

# **From Principles to Practice: Resolving the Perceived Conflict Between Territorial Integrity and Self-Determination in International Law**

By Davit Avagyan

## **I. Introduction**

The right to self-determination is an old concept: people, being free, must themselves choose their government and its ability to impose limitations on them. Yet so is the concept that each country has a right to territorial integrity — to be free from attempts by others to usurp its territory.

The right to self-determination emerged as a response to colonialism and oppressive regimes, meant to empower people in cultural, economic, and political spheres. Since states typically resist territorial concessions, when the exercise of a right to self-determination threatens the states right to any territory, it leads to perceived clashes between self-determination and territorial integrity. States argue that secession violates their territorial integrity, after all, it forces a change in the state's borders (likely without its consent). But under international law, a states rights to territorial integrity does not inherently place limits on the exercise of self-determination in a manner that causes territorial changes.

While ongoing conflicts are discussed here, this paper maintains neutrality and merely seeks to outline current issues and arguments. It provides a brief overview of territorial integrity and the right to self-determination without delving into

exhaustive historical contexts. The focus is on the perceived conflict between a state's territorial integrity and a people's right to self-determination, asserting that the latter is not limited by, and its legal exercise externally does not violate, the former.

## II. Territorial Integrity

Throughout much of early history, from early kingdoms to later republics, nations pursued territorial expansion through warfare. Often, these wars of conquest did not have any justification. Early efforts to regulate warfare emerge with the “just war” theory, which was aimed at taming the regular violence of the age.<sup>1</sup> The just war doctrine, as first contemplated by Augustine, was first conceptualized as a theory of protecting communities, not the borders of or the conquest of the state.<sup>2</sup> But from the early theories, the concept of justification to initiate war arose into a more “legal” concept directed towards state action as opposed to the intra-community violence.<sup>3</sup> Nations even then began to enter into agreements which set out the borders between neighbors,<sup>4</sup> to protect their right to the territories claimed. These early origins of territoriality were codified somewhat during the peace of Westphalia.<sup>5</sup> However, the current system of territorial integrity and the concept of the “inviolability of borders” did not truly emerge until the League of Nations.

---

<sup>1</sup> Mary Ellen O’Connell, *International Law and the Use of Force* 118-38 (2nd ed. 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> BETH A. SIMMONS, *BORDERS RULES*, 5-6 (2019).

<sup>5</sup> *Id.*

The aftermath of World War I prompted global efforts to prevent future conflicts, culminating in the formation of the League of Nations. Its Covenant, particularly Article 10, underscored the commitment to uphold territorial integrity against external aggression. Specifically, Article 10 committed that “[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”<sup>6</sup>

Despite the League's ultimate failure to avert another world war, the imperative for territorial stability persisted. The United Nations, succeeding the League, reinforced this commitment in the new United Nations Charter, prohibiting the threat or use of force against territorial integrity. In relevant part, the United Nations charter Article 1 commits that “[a]ll 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.”<sup>7</sup> United Nations Charter also codifies internal sovereignty through Article 2(7), which precludes the United Nations from intervening in internal matters of any country.<sup>8</sup>

Subsequent treaties and declarations, such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among

---

<sup>6</sup> League of Nations Covenant art. 10.

<sup>7</sup> U.N. Charter art. 1, ¶ 2(4).

<sup>8</sup> U.N. Charter art. 1, ¶ 2(7).

States, reaffirmed the sanctity of territorial integrity.<sup>9</sup> These principles, enshrined in various UN documents, aimed to deter interstate intrusion and foster global stability.

Since the formation of the United Nations, territorial integrity has been invoked in various conflicts worldwide, from Cyprus, Syria, Armenia, Ukraine, and others. States often cite this principle to safeguard their territorial and sovereign rights, whether legally speaking the right applies or not, similar to how states invoke the right to self-defense as they engage in the use of force that exceeds the parameters of self-defense.

Membership in the United Nations is limited to sovereign states, through their recognized governmental representatives. The United Nations Charter only talks about “members” and the “threat or use of force” against a “state.”<sup>10</sup> This leaves open the possibility that states could see territorial changes in some contexts since the charter only prevents other states from interfering with the territorial integrity of another state through the use or threat of force. Thus, nothing prevents a state from negotiating to give away or take a portion of territory with another state or people.

---

<sup>9</sup> U.N.G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

<sup>10</sup> U.N. Charter art. 1, ¶ 2(4).

However, states like Serbia facing disputes over secession,<sup>11</sup> have invoked the right to territorial integrity by arguing that secession would violate the states' right to territorial integrity. The argument is that by changing the borders of a state without its consent, the territorial integrity of the state is violated. This argument is further discussed later in the paper.

### III. Self-Determination

The right to self-determination is not a new concept but rather has its roots in the theories of individual and community rights from centuries ago. We can see some of the earlier concepts of self-determination in the writings of St. Thomas Aquinas, in the thirteenth century, advocating for the right of people to rebel against a tyrant.<sup>12</sup> Several centuries later, John Locke would make significant contributions to the modern formation of the right to self-determination by advancing the idea of individual rights and the concept of the “consent of the governed.”<sup>13</sup> His view placed individual rights as supreme to the government and would come to take center stage in revolutions of the seventeenth century such as the American revolutions.<sup>14</sup> While the American revolutionaries did not specifically invoke a “right to self-determination” by those very words, that is because the concept had not been solidified by that time. However, the declaration of

---

<sup>11</sup> In the case of Kosovo there were also external attacks by NATO which supported the secessionist movement. However, this paper focuses on the relationship between the state and those wishing to secede from the state, and not on third-party actors.

<sup>12</sup> MARY E. O'CONNELL, *THE ART OF LAW IN THE INTERNATIONAL COMMUNITY* 240 (2019).

<sup>13</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT: THE SECOND TREATIES OF CIVIL GOVERNMENT* 181-82 (Thomas I. Cook 1965) (1690).

<sup>14</sup> O'CONNELL, *supra* note 12.

independence and the arguments used for the revolution show a clear appeal to the early concepts that would develop into what is known today as the right to self-determination.<sup>15</sup> In particular, Locke's ideas of the consent of the governed found prominence in the argument to break away from English rule.<sup>16</sup> Years later, the French would use similar arguments to overthrow the monarchy, and in the nineteenth century, the Greeks would successfully fight the Greek War of Independence against the Ottoman Empire.<sup>17</sup> More than anything, the use of the early concepts that would become the building blocks of the right to self-determination showed the practical application of the ideas of human rights rather than the rights of states or monarchs.

The concept of self-determination continued to evolve,<sup>18</sup> and by the early twentieth century, it had been solidified enough for world leaders to use it as a justification for foreign policy.<sup>19</sup> The right also found more prominence in the twentieth century because the world was seeing major changes and there was growing resentment towards the imperial powers. Colonization in the earlier

---

<sup>15</sup> Declaration of independence (U.S. 1776) (arguing "Governments are instituted among Men, deriving their just powers from the consent of the governed -- That 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").

<sup>16</sup> Among other arguments, such as the natural law and natural rights of men.

<sup>17</sup> O'CONNELL, *supra* note 10.

<sup>18</sup> As well as development of international law and international human rights law, which took on a greater role in international affairs and became more sophisticated as a legal tool, rather than merely a political one.

<sup>19</sup> Woodrow Wilson used the right to self-determination after World War I as a means of decolonization, though despite his best efforts the right would not become a central pillar of the League of Nations as it later would of the United Nations. *See* Michael Ajemian, *Territorial Stalemate: Independence of Nagorno-Karabakh Following the Dissolution of the Soviet Union, and its Lingering Effects Decades Later*, 34 Suffolk Transnat'l L. Rev. 375, 386 (2011) (citing to MALCOLM N. SHAW, *INTERNATIONAL LAW* 178, 225 (5th ed. 2003)). Self-determination would even find itself in domestic law, such as the United Soviet Socialist Republics constitution.

centuries had subjugated millions of people and brought with it much suffering for the people of the colonies. With the end of World War II, the peoples of the colonies were calling for independence from the colonial powers.

Thus, when the UN Charter was written after World War II it not simply recognize a right to self-determination. Instead, it states that the *purpose* of the organization is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,”<sup>20</sup> making the right of self-determination by peoples a cornerstone of the United Nations. In 1960, Resolution 1514 was adopted in support of decolonization and stating unequivocally that “[a]ll 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.”<sup>21</sup> As a result, the International Court of Justice (ICJ) would come to state, “[i]n the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable,” ending any remaining debate about the importance of the right to self-determination.<sup>22</sup> The ICJ in 2019 reaffirmed again that self-determination is a “fundamental human right.”<sup>23</sup>

---

<sup>20</sup> UN Charter Ch. 1, Art. 1(2).

<sup>21</sup> U.N.G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960). (While some have argued that the declaration was written in the context of colonization and should not be viewed outside of that context, this declaration in conjunction with others that documents which followed set the course of the right to self-determination for all peoples, not only those in the context of colonization. While Declaration 1514 might be about colonized people, its importance in the development of the right to self-determination cannot be overlooked.)

<sup>22</sup> Case concerning east Timor (Portugal v Australia), Judgment, 1995 ICJ (n 2) para 29.

<sup>23</sup> Legal Consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. para 144 (Feb. 25).

However, despite this, two difficult questions remained unanswered about the exercise of the right to self-determination. The first question is who possesses this right and can legally trigger its exercise. The second question is what the exercise of the right to self-determination entails.

In the UN Charter, self-determination is a right that is recognized to belong to all “peoples.”<sup>24</sup> A peoples is a distinguishable group of people, usually connected by a mutual culture, religion, language, or other characteristics that unite them.<sup>25</sup> The group will be different from the majority of the state’s population in important ways. However, understanding whether a particular group is a “peoples” can be a difficult question since a peoples can possess stark differences from the majority of the population, yet share key similarities.<sup>26</sup> A further difficulty arises when a particular group claims to be a peoples in order to assert their right of self-determination and the state refuses to acknowledge the existence of such a peoples. The administrative state will refute that the group is in fact a peoples and say that while the group might have differences, they are actually quite similar to the general population of the state. Since not all groups are considered a peoples,<sup>27</sup> the

---

<sup>24</sup> UN Charter Ch. 1, Art. 1(2). This would also be reaffirmed in later resolutions of the UN, statements by states, and the International Court of Justice.

<sup>25</sup> JAN KLABBERS, *INTERNATIONAL LAW* 129 -131 (2nd ed. 2018).

<sup>26</sup> *Id.* (Klabbers shows the difficulty through Americans and Australians, who share the same language but few would think constitute one people. At the same time, the history of the Catalans is tied closely with the Spanish, but the Catalans themselves feel strongly different from the Spanish. While Klabbers gives these examples of difficult situation, there are cases where there could not be much argument that a group of peoples constitutes a Peoples, such as the Kurds who have a distinct culture, language and identity).

<sup>27</sup> The members of a political party, for example, would not be considered a peoples even though they are a clearly identifiable group which have similar beliefs, nor would the inhabitants of one city or province who are not in any other significant way indistinguishable from the general population of the state.



state can attempt to claim that the group responsible for claiming rights as a peoples does not have standing because they do not meet the criteria.<sup>28</sup> Thus, a group must possess some characteristics which will support their assertion that they are, in fact, a peoples. Even though there is no specific checklist, a distinct culture, language, religion, and other similar characteristics can be a guide to determining whether a group constitutes a peoples.<sup>29</sup> Since this area has many subjective elements, it has remained quite unclear. This unclarity has, in turn, led to states arguing that a certain group is actually much more like the general population and not as distinct as some would claim. On the other hand, in some cases, the existence of a peoples is much clearer. For example, no credible debate exists that the Kurds or the Sami are not a Peoples.<sup>30</sup>

The second issue, how and when the right to self-determination can be utilized is much more contentious. Neither the UN Charter nor other international documents of wide acceptance contain a road map of how to use the right to self-determination. This has resulted in different theories of when the right to self-

---

<sup>28</sup> This has occurred in history even when it is clear that a group is a peoples. For example, Sweden did not recognize the Sami as a Peoples until 2010, after which it has tried to give them a level of self-determination internally. *See* James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, Human Rights Council, U.N. Doc. A/HRC/18/35/Add.2, United Nations, (6 June 2011). *Also see* United Nations Committee on the Elimination of Racial Discrimination, concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session, U.N. Doc. CERD/C/SWE/CO/19-21, (Sept. 23, 2013); United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review-Sweden, U.N. Doc. A/HRC/29/13, 4, (13 April 2015).

<sup>29</sup> Klabbers *supra* note 22. *See generally* James Summers, Peoples and International Law, (2nd ed. 2007).

<sup>30</sup> *Who are the Kurds?* BBC (Oct. 15, 2019) <https://www.bbc.com/news/world-middle-east-29702440>; *Sami in Sweden*, <https://sweden.se/society/sami-in-sweden>.

determination can be used, how it can be used and how it is regulated or limited. It is generally accepted that there is a right to internal and external self-determination.<sup>31</sup> Internal self-determination is not a controversial topic when compared to external self-determination.<sup>32</sup> A peoples can exercise its right to self-determination by working with the state to promote their social, cultural and economic rights. A good example of this is the case of the Sami in Sweden. Working with the Swedish government, the Sami have formed a parliament to represent them, have recognized rights to language, culture and other aspects of importance. While certainly there remain legitimate concerns about the Sami's rights in Sweden<sup>33</sup> and whether the Swedish government has allowed the proper exercise of their rights to self-determination in certain aspects or instances, the Sami's right to self-determination within the borders of Sweden is recognized and there are mechanisms in place to guarantee and advance them.<sup>34</sup> States have tried to argue that self-determination only applies in this way, through internal means, most commonly using a state's right to territorial integrity as a means of making this argument. However, it is widely accepted that in some instances, the right to self-

---

<sup>31</sup> Vladyslav Lanovoy, *Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?* 4 *Cambridge J. of Int'l and Comp. L.* 388, 391-92 (2015).

<sup>32</sup> This is not to say that internal self-determination is not rife with issues or that people fighting for internal self-determination to not face significant challenges from their governments.

<sup>33</sup> Anaya *supra* note 25.

<sup>34</sup> *Id.* (The same can be said of the Sami in Norway and Finland).

determination can be an external right, which would allow a group to secede from the state.<sup>35</sup>

External self-determination is more controversial in the discussions since states guard their territories quite jealously. The exercise of external self-determination will be an attempt by the peoples to secede from the state and, as a result, take with them territory that the state perceives to belong to it. While states might begrudgingly give some autonomy or special status to a minority group, external self-determination remains controversial because no state wants to give up its territory. This very reason is what has driven states to declare their commitment to territorial integrity in cases where self-determination has upset state borders. However, there is evidence through some cases that shows the states willingness to recognize external self-determination as a viable option in some circumstances despite it affecting internationally recognized borders. The recognition of Kosovo by over one hundred states<sup>36</sup> and a more limited recognition of Abkhasia are good

---

<sup>35</sup> Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 134 -35 (Can.) (Even the Canadian Supreme Court, which ruled that Quebec did not have a right to unilaterally declare independence under Canadian law or international law recognized that there is a legitimate argument that people whose right to internal self-determination has been frustrated might have recourse by exercising their right externally. The Canadian Supreme Court refused to consider this issue since it found that Quebec's circumstances did not even approach such a threshold).

<sup>36</sup> Republic of Kosovo Ministry of Foreign Affairs, <http://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483> (Serbia and those who opposed the recognition of Kosovo used territorial integrity as one of the, if not the, primary reason. The recognition by over one hundred countries shows that states do not see the maintenance of borders as an absolute rule.)

examples.<sup>37</sup> That is not to say that external self-determination does not have its inherent limitations, just as many other human and states' rights do.

The right to external self-determination does not exist in all cases. There are limitations. First, the exercise in the external context is seen as a last resort, one which should be utilized only if the peoples is being oppressed to a high degree and has no reasonable way of exercising self-determination within the territory of the state.<sup>38</sup> Second, as has been discussed, this right is vested only with recognized groups who are considered to be a "peoples." There are also practical considerations that will hamper most attempts to secede ranging from economic and geographic issues to security concerns. However, practical considerations do not affect the legal considerations.<sup>39</sup>

Many states<sup>40</sup> and scholars have argued that the exercise of self-determination is contrary to states' right to territorial integrity. "Importantly, though, before ethnic-cleansing began, the Kosovar Albanian right to self-determination was thought to be exercisable only within the broader Yugoslav federation (concerns for territorial integrity coming to the fore)."<sup>41</sup> Concerns for the

---

<sup>37</sup> As of 2018, six United Nation Member states had recognized Abkhasia. Importantly, the states which recognize Abkhasia are those who opposed the recognition of Kosovo. Their willingness to recognize Abkhasia despite Georgia's claims of territorial integrity show that the opposition to Kosovo is not based on territorial integrity but rather a political one.

<sup>38</sup> Reference Re Secession of Quebec, *supra* note 36, at 134 (*citing* to the Vienna Convention on the Law of Treaties, Multilateral, May 23, 1969).

<sup>39</sup> *See generally* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21).

<sup>40</sup> Especially those facing secessionist movements within their borders.

<sup>41</sup> Rodney Pails, *Self-Determination, the Use of Force and International Law: An Analytical Framework*, 20 Tasmania L. Rev. 1, 84 (2001).

territorial integrity of the state are always brought to the fore when external self-determination issues arise. This has created in the minds of many an inherent clash between the rights of a peoples and a right of the state.

#### **IV. The Alleged Clash Between Self-Determination and Territorial Integrity**

Territorial integrity and self-determination are usually invoked in the same context and by opposing sides. This has created a perception that the two concepts of international law clash. Both scholars and government officials have been arguing about the clash of these two rights for decades. There are numerous scholarly articles dedicated to the discussion of how to resolve the “inherent” conflict between territorial integrity and self-determination,<sup>42</sup> while governments have taken to arguing for one side or the other in any given conflict based on their interest in territorial integrity or self-determination.

The abundance of documents, statements, and resolutions that purport to support territorial integrity and self-determination at the same time do not help clear this confusion. For example, while the Declaration on Principles of

---

<sup>42</sup> See Constantine Pitykakis, *An Assessment of the Right to Self-Determination and Secession in Regards to International Security* 21 (2018) (arguing that since territorial integrity and self-determination appear together and the attitude of states toward secession, then self-determination yields to territorial integrity). Lanovoy *supra* note 31, at 391 (stating that territorial integrity is a limitation on the right to territorial integrity). See generally Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force* 55 *Int'l Orgs.* 215 (2001).

International Law Concerning Friendly Relations and Co-operation Among States<sup>43</sup> declares that “any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter,” it also says “[e]very 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.”<sup>44</sup> This same document then also goes on to say that “[n]othing 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” (emphasis added).<sup>45</sup>

Does the forgoing mean that a state, which is not in compliance with the principles of equal rights and self-determination, can have its territorial integrity or political unity dismembered, contrary to what was said a few sentences above it? The attempts by United Nations members to protect their territories while also heeding to human rights have resulted in much confusion. This has also occurred through the actions of states. For example, NATO has supported the independence

---

<sup>43</sup> U.N.G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

of Kosovo, citing the right to self-determination, while at the same time arguing for the territorial integrity of Georgia in the case of South Ossetia.

It is precisely the fact that territorial integrity is continuously brought up during discussions of self-determination that creates the impression of the clash. This had occurred so much that a number of states made the argument in the International Court of Justice during the arguments for the advisory opinion of Kosovo. The ICJ avoided much of what many wish it would have addressed in that case. However, the ICJ had no choice but to state that the arguments for territorial integrity were simply out of context and not address them further, which will be discussed later.

The Helsinki Final Act, which attempted to reduce tensions world-wide during the cold war, also followed this confusing trend. First, the Act stated that “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.”<sup>46</sup> This sounds like the text in the Declaration on Friendly Relations and Co-operation Among States, but the Helsinki Act goes a little further. In the following paragraph it states that under the principle of self-determination, all peoples have the right to determine their “internal *or external political status*, without external interference, and to pursue as

---

<sup>46</sup> Conference on Security and Co-operation in Europe (Helsinki Final Act), 14 I.L.M. 1292 (1975)

they wish their political, economic, social and cultural development.”<sup>47</sup> This would seem to support the idea that peoples have a right to external self-determination, despite the fact that territorial integrity is mentioned just above it. The Helsinki act was signed by most European states, Canada, the United States, and the Soviet Union.

Finally, it is important to understand the argument that the states use. The argument used by states is actually not difficult to understand. In fact, it seems internally logically consistent, until one takes a close look at the right being invoked. States will point to their right to territorial integrity and say that some group of its citizens is attempting to secede, which will necessarily take away some of the state’s territory. Since there will be a disruption to the territoriality of the state and its recognized borders will need to be changed, this violates the right to territorial integrity. Sounds logical. However, it is once the right to territorial integrity is examined closer that it becomes clear that states are twisting the right and taking it out of context in order to “legalize” their argument.

## **V. Decisions by the International Court of Justice and Other Tribunals**

The International Court of Justice has had several opportunities to hear cases regarding the right to self-determination. In all these cases, while self-determination was a central issue in the case, the court did not spell out the rights

---

<sup>47</sup> *Id.*



under self-determination, especially as it related to rights of secession.<sup>48</sup> The ICJ has only gone as far as it was asked to, only answering the question as they were posed and refraining from commenting much further. The ICJ cases regarding Namibia (South West Africa), Western Sahara, Kosovo, and the Canadian Supreme Court decision regarding Quebec are particularly illustrative for this discussion.<sup>49</sup>

In the 1970s, South Africa still retained effective control over Namibia. The Security Council of the United Nations had declared that South Africa did not have a right to administer the territory several years before, in 1966. However, South Africa had persisted, and the Security Council requested an advisory opinion from the International Court of Justice.<sup>50</sup> The case of Namibia was in the context of decolonization and so there was no issue of territorial integrity in this case. However, this case was important not only for understanding the legal aspect of decolonization but also the legal aspects and rights as they relate to self-determination.<sup>51</sup> The ICJ discussed several of the argument posed by South Africa, finding them unpersuasive. One such argument posed was that “limitations” needed to be considered by the court, which arose because of tribal and cultural differences,

---

<sup>48</sup> Gentian Zyberi, *Self-Determination Through The Lens Of The International Court Of Justice* 56 *Neth. Int'l L' Rev.* 435 (2009).

<sup>49</sup> The ICJ's has had several other important cases which discuss the rights to self-determination and territorial integrity in this context, however, they fall too much outside the scope of this article or are mentioned elsewhere as needed. See generally *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. Rep. 554 (Dec. 22); *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. Rep. 90 (June 30); *Legal Consequences of the separation of the Chagos Archipelago From Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. Rep. (Feb. 25).

<sup>50</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21).

<sup>51</sup> Zyberi *supra* note 44, at 436.

and could practically restrict the population from seeking full independence.<sup>52</sup> This argument was denied by the court, which stated that heeding to it “in effect means a denial of self-determination as envisaged in the Charter of the United Nations.”<sup>53</sup> Thus, the court denied the idea that practical barriers could be a reason to deny people a fundamental right to self-determination legally. Namibia gained its independence on March 21, 1990.

The ICJ made another important decision in 1975 when it provided an advisory opinion for the situation in Western Sahara.<sup>54</sup> Western Sahara was a complicated conflict as both Morocco and Mauritania had territorial claims to the land, and Spain had colonized the territory but wanted to set in motion decolonization based on the free expression of the self-determination of the people of the territory.<sup>55</sup> The ICJ was asked to determine whether Western Sahara was at the time of colonization by Spain *terra nullius*<sup>56</sup> and if not, what were the legal ties between Morocco and Mauritania.<sup>57</sup> The court was aware that the opinion was requested for a practical purpose since it was meant to help the General Assembly in finding a solution to the issue.<sup>58</sup> The ICJ answered the first question in the negative, saying that the territories were not lands that belonged to no one. Then, the ICJ went on to discuss the legal ties of Morocco and Mauritania. The Court

---

<sup>52</sup> Namibia, *supra* note 45, at 63.

<sup>53</sup> *Id.*

<sup>54</sup> Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16).

<sup>55</sup> *Id.* at 34.

<sup>56</sup> *Terra Nullius* means land that belongs to no one. *See Id.* at 38-39.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 20.

found that there were some territorial ties between Morocco and Mauritania, but none that would establish territorial sovereignty by either state.<sup>59</sup> The court noted that the legal ties which were present did not affect the “decolonization of Western Sahara, and *in particular, of the principle of self-determination* through the free and genuine expression of the will of the peoples of the Territory.”<sup>60</sup> (emphasis added) The ICJ’s opinion here was also helpful in that it established certain norms or requirements in the exercise of self-determination. Namely, these were that the application of self-determination required the *free* and *genuine* expression of the will of the people<sup>61</sup> *and* that a referendum was the accepted means of consulting the people.<sup>62</sup>

In 2008, the assembly of Kosovo voted to unilaterally declare independence from Serbia.<sup>63</sup> Serbia viewed the declaration as illegal under international law and sought clarification from the International Court of Justice. A request for an advisory opinion was sent to the ICJ through a United Nations General Assembly resolution.<sup>64</sup> The question which was asked of the ICJ was quite a narrow one. “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”<sup>65</sup>

---

<sup>59</sup> *Id.* at 68.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 32.

<sup>62</sup> Zyberi *supra* note 44, at 436.

<sup>63</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ Rep. 403 (July 22).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 407.

The International Court of Justice in answering the question posed by the General Assembly both evaded commenting on some issues which relate to self-determination but also provided some key insights into the interplay between the different rights claimed in this case. The ICJ's narrow reading of the question allowed it to avoid any claims of judicial activism and protect the judiciary's credibility. Nonetheless, the decision by the ICJ, in this case, was one of the most, if not the most, important recent development in the field. It shines a light on the alleged controversy between territorial integrity and the right to self-determination. First, the ICJ answered the question by stating that a unilateral declaration of independence is not illegal under international law.<sup>66</sup> The ICJ does not attempt to answer the question regarding how this ruling affects territoriality, the inviolability of borders, or secession as a right to self-determination since this would be venturing outside of the narrow question presented to the court.<sup>67</sup> Moreover, the ICJ in the Kosovo opinion refused to opine on whether self-determination outside the colonization context had developed to the point where a right to secession existed, whether as a manifestation of the right to self-determination or as what some describe as a right to "remedial secession."<sup>68</sup>

---

<sup>66</sup> *Id.* at 452.

<sup>67</sup> *Id.* at 438. (The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law ... To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999))

<sup>68</sup> *Id.* at 82. The ICJ in its most recent advisory opinion regarding self-determination hinted that a right outside of decolonization might be forming. The Court stated that "[t]he Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization." Chagos Archipelago, *supra* note 21, at 35.

However, the court did address the arguments regarding territorial integrity since several states had submitted arguments against Kosovo's position based on territorial integrity. They argued that the right to territorial integrity under international law inevitably meant that a unilateral declaration of independence was illegal under international law.<sup>69</sup> In dismissing these arguments, the court stated, "the scope of the principle of territorial integrity is confined to the sphere of relations between States."<sup>70</sup> Thus, the International Court of Justice took the position that territorial integrity does not make a declaration of independence illegal since territorial integrity simply does not apply to the situation. The fact that the court did not venture further to discuss the practical effects of a unilateral declaration of independence is why the argument still persists on this matter.

Lastly, a note on Canada: in 1998, the Canadian Supreme Court made a decision on the attempts by some in Quebec to secede from Canada. While the decision was based largely on domestic law, it also addressed the right of succession under international law in the specific context of Quebec. The Canadian Supreme Court understood that its jurisdiction was limited when it came to a discussion of international law.<sup>71</sup> This is why it likely remained largely ignored by the International Court of Justice in its decisions.<sup>72</sup> Nevertheless, the Canadian

---

<sup>69</sup> Kosovo Advisory Opinion, *supra* note 58 at 437.

<sup>70</sup> *Id.*

<sup>71</sup> Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 109 (Can.) (the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address.)

<sup>72</sup> For example, in the Kosovo Advisory Opinion the ICJ simply says that the questions presented to the Canadian Supreme Court and the ICJ in that case were different, never mentioning the opinion again.

Supreme Court's discussion has been widely cited by scholars, especially if arguing against a right to secession.

The Canadian Supreme Court did not reach a specific conclusion about the self-determination rights of all peoples. Rather, the Court addressed how such rights affect the position of those advocating for secession of Quebec from Canada. In the discussion regarding a positive right to secession, the Canadian Supreme Court notes that “international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally.”<sup>73</sup> The court goes on to discuss what the right to self-determination means but ultimately states that whether a right to secession exists or not under international law, it would not apply in this case because the “population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world.”<sup>74</sup> The court finds that if a right to secession does exist, it is in exceptional circumstances where people are denied internal self-determination if a people is oppressed, or under colonial rule.<sup>75</sup> It finds that the situation in Quebec would not even come close to such a situation.<sup>76</sup>

---

<sup>73</sup> Reference Re Secession of Quebec *supra* note 66, para. 111.

<sup>74</sup> *Id.* at 136.

<sup>75</sup> *Id.* at 138.

<sup>76</sup> *Id.*

The International Court of Justice decisions and advisory opinions show that self-determination is a fundamental right that is to be afforded to all peoples irrespective of practical barriers or challenges. States cannot use their perceived concerns to deny peoples a right to self-determination and must give peoples an opportunity for a free and genuine expression of their will and respect the result of such expression. Territorial integrity, while an important principle of international law in other contexts, does not play a role if there is a genuine move for self-determination by peoples.

## **VI. Why the Two Rights Do Not Conflict**

Since the International Court of Justice has not clearly stated that territorial integrity cannot be a limitation to the right to self-determination, but rather hinted at it, this argument has persisted by states. As was discussed above, the international documents drafted by states usually tend to both declare their commitment to self-determination as a human right and to territorial integrity. However, while both are important rights, these rights are not as intertwined as some believe. Territorial integrity came about as a concept that was meant to prevent war between nations, and it continues to have an important role to play in that context. Yet, territorial integrity does not play a limiting role in the right to self-determination.<sup>77</sup>

---

<sup>77</sup> That is not to say that self-determination does not have any limitations, but those limitations exist internally within the right to self-determination.

While it might seem that states were attempting to intertwine the right to self-determination with the right to territorial integrity by including both rights together in every major document, there might be a much more practical reason why states include both rights together. For example, let us consider the Helsinki Final Act, which states in relevant part that participating states will respect the right to self-determination and act at all times in conformity with the Charter of the United Nations including those relating to territorial integrity.<sup>78</sup> This paragraph is aimed at the state, not the people. The paragraph demands two things, 1) that a state must respect self-determination, and 2) that the state must act in conformity with international norms, including territorial integrity. This means that a state must respect the right to self-determination of peoples within its territory and outside of its territory. Moreover, it precludes states from using the right to self-determination within another States territory. In other words, pushing peoples within the territory of another state to declare independence is what that is attempting to prevent by making it clear that in “respecting” the right to self-determination, states must consider the right to territorial integrity. However, this does not create any obligation on the part of the peoples towards the State’s territorial integrity.

Territorial integrity is a right that all states enjoy. Specifically, this means that a state has a right not to have its territorial integrity violated or threatened by other states. Whether this is physically or through other means. For example, when

---

<sup>78</sup> Helsinki Final Act *supra* note 45.



Iraq invaded Kuwait, that was a violation of the territorial integrity of Kuwait by another state, Iraq. However, in the context of self-determination struggle, there is the state and the peoples of a territory, which is at the time wholly within the state. There can, of course, be outside supporters, such as NATO in Kosovo; however, their actions and any repercussions for them will be discussed later. It is enough to say for now that third parties' actions do not jeopardize a peoples' legal rights to self-determination. As was discussed above, the states argue that since their borders will inevitably change if an external self-determination movement is carried out to its conclusion, they will at that time suffer a violation of their territorial integrity. Let us consider this argument in light of ICJ opinions.<sup>79</sup>

In order to demonstrate this argument in the clearest way possible, a hypothetical scenario is proposed. A group of peoples called Group A is indigenous to a specific region, which now falls in the territory of State X. Group A practices a different religion than the majority of State X, has a distinct culture and language, making their identity as a Peoples of the Territory clear. Unfortunately, Group A has no rights under the constitution of State X, is harassed, and often killed. Member of group A have been living under oppressive conditions for years and have no means of achieving self-determination internally; in fact, the situation is only getting worse year by year. Group A organizes itself and decides to declare independence from State X, with the Territory that they are indigenous to. Group A

---

<sup>79</sup> This paper does not consider the decolonization context of self-determination as that issue has mostly been settled, at least legally, if not practically. Moreover, the argument that territorial integrity somehow limits self-determination does not often arise in the context of decolonization.

holds a referendum in the Territory, asking whether those living in the area wish to form an independent state. The results are an overwhelming vote for independence, so representatives of Group A declare independence. Up to this point, Group A has followed the International Court of Justice's opinion in holding a referendum, given that it was a free and genuine vote of the people, and declaring independence legally under international law. Some would argue that it is at this point that this paper loses its point. Surely, it appears that once Group A secedes from State X, the states right to territorial integrity has been violated. However, that is not so. State X never had a right to territorial integrity as to the people living within its borders. It only possesses that right as to other recognized states. So, the people of Group A have not violated any right of State X because they are incapable of violating a right that only other States can violate.

Once Group A has declared independence, State X has two options. State X can either 1) recognize Group A as an independent state or, and more likely, 2) refuse to recognize Group A as an independent state. At this point, while Group A might have the de facto control over its territory, it does not have international recognition as a state. Even though at this point Group A might even have de facto independence or sovereignty and State X has lost control over a certain portion of its territory, this issue continues to be inherently an internal matter of State X. In this case, international human rights law continues to apply since international human rights law creates obligations for states in relation to all people, whether

they are a part of one's State or not.<sup>80</sup> On the other hand, States enjoy the protection of their right to territorial integrity only against other states. In the scenario presented above, any grievance that State X has is against a Peoples, not a State with an international character and the capacity to violate the States territorial integrity.

In the case of armed conflict, there are serious arguments regarding a right to rebellion. Some argue that no such right exists and that any self-determination movement must be carried out through peaceful means.<sup>81</sup> On the other hand, others argue that a right to struggle against oppressors is a right or a manifestation of the right to self-determination.<sup>82</sup> This paper will not delve into these complicated issues since that would likely require a paper of its own. However, during such conflicts, it is common for the separationist to be backed by other states. For that reason, it is important to consider the violation of territorial integrity which might arise. If State X decides to send its military in to retake the territory under the control of Group A, and State Y (an unrelated third party) decides to provide military assistance against State X in order to protect Group A, what are the legal repercussions? In such a scenario, State X might have a legitimate grievance that State Y violated its right to territorial integrity. The United Nations Charter applies to State Y since it is a member state and it has a duty to refrain from the

---

<sup>80</sup> These could be *erga omnes* rights, customary international law or specific treaties which obligated State X to protect certain human rights laws. Whether Group A now constitutes another state or not, State X would still not be able to enslave people since that would be a violation of human rights, whether carried out against one's own people or another states.

<sup>81</sup> O'Connell, *supra* note 10 at 247-48.

<sup>82</sup> *Id.* at 245-247.

threat or use of force against State X, unless an exception applies.<sup>83</sup> That is for State Y and State X to litigate. Despite any grievance that State X might have against State Y, this does not change the legal right of Group A. Group A cannot be penalized for a violation that was committed by a different entity that has a different capacity, rights, and obligations. This applies if Group A solicit aid, since the decision to intervene is on the sovereign state.

Finally, let us consider what effect the above mentioned has if Group A becomes a state. It has been numerous years since the facts mentioned above. In order for Group A to become a state, it must meet certain minimal thresholds and gain international recognition from other States.<sup>84</sup> Group A has managed to successfully create a state which has a permanent population within the Territory which they claimed as part of their declaration of independence from State X. Moreover, Group A has managed to create a government with all the necessary agencies to carry out the duties of a state. Not only that, but Group A's efforts have gained it the recognition of most states around the world, despite the continued protestations of State X. Does State X now have a claim that its territorial integrity has been violated by Group A? The answer remains no. In this case, State X still

---

<sup>83</sup> It is possible that collective self-defense between State Y and Group A, a Security Council Resolution, or humanitarian intervention might apply. Humanitarian intervention is a controversial topic. For a discussion on the use of force generally and a discussion on humanitarian Intervention through Armed Force exists, *see* MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (2nd ed. 2009). There can also be an argument that State Y had a duty to protect Group A, since self-determination is an erga omnes right.

<sup>84</sup> Montevideo Convention on the Rights and Duties of the States, Multilateral, Dec. 26, 1933 (The convention, though not signed by all states, is a good example of what is required: a permanent population, a defined territory, a government and capacity to enter into relations with the other states.)

sees Group A as its citizens, living within its borders. So, from the perspective of State X, this issue continues to remain one that is internal by its nature. Nothing has changed from State X's perspective since no separate state exists in the territory of Group A, which is separate from State X. On the other hand, State X might have a grievance against those other states which have recognized Group A as an independent country, subject to the same arguments regarding the nature of self-determination rights, but not against the Peoples of Group A. Territorial integrity does not mean that State X has an inalienable right to its internationally recognized borders under any and all circumstances. Territorial integrity is only meant to protect a state from other states. Its citizens, on the other hand, are not limited in the same way, giving Group A a right to external self-determination, which cannot be limited by State X's rights against other states.

No matter during what stage of the secession process, a peoples do not have the capacity to violate a state's right to territorial integrity. It is only states that possess such a capacity. Thus, invoking territorial integrity as an argument against the right to self-determination is invoking a concept which has no connection with the issue at hand. However, does this mean that as long as a peoples declares independence, there is no argument that States have to prevent them from seceding from the State? The answer to that is a resounding no, however that argument does not rest on the right to territorial integrity but within the limitations of the right to self-determination.

## **VII. Inherent Limitations of Self-Determination**

Exercising the right to self-determination is not an easy task because of the very fact that the right has internal checks that balance its powerful effect. While there are concerns about attempts to abuse the right to self-determination, these concerns cannot be used as justification to limit human rights.<sup>85</sup> Some of these limitations have been discussed above but it is important to understand just how difficult it is for an external exercise of self-determination to occur and just how states can legitimately challenge any attempts of secession by arguing through the right of self-determination, instead of using unrelated states' rights.

The first condition to any attempt to exercise self-determination, whether internally or externally, is that there must be a peoples who are attempting to exercise such a right. Not every, or even most, distinguishable groups in society constitute a peoples. This is the very first hurdle that any group must be able to surpass in order to claim a right to external self-determination. For a state, this is the first opportunity to challenge an attempt by any group to secede. However, if the group is clearly a peoples, there are also other limitations to external self-determination.

It is widely accepted that self-determination can take on an external or internal characteristic. If a group has internal self-determination, it is a difficult

---

<sup>85</sup> The ICJ's pointed out that practical "limitations" could not be used to deny people their right to self-determination in the case of Namibia and it makes little sense why unproven fears would be enough. Moreover, abuse is possible in the case of state rights as well. For example, states use the Article 51, the right to self-defense, as a justification for military action when the required condition for self-defense have clearly not been met. This does not mean that states should lose their right to self-defense because some bad actors have abused the right.

argument to make that there is justification to secede from a state. Internal self-determination does not mean that every wish or demand of the group must be met, only that there must be mechanisms in place for the group to have the opportunity for internal self-determination and that they be given an opportunity to exercise it. In fact, arguments for a right to external self-determination always turn to a discussion of the peoples being oppressed. External self-determination is seen as a last resort. Even if there are internal disagreements about what internal self-determination means or what falls under that right, small disagreements like that are not enough. A state can challenge an attempt to external self-determination by showing that the group was given rights and opportunities for internal self-determination within the territory of the state. For example, when some in Quebec attempted to secede from Canada, the Canadian Supreme Court was quick to point out that “Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world.”<sup>86</sup> There was no legitimate argument the Quebecers did not have opportunities to exercise their rights to self-determination internally, so their attempt to exercise external self-determination failed at that stage. This is the second way that a state may challenge a particular group’s attempt to exercise external self-determination.

---

<sup>86</sup> Re Secession of Quebec *supra* note 66, para. 136.

Third, self-determination requires the free and genuine expression of the peoples of the territory. This does not mean only the peoples who are part of the group, but all people who reside in the territory which would secede. If a referendum is held on the issue, there are two different ways that a state can challenge it. The first would be to contest the free and genuine characteristic of the vote. If there are serious voter harassment, corruption, or other form of activities that the state believes show that the vote was not the free and genuine expression of the people, it can argue that the referendum is void. Second, it is possible that a portion of the population residing within the Territory is completely excluded from the vote,<sup>87</sup> which would disqualify the referendum since all people within the territory must be able to vote, not only the group attempting to secede.

A state has ample opportunity to argue against a secessionist movement within its borders, during different stages of the process. A state can show that the secessionists are not a peoples recognized to hold the right, that they have internal self-determination, and that a process by which they attempted to gain independence was not the free and a genuine expression of the will of the people. Moreover, it is even possible that a genuine attempt to reconcile differences at an early enough stage could warrant transitioning to internal self-determination rather than an external one. However, to be practical, it is worth noting that once a secessionist movement has begun, the chances of an internal solution become less

---

<sup>87</sup> This is not referring to self-exclusion, when a portion of the population who do not agree with the secessionist boycott the voting process altogether. This is referring to a purposeful effort by the secessionists to exclude some people of the territory that is attempting to secede.



likely through each stage, so it is on states to act quickly to provide their citizens a genuine opportunity to exercise their rights internally.

## VIII. Conclusion

Self-determination is an *erga omnes* right in international law. Its development throughout history points to the struggle against oppressors, and the development of human rights strongly correlates with the right to self-determination. Exercising the right to self-determination is not an easy task, and it is not done so lightly. There are examples of many peoples who continue to live within a state, as long as they have meaningful rights to internal self-determination. If a peoples makes the difficult decision to move towards external self-determination, they must be ready to overcome not only the practical difficulties which will arise but also to satisfy the legal requirements to exercise their right to self-determination.

On their part, states have often argued that territorial integrity is a limitation on the right to self-determination since the exercise of the right externally would change the territory of the state. However, this is a flawed argument that presupposes that a state has an absolute right to its territory *visa-a-vis* its people. However, that is not the case. States have a right to territorial integrity against attempts by other states to encroach on their land. Against their own people states do not have such a claim, since the people are the ones who make up the state. The government is merely the one who carries out the will of the people. If states wish to argue against the right to self-determination of a certain

group within their territory, they can do so. However, that argument must be based on the internal limitation of the right to self-determination.

Too often, states have made the easier argument that there will be a violation of their territorial integrity. Unfortunately for the states, territorial integrity protects it against intrusions by other states, but it cannot be a shield against the free and genuine expression of the will of the peoples of the state itself. The principle of territorial integrity operates within the sphere of interstate relations, while self-determination is a principle of internal character. The principles are both important in their own areas; however, attempts to pin them against one another take the right to territorial integrity and twist it out of context.