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Edited by Fernando R. Tesón
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Introduction

The Conundrum of Self-Determination

FERNANDO R. TESÓN

As I write these lines, Ukraine is beset by turmoil. Ample majorities in Ukraine's Russian-speaking provinces of Crimea, Donetsk, and Luhansk have voted to leave Ukraine and join Russia. Russia welcomed Crimea (the fate of the other two provinces is uncertain), but the annexation was condemned by virtually everyone else.¹ This rejection is largely inconsequential, however. Not only will the world eventually accept the annexation of Crimea, but also, as I write, it watches impotent while Russian troops cross the Ukrainian border.² The questions for academics are: Did Crimea have a *right* to secede from Ukraine and join Russia? Was majority vote the appropriate way to implement this right? If Crimea has this right, could California vote by referendum to join Mexico or become independent? What is the nature and basis of the right of collective self-determination (whether or not its exercise leads to secession)? Who has this right and under what circumstances? And what are the consequences for the group and for outsiders?

This volume begins to answer these vexing matters. It has convened international law scholars, philosophers, and political theorists. The purpose of the volume is to present salient aspects of self-determination from the perspectives of law, philosophy, and history.

No other area of international law is more indeterminate, incoherent, and unprincipled than the law of self-determination. When international law (or any legal system, for that matter) establishes a right, it must specify with

¹ For an account of the events, see Alan Yuhas, "Ukraine Crisis: An Essential Guide to Everything That's Happened so Far," *The Guardian*, April 13, 2013, at www.theguardian.com/world/2014/apr/11/ukraine-russia-crimea-sanctions-us-eu-guide-explainer.

² Annie Gowen and Karoun Demirjian, "Ukraine Says Russian Forces Cross Border in Tanks, Armored Vehicles," *Washington Post*, Aug. 25, 2014, at www.washingtonpost.com/world/europe/ukraine-says-russian-forces-cross-border-in-tanks-armored-vehicles/2014/08/25/8cb7did4-2c3f-11e4-994d-202962a9150c_story.html.

a reasonable degree of certainty three things, if the right aspires to be operational. It must identify the *holder* of the right, it must identify the *content* of the right, and it must specify the correlative *duties* of insiders and outsiders to the group in question.

International law, as it stands at present, is deficient on the three fronts. Let us start with the pertinent international documents. The common Article 1 to the United Nations human rights covenants reads:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.³

The trouble starts in the very first sentence: “all peoples have the right of self-determination.” This means that not every population has this right; only “peoples” do. So when is a group a people? It would seem that a people is a bonified group of some sort.⁴ For example, arguably the state of Florida is not a people, so it does not have the collective right to vote itself out of the United States. In fact, when the Southern states attempted to secede, the United States federal government prevented it by the sword. But Scotland apparently has such right. Why? Is it because the United Kingdom does not care? What if the British Parliament vetoes Scotland’s secession? Or is it because the Scots, unlike the Floridians, are a “people” in the relevant sense? Does international law give the Scots a remedy against the United Kingdom’s veto?

International practice has offered two distinct accounts of this issue. The first is an ostensive *historical* definition: “peoples” are *only* the indigenous populations that inhabited the territories in Asia, Africa, and elsewhere that were colonized by Western European powers in the fifteenth through the nineteenth centuries.⁵ Uganda, Algeria, India, Mexico, Nigeria, Cameroon,

³ Article 1, United Nations Covenant on Civil and Political Rights, 1966.

⁴ Thus in the *Western Sahara* opinion the International Court of Justice explained why sometimes populations were not consulted in a territory’s change of status: “Those instances were based . . . on the consideration that a certain population did not constitute a “people” entitled to self-determination.” (*Western Sahara* opinion, 1975, para 59.)

⁵ In none of its opinions on self-determination did the Court depart from the restrictive view that only former colonies (and a few territories assimilated to colonies) had the right to self-determination. See, e.g., *Legal Consequence for States of the Continued Presence of South*

for example, are “peoples” in this specific historical sense. These territories were all conquered by Europeans and, under the law of decolonization, their populations have a collective right – the right of self-determination – to terminate the colonial relationship and (usually) become independent. This definition of self-determination, developed during the Cold War, was music to the ears of the Soviet Union, because the territories that the Soviets had conquered, such as the Baltic States, Ukraine, and others, were not (for unclear reasons) colonies in the historical sense. Therefore, the Soviets argued, these populations did not have the right to self-determination. For anyone thinking properly, this argument would not pass the laugh test. However, most governments and lawyers supported the view, not because they thought it was particularly principled, but because they feared that recognizing a broad right to secede would bring chaos. Confining the right of self-determination to the European colonies not only allowed the Soviets to cover for their aggressions: it also allowed other states, including the newly independent colonies who had fiercely supported self-determination for *them*, to prevent, often by force, attempts at secession by their own provinces.⁶

Yet, as I indicated, it does not take much to see how unprincipled this position is. Why did only *some* unjustly conquered populations have the right to break the chains of domination and not others? If India had the right to break away from unjust British domination, so Estonia had the right to break away from unjust Soviet domination. Eventually, the deserved collapse of the Berlin Wall brought with it the equally deserved collapse of this view. Suddenly, all these territories that supposedly did not have the right of self-determination nonetheless exercised that right and became independent. Lawyers, as is their wont, had to readjust to these realities. Gradually, the view that only former European colonies had the right of self-determination gave way to a new view that preserved the idea that a “people” was a bonified kind of population but did not confine it to historical colonies.

This is the *nationalist* view of self-determination. The populations that qualify as peoples are now defined by some kind of *ethnic status*. The separatists in Ukraine, for example, think that a *language* is a defining factor: unlike the rest of Ukrainians, they speak Russian. They appeal, moreover, to a mysterious Russian *ethnicity* as the distinctive factor – this, in territories where

Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia opinion), International Court of Justice, June 21, 1971, paragraph 52.

⁶ For a lengthy study on the Soviet position, see Karen Christine Knop, *The Soviet Position on the Right to Self-determination as Applied to Nations Within Existing States* (New York: Columbia University Press, 1990)

the different races have intermingled for thousands of years. A few years before, the South Ossetian and South Akazian separatists in Georgia put forth similar ethnic arguments, this time with a racist overtone: they tried to show that while they were closest to the Russian race, the Georgians were ethnically linked to some other race. Another popular incarnation of ethnic status is *religion*. For Kosovars, being Muslim was the decisive factor in their argument for independence from Serbia. Here, too, religious differences were not enough to set them apart, so Kosovars added for good measure the interesting fact that they, unlike the Serbs, are ethnic Albanians. So being Muslim and Albanian is enough justification for a group to secede from the parent state and take the territory away.

The nationalist conception enjoys considerable support in diplomatic practice and crops up in a variety of diplomatic and judicial pronouncements, although that practice is not uniform. Among philosophers, variations of the nationalist view have been defended by David Miller and by Joseph Raz and Avit Margalit. Miller's view is closest to the more traditional nationalist conception. He claims that a nation, defined by a variety of traits, is the proper holder of the right of self-determination. For Miller, national identity is an important source of personal identity, and nations thus circumscribed have valid reasons to be self-determining.⁷ Raz and Margalit have a milder nationalist view: to them, only "comprehensive cultures" have the right to national self-determination.⁸ The idea is that living in a comprehensive culture is essential for the well-being of individuals, and providing self-government is a particularly strong way to affirm that comprehensive culture. They offer a few conditions, including the requirement that groups may not be oppressive and must respect the rights of women and minorities. (Why not everyone's rights?)⁹

The nationalist position, however, is plagued by a number of difficulties. The most glaring concerns the status of those members of the population who do not share the ethnic trait in question (race, religion, language, culture). If ethnic status is the foundation of the state, as the nationalist position would have it, then these persons are not, in a moral sense, citizens of the state. They can be legal citizens, of course, but if the reasons that justify X's being a state are ethnic reasons, someone who does not possess the ethnic trait fails to share

⁷ See David Miller, *On Nationality* (Oxford University Press, 1995)

⁸ See Avishai Margalit and Joseph Raz, "National Self-Determination," *The Journal of Philosophy* 87 (1990): 439–61.

⁹ Margaret Moore can be included among supporters of the nationalist view. See Margaret Moore, *A Political Theory of Territory* (Oxford University Press, 2015).

in the reasons that make her a member of X. She is not a member of the “people,” since peoplehood is defined by a trait she does not possess. These are the worries, in the United States, that people justifiably raise every time someone proclaims that the United States is a “Christian nation.” These statements disrespect Americans who are not Christian. One idea behind the nationalist view of self-determination is a supposed right to be governed by “someone like me.” This approach is dangerous because it easily leads to exclusion, discrimination, and ultimately ethnic conflict.¹⁰

Given these and other difficulties, recent approaches to self-determination have steered away from nationalism. Cara Nine, for example, has suggested that collective entities (including but not limited to states) are the proper holders of the right of self-determination. These collective entities must satisfy some nonethnic conditions, such as sharing a sense of justice.¹¹ Others have argued that the right of self-determination is always *remedial*: a group has the right of self-determination just in case it has been wronged by the parent state in some way.¹² Finally, some authors have pursued an *individualist* account of self-determination, according to which any analysis of the right of self-determination must be translated without loss of meaning to an analysis of the rights and interests of individuals.¹³ These new lines of argument are, to my judgment, philosophically superior to the nationalist view, but, as indicated, the latter is widely accepted in the messy arena of international politics.¹⁴ One reason, I suspect, is that nationalist themes have a stirring appeal moored to romantic notions of popular sovereignty and the desire to shake off foreign domination – real or imaginary.

¹⁰ See Fernando R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), chapter 5.

¹¹ Cara Nine, *Global Justice and Territory* (Oxford University Press, 2012), 45–50.

¹² The concept was introduced by Allen Buchanan in his seminal work on secession. See especially his article “Secession” in the Stanford Encyclopedia of Philosophy, at <http://plato.stanford.edu/entries/secession/> (2013). Recently the World Court mentioned remedial secession without addressing it. International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, July 22, 2010, paragraph 82.

¹³ See A. John Simmons, “On the Territorial Rights of States,” *Philosophical Issues: Social, Political, and Legal Philosophy*, 11 (2001): 300–26; Hillel Steiner, “Territorial Justice,” in Simon Caney, David George, and Peter Jones, eds., *National Rights, International Obligations* (Boulder, CO: Westview Press, 1996); and Fernando R. Tesón, “The Mystery of Territory,” forthcoming in *Social Philosophy and Policy*.

¹⁴ Christopher Wellman defends a broad, but still collective, right to secede. See Christopher Heath Wellman, *A Theory of Secession: The Case for Political Self-Determination* (New York: Cambridge University Press, 2005). In my view, this approach is superior to the nationalist view as well.

What is the content of the right of self-determination? According to the applicable texts, peoples “freely determine their political status and freely pursue their economic, social, and cultural development.” This merits several comments. First, the description uses the adverb “freely” in a curious sense. Here “freely” does not mean “with due regard to individual freedom.” Nor does it mean “democratically.” The right of peoples to freely determine their economic, social, and cultural development means that that the relevant groups are entitled to do this without *foreign* direction. This is not individual freedom; it is collective freedom, the freedom of a collective from domination by another collective. Second, the meaning of the freedom of a people to pursue its “economic, social, and cultural development” is uncertain. International law and morality place boundaries on the permissible forms of political organization. For example, one would expect that groups may not pursue a development that includes violation of human rights, subjugation of women, or the sheer impoverishment of the population. Alas, this is exactly what has happened in many of these pursuits. The principle of self-determination simply forbids foreigners to *dictate* to a “people” how it should conduct its affairs. If the people conduct those affairs contrary to international law or morality, then this is a separate question. This is the way in which the issue has been understood in international practice. That Idi Amin committed atrocities in Uganda does not mean that it is justified to reinstate British sovereignty over Uganda.

Third, the phrase “political status” means *international* political status. The idea is that the “people” alone can decide whether it should remain with the parent state, join another state, or seek independence. (Recall that the population has to be a “people,” whatever that means. Not every province, community, entity, or political group has these options.) Several international documents have specified adult popular suffrage as the proper procedure for the people to express these preferences.¹⁵ However, again, this does not mean that voters have the right to elect their rulers. The right of self-determination is *not* a right to democratic governance (whether international law recognizes this right is a separate question). But this requirement of popular vote is murky. A particularly disconcerting example of a “people’s” pronouncement

¹⁵ For example, in 1991 the United Nations Security Council voted to create a Mission for the Referendum in Western Sahara. See UN SEC Res 690, April 29, 1991. But in the Crimea case, the United Nations General Assembly declared the Crimean referendum invalid. See www.asil.org/blogs/general-assembly-adopts-resolution-declaring-crimea-referendum-invalid-march-27-2014. The General Assembly, however, has no legislative or other binding powers. A similar measure brought up in the UN Security Council was vetoed by Russia. See www.nytimes.com/2014/03/16/world/europe/russia-vetoes-un-resolution-on-crimea.html?_r=0.

was the recent declaration of independence by the Serbian province of Kosovo. The International Court of Justice, confronting the question, opined that nothing in international law prohibits a declaration of independence. For the Court this had no bearing on the question of secession. In other words, people may declare whatever they want, but this will not have any legal effect on the status of territory one way or the other, because the principles that govern mere declarations differ from the principles that govern secession. For the Court, a group can declare itself independent, or declare itself anything else for that matter, but this will have no legal effect, whether or not it does so by referendum. Referenda are not the same as declarations of independence by some constitutional convention, but the same reasoning might apply: for example, under the Court's reasoning the recent referenda in the Ukrainian provinces might not suffice to establish the annexation of those provinces to Russia. Is this because these provinces are not "peoples"? No one really knows. Applicable principles, then, fail to distinguish between cases such as Kosovo, on one hand, and Crimea, on the other. Perhaps a clean referendum is a *necessary* condition for a population to become independent, even if it is not a sufficient condition. But even this is uncertain, as the independence or merger secured by many territories at one point or another was not preceded by a popular referendum.¹⁶

This leads us to another difficulty with the principle of self-determination in international law. This is the inconsistency between the right of self-determination and the right of states to keep their territory intact – the principle of territorial integrity. If Crimea has the right of self-determination and Ukraine has the right of territorial integrity, which one should prevail? The answer in international practice is this: whoever wins in the battlefield, literal or political, has implemented the relevant principle. If the government prevails, then territorial integrity has been vindicated. If the secessionists prevail, then self-determination has been vindicated. International law has long recognized the principle of *effectivité*, according to which political realities, effective political power, and territorial occupancy form the basis of international relations. So it does not really matter if the inhabitants of Crimea or Scotland are or are not "peoples." If Ukraine or the rest of the world does nothing about the annexation to Russia, then Crimea will become legally part of Russia and the principle of self-determination would have been vindicated.

¹⁶ The transfer or return of Hong Kong to China, for example, was not preceded by a referendum among the inhabitants of the isle. See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: The University of Pennsylvania Press, 1990), 129–50.

If, on the contrary (and improbably), Ukraine prevents Crimea from joining Russia, then the principle of territorial integrity would have been vindicated. Under international law, there is no *ex ante* metaprinciple to decide between the two. If Scotland decides by referendum to secede from the United Kingdom and the United Kingdom does nothing, then Scotland will be legally independent. The same position holds for Kosovo, Quebec, Catalonia, and the rest.¹⁷

We can now see the profound deficiencies in the standard understanding of self-determination. They are at least three. First, because of the principle of *effectivité*, it is not possible to decide *ex ante* if a specific group has a right of self-determination. It can only be decided in the battlefield or in the corridors of politics. Most lawyers (with specious arguments, in my view) affirmed prior to 1990 that Estonia did not have the right of self-determination. When the Soviet Union collapsed, suddenly the Estonians became a self-determining unit. But suppose Estonia and the Soviet Union had appeared before an impartial court *prior* to the Soviet collapse and asked the court's opinion on whether Estonia had the *right* of self-determination. If that court followed international practice, it would have been forced to say: "I don't know. Why don't you fight it out and we'll see?" In my judgment, this is not law but antilaw, where might makes right. A right that can only be implemented by a war between the right-claimant and the right-denier is not a right in any meaningful sense of the word.

Second, the right of self-determination, despite the stirring rhetoric of its advocates, is profoundly illiberal. It is not a right *against* a state but a right *to* a state. It is unconcerned with the legal and moral rights of individuals but is concerned with asserting a new sphere of political power – often more oppressive than the one left behind. It masks the ambitions of political entrepreneurs who claim to represent the "people" regardless of whether or not they have been properly elected, and regardless of the views of minorities and individuals who do *not* want to secede or be autonomous. This might not be a widespread view, but I do not think the preferences of Scots who do not want independence from the United Kingdom are worth nothing. Even in the successful and largely beneficial cases of self-determination, such as the

¹⁷ In the *Kosovo* opinion the Court wrote that states have a right to territorial integrity *only* against other states, not against their own constituent parts. *Kosovo* opinion, paragraph 80. This would mean that in 1861 the United States breached international law when it tried to keep the Union together. This is another startling statement in an opinion that is silly in many regards. One may or may not like states, one may or may not like secessions, but it is well established that, absent persecution, genocide, and similar atrocities, a sovereign state has the authority to oppose dismemberment of its territory.

American Revolution, it is often hard to see the *ex ante* moral justification to secede, other than the fact that the revolutionaries ultimately conquered their independence on the ground.

But the tension between self-determination and liberal principles runs deeper. The idea that collective entities have the right to determine themselves is so rooted in the political imagination and in international law that it may sound farfetched to deny it. Yet, if the right of self-determination means the right of some to forcibly enroll others in their projects, then it should be subject to a more searching philosophical scrutiny that has received so far. In particular, the right of self-determination is vulnerable to a classical-liberal challenge. Let me explain.

Many people think that just as individual autonomy is a value, so group autonomy is a value; just as persons pursue individual projects, so groups pursue collective projects; just as persons seek the private good, so groups seek the collective good. But this analogy does not hold in a straightforward way. Surely groups can have value for their members. Groups can facilitate the achievement of goals that cannot be achieved individually. But this value of groups holds *as long as they are voluntary*. Groups are importantly disanalogous to individuals. An individual has a mind that makes plans and weighs options, alternatives, values, and goals. She may err, of course, but her error will be the result of her considered judgment about how she desires to pursue her personal project, how to lead her life in her own terms. Groups, on the contrary, do not have minds. They are collections of individuals where some cooperate but others dominate, exploit, and prey on others. When an individual forms a life plan she acts freely (with the usual caveats and exceptions). When a ruler devises a plan for society he coercively enrolls others in his projects, whether his projects are shared by many or few.

Classical liberals do not dispute the claim that it is *possible* to say that groups have ends, interests, or projects that are not conceptually reducible to individual ends, interests, or projects.¹⁸ But it does not follow that the group leaders can *coercively* impose those ends on the dissenters within the group. This is quite obvious in the cases of nondemocratic governance, but is also often true where majority rules. Most of the time an individual is the best judge of her interest and welfare; conversely, most of the time group rulers are *not* the best judges of the interests of its members. This means that *nonvoluntary* collective self-determination, that is, a collectively *coerced* decision about the political status, or the cultural identity, or the economic system of a group, is morally

¹⁸ See Phillip Pettit and Christian List, *Group Agency* (Oxford: Oxford University Press, 2011).

suspect. The realization of human ends, including those that can be realized collectively, should in the last analysis be the result of voluntary interaction among free individuals. On the classical liberal view, there are no nonconsensual goods for collectives, nations, or tribes (over and above the goods of persons who comprise the collectivity) that group leaders can permissibly enforce. The classical liberal claim, then, is normative, not conceptual: the only morally valuable projects are (1) individual projects and (2) voluntary group projects. Even if we can meaningfully speak of a group project, group leaders cannot permissibly impose that project on dissenters (with the usual caveats and exceptions). In my judgment, self-determination advocates have yet to meet this challenge.

The third congenital problem is that self-determination advocates often conceal the fact that their real aim is to appropriate territory.¹⁹ The self-determination rhetoric emphasizes religion, race, shared history, past wrongs, and similar factors to support their claims. In reality, a self-determination claim is a claim to exercise control over the land and resources over which the “people” sit. When the Crimeans assert their purported right to join Russia, what they really mean is to take away the land and resources of Crimea and hand them to Russia. When the Quebecois insist that they deserve to break away from Canada because they are a “distinct” society with their own language and culture, what they really mean is that they, and not Canada, “own” the territory of Quebec. Because of the nationalist rhetoric the territorial dispute between the irredentist “peoples” and their parent states gets invariably obfuscated.

Having rejected, then, the nationalist–ethnic rationale for self-determination, I suggest two kinds of reasons that may reasonably support a self-determination claim. The first is political injustice. As I pointed out, writers and courts have dubbed this *remedial* secession. When the parent state unjustly persecutes the inhabitants of a province or similar territory, it may be that breaking ties is the only remedy available to the latter. Contrary to prevailing rhetoric, such persecution need not be based on race, religion, or language. It may be just political persecution, or other forms of serious harm that the central authorities inflict on the inhabitants of the territory. When this occurs, I think the right of self-determination should be broadly recognized. If the inhabitants of a territorial subunit of Cambodia could have claimed the right of self-determination as the only available remedy against the massive crimes of the Khmer Rouge in 1975–77, I believe such claim should have

¹⁹ See Lea Brilmayer, “Secession and Self-Determination: A Territorial Interpretation,” *Yale Journal of International Law*, 16 (1991): 177–202.