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Introduction

The law of self-determination has been instrumental in shaping contemporary international relations. Its most important contribution has been as a normative framework for the dismantling of European empires in the second half of the twentieth century. Yet with decolonization now almost complete, the contemporary focus has shifted away from the problems of classical colonialism. Modern scholarship on self-determination is chiefly preoccupied with how the concept might be relevant in confronting some of the challenges of a fragmenting, postcolonial world; from ethnic unrest in the Balkans and Caucasus to the claims of indigenous peoples to greater self-government within States. While the modern debate tends to focus on these novel developments, several colonial cases remain unresolved, and certain aspects of the normative framework governing colonial self-determination remain poorly understood.

In particular, there is a degree of confusion surrounding the treatment of a number of disputed colonial territories, where self-determination appears to have been denied or qualified in some way. As the era of classical colonialism draws to a close, it seems an opportune moment to survey the entire landscape and reflect on the conceptual difficulties that the most troublesome, contentious colonial cases have given rise to.

The present work can be situated within a broad school of investigation into the modern development and ramifications of self-determination as a legal norm.[1] Its primary focus is on international practice and doctrine regarding 'Non-Self-Governing Territories' under Chapter XI of the UN

[1] Leading works include A. Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press 1995); A. Rigo-Sureda *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Leiden: Sijthoff 1973); J. R. Crawford *The Creation of States in International Law* (2nd edn Oxford: Oxford University Press 2006); M. Pomerance *Self-Determination in Law and Practice* (The Hague: Nijhoff 1982); O. U. Umozurike *Self-Determination in International Law* (Hamden: Archon Books 1972); K. Knop *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press 2004); H. Hannum *Autonomy, Sovereignty and Self-Determination: The*

Charter. It is more specifically concerned with disputed colonial territories where external self-determination has been denied or qualified. It aims to provide a comprehensive account of international practice in relation to these disputed colonial territories.

The adjective 'colonial' is used here rather loosely. It will be applied not only to Chapter XI Non-Self-Governing and Chapter XII Trust territories, but also occasionally to parts of such territories. Use of the term in this work does not necessarily imply a relationship of subordination between the territory in question and the metropole. For example, the island of Mayotte will be considered to fall within the class of 'disputed colonial territories' for the purposes of this work, even though Mayotte is not a Chapter XI territory in its own right, and even though it is today integrated administratively with France.

1.1 Methodology and *Problématique*

In his seminal overview of the international law of self-determination, Cassese asserts that his approach is 'unashamedly doctrinal: its by-word is *lex lata*'.[2] The present work shares a similar 'positivist' commitment to mapping the *lex lata*. It will largely avoid discussion of the direction in which the law might be, or ought to be, heading, and in this sense it could be said to be more modest in scope than Cassese's work.[3]

The present work also shares Cassese's concern with pursuing a 'contextual', 'historical' approach to the international law of self-determination.[4] The approach taken herein is broadly informed by the kind of 'sociological' approach to international law pioneered by Max Huber.[5] This is characterized by a 'strong emphasis on elucidating the development of the history of international law in the context of the prevailing socio-political conditions', with the purpose of understanding 'when and why rules for the conduct of intergroup or interstate relations have developed'.[6] It is also concerned with the question of 'why and under what conditions legal rules of intergroup/

Accommodation of Conflicting Rights (Philadelphia, PA: University of Pennsylvania Press 1990; rev edn 1996).

[2] Cassese (n 1) 2.

[3] Ibid., 3.

[4] Ibid.

[5] Especially M. Huber *Die soziologischen Grundlagen des Völkerrechts* (Berlin: Rothschild 1928).

[6] J. Delbrück 'Max Huber's Sociological Approach to International Law Revisited' 18:1 *EJIL* (2007) 97, 111.

interstate relations become effective beyond voluntary compliance'.[7] The aim is not to go 'beyond the realm of law' (as Cassese puts it) but rather to seek to understand how the law of self-determination is shaped, and to integrate this understanding into an account of what the law is.[8]

Crawford has observed that the *lex lata* of self-determination is also *lex obscura*.[9] A contention in the present work is that the *lex lata* may be more obscure than even some of the more insightful commentators on self-determination are prepared to acknowledge. This is partly because while the importance of politics in determining the scope of self-determination may be widely accepted,[10] the role of political discretion in the application of self-determination is sometimes overlooked. While the differential treatment of ostensibly similar colonial cases will sometimes suggest a rational justification for placing certain cases outside the scope of colonial self-determination (most notably in cases where clear ties of territorial sovereignty exist between a colonial territory and a State other than the administering power, such as in the case of a 'leased' territory), other anomalous cases pose a more difficult interpretive challenge, especially for proponents of a strong (perhaps even *jus cogens*) rule mandating the emancipation of overseas colonies.

There is a tendency in much of the literature to treat the application of self-determination in a colonial context as settled law, applying to a narrow set of 'core' cases.[11] The 'penumbra' is widely believed to lie outside the colonial sphere, in the space where debates over minority rights and secession disputes unfold. There, it is said, lie the 'hard' cases, where the

[7] Ibid.

[8] Compare Cassese (n 1) who suggests (at 3) that a contextual approach involves a departure from 'the realm of law', a statement which is queried by J. Crawford in his review of Cassese's book, in 90 *AJIL* (1996) 331.

[9] J. Crawford 'The Right to Self-Determination in International Law: Its Development and Future' in P. Alston (ed.) *Peoples Rights* (Oxford: Oxford University Press 2001) 7, 38. On the indeterminate nature of self-determination see M. Koskenniemi 'National Self-Determination' (1994) 43 *ICLQ* 241.

[10] See e.g. Crawford (n 1) 115.

[11] The core/penumbra distinction is taken from H. L. A. Hart *The Concept of Law* (2nd edn Oxford: Oxford University Press 1994 (1961)). Hart states (at 123) that

> [a]ll rules require recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate the duality of this core of certainty and penumbra of doubt when we are engaged in bringing particular situations under general rules.

normative power of principles (as opposed to rules) comes to the fore, and where interpretation 'involves a politico-legal choice'.[12]

It is striking that even some of the more critical accounts of self-determination in the literature appear to have been swayed by this classification, to the extent that it leads authors to neglect the potential significance of cases where self-determination has been applied inconsistently even in the colonial context (that is to say, within the supposedly settled 'core' of self-determination). For instance, when discussing the problem of identifying 'nations', Koskenniemi states:

> It is sometimes suggested that this problem does not present itself to international law because the legally relevant unit is a territorial one and thus recognisable through the territorial criterion. In as much as the UN law of decolonisation – with its normative basis in General Assembly resolutions 1514 and 1541 of 1960 and Chapter XI of the Charter – is concerned, this is no doubt true.[13]

This statement does not account for the fact that claims to 'nationhood' by some of the Chapter XI territories that the present work will focus on have not been received sympathetically. As Koskenniemi observes later in the same article, in certain cases – such as Gibraltar (a Chapter XI territory) – 'the will of the population, it appears, may at least in a colonial context be overridden by the self-determination of a larger entity', thus confirming that 'the subjective will of a population to exist as a nation and enjoy a right of self-determination cannot be a sufficient condition for its application'.[14] It cannot therefore be 'no doubt true', on Koskenniemi's account, that in relation to all Chapter XI cases the legally relevant unit for determining nationhood is a territorial one and thus recognizable through the territorial criterion. If something else is occurring in anomalous Chapter XI cases such as Gibraltar, the phenomenon in question surely merits scrutiny.

It is also worth highlighting Knop's position in this respect. She states:

> It is common ground that the population of an overseas colony is a 'people', that these peoples have the right of self-determination and that their right of self-determination gives them the choice of independent statehood.[15]

Beyond this, 'it is unclear who else qualifies'.[16]

[12] Knop (n 1) 38.
[13] Koskenniemi (n 9) 262.
[14] Ibid., 263.
[15] Knop (n 12) 18.
[16] Ibid., 38.

According to such accounts, it is *beyond* the colonial context that self-determination becomes really problematic. This approach overlooks some of the cases that will be considered in this work, where the 'peoplehood' of the inhabitants of certain overseas colonies has been contested. Indeed, arguments about the status of the population continue to feature prominently in the debates surrounding the future of territories such as Gibraltar, the Falkland/Malvinas Islands, Mayotte and Western Sahara. Knop purports to present, 'from the margins', a more 'complex' account than some of the 'rigid' and 'linear' mainstream accounts.[17] However, she overlooks certain marginal colonial cases that call into question the solidity of the supposed 'core' of self-determination.[18]

Other authors confront apparent inconsistencies in the context of colonial self-determination more directly. Some have sought to rationalize the different treatment of some Chapter XI territories by arguing for the existence of special categories of territory, whose members possess a given set of factual characteristics which render self-determination inapplicable, and which mandate a merger with a neighbouring claimant State. Such doctrines, the most influential of which posits an exception to the rule in the case of so-called 'colonial enclaves' will be examined in this work.[19] In the final analysis, such rationalizing efforts appear unconvincing, both in terms of their basis in State practice and also occasionally in terms of their internal coherence.

The analysis of anomalous cases contained in this work will expose ways in which the political interests of States can come to bear not only on the scope of colonial self-determination but also on its application, especially when decolonization takes place under the shadow of an irredentist claim over the territory in question.[20]

Before explaining how this work is organized, it is necessary to say something about the evolution of self-determination, from its origins as

[17] Knop's stated aim is to present an alternative account of self-determination 'as a series of challenges from the margins' (ibid., 14), which includes an interesting feminist critique of standard accounts.

[18] Note, however, that Knop does consider the ICJ's approach in its *Western Sahara* opinion towards the different treatment of Western Sahara and Ifni by the General Assembly. See ibid., 162–4.

[19] See Chapter 4. The most popular definition of 'colonial enclaves' is Crawford's: '… minute territories which approximate to "enclaves" of the claimant State, which are ethnically and economically parasitic upon or derivative of that State, and which cannot constitute separate territorial units'. See (n 10) 647.

[20] On this point, see D. W. Greig 'Reflections on the Role of Consent' 12 *Aust YBIL* (1988–9) 125, 157.

a vaguely defined political ideal to its emergence as a rule of international law during the latter half of the twentieth century.

1.2 Self-Determination: The Emergence of an International Legal Rule

Self-determination is a notoriously slippery concept. It has been described as

> … an *idée-force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law.[21]

The philosophical origins of the principle can be found in the work of Enlightenment thinkers such as Locke and Rousseau.[22] Early formulations of self-determination give expression, at their most basic level, to the human desire to be master of one's own destiny. As a political principle, self-determination was invoked on behalf of people who wished to govern themselves, or at least choose their own governments, rather than be governed by their monarchs. The principle provided the ideological impetus for political movements that led to the drafting of documents like the French Declaration on the Rights of Man and the Citizen and the American Declaration of Independence, and it has been appropriated in the context of countless political struggles since. It has been remarked that self-determination, broadly conceived, is a constant feature in the field of human conflict.[23]

It would have been difficult to predict the emergence of self-determination as a legal norm in the years prior to World War II. Neither the rhetoric of Lenin, who championed self-determination as a principle of anti-colonialism and class-struggle,[24] nor that of Wilson, who spoke during World War I of the 'evident principle … of justice to all peoples and nationalities'[25] and later proclaimed national self-determination to be 'an

[21] R. Stavenhagen 'Self-Determination: Right or Demon?' IV *Law and Society Trust*, Issue No 67 (1993) 12.

[22] See D. Raic *Statehood and the Law of Self-Determination* (The Hague, Netherlands: Kluwer 2002) 174 and the works cited therein: J. Locke *Two Treatises of Government* (1690) Chapter 7; J. J. Rousseau *Du Contrat Social* (Amsterdam: Rey 1762) Book I, Chapter 6.

[23] Crawford (n 9) 7.

[24] See H. Carrère D'Encausse 'Unité prolétarienne et diversité nationale. Lénine et la théorie de l'autodétermination' 21 *Revue française de science politique* (1971) 221–55.

[25] President Wilson, 'Speech on the Fourteen Points' delivered to Congress in Joint Session, Congressional Record 65th Congress 2nd Session, 8 January 1918.

imperative principle of action',[26] bore fruit in any operational sense during the inter-war years.[27] The Covenant of the League of Nations was silent on self-determination, and it was certainly not accepted at the international institutional level that the principle might play a systematic role in enfranchising peoples who found themselves under foreign domination (perhaps unsurprisingly, given the economic benefits still being derived from many of the Allies' colonial holdings).

The case of the Aaland Islands is often cited in support of the proposition that self-determination had not crystallized into a legal norm during the inter-war years. The Islands were taken by Russia from Sweden and Finland in the early nineteenth century, and were then subsumed by a newly liberated Finland at the end of World War I. Two reporting bodies were established by the Council of the League of Nations to report on various aspects of a dispute between Sweden and Finland over the Islands. Sweden had attempted to invoke the principle of self-determination on behalf of the inhabitants of the Islands, most of whom wished to be attached to Sweden rather than Finland.

An International Committee of Jurists ruled that self-determination was not a positive rule of law and that the right to dispose of territory thus remained the prerogative of sovereign States.[28] However, according to the Committee, Finland 'had not yet acquired the character of a definitively constituted State' at the time it separated from the Russian Empire, and the matter was therefore deemed to fall within the competence of the League of Nations.[29] The Council of the League of Nations subsequently appointed a Commission of Rapporteurs to advise on a programme of action. The Commission acknowledged that over 95 per cent of the islanders were 'Swedish in origin, in habits, in language and in culture' and feared Finnish even more than Russian domination, but it nevertheless ruled that Sweden could not justify its claim by invoking the principle of self-determination on behalf of the Islands' inhabitants.[30] The Islands would therefore remain under Finnish control, albeit with substantial guarantees of autonomy in place. These guarantees were described by the Council as necessary for ensuring 'the interests of the world, the future of cordial relations between Finland and Sweden, [and] the prosperity and happiness of the Islands

[26] Interview with President Wilson *The New York Times* 12 February 1918.
[27] Cassese (n 1) discusses the legacies of Lenin and Wilson in detail at 14–23.
[28] *Aaland Islands Case* (1920) League of Nations Official Journal Spec Supp 3, 5.
[29] Ibid., 14.
[30] League of Nations Doc B7 21/68/106 (1921).

themselves'.[31] Most notable for present purposes was the Commission's finding that self-determination was not a rule of international law but rather 'a principle of justice and liberty, expressed by a vague and general formula'.[32]

The signing and entering-into-force of the UN Charter in 1945 marked a key turning point in the emergence of self-determination as an international legal norm. Self-determination is referred to directly in Articles 1(2) and 55 of the Charter, while its application is implicit in Chapters XI and XII, which relate to Non-Self-Governing Territories and Trust territories respectively. Article 73 describes the obligation assumed by Members of the UN to promote self-government in these territories as a 'sacred trust' and the interests of the inhabitants of those territories are described as 'paramount'. While the nature of the norm itself was not defined in the text, its subsequent development through a series of General Assembly resolutions left no doubt that self-determination would find concrete application within the limited sphere of classical colonialism.

In 1952, General Assembly Resolution 637 (VII) recognized that 'every Member of the United Nations, in conformity with the Charter, should respect the maintenance of the right of self-determination'.[33] Early attempts to extend the right of self-determination beyond the colonial context found little sympathy within the General Assembly. In the wake of Resolution 637 (VII), Belgium made the argument that 'colonies' cannot be the only 'non-self-governing' territories envisaged by Chapter XI.[34] According to this argument, if self-determination applies as a means of enfranchising the inhabitants of colonies, it should also apply to all peoples who are non-self-governing, including minorities and indigenous peoples within existing States.[35] The so-called 'Belgian thesis' was rejected by the General Assembly.[36] This was unsurprising, given the nervousness among some States regarding secessionist elements with their borders, and the recent memory of how the principle of self-determination could be manipulated by politicians; Hitler's invocation of self-determination on

[31] Council Res of 24 June 1921, 13th Sess, Supp, League of Nations Official Journal (1921) 24.
[32] Ibid. Prominent authors have observed that the League of Nations reports on this issue contribute significantly to the development of the principle of self-determination as a catalyst for policy, particularly in defence of minorities within oppressive states: Cassese (n 1) 30–1 and 33; Crawford (n 1) 111–12.
[33] GA Res 637 (VII), 16 December 1952.
[34] UN Doc A/AC.67/2 (8 May 1953) 3–31.
[35] Ibid. For discussion of the Belgian thesis see J. Castellino *International Law and Self-Determination* (Dordrecht: Nijhoff 2000) 65.
[36] See Castellino (ibid.).

behalf of the Sudeten Germans was a case in point.[37] States thus moved 'in the direction of accepting whole colonial territories as the subjects of self-determination – the "people" – and not ethnic, etc., groups within them'.[38] It was clear that the General Assembly was not prepared to countenance anything more far-reaching than 'a right of territorially defined peoples to emancipate from imperial rule'; that is to say, a right of 'external' self-determination in the colonial context.[39]

Colonial self-determination in this limited sense crystallized as a legal norm during the 1960s. It is no coincidence that by this time the burden of maintaining empires had become too much to bear for most European colonizers who, economically and politically weakened after World War II, had resolved to accept the inevitability of decolonization. It was principally the dictatorships in Portugal and Spain that continued to resist the tide of decolonization.[40]

The role of the General Assembly in framing colonial self-determination as a legal norm was crucial during this period. While resolutions of the General Assembly may not be legally binding *per se*, it is widely contended that they play an important role in shaping international law, especially when they are adopted with the support of an overwhelming majority of States. At least it is fair to argue, as Higgins does, that the resolutions of the General Assembly as a whole provide 'a rich source of evidence about the development of customary international law'.[41] The most momentous act of the General Assembly with regard to self-determination was the adoption of Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples ('the Colonial Declaration'), by eighty-nine votes to none, with nine abstentions.[42] The Colonial Declaration proclaimed that '[a]ll peoples have the right to self-determination'[43] and laid down concrete guidelines for the implementation of this 'right':

> Immediate steps shall be taken, in Trust and non-self-governing territories or all other territories which have not yet attained independence, to

[37] See the microfilmed minutes (unpublished) of the debates of the First Committee of the First Commission of the San Francisco Conference, 14–15 May and 1 and 11 June 1945, Library of the Palais des Nations, Geneva, cited in Cassese (n 1) 39–40.
[38] P. Thornberry 'Self-Determination, Minorities, Human Rights: a Review of the International Instruments' 38 *ICLQ* (1989) 867, 93.
[39] Ibid.
[40] See M. Weller *Escaping the Self-determination Trap* (Leiden: Martinus Nijhoff 2008) 35.
[41] R. Higgins *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press 1963) 5.
[42] GA Res 1514 (XV), 14 December 1960.
[43] Ibid., para 2.

> transfer all powers to the peoples of those territories, without any conditions or reservations.[44]

If the language of 'peoples' and 'rights' was suggestive of a norm with the potential to subvert the statist underpinnings of the international system, the drafters of the Colonial Declaration left no doubt that self-determination as a legal norm would be administered so as to uphold an international order founded on sovereign States and respect for existing territorial boundaries. Central to the Colonial Declaration was the warning 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.[45]

The Colonial Declaration thus epitomizes an international concern for managing two broad imperatives, which often exist in a state of uneasy tension: the interest in preserving international order on the one hand, and the interest in promoting international justice on the other.

'International order' and 'international justice' are understood here in the sense that Hedley Bull used these terms. International order is understood narrowly, as 'a pattern of activity that sustains the elementary or primary goals of the society of states'.[46] It is distinct from the more 'fundamental and primordial', and 'morally prior' concept of 'world order' (or 'order in human society as a whole').[47] If international order has value, 'this can only be because it is instrumental to the goal of order in human society as a whole'.[48]

The meaning of justice escapes objective definition, and Bull makes no attempt to define it subjectively, noting merely that 'there are certain ideas or beliefs as to what justice involves in world politics, and that demands formulated in the name of these ideas play a role in the course of events'.[49] Within this scheme, 'international justice' (as distinct from 'individual or human justice', or 'cosmopolitan or world justice') is also understood narrowly, by reference to 'the moral rules held to confer rights and duties upon … nations'.[50] Bull includes among these 'the idea that all nations are

[44] Ibid., para 5.
[45] Ibid., para 6.
[46] H. Bull *The Anarchical Society: A Study of Order in World Politics* (3rd edn Basingstoke: Palgrave 2002) 8.
[47] Ibid., 21.
[48] Ibid.
[49] Ibid., 75.
[50] Ibid., 78. This type of justice, like the idea of 'justice between states', may be no more than a metaphor, as Franck contends: *The Power of Legitimacy Among Nations* (New York, Oxford: Oxford University Press 1990) 232. It may be, to paraphrase R. Keohane, that a justification