

Self-Determination, Human Rights, and the Nation-State: Revisiting Group Claims through a Complex Nexus in International Law

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Abstract

In this article I examine selective dimensions of the nexus among the right to self-determination, human rights, and the ‘nation-state’ as they relate to claims made by certain ethno-cultural minority groups. I first discuss some conceptual extensions of ‘national’ claims and their underlying relation to international law and state sovereignty. Then, I critique elements of ‘national’ self-determination that are supposedly constitutive of the law of self-determination, including arguments about sub-national groups as ‘peoples’, and discuss some alternative approaches to the role of international law vis-à-vis this sort of claims. Finally, I argue that international human rights law can offer a synthesis of the above nexus insofar as it works, not so much as a platform for accepting or rejecting seemingly ‘absolute’ rights or solely enabling legal-institutional ad hocism, but rather as a general process-based framework for assessing group-related pathologies that are (directly or indirectly) of international law’s own making.

Keywords: national claims – self-determination – human rights – sovereignty – inter-group diversity – recognition – participation – proportionality

1 Introduction: Charting the Field

This article seeks to address the impact of claims made by certain ethno-cultural minority groups on the triangular nexus among the right to self-determination, the wider human rights framework, and the ‘nation-state’, within the international legal system.¹ In particular, it seeks to explore the way in which international human rights law deals with those claims within the framework of the state, and the polyphonic, and arguably ambivalent, discourses that result from that. While recent history’s ethno-separatist claims tap into international law’s traditional inclinations to take external dimensions more seriously than internal ones, recent waves of ‘nationalist’ (exclusionary) arguments as a basis for the exercise of sovereign power,² coupled with a surge in collective dimensions within human rights law and policy (indigenous rights being the most evident manifestation of this),³ make such an enquiry all the more fitting.

Indeed, ethno-cultural group claims, particularly those of a ‘national’ variety, sit at complex crossings of those three categories. They can as much ground as limit or reject those claims. In terms of the postcolonial ramifications of self-determination, the intersection can operate at least at three levels. It can take the form of a discrete debate over whether a minority group can be entitled to separate statehood in the event that the group is chronically denied meaningful access to government

¹ The focus will be on traditional sub-state minority groups loosely understood as those communities that claim to embody a strong sense of group identity, including national minorities, minority nations, or indigenous peoples or nations. The terms ‘nation-state’ and ‘state’ will generally be used interchangeably, though ‘nation-state’ will emphasise, in a non-technical sense, a greater sense of national (state-wide) identity.

² Recent political circumstances, such as the Ukrainian crisis and Russia’s mounting regional and global ambitions, Great Britain’s Brexit decision, or the rise of anti-immigrant movements in Europe and the United States, have partly involved ideas of national identity.

³ See e.g. G. Pentassuglia, “Ethnocultural Diversity and Human Rights: Legal Categories, Claims, and the Hybridity of Group Protection”, VI *The Yearbook of Polar Law* (2015), p. 250; *id.* (ed.), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques* (Martinus Nijhoff Publishers, Leiden, forthcoming, 2018).

by the state where it is located.⁴ It can translate into claims of distinctive groups as ‘peoples’ for purposes of internal self-determination, or even external self-determination insofar as the claim relates to the issue of secession or is otherwise linked to ‘peoplehood’ tout court, regardless of its multiple articulations.⁵ Or it can more narrowly reflect a self-determination process involving the entire population of the state, including minority groups, but with no international legal criteria as to how to handle group claims to specific articulations of internal self-determination.⁶

The (re-)formulation of self-determination as a human right both within and outside the colonial context further complicates matters. The impact of the human rights argument on ethno-cultural claims has largely become a function of the general democratic entitlement which is claimed to exist in matters of internal governance, and, more specifically, of the connection between (internal) self-determination and group accommodation, including possibilities for autonomy arrangements. Just as the meaning of democratic participation in the political community is the subject of some contention, so are the legal ramifications of that connection.⁷

Group claims of this sort are equally affected, though more broadly, by the legal and political narrative of the nation-state. For one thing, the ‘neutrality’ of the state’s public culture has been challenged on the basis that minority cultures are endemically under greater threat than majority cultures in the public sphere and thus require special protection. In this sense, the state’s ostensibly equal treatment of individuals within the political community is said either to conceal majoritarian preferences and identities in the public distribution of resources and structures or otherwise to reflect a vision of a uniform polity that is at odds with the recognition of group diversity within.⁸ At the same time, the pre- and first post-war encounter between statehood and the notion of ‘national’ self-determination (based on a virtual congruence of the political and cultural – indeed, ‘national’ – boundaries of the state), though relatively short-lived in the wider framework of international law and relations, generated a variety of responses to sub-national claims the doctrinal and institutional richness and seminal character of which have been thoroughly documented and examined.⁹

These lines of reasoning or areas of legal uncertainties all speak to certain understandings of self-determination, human rights, or the state in international law and their difficult encounters with underlying group claims and identities. It is no coincidence that complex cases of group accommodation tend to be explained as an illustration of an ‘enhanced’ role of international law and institutions in problem-solving, or even as attempts at creatively transcending the external and internal strictures of sovereignty as an international and constitutional legal category.¹⁰

However, at the level of general international law discourse, these conundrums have been more typically subsumed into discussions of ‘absolute’ rights, understood in the weak sense of direct, generally applicable and/or unilateral rights that inhere in particular types of entities – either groups defined by ethno-cultural elements or wider ‘civic’ entities or polities that are deemed entitled to representation and self-government. Whether it is secession, forms of autonomy, or democratic governance, international law scholars, human rights experts and/or civil society organisations have variably contributed to a discourse which is essentially concerned with the existence (*vel non*) of a distinctive legal right that can benefit the entity in question.

Less of a concern, though, has been the development of a deeper understanding of what is at stake when it comes to addressing group claims or some of them, or otherwise the outlining of a

⁴ See e.g. T. Franck, “Post-modern tribalism and the right to secession”, in C. Brölmann, R. Lefebvre and M. Zieck (eds.), *Peoples and Minorities in International Law* (Kluwer Law International, Dordrecht, 1993), p. 3, at pp. 13-14.

⁵ See e.g. J. Crawford, “The Right of Self-Determination in International Law: Its Development and Future”, in P. Alston, *Peoples’ Rights* (Oxford University Press, Oxford, 2001), p. 6, at pp. 64-65; D. Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International, Dordrecht, 2002), ch. 7; H. Moodrick-Even Khen, *National Identities and the Right to Self-Determination of Peoples* (Martinus Nijhoff Publishers, Leiden, 2016).

⁶ A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995), p. 332.

⁷ See below, Section 4.

⁸ See e.g. W. Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press, Oxford, 1989); A. Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press, Princeton, 2014); J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995).

⁹ N. Berman, ““But the Alternative is Despair”: European Nationalism and the Modernist Renewal of International Law”, 106 *Harvard Law Review* (1993), p. 1792.

¹⁰ N. Berman, *supra* note 9; D. Orentlicher, “Separation Anxiety: International Responses to Ethno-Separatist Claims”, 23 *Yale Journal of International Law* (1998), p. 1, at pp. 62-68; C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, Oxford, 2008), chs. 5, 11.

framework for assessing the relative legitimacy of such claims. Drawing mainly upon recent crises involving a plurality of claims and/or violent strife (Quebec/Canada, USSR/Yugoslavia, and so on), commentators have frequently called for a mechanism or process that has the capacity to handle these issues, and to do so in ways that are timely and responsive to local or regional circumstances. This approach significantly differs from positions that are overly reliant on ‘inherent’ rights to self-determination (or autonomy), or all-encompassing rights to democratic governance based on elections, in that it involves an active and sustained engagement with multiple claims, including group claims, and wider societal conditions, in an attempt to regulate conflicts, both domestically and within the international legal system.¹¹

There is evidence that some kind of process-based approach to the triangular relationship among self-determination, human rights, and sovereignty may be emerging in connection with processes of state creation,¹² but there is little evidence of a parallel focus on how best to address group claims within the state from that perspective, and more crucially, why one ought to do so. Indeed, an important question is whether there is a way to explain the role of international human rights law in dealing with group claims that lie at the intersection of the aforementioned triangular nexus without falling prey to aspirations based on primordial title or pristine national authenticity, the logic of *fait accompli*, or otherwise minimalist views of the democratic entitlement and its human rights components.

In this article I thus address selective dimensions of the self-determination/human rights/nation-state entanglement as they specifically affect the scope of claims made by distinctive sub-state groups. I first discuss some conceptual extensions of ‘national’ claims and their underlying relation to international law and state sovereignty (Section 2). Then, I critique elements of ‘national’ self-determination that are supposedly constitutive of the law of self-determination, including arguments about sub-national groups as ‘peoples’, and discuss some alternative approaches to the role of international law vis-à-vis this sort of group claims (Sections 3 and 4). With a focus on the internal configuration of states, I finally argue that international human rights law can offer a synthesis of the self-determination/human rights/nation-state nexus insofar as it works, not so much as a platform for accepting or rejecting seemingly ‘absolute’ rights or solely enabling legal-institutional ad hocism, but rather as a general process-based framework for assessing group-related pathologies that are (directly or indirectly) of international law’s own making (Sections 5 and 6).

2 ‘National’ Claims, International Law, and the Shaping of Sovereignty

In 2006, the Council of Europe’s Parliamentary Assembly adopted a resolution on the concept of ‘nation’ in response to debates over the legal and policy parameters of kin-state involvement in the affairs of kin-minority groups across state boundaries.¹³ While noting the impossibility of arriving at a common definition of the concept within the Council of Europe membership, the resolution provides something of a snapshot of familiar meanings derived from history, public discourse and expert analysis. It analytically distinguishes ‘nation’ as a legal-political category employed to describe a civic link between the state and the individuals subject to its jurisdiction from ‘nation’ as shorthand for a community which is organically defined by ethno-linguistic, indeed ethno-cultural, traits broadly understood. Still, it crucially acknowledges the subtle intertwining of the two understandings to a point where both of them “are used simultaneously” or otherwise “the term “nation” is sometimes used with a double meaning, and at other times two different words are used to express each of those meanings” (para. 5).

When looking at the historical record, one may argue that such a subtle entanglement reflects complexities surrounding the relationship between political and cultural dimensions in the history of nationalism. For example, a rigid dichotomy between eighteenth and nineteenth century French and Anglo-American ‘political’ nationalism and German, Italian or Polish ‘cultural’ nationalism, seems to

¹¹ From different angles, see e.g. M. Koskeniemi, “National Self-Determination Today: Problems of Legal Theory and Practice”, 43 *International and Comparative Law Quarterly* (1994), p. 241, at pp. 264-269; R. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge, New York and London, 2000), ch. 6; D. Orentlicher, *supra* note 10.

¹² See below, Section 5.

¹³ Recommendation 1735 (2006), *The concept of “nation”*, adopted by the Assembly on 26 January 2006 (7th Sitting).

obscure a more complex picture whereby hybrid political-cultural lines of thought or models of authority, or very real patterns of cultural-political dominance, can be found on both sides of that seemingly static division.¹⁴ Hurst Hannum¹⁵ usefully draws a distinction between ‘national’ demands by ethno-cultural groups or communities and ‘statism’ in the sense of claims to political power or the exercise of political authority on a purely institutional-territorial basis. And yet, he acknowledges the quest for homogeneity and uniformity by the new states that arose out of the anti-colonial movement post-1945, though ostensibly as a culturally neutral nation-building project. The fluid, even ambiguous, link between civic and ethnic dimensions of ‘nationhood’ has been amply documented and I will not pursue this line of reasoning any further.

Rather, what is important for the purpose of this discussion is to note that the concept of ‘nation’ has been used in history as much to assert national identity as to deny and suppress ‘national’ *diversity*. Unsurprisingly, in the 2006 resolution the Council of Europe’s Parliamentary Assembly accounts for a trend towards a multicultural state that is capable of transcending purely ethnic or civic patterns of sovereign authority, one “where specific rights are recognised with regard not only to physical persons but also to cultural or national communities” (para. 7). Whereas classic versions of liberal, nationalist, and/or communitarian constitutionalism are all linked to visions of uniform polities bound together by common goods and (in the classic liberal variant) individualist pursuits,¹⁶ a multicultural approach to the state also requires a sustained commitment to intra-state group diversity within a commonly shared system of institutions and laws.¹⁷ It is thus the relationship between a dominant group and minority groups in the context of changes in sovereignty that takes centre stage. The resolution presents national minorities or communities as a “co-founding entity” of the nation-state, a by-product of reallocations of sovereign power across the international system in the nineteenth and twentieth centuries (and arguably in earlier centuries as well). It calls for collective protection through individual rights, including the right “of all individuals to belong to the nation which they feel they belong to”, either in terms of citizenship or “language, culture and traditions” (para. 12), as well as non-territorially-based structures endowed with legal personality (para. 10).

If this approach is a reasonably accurate one, both historically and conceptually, then, whatever we make of the resolution as a matter of law, it makes sense to explain ‘national’ claims by appreciating the analytical difference between the narrow question of whether a ‘nation’ needs to be established in order to substantiate a claim to statehood in international law from the broader question involving the articulation of group identities within an existing (or newly created) state. The early history of state-making and its reflection in the international legal order hardly reveals an automatic correlation, let alone a legal causality, between the prior existence of a coherent sense of ‘nationhood’ and the subsequent emergence of a sovereign state. As has been convincingly demonstrated, the rise of modern states, particularly in Western Europe, has often been a function of military, political and/or economic realities, including the requirements of industrialisation, rather than any deliberate effort to accommodate discrete (pre-defined) nations as natural units for new sovereign orders.¹⁸ This seems to be reinforced by the commonly held view that, in the eyes of international law, the state operates essentially as a regulatory or procedural mechanism that is capable of articulating external and internal sovereign power (whatever its precise territorial boundaries), not as an entity that affirms specific forms of communal identification (on whatever basis) upon which its existence or recognition is made legally dependent.¹⁹

¹⁴ See e.g. A. Smith, *The Ethnic Origins of Nations* (Blackwell Publishing, Oxford, 1986), p. 139; F. Chabod, *L’idea di nazione* (Laterza, Roma, 1961), pp. 55-90 (tracing, for example, the difference between eighteenth and nineteenth century German and Italian ideas of the ‘nation’ back to an underlying critical distinction between Romantic pre- and a-political (pre-statal) naturalistic *ethnos* and political (state-oriented) voluntarism and humanitarianism).

¹⁵ H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, rev. edition, Philadelphia, 1996), p. 24.

¹⁶ J. Tully, *supra* note 8.

¹⁷ See e.g. A. Eide, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, UN Sub-Commission on the Promotion and Protection of Human Rights, 11 August 1993, E/CN.4/Sub.2/1993/34 (1993).

¹⁸ A. Cobban, *The Nation State and National Self-Determination* (Thomas Y. Crowell, New York, rev. ed., 1969); E. Gellner, *Nations and Nationalism* (Cornell University Press, Ithaca, 2nd ed., 2009).

¹⁹ For discussion, see e.g. M. Craven, “Statehood, Self-determination, and Recognition”, in M. Evans (ed.), *International Law* (Oxford University Press, Oxford, 2010), p. 203.

Yet, it would be wrong to assume that ‘national’ identities and claims have proved of no consequence whatever to international law-making, and, more to the point, the configuration and reconfiguration of states. Indeed, it might be argued that, although a temporal sequence or connection between ‘nationhood’ and statehood is virtually non-existent as an international legal condition relating to state-making, group identities in their multiple permutations *have* consistently impacted the concept of sovereignty in international law.²⁰ As implied by the Council of Europe’s Parliamentary Assembly, the impact of group identities transcends the question of statehood per se to include the broader articulation of majority-minority dynamics generated by rearrangements of sovereign authority at various (recent and less recent) historical junctures. In this sense, the question of whether or not some ‘national’ aspirations have been occasionally accommodated into independent states – a question that reached its peak with the 1919 Versailles Peace Conference’s official (altogether remarkable) commitment to a nation-to-state trajectory – is comparatively less significant than a proper understanding of the underlying plurality of ‘national’ demands occasioned by those rearrangements and the plurality of ways in which international law has sought to respond to those recalibrations as ultimately matters of inter-group diversity.

Whatever our preferred reading or understanding of a ‘nation’, the reality of states as legal entities is almost invariably the reality of a ‘public culture’ coalescing around a dominant group. As states look largely ‘faceless’ from an international law standpoint, the recognition and accommodation of group diversity – paradoxically – regularly features as a crucial legal dimension of the state-building process. A few examples can help briefly illustrate the point. The Westphalia settlement in 1648, overwhelming credited with inaugurating the state system in Europe as an alternative to several medieval models of political organisation, constructed sovereignty in conjunction with the protection of Catholic and Protestant minorities within states in which the dominant religion was, respectively, Protestant or Catholic. Under the Treaty of Osnabrück, the principle of *cuius regio, eius religio*, which had allowed princes to define the faith of their territories as a key hallmark of their sovereign authority, came to be restricted to their court and could not in any way affect minority religious practices as long as the latter did not threaten public order. The very fabric of sovereignty thus involved an obligation to recognise religious pluralism while still reserving the right to emigrate (*ius emigrandi*) to those who did not accept the new state of affairs.²¹ If the Peace of Westphalia understood the majority-minority identities underpinning state-building through the lens of religion, the Versailles settlement in the aftermath of the First World War did so by openly using the language of ‘nationhood’. However, the international law of the time did not prioritise the ‘nation’ over the ‘state’, but rather gave rise to a complex system whereby various sources of authority coexisted in international legal doctrine and practice in articulating responses to ‘national’ demands.²² The plurality of ‘national’ claims was effectively more significant than ‘national’ sovereignty as such. Indeed, US President Wilson’s commitment to the recognition of new states in “indisputably” national territories²³ proved only part of a wider treaty-based and institutional structure designed to empower international law over and above other sources of authority, whether state or nation, in addressing inter-group diversity issues from within the system. For instance, in the Aaland Islands case,²⁴ the Commission of Jurists appointed by the League of Nations’ Council to determine the (international or domestic) nature of the dispute between Finland and Sweden went as far as to recognise something of a ‘national’ *droit acquis* in favour of the Aalanders (equal or akin to the right of the Finnish ‘nation’ to seek independence from the Russian Empire) at a time when, in the Commission’s view, the ‘normal’ rules of positive international law, including traditional prerogatives of sovereignty, did not apply because of deep political uncertainty. Yet, both this Commission and the Rapporteurs who were

²⁰ For a useful survey of legal history, see J. Nijman, “Minorities and Majorities”, in B. Fassbinder and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012), p. 100.

²¹ For an insightful analysis, see C. Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge University Press, Cambridge, 2013), pp. 97-102.

²² N. Berman, *supra* note 9.

²³ US President Wilson’s Fourteen Points Address to Congress, 8 January, 1918, point XIII (regarding Poland); see also similar references, including point IX (regarding Italy) and point XI (regarding several Balkan states).

²⁴ *The Aaland Islands Question (On Jurisdiction)*, Report of the International Committee of Jurists, League of Nations Official Journal, Special Supplement No. 3 (1920); *The Aaland Islands Question (On the Merits)*, Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921).

subsequently called upon to decide on the merits of the case, declined to use the ‘nation’ as the ultimate controlling legal principle in state-making. Instead, they framed (in different ways) the flexible role of international law (and the international community) in responding to group demands deemed legitimate under the circumstances.

Remarkably similarly, the so-called Badinter Commission established by the-then European Community (EC) to assess the situation in the former Yugoslavia, indicated in its well-known Opinion No. 2 that the Serbs within emerging Bosnia had a “right to choose their nationality”, controversially implying a complex reshaping of internal and external sovereignty as part of a wider package of guarantees under international law, though stopping short of making Serbian nationality the foundation of separate statehood.²⁵ In a broadly similar vein, later comprehensive group accommodation settlements such as the 1995 Dayton Peace Agreement on Bosnia, the 1998 Good Friday Agreement on Northern Ireland, and several other peace settlements seeking to accommodate and govern competing claims, translate ‘national’ demands (“the right of all individuals to belong to the nation which they feel they belong to”, in the words of the 2006 Council of Europe resolution) into elements for creative exercises in constitutional restructuring within and across state boundaries, based on an expanded cumulative view of international law and human rights standards, including enhanced modalities of group protection.²⁶

In short, the 2006 Council of Europe resolution exemplifies an attempt to capture the interplay between sovereignty and group diversity in a way that is arguably consistent with recent and less recent practice. Although international law does not feature ‘nationhood’ as a pre-condition for statehood (let alone a definition of ‘nation’), it has typically sought to accommodate, and yet discipline, ‘national’ demands as an area of inter-group diversity relating to the content and shape of sovereignty – from relatively straightforward respect for cultural diversity to complex forms of dislocation of power. It goes without saying that, while not all such demands seek, or even require, significant degrees of political power or decision-making authority, many claimants have used the language of ‘national’ self-determination to articulate those demands. It is to this dimension that I now turn.

3 ‘National’ Self-Determination in International Law: A Critique of Familiar Themes

In this context, self-determination claims made by groups who view themselves as ‘nations’ or ‘peoples’ – be they the ethnic Russians in Ukraine, the Kosovar Albanians, or the Kurds in Turkey and elsewhere – are significant in at least two respects. For one thing, they seek to expand on the ‘international law of nationalism’²⁷ by closing the aforementioned gap between ‘nationhood’ and sovereignty in legal and political discourse. They wish to push the general boundaries of international law through the specific law of self-determination. At the same time, as the law of self-determination resists using the ‘nation’ as its ultimate most authentic source of legal rights, the question arises as to how best to deal with those claims within the international legal order. In the current section and following one, I will briefly critique, respectively, some familiar themes or popular tropes about the ‘national’ self-determination claim and a few alternative lines of thinking that have been suggested. There exist at least four such themes: that there is a linear continuity in thinking about self-determination as an international legal entitlement; that self-determination is fundamentally concerned with independence or secession; that it operates as an inherent unilateral right; and that it is defined by the universal aspiration of groups who characterise themselves as ‘peoples’ or ‘nations’ in a broadly cultural sense.

3.1 *Legal Continuity or Switch?*

²⁵ European Community Arbitration Commission, *Opinion No. 2*, 11 January 1992, 31 *International Legal Materials* (1992), p. 1497.

²⁶ C. Bell, *supra* note 10.

²⁷ I borrow this expression from Nathaniel Berman’s chapter titled “The International Law of Nationalism: Group Identity and Legal History”, in D. Wippman, *International Law and Ethnic Conflict* (Cornell University Press, Ithaca and London, 1998), p. 25.

It has not been uncommon for commentators to assume (explicitly or implicitly) that the international legal right to self-determination as it developed in the second post-war period somehow built upon the ‘national’ categories employed to reshape Europe after the First World War.²⁸ The underlying idea is that, whatever permutations the concept of self-determination may have undergone in the 1950s, 1960s, and 1970s, the operationalisation of self-determination came to be essentially a way of prioritising certain ‘peoples’ or ‘nations’ over others in the process of state-making and never quite managed to overcome a nationalist view of self-determination linked to some kind of ethno-cultural status.²⁹

In a stronger legal sense, the argument suggests that the way in which the UN-sponsored process of decolonisation was organised – by establishing a “territory which is geographically separate and is distinct ethnically and/or culturally” in UN General Assembly Resolution 1541 (XV) as a material basis for identifying the colonial units which qualified for self-determination under the terms of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples – signalled the endorsement of ‘national’ self-determination in its multiple variants. It represented, in other words, some kind of iteration of the concept that was deemed acceptable (at least politically) at Versailles. While this argument is used, rather curiously, to both support and challenge an ethno-nationalist view of self-determination (particularly through the overwhelmingly chosen pattern of liberation: independence),³⁰ it does not stand the test of a rigorous scrutiny of practice.

The Versailles settlement in 1919 sought to accommodate, however imperfectly and in quite a hybridised manner, some of the ‘nationalities’ of Europe. It did not reach out to overseas European colonies, despite Lenin’s earlier suggestion that ‘national’ self-determination should have that broader anti-imperial thrust and US President Wilson’s seemingly unintentional open characterisation of the colonial issues facing the international community at that stage in Point V of his Fourteen Points Address to Congress in 1918.³¹ Besides its geographically circumscribed and substantively qualified scope (in terms of limited statehood, minority protection, and/or plebiscites), the settlement, though impactful at the level of international legal doctrine and practice, did not translate into a freestanding legal right to self-determination, as was made clear by the Commission of Jurists in the Aaland Islands case. From this perspective, the United Nations Charter adopted in 1945 could not have been any more aloof from the Versailles line of thinking. The ‘nations’ of Article 1 (2) of the Charter on which “equal rights and self-determination of peoples” were to be based were essentially already constituted states pledging respect and friendly relations to one another.³² There was no legal right to self-determination per se, let alone a legal right for stateless ‘nations’. The right to self-determination in the context of decolonisation had not been enshrined in 1945 but rather developed by way of practice at a later stage. Contrary to some popular perceptions, the Charter did accommodate the expectations of the remaining colonial empires, though in an attenuated form, through the non-self-governing and trust territories systems (Chapters XI and XII). If it ever meant anything specific, the ethno-cultural reference in Resolution 1541 (XV) applied to the relationship between the coloniser and the colonised rather than the ethno-cultural features of any particular community – the myriad of them encompassed by the administrative boundaries of the crumbling empires. It contributed at best to marking off a space separate from the metropolitan state where sovereign power exercised by a distant ruler was no longer legitimate. The decolonisation that became acceptable as an international law standard was unsurprisingly built around geography, not demography, territory, not nationhood or ethno-cultural identity, external, not internal, matters. In fact, the national liberation movements that

²⁸ For discussion, see C. Reus-Smit, *supra* note 21, pp. 187-192.

²⁹ From different perspectives, see e.g. F. Tesón, “Introduction: The Conundrum of Self-Determination”, in F. Tesón (ed.), *The Theory of Self-Determination* (Cambridge University Press, Cambridge, 2016), p. 1; F. Mégret, “The Right to Self-Determination: Earned, Not Inherent”, *ibid.*, p. 45.

³⁰ See e.g. A. Patten, “Self-Determination for National Minorities”, in F. Tesón (ed.), *supra* note 29, pp. 126-129; E. Rodríguez-Santiago, *The Evolution of Self-Determination of Peoples in International Law*, *ibid.*, p. 238.

³¹ “A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined”; for commentary, see A. Cobban, *supra* note 18, p. 21. For earlier articulations of the concept within Marxist socialist thought and the famously tense debate between Lenin and Luxemburg over self-determination, see H. Davis (ed.), *The National Question: Selected Writings by Rosa Luxemburg* (Monthly Review Press, New York and London, 1976).

³² A. Cassese, *supra* note 6, pp. 37-43.

eventually achieved independence on behalf of the colonies were amongst the most ardent supporters of this line, pre- and post-independence.³³

That being said, two caveats seem to be in order. One is that, no matter how starkly different, Versailles self-determination and UN (colonial) self-determination both generated significant ruptures and realignments within the state system. In other words, both of them, in their own distinct ways, worked towards strengthening the state as the fundamental unit of the international legal order. Both of them reaffirmed state sovereignty as the key institutional pillar of international law, though the expansive move of decolonisation grossly outweighed the more limited Wilsonian approach to state-making. It is this systemic institutional point that can lead to a cumulative view of these historical developments, not any underlying linear thinking about nationality or ethno-cultural diversity per se. The other is that, the differences between the two stages of self-determination discourse did not mean – and could not have meant – the vanishing of ‘national’ claims, or more broadly, of inter-group diversity matters from the international legal and political landscape. It would be deceptively simple to argue that this is so merely because the law of colonial self-determination reconstructed the concept by disregarding those claims. Not only did pressing political crises – from Palestine to Cyprus – immediately call upon the United Nations to resort (partly at least) to the Versailles repertoire of legal techniques and heightened institutional competence vis-à-vis group accommodation; that panoply of tools was also bound to resurface – wholly or partially – in connection with more recent crises in the Balkans and elsewhere.³⁴

3.2 A Quest for ‘Nation-Statehood’?

As noted by Hurst Hannum, “[it] may well turn out that Europe’s most enduring legacy to Africa [as well as to Asia and the rest of the world] is the nation-state”.³⁵ This point broadly echoes our previous acknowledgement of an overarching commitment to a state-centred international system running through the entire twentieth century, but also implies a constant (conscious or unconscious) attempt to carve out fairly uniform societies (politically and culturally) out of nation-building projects.

It is not unreasonable to argue that the “state-shattering practices”³⁶ witnessed in non-colonial or postcolonial contexts like the Soviet Union, Yugoslavia and several other areas of the world, have sought to replicate the logic of the nation-state whereby appeals to democratic rule and ethno-cultural homogeneity have variably (and ambiguously) combined. Yet, however inconsistently and incompletely applied, the law of self-determination has carried with it much more than a mere insistence on independent statehood, and any quest for a homogenous nation-state is more likely to obscure than to clarify the issues involved.

For one thing, colonial self-determination never meant a simple transition to statehood for designated territories – independence for its own sake. Rather, it articulated a bundle of choices (independence being one of those) largely built around collective acts of decision-making, or, in the famous words of the International Court of Justice (ICJ) in *Western Sahara*, “the need to pay regard to the freely expressed will of peoples”.³⁷ If this is correct, and however imperfectly implemented, external self-determination thus required (or at least assumed) minimal acts of popular sovereignty, namely a minimal substantive correlation between the colonial unit and its inhabitants, whatever the former’s ultimate shape.³⁸ It is not entirely surprising that the UN Friendly Relations Declaration of 1970 expanded on that seminal approach by not only matching classic colonialism with comparable situations of ‘alien subjugation and domination’ but also fostering a flexible concept of ‘representative government’ that was, already at that stage, open to wider application beyond decolonisation matters,

³³ M. Koskenniemi, *supra* note 11, pp. 254-255 (“[w]hat was important for the liberators was to seize the particular forms of State power ... that had been introduced by colonial rule, not to re-establish whatever tribal or statal entities preceded colonialism”).

³⁴ See e.g. N. Berman, *supra* notes 9 and 27; D. Orentlicher, *supra* note 10.

³⁵ H. Hannum, *supra* note 15, p. 25 (citing from A. A. Mazrui and M. Tidy, *Nationalism and New States in Africa* Heinemann, London, 1984, p. 70).

³⁶ R. Falk, *supra* note 11, pp. 100-101.

³⁷ Advisory Opinion, ICJ Reports 1975, p. 12, at p. 25. See also UN General Assembly Resolution 1541 (XV), UN Doc. A/4684 (1960), Principle VI; see also the Declaration of Judge Nagendra Singh, *Ibid.*, p. 81.

³⁸ For some grey areas in this regard, see K. Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, Cambridge, 2002), pp. 162-167.

as evidenced by the case of apartheid South Africa.³⁹ In fact, the 1970 Declaration inaugurated a progressive move towards the internal configuration of states, self-determination not simply as the legal trigger of external sovereign power in pre-defined scenarios but, more subtly, as the legal barometer of sovereignty within the state's own political community.⁴⁰

Indeed, the reformulation of self-determination as a human right and its entrenchment in common Article 1 of the UN Covenants on Human Rights, coupled with a string of developments in distinct areas of group protection (minority and indigenous rights featuring prominently among them), have gradually added to postcolonial extensions of the concept by viewing specific forms of 'effective' participation in, or control over, decision-making processes as the most significant ways of enriching the minimum legal standard of representation upheld by the 1970 Declaration.⁴¹ They routinely feature in contemporary accounts of self-determination – from relatively basic demands for group equality and recognition within mainstream institutions to hybrid attempts to accommodate individual and collective interests across internal and external dimensions of sovereignty.⁴²

This brings the other legal pillar of self-determination into focus: the principle of territorial integrity as articulated by both the 1960 and 1970 Declarations, and explicitly reaffirmed, on a different basis, in the context of particular group protection instruments.⁴³ Richard Falk has noted that the international community's resistance to secessionist claims and insistence on preserving the territorial integrity of states has not prevented sovereignty readjustments in responding to new empirical realities, as exemplified by the recognition of new states within Yugoslavia's former constituent republics' boundaries or partial recognition of Kosovo's unilateral independence.⁴⁴ Whatever we make of the legal strength of territorial integrity in the face of developments on the ground, one cannot deny the consistently inhibiting factor the principle has had on the international endorsement of secessionist movements. So much so that the independence of the colonies was not treated as 'secession' from the metropolitan state, the collapse of the USSR and Yugoslavia was regarded, consistently with the no-secession rule, as no more than 'dissolution', and various so-called 'frozen' conflicts in Eastern Europe have continued to attract (at least nominal) support for territorial unity.⁴⁵ Importantly, there is an internal aspect to the territorial integrity principle that is probably more significant than the formal capacity of the principle to contain 'state-shattering' practices. One may argue that territorial integrity no longer defines solely the outer limits of sovereign power, but rather delineates a physical and legal space within which sovereignty must be 'earned' through constant engagement with the state's individual and collective constituents.⁴⁶ Well-known arguments about 'remedial secession' in response to a chronic failure by a group to exercise internal self-determination, as tentatively articulated in recent judicial pronouncements – are not so much a (re-)statement of the contingent nature of the territorial integrity of states as a reminder of the role of self-determination as a basis for both validating and challenging the configuration of domestic legal orders.⁴⁷

³⁹ A. Cassese, *supra* note 6, p. 131.

⁴⁰ For discussion, see also P. Macklem, *The Sovereignty of Human Rights* (Oxford University Press, Oxford, 2015), ch. 7.

⁴¹ See e.g. United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res. 47/135 (1992), Article 2(2)-(4); United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/61/L.67 (2007), Articles 3, 4, 18, and 19; Framework Convention for the Protection of National Minorities, 1 February 1995 CETS No. 157, Article 15; see generally G. Pentassuglia, *supra* note 3, pp. 271-280; M. Weller (ed.), *Political Participation of Minorities: A Commentary on International Standards and Practice* (Oxford University Press, Oxford, 2010).

⁴² See e.g. P. Macklem, *supra* note 40; C. Bell, *supra* note 10.

⁴³ See e.g. United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 41, Article 8(4); United Nations Declaration on the Rights of Indigenous Peoples, *ibid.*, Article 46(1); Framework Convention for the Protection of National Minorities, *ibid.*, Article 21.

⁴⁴ R. Falk, *supra* note 11, pp. 114-116.

⁴⁵ For discussion, see M. Craven, *supra* note 19; J. Ringelheim, "Considerations on the International Reaction to the 1999 Kosovo Crisis", 2 *Revue Belge de Droit International* (1999), p. 475; C. Bell, *supra* note 10, pp. 226-227.

⁴⁶ See e.g. P.R. Williams and F. Jannotti Pecci, "Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination", 40 *Stanford Journal of International Law* (2004), p. 1; H. Hannum, *supra* note 15.

⁴⁷ *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217 (hereinafter: the *Reference* case). 'External' self-determination in the form of 'remedial secession' would be contingent upon the state failing to respect 'internal' self-determination; *ibid.*, paras. 134-135. For a similar thesis, see D. Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International, Dordrecht, 2002), ch. 7.

In short, for all its imperfections and selectivity, the law of self-determination cannot be reduced to a quest for ‘nation-statehood’, or indeed for strictly homogenous societies in the face of overwhelming diversity within and across state boundaries. While the centrality of the state as an institutional entity remains intact, the theoretical and practical workings of that law have increasingly exposed the failures of the nation-state’s homogenising purposes. The fundamental question is, in fact, not one of independence of ‘nations’ but rather the ability of self-determination to yield recalibrations of authority as a result of agreed processes and legitimate group demands.

3.3 *A Unilateral Act?*

Another familiar trope in ‘national’ self-determination discourse is the notion that what is at stake is fundamentally a unilateral right, a right that inheres in the claimant whose decision-making operates as something of a trump card over others’ interests, or more accurately, as a right capable of overriding others’ consent within the wider political community. For example, several of the ethnic conflicts in Eastern Europe and elsewhere have been fuelled by unilateral moves by sub-national groups in the form of national independence referenda or declarations of independence outside of an agreed process with the central government.

From an international law standpoint, there is very little evidence, however, that this sort of approach has ever been deemed (a priori) acceptable, or indeed that self-determination is being reconfigured as a right of irredentist groups such as the ethnic Russians in Crimea to join a state to which they are historically linked.⁴⁸ Comparatively speaking, the process of decolonisation was fairly unique in that it enabled colonial territories to achieve independence through actual (or presumed) acts of unilateral decision-making, despite attempts by the colonial powers to somehow undermine the notion of colonial self-determination as a legally protected entitlement to break away from empires regardless of the latter’s consent or negotiating good-will.⁴⁹ But if this paradigm was meant to remedy the emerging ‘abnormality’ of colonialism on the basis of a political and legal rupture between the status of those territories and the territories of the states administering them, one cannot assume that the same paradigm applies within established states. In fact, most of the aforementioned unilateral proclamations (via a local referendum or the act of some local representative body) have been rejected by the international community as providing a potentially useful but clearly insufficient basis for statehood. In the Advisory Opinion on Kosovo’s declaration of independence,⁵⁰ the ICJ strictly distinguished such a declaration from the exercise of a pre-existing right to independence, or indeed secession, under international law. It is one thing, the Court argued, to unilaterally declare an entity to be a state, and it is quite another to treat the declaration (or by analogy, a referendum result in favour of independence) as the reflection of the exercise of a right conferred on the entity to separate itself from the state where it is located under international law.

The ICJ’s reluctance to address underlying issues of self-determination and secession in the Kosovo case goes quite a long way towards explaining its seemingly formalistic approach to the question posed to it by the General Assembly. In fact, declarations of independence or independence referenda are typical attempts to assert a right to self-determination by those groups who feel entitled to it. Arguing as the ICJ did, that unilateral proclamations of statehood are not in violation of international law unless incompatible with norms of *ius cogens* does little to explain, let alone acknowledge, that correlation. And yet, the overly prudent position of the ICJ can hardly be taken to imply the underwriting of unilateral independentism as the basis for determining the claimant’s position vis-à-vis the state, especially when considered against the historical backdrop of internal referenda or plebiscites (or less frequently, declarations of independence) that received a modicum of

⁴⁸ But see Y. Shany, “Does International Law Grant the People of Crimea and Donetsk a Right to Secede?” 21 *Brown Journal of World Affairs* (2014), p. 233.

⁴⁹ J. Summers, “The internal and external aspects of self-determination reconsidered”, in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, Cambridge, 2015), pp. 245-246.

⁵⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403.

international supervision as well as the undisputed unilateral right of the colonies to independence.⁵¹ Needless to say, circumstances on the ground may be such that the handling of such claims may translate into a more nuanced practice. As the collapse of Yugoslavia seems to show, there might be situations where the cumulative impact of unilateral acts of independence can lead to a de facto reshaping of acceptable self-determination units out of the ashes of a federal state,⁵² while Kosovo's ostensibly self-conferral of statehood in spite of Serbian assertions of sovereignty can still be recognised by states, though not necessarily by all of them.⁵³ There might even be cases that are widely regarded of a quasi-colonial nature, as the case of Palestinian occupied territories, where implementation of unilateral rights may be difficult to achieve.⁵⁴ Conversely, proponents of 'remedial' secession argue precisely on the basis of a unilateral right to independent statehood as a remedy against gross human rights violations suffered by the group who is seeking it. Multiple variables of course affect legal analyses, be they the systematic failure of entire states as opposed to discrete segments of them, an irreversible deadlock in negotiations or an amply documented record of severe human rights abuses by the central authorities. Yet, none of them suggests that unilateral independentism is, in and of itself, acceptable, let alone desirable, save in fairly specific circumstances.

Whatever explanatory nuances we attach to particular cases or whatever one's view of the capacity of remedial secession to stand on its own feet as a separate legal entitlement, there is a strong case to be made for the postcolonial extension of self-determination as a quintessentially relational exercise. Under international human rights law, general and special participation rights have in effect aimed to deliver rights to have a say, to shape up the process, or even to negotiate distinctive outcomes. In this sense, the significance of the 1998 *Reference* case before the Supreme Court of Canada does not turn on a failure to identify a unilateral right of Quebec to secede from Canada under both constitutional law and international law, but rather on the constructive legal framework that the Court delineated in order to articulate a 'meaningful' exercise of internal self-determination to the benefit of all the parties concerned, including groups and individuals within and outside the province. The Court's insistence on the interplay of federalism, democracy, the rule of law and the protection of minorities as a basis for addressing Quebecois' claims, while distinctive to the Canadian constitutional and political set-up, simultaneously spoke to a wider international practice concerned with general or special access to government and representation, various forms of cultural recognition, and/or the constitutional redefinition of the state itself.⁵⁵ In retrospect, it is not unreasonable to read some of the Eastern European developments as attempts to deliver or support hybrid solutions to inter-group diversity that link the recognition of national identities to participation and power-sharing arrangements, including (partly) cross-border ties. For example, the Badinter Commission's opinions delivered in light of the 1991 EC's Guidelines on Recognition and an EC-sponsored draft convention on "human rights and rights of national and ethnic groups", as well as the 'Ahtisaari Plan' for Kosovo in 2007, they both sought to combine minimum standards of participation and representation in government with complex forms of inter-group accommodation.⁵⁶ While the EC's commitment to this

⁵¹ This was reaffirmed in *Reference Re Secession of Quebec*, *supra* note 47, para. 132 (distinguishing the colonial entitlement from a secessionist claim within a state context). For the limited role of plebiscites in post-war Versailles, see N. Berman, *supra* note 9, pp. 1859-1860.

⁵² See generally European Community Declaration on Yugoslavia and the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, 31 *International Legal Materials* (1992), p. 1485.

⁵³ As of December 2016, over 100 states had recognised Kosovo's independence.

⁵⁴ For discussion over the type of obligations involved in relation to Palestinian self-determination, see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 131, Separate Opinions of Judge Higgins, Judge Koijmans, and Judge Elarby.

⁵⁵ G. Pentassuglia, *supra* note 3, pp. 271-280; *id.*, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff Publishers, Leiden, 2009), pp. 106-121 (especially pp. 117-121).

⁵⁶ See *supra* note 52; *Report of the Secretary General on the International Conference on the Former Yugoslavia*, 31 *International Legal Materials* (1992), p. 1549; for commentary over the-then EC policy, see also D. Orentlicher, *supra* note 10, pp. 65-68. As for Kosovo developments, see The Comprehensive Proposal for Kosovo Status Settlement ('Ahtisaari Plan'), UN Doc. S/2007/168 (2007); <http://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>; M. Weller, *The Crisis in Kosovo 1989-1999: International Documents and Analysis*, 1 (Cambridge University Press, Cambridge, 1999).

process failed the test of practical consistency rather than principled coherence,⁵⁷ Kosovo's ex post recognition of independence by several states was still conditioned on the existence of inter-group mechanisms of power-sharing and some form of international supervision.⁵⁸ Here again, the question was not one of legally underwriting a unilateral march of self-contained 'nations' into sovereign independence, but rather one of capturing conditions under which various group claims could be considered for some rearrangement of authority within emerging states.

3.4 *Vindicating 'Peoplehood'?*

Probably the most significant area of uncertainty and confusion surrounding popular claims to 'national' self-determination is the association of the claimant with a 'people' (or indeed, a 'nation'), particularly in the sense of a fairly coherent cultural community linked to a traditional homeland. Contemporary (postcolonial) self-determination claimants have typically sought to ground their claims in their status as a 'people' under international law. In other words, they have sought to convert what they perceive as a very distinctive socio-political reality into a legal claim based on the category used by international law to identify the beneficiary of the right to self-determination.

In terms of legal terminology post-1945, the progressive shift from 'nation' to 'people' marked the beginning of a process aimed to vest self-determination with a reconfigured status and meaning. In practice, the occasional pairing of these two terms in early UN articulations of the concept, including Article 1(2) of the UN Charter, the 1952 General Assembly Resolution 637(A) on "The Rights of Peoples and Nations to Self-Determination"⁵⁹ or the 1960 Declaration, reflected a deliberate narrowing of self-determination to either the recognition of the right of states to be free from outside interference or the right of dependent territories (and 'peoples') to achieve political and legal independence. Crucially, colonial self-determination did not operate on the basis of a pre-defined cultural community, nor was there already in place a sufficiently strong civic nation on which the would-be states could thrive. As Diane Orentlicher has aptly noted, the forging of national identities in postcolonial African states effectively started by the time the colonies broke with their empires, which also meant that such a goal had to be achieved in a remarkably short period of time. The weakness of their civic and institutional structures was more of a dark legacy of colonialism than the emergence of multi-ethnic societies per se.⁶⁰

Be that as it may, colonial self-determination was to a large extent a one-off affair. The need for the claimant to qualify as a territorially-configured colonial people in order to benefit from the right added contingency to it. It was not a way of recognising a right that inhered in 'all peoples' defined in the abstract, but rather a way of prioritising certain communities (territorially defined) over other communities (however defined).⁶¹ If postcolonial states provided one of the starkest examples of a state-to-nation trajectory, the simultaneous reshaping of self-determination as a human right (indeed, an essential requirement for all human rights), first articulated in the aforementioned General Assembly Resolution 637(A), nonetheless laid the foundations for the later broader articulation of the right in common Article 1 of the UN Covenants on Human Rights ("all peoples have the right to self-determination"), at least within the institutional (constitutional and political) framework of the state.⁶²

While these developments have been the subject of a sustained scholarly debate over the years, it is relatively less clear how international law (and the international community) should respond to 'national' groups' claims to self-determination that are seemingly in conflict with this (largely

⁵⁷ As is known, some of the Badinter Commission's findings were not consistently followed through by the European Community as the recognition of the new entities, particularly Croatia and Bosnia, became politically expedited in 1992.

⁵⁸ See details at <http://news.bbc.co.uk/1/hi/world/europe/7249034.stm>.

⁵⁹ UN Doc. A/RES/637 (VII), 16 December 1952.

⁶⁰ See D. Orentlicher, *supra* note 10, pp. 17-18.

⁶¹ Importantly, the divide between European states and League mandate territories, or between post-UN overseas colonies and other (still unchallenged) dominated territories, though based on political priorities and/or the broad cultural assumptions underpinning the 'civilised/uncivilized' paradigm, still did not reflect a 'cherry-picking' act from a pre-set variety of entities claiming to represent 'ethnic' or 'cultural' nations. See *supra* Section 3.1. For interesting commentary, see also A. Anghie, "Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations", 41 *Texas International Law Journal* (2006) p. 447 (noting that, if anything, the new 'culture' of the postcolonial state was to transcend local cultures altogether).

⁶² Human Rights Committee, *General Comment No. 12: Article 1 (Right to Self-determination)*, 13 March 1984, at <http://www.refworld.org/docid/453883f822.html>, para. 4.

territorial) paradigm. The problem is unlikely to be resolved through precise definitions or judicial or quasi-judicial pronouncements over the status of a claimant as a ‘people’ or a ‘nation’ within an emerging or established state. For example, the EC Badinter Commission located the position of the Bosnian Serbs around hybrid notions of ‘population’, ‘minority’ and ‘ethnic group’ for purposes of self-determination within Bosnia.⁶³ The ICJ, for its part, held that Kosovo’s Declaration of Independence was not, in and of itself, at odds with international law, but still refrained from recognising the population of Kosovo, let alone the Kosovars Albanians, as a people in a legal sense.⁶⁴ Critics have suggested that the awkwardness surrounding these rulings reflect a failure to recognise sub-unit claims from within the internal federal boundaries of collapsing Yugoslavia or a failure to genuinely engage with self-determination issues from within Serbia as an established state.⁶⁵ Yet, it can be argued that these pronouncements underscore a deeper tension between the law of self-determination and claims to self-determination made by ‘national’ groups, one that can be resolved neither through carving out entire states out of a ‘national’ *droit acquis* in ‘abnormal’ circumstances of territorial and political transition,⁶⁶ nor through outright rejection of such claims or some alternative version of them.⁶⁷

These ambiguities can be further illustrated by the Supreme Court of Canada’s approach to the status of Quebec in the *Reference* case. The gist of the Court’s general line of reasoning is that, because the right to self-determination is a human right, it cannot be a right of states, let alone nation-states. Being as it is a right that accrues to a ‘people’ as opposed to a state, it “may include a portion of the population of an existing state”. Arguing otherwise, the Court says, would make the right to self-determination “largely duplicative” and “would frustrate its remedial purpose”.⁶⁸ These comments do not seem entirely convincing. For one thing, it can be questioned whether remedial secession (even assuming the existence of a positive norm to that effect) requires the existence of a victimised ‘people’ as opposed to a minority or an institutional entity comprising several groups.⁶⁹ More broadly, the distinction between the rights of states and the rights of individuals and groups (of which the right to self-determination is one) does not, in and of itself, tell us anything specific about the depth or contours of ‘peoplehood’. It is one thing to argue that the rights of groups are not the rights of states or governments, and it is quite another to derive from this any firm legal conclusions about the extent to which the term ‘people’ can reach out to particular groups, such as distinct ‘nations’ or sub-national communities. All human rights – both individual and collective – accrue to entities other than the state within which they are enjoyed. In other words, all individuals and groups hold (or may hold) human rights because they are not states. While this disjunction – or non-state marker – lies at the very heart of international human rights law, it cannot be determinative of the personal scope of the right to self-determination other than by contrasting this right with the rights of states. This does not mean that self-determination may not benefit “a portion of the population of an existing state”. It only means that the self-determination/human rights nexus as defined by the Court is not conclusive as to who is entitled to claim particular forms of self-determination from within the state.

What is remarkable about the Court’s approach is that, what would intuitively appear to be a sympathetic view of Quebec as a people for purposes of self-determination does not translate into an actual acknowledgement of it. Quite the reverse, the Court noted in no uncertain terms that

⁶³ European Community Arbitration Commission, *Opinion No. 2*, *supra* note 25, p. 1497.

⁶⁴ See *supra* note 50, paras. 51, 56, 82, 89, 105, 109.

⁶⁵ See e.g. R. Falk, *supra* note 11, pp. 115-116 (commenting on H. Hannum’s “Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?”, 3 *Transnational Law and Contemporary Problems* (1993), p. 59).

⁶⁶ Just as in the Aaland Islands case the international community’s intervention to address the claims in transitional circumstances did not use the ‘nation’ as the ultimate controlling legal principle, so the EC’s heightened competence in Yugoslavia did not buttress the equation between ‘natural’ (national) communities and nation-states.

⁶⁷ However arguably clumsily, the Badinter Commission’s Opinion No. 2 (*supra* note 25) still sought to reconcile sovereignty, self-determination and human rights by looking at minority protection and possible dislocations of power across national boundaries.

⁶⁸ *Reference Re Secession of Quebec*, *supra* note 47, para. 124.

⁶⁹ This is even more so if the unit in question includes individuals or groups who do *not* wish to secede or if that unit is subsumed into the colonial category of ‘non-self-governing territory’: on the latter case, see T. Franck, “Post-modern tribalism and the right to secession”, in C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Kluwer Law International, Dordrecht, 1993) p. 3, at pp. 13-14. In any event, the Court did question whether remedial secession could be considered an established international law standard (*supra* note 47).

determining the exact status of the French-speaking community of Quebec, or indeed of any other group within Quebec, as a ‘people’ was *not* necessary in the case at hand. Given that much of the judgment locates Quebec’s position in the context of a wider process of internal self-determination and even the possibility of Quebec’s secession,⁷⁰ such an agnostic line says more about the ambiguities of the ‘peoplehood’ (or ‘nationhood’) argument than it says about the substance of self-determination. In a language that essentially drew upon the 1970 Declaration, the Court did not prioritise group status issues but focussed instead on the “whole of the people or peoples resident within the territory” as a basis for proper constitutional (internal) arrangements. What does come into view is thus an explicit, yet hybrid, acknowledgment of the coexistence of various ‘national’ groups within the state and the requirement of complex constitutional conversations designed to achieve accommodation of that diversity, regardless of precise group classifications. To put it differently: Recognising Quebec’s Francophone population as a ‘people’ for purposes of international law (or even a ‘people’ amongst other ‘peoples’ within Quebec) would not have added anything specific or substantive to the general argument about inter-group diversity within the state as the legal and political arena for such an accommodation.

These decisions may struggle to fit rigid patterns of doctrinal coherence or to fully match expectations on the ground. Still, they seem to be able to make space for a constructive, though tentative, response of international law to ‘national’ demands (or some of them), in ways that arguments built around ‘peoplehood’ (or ‘nationhood’) per se cannot, as they tend to be either implausible or incomplete. This is not to suggest that sub-national groups seeking a measure of self-determination can never be viewed as ‘peoples’ for legal purposes, however hybrid and highly contingent such a recognition may be,⁷¹ and however reluctant to make this sort of determinations national legislators, adjudicators or policy-makers are.⁷² Rather, the central point is that this matter is only part (most likely a minimal part) of a more complex story about the articulation of group protection and inter-group diversity within plural societies, not the effect of logical or normative necessity, let alone an international legal requirement, regarding sub-state ‘peoplehood’.

4 ‘National’ Claims and the Instabilities of International Law Discourse

If the legal oddity generated by some familiar themes surrounding the ‘national’ self-determination claim, as discussed in Section 3, exposes the tensions and selectivity of the law of self-determination, that same uncertainty can also feed into broader perspectives that lead to questioning the very validity of ‘national’ claims of a broad ethno-cultural variety, the ability of international law to relate to complex socio-political realities on the ground, or the permissibility or desirability to respond to those claims in distinctive ways. They arguably account for much of the ambivalence of international law towards asserted group identities.

Some commentators, for instance, have argued that, since there is no natural standard to assess the existence of ‘national’ communities, ‘national’ self-determination claims should be understood essentially as ways “to enlist popular support for the struggle against political oppression”, be they in the form of anti-colonialism as we have known it, or some other form of resistance or reaction to

⁷⁰ True, the Court ruled out remedial secession on human rights grounds in the case at hand, but it was unclear how that reconciled with the Court’s prior silence as to who was entitled to remedial secession in the first place, and whether Quebec would have been entitled to remedial secession as a distinct ‘people’ or some other entity, had denial of access to government and gross human rights abuses been proven.

⁷¹ Some such groups have gradually come within the purview of the ACHPR as being entitled to ‘peoples’ rights’, and indigenous groups have been recognised as ‘peoples’ entitled to self-determination under the United Nations Declaration on the Rights of Indigenous Peoples; see recently the African Court on Human and People’s Rights’ decision in *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Application No. 006/2012, Judgment of 26 May 2017, para. 198. However, as I have discussed elsewhere (G. Pentassuglia, ‘Do Human Rights Have Anything to Say about Group Autonomy?’, in G. Pentassuglia (ed.), *supra* note 3, Section 2.4.2), neither of these cases reflects a strict terminological coherence or a quest for group status precision, either within the context of the same treaty or across the field.

⁷² Indeed, the reluctance by international bodies to engage in such classifications matches a similar reluctance in domestic settings: see e.g. M. Suksi, “On the Entrenchment of Autonomy”, in M. Suksi (ed.), *Autonomy: Applications and Implications* (Kluwer Law International, Dordrecht, 1998), p. 151, at p. 165 (noting that very few groups enjoying autonomy through domestic arrangements have been recognised as ‘peoples’ for such purposes).

imperial or post-imperial domination around the world.⁷³ Even more strongly, others have gone as far as to question the plausibility of coherent cultural, national, or identity claims as significant drivers of human identity in an era of globalisation and mobility.⁷⁴ For them, if there is any culture or identity at all, it is a global one that dissolves, not affirms, differences. However, while it may be historically accurate to link several ‘national’ claims to emancipatory projects, or other ostensibly similar claims to political manipulation or aggressive chauvinism and imperialism, or to capture fluidity in cultures seemingly underpinning such claims, it would be wrong to assume either that claims made by sub-national groups can be reduced to purely political discourse or that all ‘national’ demands, because of political priorities, involve considerable restructuring of the state as opposed to more limited forms of equality and recognition. For one thing, social science research has convincingly shown that, whatever their origins and form, and whatever their openness and potential for negotiation and revision, group identities including ‘national’ sentiments must be taken seriously as they are no less real underlying social determinants than the political projects or priorities that help mediate them (or some of them).⁷⁵ At the same time, ‘national’ claims feed into a legal and political narrative that is distinctive to the creation and functioning of the modern state. Virtually no states are home to homogenous socio-cultural ‘nations’, yet most states seek to secure one version or another of a uniform public culture, of a uniform cultural paradigm, that poses a threat (in principle or in practice) to group diversity. As I discussed in section 2, the very emergence of new states in the name of ‘national’ independence, or the continuing running of states as nation-states – from Europe, to the Americas, to Africa and Asia – have consistently raised questions about the rearrangement of authority within the newly constituted or established entity in order to meet certain group demands.⁷⁶

While there is a wide consensus on the notion that self-determination operates below the surface of the state as it encapsulates a right of peoples, not states or governments per se, there is a sense that international law leaves space for conceptual ambiguity vis-à-vis the paths on which it needs to be set for this sort of (sub-state) group claims to be taken seriously. This can be best illustrated by analyses of group claims to secession or autonomy arrangements, on the one hand, and to democratic participation in governance, on the other.

At one end of the scale is what I might call the ‘effectiveness’ approach to self-determination. It is essentially based on the notion that, because international law does not or cannot regulate matters such as unilateral secession or autonomy regimes within a state, the law of self-determination is inevitably hostage to facts on the ground. Fernando Tesón, for example, has argued that the principle of self-determination and the principle of territorial integrity prevail over one another depending on whether or not a secessionist movement is successful in overcoming resistance from the territorial state and the international community. On this model, the annexation of Crimea by Russia or the independence of Kosovo would be *legally* a matter of *self-determination (vel non)* depending on whether or not Ukraine, Serbia and/or the rest of the world are factually capable of reversing it.⁷⁷ Tesón’s view seems questionably to imply some measure of retrospective legal recognition of self-determination claims and arguably downplays international law’s a priori resistance to validating facts that are deemed incompatible with peremptory rules of general international law.⁷⁸ But what is important for this discussion is the logic of *fait accompli* – ‘secession in the streets’, to borrow from the *Reference* case⁷⁹ – on which this approach rests. Although the principle of ‘effectiveness’ is not

⁷³ M. Koskeniemi, *supra* note 11, p. 262.

⁷⁴ For discussion and critique of this line, see e.g. J. Tully, *supra* note 8, pp. 45-47.

⁷⁵ See e.g. the insightful analyses of I. Berlin, “Nationalism: Past Neglect and Present Power”, in H. Hardy (ed.), *Against The Current: Essays in the History of Ideas* (The Hogarth Press, London, 1979), p. 333; C. Geertz, *The Interpretation of Cultures* (Fontana Press, London, 1973); *Id.*, *Mondo globale, mondi locali: cultura e politica alla fine del ventesimo secolo* (il Mulino, Bologna, 1995), chps. II and IV; J. Tully, *supra* note 8.

⁷⁶ On the various dynamics at play, see e.g. M. Walzer, *The Paradox of Liberation: Secular Revolutions and Religious Counterrevolutions* (Yale University Press, New Haven and London, 2015); G. Pentassuglia (ed.), *supra* note 3. For a review of similar debates in South East Asia, see e.g. J. Castellino, “Autonomy in South Asia: Evidence for the Emergence of a Regional Custom”, in T. Malloy and F. Palermo (eds.), *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford University Press, Oxford, 2015), p. 217.

⁷⁷ F. Tesón, “Introduction: The Conundrum of Self-Determination”, in F. Tesón (ed.), *The Theory of Self-Determination* (Cambridge University Press, Cambridge, 2016), pp. 7-8.

⁷⁸ See e.g. J. Vidmar, “Crimea’s Referendum and Secession: Why it Resembles Northern Cyprus More than Kosovo”, at www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo.

⁷⁹ *Reference Re Secession of Quebec*, *supra* note 47, para. 142.

necessarily a trump card for securing statehood under these circumstances, international law's clearly hostile, yet deregulatory, approach to unilateral secession can be overtaken by new political and military realities on the ground, and can possibly become entrenched by some degree of international recognition.⁸⁰ In a broadly similar fashion, international support for groups seeking autonomy arrangements (short of independence) within a state has been exceptionally vocal in response to new 'facts' on the ground – the reality of territorial control and/or loss of life often coupled with the abolition of previous forms of self-government – and, conversely, more cautious and tentative (though not necessarily hostile) where these circumstances have not (or have never) been met.⁸¹ The 'effectiveness' approach generally displaces human rights considerations in the name of security (*realpolitik*) priorities, or in a more attenuated form, it tends to value autonomy claims as valid human rights matters *only* by reference to regimes that already exist(ed) within a state.⁸²

At the other end of the scale is a minimalist concept of participation in governance within states. As I noted earlier, international law's gradual shift away from colonial self-determination towards the notion of internal self-determination based on 'representative government' and a closer link with the substance of human rights standards (e.g. under Article 25 of the International Covenant on Civil and Political Rights), has suggested an alternative avenue for addressing sub-state group claims. Nevertheless, calls for equating internal self-determination with a distinct 'right to democracy' under international law – the right of a people to engage in meaningful decision-making within the state – have remained ambiguous given their somehow elusive empirical foundations and more crucially, the different ways in which the requirement of democracy can be articulated. Proponents of narrow electoral views of democracy have emphasised general collective aspects of voting rights and internationally-backed processes of election monitoring rather than any additional requirement of re-arranging decision-making authority for the benefit of particular groups.⁸³ And yet, a 'right to democracy' understood as a mere entitlement to inclusion in the political community on a non-discriminatory basis does little to engage with those sub-state claims, including claims to specific involvement in decision-making and/or political autonomy.⁸⁴ In short, placing the normative spotlight on democratic regimes has typically generated controversy over the content and boundaries of such regimes. To the extent that a focus on democratic governance aligns with traditional individualist accounts of human rights, it also generates tensions with efforts to vest rights in particular minority communities.⁸⁵ Moreover, a focus on the content of domestic group arrangements within a human rights-based framework, though of considerable practical significance, has often overshadowed central questions relating to the nature of the political community within which group claims, including autonomy claims, are made.

If the foregoing account is correct, then these conceptual instabilities do not merely mirror the uncertainties of the positive law of self-determination vis-à-vis 'national' demands. Rather, they raise the broader question of whether there is a way for international law to capture the legitimacy of group

⁸⁰ T. Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness", in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, Cambridge, 2006), p. 138. As a matter of positive international law, this approach is thus independent of whether remedial secession is a viable legal entitlement.

⁸¹ See e.g. the review of practice by J. Ringelheim, *supra* note 45.

⁸² The Framework Convention Advisory Committee has commended autonomy arrangements "in States parties where they exist" (*Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, 27 February 2008, paras. 133-137).

⁸³ See e.g. T. Franck, "The Emerging Right to Democratic Governance", 86 *American Journal of International Law* (1992), p. 46; G. Fox, "The Right to Political Participation in International Law", 17 *Yale Journal of International Law* (1992), p. 539; G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000). But see also United Nations Millennium Declaration, GA Res. 55/2, UN Doc. A/55/L.2 (2000), Section V, paras. 24-25.

⁸⁴ For a thoughtful account, see e.g. S. Marks and A. Clapham, *International Human Rights Lexicon* (Oxford University Press, Oxford, 2005), pp. 61-70. From a different angle, see also D. Orentlicher, *supra* note 10, pp. 44-78 (cautioning that a rapid move to free elections or referenda, and nothing else, might paradoxically support certain ethno-separatist claims and/or entrench ethnic divisions where a strong civic culture is still in the making; a similar point is made by B. Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law", 34 *New York University Journal of International Law and Politics* (2001), p. 232).

⁸⁵ The point can also be made from a moral or political perspective. A modified version of the approach to democracy, including the 'equalising effect' of autonomy regimes, is defended, for example, by A. Patten, "Self-Determination for National Minorities", in F. Tesón (ed.), *supra* note 77, p. 120.

claims, including those made by sub-state groups who view themselves as separate ‘nations’ or somehow distinct communities. Can one make sense of the self-determination/human rights/nation-state entanglement in ways that are not reduced to accepting or rejecting seemingly ‘absolute’ claims to self-determination or solely enabling legal-institutional ad hocism? Is there a way for human rights discourse to address group-related pathologies that are (directly or indirectly) of international law’s own making?

5 A Shift to Process: In Search of Criteria for the Internal Configuration of States

As sub-state group demands test the outer limits of the right to self-determination, both externally and internally, there is a sense that international law requires something of a mechanism, a process or a framework for it to be able to meaningfully assess those demands, ideally under conditions of international supervision or otherwise external scrutiny.⁸⁶ In other words, there is a sense that any ramifications of self-determination beyond decolonisation can hardly operate on their own or be left to the vagaries of factual realities.

For example, a process-oriented line is starting to emerge in relation to claims to independence or secession. In a bid to transcend both the seemingly intractable issue of defining ‘peoplehood’ or ‘nationhood’ vis-à-vis sub-state group claims and the crude application of the principle of ‘effectiveness’, a view is gradually emerging that international law can still engage with such claims by capturing criteria on the basis of which any successful secession can be assessed for purposes of recognition or even retrospective legality. Antonello Tancredi, for instance, argues for a rule of law-based approach to secession that, while acknowledging the lack of a distinct right of sub-state groups to that effect, still views a range of legal criteria – including the absence of military support from third states, majority support through local popular vote, and territorial stability tied to the principle of *uti possidetis* – as valid parameters to determine the lawfulness of a secessionist act ex post-facto.⁸⁷ To some extent, the EC Guidelines issued during the conflict in the former Yugoslavia, too, reflected an attempt to manage the collapse of a federal state by employing a mix of legal and diplomatic criteria, including requirements of human rights and group rights protection as a basis for the eventual recognition of the new entity.⁸⁸ The Supreme Court of Canada in the *Reference* case heavily drew upon a duty to negotiate as a fundamental benchmark against which to assess the legitimacy of any possible de facto secession of Quebec in the eyes of the international community.⁸⁹ Although that duty as it applied to Quebec and other constitutionally significant actors was primarily found in the unwritten fabric of the Canadian Constitution, it did resonate with similar duties to negotiate tied to the settlement of ethnic conflicts and similar sub-national disputes.⁹⁰

Crucially, remedial secession, whatever its status in positive international law, is being reassessed as a function, not of its merely factual success, but of a host of criteria – including engagement in good faith negotiations and the exhaustion of all realistic possibilities for internal self-determination such as autonomy – that are deemed sufficient to determine the legitimacy, and possible legality, of any secession that may indeed occur on that basis.⁹¹ The point on remedial secession is arguably critical. It looks at secession as a remedy for the injustice of internal arrangements rather than ‘peoplehood’ or ‘nationhood’ per se. To the extent that remedial secession, at least conceptually, confirms the capacity of self-determination to challenge domestic legal orders, not only to protect

⁸⁶ Here I refer, depending on the case, to either the sort of heightened competence over group accommodation experienced by the international community in the last century, or to more robust engagements of international institutions, policy-makers and legal scholarship with the substance and modalities of the claims.

⁸⁷ A. Tancredi, “A normative ‘due process’ in the creation of States through secession”, in M. Kohen (ed.), *supra* note 80, p. 171, at pp. 189-193. One should note, however, that the weight of local electoral or popular majorities tends to become highly problematic in the face of vocal opposition to independence from significant groups within the entity, as the cases of Bosnia and Kosovo illustrate (see also *supra* note 84).

⁸⁸ S. Tierney, “In a State of Flux: Self-Determination and the Collapse of Yugoslavia”, 6 *International Journal on Minority and Group Rights* (1999), p. 197.

⁸⁹ *Reference Re Secession of Quebec*, *supra* note 47, para. 143.

⁹⁰ See e.g. J. Ringelheim, *supra* note 45, pp. 527-528; C. Bell, *supra* note 10, ch. 11; see also E. Ruiz Vieytes, “Minority Nations and Self-Determination: A Proposal for the Regulation of Sovereignty Processes”, 23 *International Journal on Minority and Group Rights* (2016), p. 402.

⁹¹ D. Raič, *supra* note 5, pp. 366-367.

them,⁹² and can be pursued in ways that prioritise process and outcome over whether there exists a separate right to it or whether secession is merely effective ‘in the streets’, it is not unreasonable to take one step back and look at group claims, including ‘national’ demands, as part of a similarly construed internal self-determination discourse. To put it differently: Can one identify criteria for the overall legitimacy of group claims as part of the *internal* configuration of states? What is actually at stake here?

Traditional views of human rights have focussed on the role of minority cultures within a universal code of human rights standards that values (at least in principle) cultural differences across the wide spectrum of human identity. They have underpinned a global system largely built around the rights of individuals and tailored only in part to the requirements of security and peace preservation. Partly troubled at the prospect of fostering Nazi-style nationalist aggression, and partly prompted by assimilationist inclinations, states gradually came to confine ‘nationalist’ claims to colonial self-determination, while subsuming other (partly Versailles-style) group claims into the more generic internationalist dimensions of human rights law.⁹³ What tends to remain under the radar on such accounts, though, is the close connection between the protection of groups like ‘national minorities’ and ‘indigenous peoples’ and the ways in which sovereignty relates to international law-making. The several rearrangements of sovereign authority that have been buttressed by international law throughout history have been constantly punctuated by efforts to mitigate the effects of those redistributions on groups who found themselves within wider political communities with which they had little or no affiliation. From the Westphalia settlement, to the Versailles and League of Nations settlement, to the rise of indigenous rights post-decolonisation, to more recent attempts to govern the demise of the USSR and Yugoslavia and other processes of state reconfiguration, the mitigating impact of these multi-layered regimes of group protection underscores a series of ‘pathologies’ or ‘anomalies’ that arise upon those rearrangements of authority, not the issue of cultural difference alone.⁹⁴

In this sense, the role of national and similar communities as ‘co-founding entities’ of the state within the meaning of the 2006 Council of Europe Parliamentary Assembly’s Resolution, is not just a function of practical implementation or political or military realities but raises fundamental questions about distinctive sovereign redistributions and distinctive conditions for the ‘just’ exercise of internal authority. The resulting complications of inter-group (majority-minority) diversity beyond the narrow question of statehood, as I discussed in broader terms in Section 2, explain the tension within traditional human rights discourse when it comes to developing specific positive obligations for the benefit of minority groups and/or a pro-active approach to issues that affect the constitutional organisation of the state.⁹⁵ Pragmatism, for its part, is unable to explain possibilities of legal or institutional differentiation or asymmetries within the state in ways other than crude deference to political stability or conflict resolution, or even the intentional or unintentional forging of sovereign inequalities.⁹⁶

The following briefly sketches out the basics of a process-based human rights approach to group claims of the sort considered in this article. There exist at least three legal (and normative) dimensions or layers the cumulative impact of which is arguably essential to probing the legitimacy of such claims as part of a wider, ‘meaningful’ (in the words of the *Reference* opinion) process of internal

⁹² M. Koskenniemi, *supra* note 11, pp. 247-249 (noting that self-determination “both supports and challenges statehood”).

⁹³ See e.g. N. Berman, *supra* note 27, pp. 53-54.

⁹⁴ A strand of scholarship has, implicitly or explicitly, drawn attention to this key ‘systemic’ or ‘constitutional’ dimension involving the redefinition of ‘Westphalian’ sovereignty. See e.g. *id.*, *supra* note 9, pp. 1872-1873; P. Macklem, *supra* note 40, chs. 5-7; S. Krasner and D. Froats, ‘Minority Rights and the Westphalian Model’, in D. Lake and D. Rothchild (eds.), *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation* (Princeton University Press, Princeton, 1998), p. 227; C. Reus-Smit, *supra* note 21, pp. 97-105; J. Nijman, *supra* note 20, p. 100; C. Bell, *supra* note 10, pp. 225-226; R. Kuppe, ‘The Three Dimensions of the Rights of Indigenous Peoples’, 11 *International Community Law Review* (2009), p. 103. For an earlier articulation of aspects of this tension in human rights discourse from a jurisprudential perspective, see G. Pentassuglia, *supra* note 55, pp. 248-256; *id.*, *supra* note 3, p. 280.

⁹⁵ On some of these tensions, see e.g. G. Pentassuglia, *supra* note 3, pp. 291-292.

⁹⁶ See e.g. J. Nijman, *supra* note 20, p. 115 (noting the built-in asymmetries in legal obligations regarding minority protection in the Versailles settlement). In the context of complex self-determination agreements, see also C. Bell, *supra* note 10, p. 235.

self-determination:⁹⁷ 1) group recognition and claim-making; 2) group participation and the relative weight of claims; and 3) the proportionality of the modalities or means of pursuing the claims.

5.1 *Group Recognition and Claim-Making*

There may well not be an international legal obligation upon states to recognise particular groups in their midst, but under international law states are still required to respect, protect and fulfil the rights of ethno-cultural minority groups as they exist within their jurisdictions.⁹⁸ Two issues arise at this most basic level. One has to do with the group's collective dimension of self-identification as a 'national' community (national minority, minority nation, indigenous nation, people, etc.) or otherwise historically distinct 'nationality' or group identity, however defined. The other is the group's ability to articulate claims in ways that are consistent with human rights standards.

This is not the place for rehearsing debates over the fluid contours of definitional matters, as the very debate over 'peoplehood' clearly confirms. Suffice it to say that, while international law inevitably gives states a measure of leeway in singling out groups for some form of special protection, it definitely prohibits arbitrary limitations on the possibility of group recognition and enables a group to self-identify within acceptable limits – be it an indigenous community in Africa or Asia, a Kurdish nation or ethno-national minority in Turkey, or a national or religious group in Cyprus.⁹⁹ From this perspective, struggles for recognition are, first of all, struggles for a particular entry point into the legal and political process, and states must thus respect the right of such traditional sub-state groups to make a plausible case for distinct recognition within the state, whatever the label they use to describe themselves.

Relatedly, any meaningful engagement of the group, including 'national' groups, within the general process of self-determination must attract the capacity of articulating valid claims within the wider community. For its part, the European Court of Human Rights has openly acknowledged the link among associative freedoms (including freedom of religion), the articulation of group identities under conditions of political and cultural pluralism, and the autonomous existence of minority communities.¹⁰⁰ Moreover, it has firmly dismissed approaches aimed to curtail such spaces of freedom on security or other public grounds. A stream of cases decided against Greece, Turkey and a few other states in the context of pro-group activities (e.g. pro-Kurdish demands for constitutional changes and language rights) is a case in point. In *United Communist Party of Turkey and others v. Turkey*, the Court held in no uncertain terms that:

[T]here can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.¹⁰¹

⁹⁷ A review of all possible dimensions of the claims, including key extra-legal (geopolitical) factors or the technicalities of accommodation models, is far beyond the scope of this article. On the other hand, it is worth pointing out that my emphasis on 'process' should always be understood in connection with substantive legal matters, and at least the possibility of substantive outcomes.

⁹⁸ See e.g. United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 41, Article 1; United Nations Declaration on the Rights of Indigenous Peoples, *ibid.*, 18th and 19th preambular paragraphs; Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Article 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para 5.2; *Sidiropoulos v. Greece*, Judgment of 10 July 1998, ECHR Reports 1998-IV, para 41.

⁹⁹ Framework Convention for the Protection of National Minorities, *supra* note 41, Article 3; International Labour Organisation Convention 169 on Indigenous and Tribal Peoples in Independent Countries, *supra* note 72, Article 1(2); United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 41, Article 33. The issue becomes particularly contentious when the state denies recognition to traditional groups who would otherwise qualify for special legal protection; see e.g. Framework Convention Advisory Committee, Third Opinion on Bulgaria, 11 February 2014, para. 28. See generally G. Pentassuglia, "Protecting Minority Groups Through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence", in A. F. Vrdoljak (ed.), *The Cultural Dimension of Human Rights* (Oxford University Press, Oxford, 2013), pp. 104-112.

¹⁰⁰ G. Pentassuglia, "The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?", 19 *International Journal on Minority and Group Rights* (2012) p. 1; *id.*, *supra* note 3, p. 300.

¹⁰¹ *United Communist Party of Turkey and others v. Turkey*, Judgment of 30 January 1998, Reports 1998-I, para. 57. See also *Stankov and the United Macedonian Association Ilinden v. Bulgaria*, Applications Nos. 29221/95 and 292225/95, Judgment of 2 October 2001, para. 97 ("[i]n a democratic society based on the rule of law, political ideas which challenge

From the perspective of internal self-determination, the ability of the group to articulate claims operates in two overlapping directions. It is suitable for enabling degrees of pluralism and ‘representation’ (within the meaning of the 1970 Declaration) in the relationship between the government and the group, and it can be instrumental in pursuing new institutional or constitutional arrangements through democratic means. It can also work within the group itself to the extent that sectors of it have a different understanding of the group’s identity and/or want to question the way in which the group characterises itself or intends to pursue its objectives.¹⁰²

5.2 *The Weighing of Claims through Group Participation*

As I mentioned, ethno-cultural minority groups, including sub-state national communities, are entitled to partake in the process of internal self-determination on the basis of a variety of participation rights, ranging from general voting rights to rights of ‘effective’ involvement in decision-making that is bound to affect them. At its core, that means that their claims have to be taken seriously by actively seeking meaningful group engagement and/or consent as part of a continuing relationship between the state and the wider political community. However, a key challenge to international human rights law is how to measure the relative weight of the rights claims involved, particularly in the event that a ‘national’ group demands stronger forms of protection such as political and language autonomy on a territorial or non-territorial basis or even some form of nationwide power-sharing. Is there a legally significant way to assess such claims that is relatively independent of practical modalities, selective preferences or military realities?

In complex cases – and even more so in cases of conflict – internal self-determination should be regarded as providing the context for rights and duties to negotiate in good faith over the nature of the state. From a process-oriented perspective, the central issue should be whether or not the claims are sufficiently strong to rebut the presumption of authority and viability of existing arrangements within the state. To the extent that group accommodation is primarily designed to mitigate the impact of certain group-related pathologies that arise from multiple (re-)allocations of sovereign power actively pursued or validated by international law, group participation in the self-determination process can only, relatedly, serve the purpose of remedying or offsetting those pathologies, that is, certain forms of majoritarian (cultural) domination or oppression that have emerged (or might emerge) as a result of those (re-)allocations. In other words, whether or not some form of injustice needs to be corrected by the state, rather than ethno-cultural or national identity alone, should provide a critical basis (at least a key concurrent basis) for assessing the legitimacy of certain claims.

This does not mean that all group claims or ‘national’ demands may require a rearrangement of sovereignty authority. In fact, in several cases the group’s demands can be met by the state by acknowledging in law and public policy the multinational (or multicultural) dimension of the political community and by respecting, protecting and fulfilling the rights of persons belonging to the group to their identity.¹⁰³ It only means that greater forms of protection beyond typical associative freedoms and cultural guarantees do not automatically derive from identity claims per se and need to be tested as part of a credible human rights discourse. Exclusion from state-formation in its various forms and/or unequal access to government, systematic attempts at forced assimilation into a singularly defined ‘national’ identity and/or coercive measures involving state-sponsored violence, the abolition of previous levels of self-government, or a combination of these, they all represent some of the most obvious threats faced by the groups claiming some ‘thicker’ measure of ‘effective’ participation in decision-making on a territorial or non-territorial basis. As I hinted at in Section 2, some of these pathologies have been ‘cured’ (at least partially) upon the very creation or enlargement of a state. Others, such as the exclusion of indigenous communities from the acquisition of sovereign power or otherwise decision-making authority, have been retrospectively addressed by human rights law in various ways, including an open recognition of indigenous autonomy under the 2007 UN Declaration. In a significant number of other cases, the pathologies have remained unresolved.

the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means”).

¹⁰² See below, Section 5.3; see also A. Buchanan, “Liberalism and Group Rights”, in J. L. Coleman and A. Buchanan (eds.), *In Harm’s Way: Essays in Honour of Joel Feinberg* (Cambridge University Press, Cambridge, 1994), p. 1, at p. 13.

¹⁰³ See e.g. Committee on Economic, Social and Cultural Rights, *Right of Everyone to Take Part in Cultural Life: General Comment No. 21*, U.N. GAOR, E/C.12/GC/21, 21 December 2009, para. 55(e).

What matters here is, not (or not only) whether any particular form of group accommodation proves acceptable in any particular case, but rather the capacity of internal self-determination to enable a lucid *case-by-case* assessment of the extent to which the group has been affected by certain distributions of sovereign power buttressed by an international legal order of which human rights are an important internal counterpoint. This approach works towards distinguishing claims, including ‘national’ claims, that are ultimately a (rebuttable) call for an internal reconfiguration of the state and its sovereignty from more basic claims to group protection that only question the outer limits of particular measures within a state’s jurisdiction.¹⁰⁴

5.3 *Proportionality: Representation, Self-Identification, and Rights Balancing*

Assuming there exists a *prima facie* legitimate claim to some rearrangement of authority within the state, the group still needs to demonstrate that the claim can in practice be pursued within the wider process of self-determination through proportionate means or modalities. Here several complexities affect the viability of group claims to autonomy or other form of power-sharing as they involve issues of representation, individual self-identification, and rights balancing and protection. Each of these dimensions would require a separate analysis that, for reason of space, is impossible to conduct in this context. Only a snapshot of their cumulative legal significance will be offered here.

The law of self-determination has hardly addressed the question of how representative a claimant should be in order to validly sustain the claim. For example, the representativeness of national liberation movements or similar structures was either assumed due to socio-political circumstances or considered on a case-by-case basis by UN and regional organisations.¹⁰⁵ Although the so-called ‘agency problem’ is in no way unique to group claims, issues of representation have surfaced in relation to minority group grievances or wider issues of participation in decision-making.¹⁰⁶ Global or regional human rights adjudicators have frequently deferred to the group structure’s self-perception as a representative body or relevant domestic patterns of interaction between the state and communal entities as legal persons. Nevertheless, they have also upheld a measure of pluralism internal to the group’s practices and an effective level of participation and inclusiveness among the various sectors of the group.¹⁰⁷ What is important for our purposes is that the claim to some rearrangement of authority can demonstrably be seen to derive from a reasonably adequate and proportionate process of informed decision-making *within* the group, in its various ramifications, that can at least mitigate the risk of elite manipulation and abuse in articulating the group’s interest. Models of democratic accountability based on voluntary electoral procedures (including some form of local popular vote by analogy with external claims, as noted earlier) are normally regarded as best positioned to ensure the legitimacy of the relevant body (or bodies) acting on behalf of the community.¹⁰⁸ Even so, it has been convincingly argued that group members that choose not to register on special electoral rosters or are otherwise members of smaller voluntary (non-elected) organisations should equally have a stake in increasing the legitimacy of group structures as they engage with state authorities.¹⁰⁹

An especially problematic issue in this context is the role of individual self-identification in relation to claims made by the group and/or assumptions about group identities made by the state. While such claims normally presuppose a legitimate institutional agent that is capable of making them (or at least individuals who can legitimately voice the shared collective interest), each putative member of the group is in principle free to opt out of her/his putative group membership and/or to

¹⁰⁴ For a broadly similar point on the question of sovereignty in the context of indigenous rights, see e.g. R. Kuppe, *supra* note 94, pp. 111-118.

¹⁰⁵ A. Cassese, *supra* note 6, p. 167.

¹⁰⁶ See e.g. M. Iovanović, *Collective Rights: A Legal Theory* (Cambridge University Press, Cambridge, 2012), pp. 135-140.

¹⁰⁷ See e.g. the jurisprudence of the European Court of Human Rights and Inter-American Commission on Human Rights, respectively: *Jewish Liturgical Ass’n Cha’are Shalom ve Tsedek v. France*, Application No. 27417/95, Judgment of 27 June 2000; *Mary and Carrie Dann v. United States*, Report No. 75/02, Case 11.1140, 27 December 2002. See generally G. Pentassuglia, *supra* note 55, pp. 142-147.

¹⁰⁸ M. Iovanović, *supra* note 106, pp. 138-140. By analogy with external claims (*supra* note 84), the critical point here is that the body works towards achieving a genuine form of consensus across the group as opposed to merely narrow electoral majorities.

¹⁰⁹ P. Vermeersch, “Minority Associations: Issues of representation, internal democracy, and legitimacy”, in M. Weller (ed.), *supra* note 41, p. 682, at pp. 695-701.

challenge any group status, or lack of it, imposed upon them by the state.¹¹⁰ However, significant challenges arise when it comes to balancing out collective and individual interests in power-sharing agreements, which are themselves seen as a typical outcome of self-determination arrangements in divided societies. In cases like Bosnia, Northern Ireland, South Tyrol/Trentino, or Cyprus, the arrangements have been such that individuals, including members of smaller minorities, XX had either to declare their affiliation with any of the dominant groups or to accept certain legal consequences resulting from their free identification as belonging to a group other than the dominant one or to no particular group.¹¹¹ One can safely argue that, under international human rights law compulsory individual identifications with (or membership in) the group are not permitted, be they enacted through legislation or other domestic practices. Less clear, though, are the terms of the balancing act between group-based protections and individuals who freely self-identity as ‘other’ in relation to pre-defined positions (e.g. certain political offices or types of employment). For example, in *Sejdić and Finci v. Bosnia and Herzegovina*, the European Court of Human Rights concluded that Bosnia’s power-sharing agreement signed at Dayton in 1995 was incompatible with Article 14 of the European Convention on Human Rights insofar as it excluded members of communities other than the Bosniak, Croat and Serbian ones (who had freely so self-identified) from certain political offices.¹¹²

On all theoretical and practical accounts, group accommodation arrangements invariably affect the position of individuals within and outside the group. Particularly in the context of self-determination arrangements, the debate over the impact of group claims on the rights of individuals should be understood as a debate over dynamic conflicts between potentially competing human rights – conflicts, that is, that are *internal*, not external, to human rights practice itself. From the standpoint of a process-based group claim to some rearrangement of authority within the state, it is thus essential that the group articulates its claim in such a way that shows respect for the rights of those who may be considerably affected by it. This requires at least credible guarantees against excessive group-based restrictions that amount to a wholesale denial of rights, and protection against any encroachments on core (usually non-derogable) fundamental rights.¹¹³ Needless to say, any judgment of proportionality must be context-sensitive and subject to a continuing process of contestation and scrutiny. International human rights law has developed sophisticated techniques for probing the impact of group claims on a case-by-case basis, and adjudicators have, more often than not, upheld the arrangements subject to revisions. As I have indicated elsewhere, the assessment of complex forms of accommodation (proposed or in place) can draw upon a range of indicators or parameters to inform proportionality reviews, including the nature of the claim and decision-making involved, the nature and depth of potentially discriminatory effects, the type of group and practices (e.g. systemic or otherwise), the level of support for the arrangements, and/or broader objectives like peace preservation.¹¹⁴

For present purposes, the broader point is that the cumulative legitimacy of group demands, including ‘national’ demands, should not be limited to articulating claims and establishing their *prima facie* legitimate aims, but needs also to be followed through on the basis of concrete modalities that can be deemed proportionate in any particular case. As noted in Section 3.3, the ‘relational’ approach that is reflected in the *Reference* case and other incidents of practice, all seem to point to hybrid, yet ‘meaningful’, means of combining inter-group protection with the rights of others based on inclusive notions of representation and participation in decision-making.

¹¹⁰ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 35; *Ciubotaru v. Moldova*, Application No. 27138/04, Judgment of 27 April 2010 (ECtHR); *Sandra Lovelace v. Canada*, Comm. No. 24/1977, Views of 30 July 1981, Human Rights Committee, Annual Report (1981), p. 166; United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 41, Articles 33(1), 44, 46(2)-(3).

¹¹¹ See e.g. Framework Convention Advisory Committee, Third Opinion on the United Kingdom, 30 June 2011, paras. 44-47; Third Opinion on Cyprus, 19 March 2010, para. 39; Fourth Opinion on Cyprus, 18 March 2015, paras. 11-12; Third Opinion on Italy, 15 October 2010, para. 53.

¹¹² *Sejdić and Finci v. Bosnia and Herzegovina*, Applications Nos. 27996/06 and 34836/06, Judgment of 22 December 2009.

¹¹³ For examples and critiques, see G. Pentassuglia, *supra* note 3, pp. 308-316.

¹¹⁴ *Ibid.*, pp. 314-316.

6 Conclusions: Connecting the Dots

In this article I have addressed selective international legal dimensions of the self-determination/human rights/nation-state nexus as they relate to certain claims made by ethno-cultural minority groups, particularly those of a ‘national’ variety. While the complexities of group accommodation have been effectively charted within narrow historical or thematic contexts, traditional scholarly preoccupations with the existence (*vel non*) of a distinct legal right (e.g. to secession, autonomy, or democratic governance) that can benefit the entity in question (a ‘people’ or some other population group) have resulted in limited attention to a deeper understanding of what is at stake when it comes to addressing group claims or some of them, or otherwise the outlining of a framework for assessing the legitimacy of such claims. With this in mind and a primary focus on the internal configuration of states, I have sought to explain the role of international human rights law in dealing with group claims that lie at the intersection of the aforementioned triangular nexus in a way that retains the value of group identities without falling prey to claims based on primordial title or pristine national authenticity, the logic of *fait accompli*, or otherwise minimalist views of the democratic entitlement and its human rights components.

I have argued that, whatever our preferred reading or understanding of a ‘nation’, the reality of states as legal entities is – almost invariably – the reality of a ‘public culture’ coalescing around a dominant group. As states look ‘faceless’ legal persons from an international law standpoint, the international legal order has typically sought to accommodate, and yet discipline, ‘national’ demands as an area of inter-group diversity relating to the content and shape of sovereignty – from relatively straightforward respect for cultural diversity to complex forms of dislocation of power. While not all such demands seek, or even require, significant degrees of political power or decision-making authority, many claimants have used the language of ‘national’ self-determination to articulate those demands.

Against this backdrop, I have critiqued some popular themes surrounding the ‘national’ self-determination claim: that there is a linear continuity in thinking about self-determination as a legal entitlement; that self-determination is fundamentally about independence or secession; that it operates as an inherent unilateral right; and that it is defined by the universal aspiration of groups who characterise themselves as ‘peoples’ or ‘nations’ in a broadly cultural sense.

At the same time, I have also noted that the limitations and uncertainties arising from these themes have fed into broader perspectives that lead to questioning the very validity of ethno-cultural ‘national’ claims, the ability of international law to relate to complex socio-political realities on the ground, or the permissibility or desirability to respond to those claims in distinctive ways. Although these perspectives arguably account for much of the ambivalence of international law towards asserted group identities, I have contended that group identities including ‘national’ sentiments are no less real underlying social determinants than the political projects or priorities that help mediate them (or some of them) and, more importantly, feed into a legal and political narrative that is distinctive to the creation and functioning of the state.

I have thus argued that those conceptual instabilities do not merely mirror the uncertainties of the positive law of self-determination vis-à-vis ‘national’ demands but raise the broader question of whether there is a way for international law to capture the legitimacy of group claims, including those made by sub-state groups who view themselves as separate ‘nations’ or somehow distinct communities. More specifically, I have discussed the question of whether one can make sense of the self-determination/human rights/nation-state nexus in ways that are not reduced to accepting or rejecting seemingly ‘absolute’ claims to self-determination or solely enabling legal-institutional ad hocism, but can instead draw upon human rights discourse to provide a general framework for assessing group-related pathologies that are (directly or indirectly) of international law’s own making.

I have then sketched out the basics of a process-based human rights approach to group claims of the sort considered in this study, regardless of distinctive outcomes. As part of a wider process of internal self-determination (ideally under respected external scrutiny in critical cases), I have captured at least three international legal (and normative) dimensions or layers the cumulative impact of which is arguably essential to probing, in a context-sensitive manner, the legitimacy of such claims: 1) group recognition and claim-making; 2) group participation and the relative weight of claims; and 3) the proportionality of the modalities or means of pursuing the claims. None of them can pre-judge any

particular claim, but all of them represent at least some of the central issues that need to be addressed in contemporary self-determination practices.