‘Peoples’ possess the right to self-determination while ‘minorities’, an amorphous term, do not. Another factor that leads to confused application of this right is the modern corollary to self-determination: uti possidetis juris. In its modern conception, uti possidetis juris ensures “that new States will come to independence with the same boundaries that they had when they were administrative units within the territory or territories of a colonial power.”47 In other words, uti possidetis juris is similar to language found in a building code prohibiting any renovation that might change the historic character of a building despite the need for modern adjustments. If the restriction of self-determination to politically defined colonized peoples laid the foundation for the inconsistency as to its application, this doctrine serves as its mortar.

Although the preambles and initial articles of the major human rights documents proscribe an expansive recognition of peoples’ rights to self-determine, the 1960 and 1970 Declarations, meant to inform the ICCPR and ICESCR in its application of Self-Determination, dampen one’s hope for the realization of such rights. Article 6 of the 1960 Declaration, and the Preamble and Declaration of the 1970 Declaration, affirms the UN’s commitment to holding a State’s territory inviolable as a breach of the UN’s founding principles.48 The ICJ, as late as 1986, stated that,

[Uti possidetis] is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power.49

48 1960 Declaration, supra note 5, art. 6; 1970 Declaration, supra note 19, preamble, declaration.
Thus, the Court states that the principle exists to protect the integrity of newly independent states, to stop border wars, and to provide stability for able governance.\textsuperscript{50} Ironically, the Court is not entirely wrong. \textit{Uti possidetis} did help to address these problems. The border wars that characterized the newly independent African states in the 1960s, as well as the Katanga secession crisis at the start of the decade, threatened the stability of the nascent African States.\textsuperscript{51} These border disputes variously involved Somalia, Kenya, Ethiopia, Congo, and many other states. The Organization of African Unity, drawing on the 1960 Declaration, drafted the 1964 Cairo Declaration in which all African states “pledge[d] themselves to respect the borders existing on their achievement of national independence.”\textsuperscript{52} The border disputes continued to simmer, but took a legal affect that helped resolve them.\textsuperscript{53}

\textbf{THE INCONSISTENT APPLICATION OF SELF-DETERMINATION: AFRICA AS COMPARED TO POST-SOVIET EUROPE}

In light of the immediate post-colonial independence movements among ethnic groups, the historical interpretation of self-determination seems logical. It provided a definitive point from which to crystallize national boundaries in order to create a cohesive national identity.\textsuperscript{54} But the independence movements of post-colonial Africa were far from the relatively orderly movements in the Orange and Velvet Revolutions in Eastern Europe. In a situation where the Post-colonial states inherited multi-ethnic populations and a tendency toward autocracy, the doctrine, coupled with the confused application of self-determination created a Catch-22 in which Africa still languishes.\textsuperscript{55}


\textsuperscript{52} Organization of African Unity [OAU], \textit{Border Disputes Among African States}, AHG/Res 16(I) (July 17-21 1964).

\textsuperscript{53} See, e.g., Libya v. Chad, 1994 I.C.J. (Feb. 3); Guinea-Bissau v. Senegal, 83 ILR.

\textsuperscript{54} Castellino, \textit{supra} note 1, at 126.

This Catch-22, familiar to those sympathetic to Yossarian's plight, is that although the UN and the African Union support self-determination in order to bring freedom to oppressed peoples, and use *uti possidetis* to facilitate the process, when the post-colonial government began oppressing its citizens, they deny the oppressed the same right. In other words, one can utilize self-determination to escape oppressive colonial regimes but must live with subsequent, homespun, oppression. Unfamiliar with the concepts of a national identity, the populations of many African states regarded tribal and family loyalties as paramount. Leaders initially elected from within a specific ethnic group, soon returned to those loyalties to the detriment of everyone else. Attempts at federation, as in Nigeria, proved a failure. Nigeria provides an example of the problems rigid application of these interrelated concepts engenders.

Nigeria gained its independence on October 1, 1960. It was a former British colony and, at independence, it was set up as a tri-federated State in which the three dominant ethnic groups, the Hausa-Fulani, the Yoruba, and the Ibo, each ran a federated province; they were the dominant ethnic group in their respective province with some corresponding overlap among them. Following a series of coups and ethnic cleansing, the Ibo, situated in the east, declared their independence from Nigeria on May 30, 1967 and formed the Republic of Biafra.

The proclamation itself implicitly relied on self-determination as the core precept of their secession. The Declaration states that the Ibo were unwilling to serve as “unfree” partners of a corrupt Federation, had the inherent rights to determine their own society, and had to self-determine their political future through secession in order to secure the freedoms that all people possess. This immediately led Nigeria to begin a military invasion of the former province in order to reunify Nigeria.

The eventual reunification of Nigeria demonstrated the absurd results that sprang from a rigid interpretation of self-determination and *uti possidetis*. The UN and the OAU condemned the act. The UN went as far as to state that the civil war was not an international issue and was instead


57 Nayar, supra note 46, at 322.


an African affair. The Secretary-General stated further that the UN would only involve itself if the Federation of Nigeria requested aid and that it would not provide humanitarian aid to Biafra as it was a non-recognized state and that this preempted it from acting. Subsequent Biafran reunification came at the loss of millions of lives due to starvation, wartime atrocities, and disease.

The UN and the OAU reaffirmed their commitment to self-determination and uti possidetis during the Biafran conflict. The UN stated that self-determination is only applicable to the entire population of a State, not a section of it, and that if it were otherwise applied, there “would be no end to . . . problems.” This statement seems prophetic, if for the wrong reasons. The OAU, later the AU, throughout the Biafran conflict reiterated the illegality of Biafran secession and called upon Nigeria, and Africa at large, to reintegrate the breakaway region. The problems persist because of the specific interpretation the UN, the AU, and the global community use.

Nigeria is an excellent example because it is the exemplar of a post-colonial multi-ethnic state. Independence was seen as a means to integrate cultures that had never before been integrated and which were historically antagonistic to each other. Obafemi Awolowo, Premier of the Western Region of Nigeria in 1947 said that: “Nigeria is not a nation. It is a mere geographical expression. There are no ‘Nigerians’ in the same sense as there are ‘English,’ ‘Welsh,’ or ‘French.’ The word ‘Nigerian’ is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not.” When that began to collapse soon after independence, there was little that the groups could do apart from secession and subsequent civil war. The Ibo got both, and without the protection of adequate international norms, suffered for it. The collapsing society restricted their basic human rights under Article 1 of the Charter and the

63 Nayar, supra note 46, at 324-26.
64 Nayar, supra note 46, at 324 quoting OBAFEMI AWOLOWO, PATH TO NIGERIAN FREEDOM, 47-48 (1947).
Simultaneously, these and other UN documents prevented them from securing that which they were guaranteed by international law.

Critics of a reappraisal continue to mirror The Frontier Land case’s import that self-determination must be checked by territoriality restrictions to prevent border wars and to provide international stability. The case concerned a colonial-era border disagreement between Burkina-Faso and the Republic of Mali. The International Court of Justice, adjudicating the dispute, worried that reappraisal of self-determination and territorial boundaries “may give rise to very grave consequences, which may endanger the life of the State itself.” The ICJ also noted that self-determination was in conflict with its corollary, *uti possidetis*, because the general principle of self-determination was restricted to former colonial territories whose borders became fixed at independence. This confused the issue by placing African states in a legal straightjacket that was not applied to emergent states in other parts of the world specifically the post-Soviet Baltic states.

Estonia, Latvia, and Lithuania existed as sovereign states until their annexation in 1940. Historically, all three regions had been part of the Holy Roman Empire or had existed as provinces of the Swedish or Russian Empires. After 1918, all three countries were internationally recognized and, until their annexation, carried out diplomatic and economic relations with the rest of the world. During the collapse of the USSR, they declared their independence in 1990. Since then, they have resumed their position in the international community.

Although the concept of self-determination was important to their independence movements, differences between the two regions prevent accurate comparisons between the two and show the impropriety of the African solution in the breach. For one thing, the Baltic countries possessed a

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68 *The Frontier Dispute Case, supra* note 49.
70 *Id.* at 88-91. (Note that Latvia, prior to World War I, had never been recognized as an independent country. Its political existence up to that point was as a territory in the Russian and Swedish Empires).
72 *Id.* at 15.
historic identity that continued throughout the occupation. Their actions immediately following independence restored lapsed diplomatic ties, established nationality laws predicated on pre-annexation legislation, and restored pre-1940 national boundaries.

Estonia, for example, unlike Nigeria, had a literate, western-styled political history from which to draw upon. Moreover, the region was, if not ethnically homogenous, politically in favor of independence. This desire was able to coalesce around a resurgent state in a way that Nigeria was never able to do where the various ethnic groups saw despotism as a means of claiming the spoils of the State.

Also important to note is that the self-determination of the Baltic States was facilitated by their secession from the USSR. They cautiously refrained from using language of self-determination and instead denoted their actions as ‘independence movements’. Although condemned in Africa, especially in light of the Biafran conflict, and globally forbidden by the UN, the UN nevertheless recognized the states despite their provenance. Interestingly, it did so on the basis that the underlying state had unraveled. This reinterpretation applied only to the states created out of the USSR and Yugoslavia where the supra-nation had in fact, disintegrated. They refused to apply it to situations in Africa where the state had also unraveled.

This creates a double standard wherein African states, embroiled in civil war and, in some cases, devoid of a centralized government, are forbidden the leeway to alter their state based on guaranteed international norms, while states in Eastern Europe and Central Asia are able to by international fiat.

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73 Id. at 15 (quoting Kristina Marek) (“[t]here can still be a relation of identity and continuity between the independent Baltic States of 1940 and such Baltic States as will recover their effective freedom. .”.

74 See id. at 15-7.

75 See Cassetese, supra note 14, at 261-63.

76 Mutua, supra note 55, at 1158.

77 See Cassese, supra note 14, at 260.

78 Mikulas Fabry, Secession and State Recognition in International Relations and Law, in On the Way to Statehood: Secession and Globalization, supra note 52 at 51, 62.

79 See id. at 61-63; Castellino, supra note 1, at 117-20.

80 For the sake of brevity, the author will not address the CIS and its impact on self-determination as it is analogous to the impact that Eastern Europe played.
possidetis; but the situations to which they had to apply these doctrines were fundamentally different.

And although it is true that a host of separatist movements within these newly created countries were denied their right to self-determination, much as they were in Africa, these countries possessed ethnic demographics that were much more homogenous than in Africa and, in effect, the creation of the new states recognized ethnic peoples in a much broader conception than in post-colonial Africa; they did so by making self-determination contingent on the protection of minorities within the State and by requiring a democratic form of government. World authorities, when dealing with European countries, allowed a much greater flexibility to the process than was allowed in Africa with deleterious consequences.

THAWING THE CURRENT NORM: EUROPE AS EXAMPLE FOR AFRICA AND THE ETHIOPIAN SOLUTION

The negative consequences of adhering to a rigid interpretation of self-determination outweigh the potential benefits to the global community. A new interpretation is necessary but the sheer weight of international complacency has created inertia that leads many to balk at the prospect. But change is possible and, unremarked upon by much of the world, has already taken place in Africa along European lines as pioneered in the Baltic States and in the former Yugoslavia.

Eritrea, a nascent country on the Red Sea, is unique in that it is the only nation in the history of both the AU and the UN created from a 'secessionist' movement that successfully succeeded. Historically, there never existed an independent Eritrean state. It was—under the Kingdoms of Axum, Kush, and Abyssinia—a series of provinces and minor subsidiary princedoms that played off of their larger neighbors for support. Between five and nine major ethnic groups populate the region with different lan-

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82 See Fabry, supra note 78, at 62-64; Cassese, supra note 14, at 268.
83 Sturman, supra note 51, at 75; Castellino, supra note 1, at 70.
Their mutual antagonism led to their coming under Ethiopian suzerainty in middle ages and Italian colonial rule in the 1880s.

Following the defeat of Italy after World War II, the UN General Assembly forcibly federated the territory with Ethiopia who, in turn, outright annexed it in 1962. This led to thirty years of conflict between Eritrean liberation units, chiefly the EPLF, the TPLF, and the EPRDF, and the Ethiopian government.

The Ethiopian Mengistu regime, called ‘The Derg’, began to collapse in the early 1990s as Eritrean forces scored major victories leading to an Ethiopian surrender in 1991.

After the Derg’s defeat, the EPLF set up a Transitional Government in Ethiopia. They asked for a UN sponsored referendum on Eritrean independence that the Eritrean provisional government echoed. Surprisingly, the UN acquiesced and, under UN General Assembly Resolution 47/144, established an Observer Mission to oversee the referendum. The resulting vote, undertaken in 1993, was resoundingly in favor of independence. Subsequently, Eritrea was admitted to the AU as well as the UN. Events subsequent to the Ethiopian surrender demonstrate that the international community can be flexible in its interpretation of self-determination.

This was a stunning move by the global community. Not only had both organizations allowed Eritrea to secede from Ethiopia, but they also recognized it, thereby legitimizing the act. They gave what amounted to a blessing for a multi-ethnic group to break away from a sovereign state. They had, for this instance, broadened the meaning of the term ‘peoples’ in

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85 Id. at 46-48. The nine major ethnic groups are the Tigre, Tigrigna, Afar, Saho, Bilien, Kunama, Nara, Hadarib, and the Rashida. The Tigrigna-speaking tribes in habit the south and east of the country while the Tigre-speaking tribes inhabit the north and north western parts of the country.

86 See id. at 52-57.


88 For ease of reading, Eritrean liberation units were labeled in the text by their acronyms. The EPLR refers to the Eritrean Peoples Liberation Front, the TPLF refers to the Tigrean Peoples Liberation Front, and the EPRDF stands for the Ethiopia People’s Revolutionary Democratic Front. See Minasse Haile, Legality of Seccessions: The Case of Eritrea, 8 EMORY INT’L L. REV. 479 531-32 (1994).

89 EYASSU, supra note 84, at 494.

90 Haile, supra note 88, at 531.


terms of self-determination. Rather than being limited to a clearly defined group sharing linguistic, cultural, and historical commonalities, in this instance it now encompassed a nascent nationalist movement that, according to the initial UN Commission for Eritrea, was a "mosaic of religious and linguistic groups" having little in common with each other "but the accident of their residence." 94

This process seems anomalous in light of the UN and AU’s continual refusal to grant recognition to secessionist groups trying to self-determine at the expense of the larger state’s territoriality. 95 But, this was no longer a unilateral endeavor. After Ethiopia’s capitulation, its Transitional Government officially recognized Eritrea as an effort to bring an end to the warfare. Although Haile Minasse finds fault with this, arguing that the Transitional Government was a puppet of the EPLRF, this is less troubling than he believes. 96 After all, the EPLRF was partly composed of Ethiopians sympathetic to the Eritrean cause. Ethiopian support of the proposal created a balanced symmetry between Ethiopian and Eritrean interests.

With mutual agreement, the armed conflict ended and the countries were able to separate. Despite recurring conflicts, the legitimacy of the Eritrea was never seriously questioned. This followed closely events in Yugoslavia that were rapidly creating new nations in the wake of its federal disintegration. Both events, occurring almost simultaneously, show that normative change may be possible and that it can have positive impact on the lives of the people living in those regions. Slovenia, for example, held a referendum in December of 1990 in which over 90% voted in favor of breaking away from Yugoslavia. 97 Croatia, Macedonia, and Bosnia-Herzegovina followed the same process. All of these nascent countries predicated their secession from the Yugoslav Federation due to its inability to "function as a legally organized state and that human rights, national rights,

95 See Katanga Peoples’ Congress v. Zaire, African Comm’n on Human and Peoples’ Rights, Comm. 75/92 (1995) (stating that Katanga has the right of self-determination within Zaire’s territory but no right to break away, in light of the AU’s actions with regard to Biafra).
97 Cassese, supra note 14, at 270, n. 24.
and the rights of republics and autonomous provinces are flagrantly violated
in it."

This claim, echoing the language of the 1960 and 1970 Declarations was similar, if more strident, to what was used by the Provisional Government of Eritrea before the UN General Assembly, in which it was stated that the past conflict had been "a just struggle waged against forcible incorporation. . . ." In other words, Ethiopia’s failure to respect the rights of Eritreans, and its annexation of the region in 1962, justified their efforts to break off from Ethiopia. This sentiment seems analogous to the creation of the Yugoslav Republics, stemming as they did from the collapse of the political core of Yugoslavia.

Critics of the international legal community bemoan its plodding nature. Such a criticism is appropriate. Nevertheless, in creating the post-Yugoslav republics, recognizing the Baltic States, and recognizing the secession of Eritrea, the international community demonstrated that self-determination is capable of being applied more creatively than one would believe. One just has to account for the centuries of inertia forcing it in one direction. Events subsequent to the Ethiopian surrender demonstrate that the international community can be flexible in its interpretation of self-determination and that judicial bodies in Europe can be receptive to novel solutions in both inside and outside Europe.

BUILDING ANOTHER STABLE: A CONCLUSION

De-colonization once defined Self-Determination and uti possidetis, but those times have ended. The great imperial powers have faded; there are no more colonial territories. Palau, the last Trust Territory, gained its independence in 1994. The European’s progeny, the salt-water colony, has tried to mature amidst a crushing legacy of despotism, ethnic plurality, and dualities of statehood such that these colonial states are houses made of cards. Without colonies, the scope and interpretation of self-determination needs to be altered to fit the new problems facing the post-colonial state. Such changes need to be consistent, easy to conceptualize, and be as applicable in Africa as they would be in Eurasia, South America, or any-

99 EYASSU, supra note 84, at 571.
101 Mutua, supra note 55, at 1147.
where else. In other words, this new understanding must not view Africa paternalistically and as something inferior to the fledgling states in the Balkans, or the often-repressive regimes in Central Asia.

As mentioned, Self-Determination is understood to involve the territorial separation from a colonial or foreign occupying power. This created a territorial identity predicated on that separation. States today fear dismemberment at the hands of peoples within their state. Assuaging them of their fear is unlikely to occur if the specter of the demise of their conception of the state is continually advocated in academic circles. Instead, the global community, including academics, should re-define self-determination to mean that peoples within a country have a right to be heard.

This must be a flexible notion, and for it to happen, minorities must be understood as 'peoples' according to the human rights documents. Categorizing minorities as 'peoples' would grant them greater protection from state depredations and would enable them to utilize the right of self-determination. Now, since the need for separation from a colonial power is no longer necessary, this right should be interpreted as granting these groups a voice at the national level. Vocalization of these newly minted peoples would let them decide how best to protect their interest in the State. Such protection could take the form of regional autonomy, greater representation in the national legislature, or a host of other ideas. The ICCPR already addresses this in Article 25:

Every citizen shall have the right and the opportunity. . . and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections. . . held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general term of equality, to public service in his/her country.¹⁰³


¹⁰³ ICCPR, supra note 3, at art. 25.
Proposals such as this stand a much better chance at success than using independence as the default procedure. By guaranteeing that the State will survive intact and that "minority peoples" are protected, both sides win. Resource rich states do not have to worry about denuding their wealth through balkanization and minority peoples can ensure that they receive their rightful share; this would have helped mitigate the repeated secessionist movements in Katanga and the bloodshed that ensued. Under this rubric, regional autonomy would most likely have satisfied the Katanganese demands for recognition and would not have aroused the fears of the AU in a balkanization of African states and resource wars. Instead, these fears led to the quick denunciation of Katanga and the slow demise of their movement.

Brownlie, Castellino, and Cassese have thought along similar lines and label this concept "internal self-determination." But this rubric is not complete. Situations exist wherein regimes will not take the steps to recognize "minority peoples." Moreover, they may take actions that deprive such groups of their human rights; situations like current conflict in the Darfur region of Sudan, or the Balkan Wars in the late 1990s. In these situa-


107 CASSESE, supra note 14, 101-33; CASTELLINO, supra note 1, 13-15, 63, 69, 103; Ian Brownlie, The Rights of Peoples in Modern International Law, in THE RIGHTS OF PEOPLES 1, 6 (James Crawford, ed., 1988);

108 Haim Shaked, Anatomy of an Autonomy: The Case of Southern Sudan, 151-170 in MODELS OF AUTONOMY (Yoram Dinstein ed., 1981) (outlining the historical roots of the conflict in Darfur, in western Sudan, the scene of some of the bloodiest
tions, the global community, beginning with the UN, must be willing to relax the structures of *uti possidetis* and allow groups to secede from the state.

Doing so would live up to the ideals of the principle of self-determination despite the radical approach. As Benyamin Neuberger states:

The right of secession is...a variant of the right of [self-determination]. [The people] defend [themselves] by seceding from an oppressive system. ...There [are] compelling reasons for secession such as if the physical survival or the cultural autonomy of a nation is threatened, or if a population would feel economically excluded and permanently deprived.109

A government that is unable or unwilling to respect the civil, political, and economic rights of its citizens would give rise to the affected peoples' right to secede as a form of self-determination. To hold otherwise would not only fly in the face of the post-Cold War European experience, it would continue to perpetuate the problems plaguing places such as Darfur.

The UN and the global community allowed secession movements to succeed following the breakup of the USSR, the disintegration of Yugoslavia, and even with the secession of Eritrea from Ethiopia. These were exceptional circumstances. But that is precisely why this aspect of a redefined international norm is necessary. Current problems relating to self-determination have sprung up because the forces involved were consistently made to function within an internationally created legal bottleneck. By forcing a myriad of complex political situations into the same round hole, no one, not the leading members of the Western world, the State in question, or the peoples seeking to protect and preserve their rights, was served by giving those seeking self-determination a square peg with which to try and advocate their position. Secession, and subsequent international recognition, must be a last recourse if all other methods have failed.110

The global community will be able to establish a consistent post-colonial policy toward protecting the rights of minority peoples only when it has broken the Hobson's choice that self-determination represents. Peoples currently have the choice to self-determine their political future out of

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a colonial state but not to set up alternative national models to protect the post-colonial population. This establishes an irreversible national and territorial identity at the cost of true representation for all of the territorial peoples. Such a right exists once and expires upon use. Those most in need of protection and a voice are stripped of it in the need for separation from the colonial power. Some would call this a necessary evil, where the needs of many outweigh those trampled underfoot.

But it does not have to be this way. The "all or nothing" approach represented by outdated interpretations of self-determination must be altered. A reinterpretation will take effort on the part of the UN and its Member States but it is possible. To do so would be to live up to the ideals of the UN as reiterated in all its founding documents. It would protect the silent peoples in Africa and in other parts of the world struggling with the legacy of colonialism. It would help to end a paternalistic view of Africa. It would allay the fears of the AU in a balkanization of their authority. Ending an inconsistent subservience to the letter, but not the spirit, of self-determination, like the Merchant for his pound of flesh, would enervate the UN’s promise to the world. If helping the helpless is part of the mission of the UN, let us have it set the example and see if it can benefit those that need it. We may find that such an action benefits us all. As Portia rebukes Shylock at his trial:

The quality of mercy is not strain’d,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.\textsuperscript{112}

\textsuperscript{111} U.N. Charter, supra note 3; the ICCPR, supra note 3; the ICESCR, supra note 3; Declaration on Minorities, supra note 19; 1970 Declaration, supra note 19; The 1960 Declaration, supra note 5; UDHR, supra note 19, at pmbl., arts. 21-22.

\textsuperscript{112} WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1.