Conceptualizing National Identity in Self-Determination Practice

A Cross-Cutting International Law Analysis

[Forthcoming in Hungarian Yearbook of International and European Law (2023) Vol 11, 238]

Gaetano Pentassuglia[*]

Abstract

While national identity disputes continue to proliferate – from secessionist claims to controversial ideas of national autonomy and indigenous sovereignty – there has hardly been any international cross-cutting (theoretically-driven) analysis of national identity issues per se, and hardly any conceptual assessment informed by legal (mainly adjudicatory) international (and international-related) practice. Drawing on international law and interdisciplinary scholarship, the aim of the inquiry is to fill this gap by offering a selective intertemporal investigation into, and articulation of, the hybridity with which international legal discourse has responded to such pressures in the context of definitional and conceptual matters linked to the right of 'peoples' to self-determination. Against general baseline meanings of 'civic' and 'cultural' national identity, I will subdivide the analysis into five broad areas of discussion, seeking to uncover the conceptual dimensions of peoplehood (and nationhood) debates in specific judicial/institutional settings, to expose their complexities, and to indicate a way forward. I will argue that there has been a move over time towards a more substantive view of national identity in international law, yet no universal or automatic test of peoplehood or nationhood applies to it; and that such a hybrid move should be viewed as neither a concession to ethnocentrism, nor merely a form of legal argumentation used to soften or even eradicate the 'elemental force' of national claims.

Keywords: national identity, self-determination, Aaland Islands, Kosovo, Quebec

1. Introduction: Navigating Nationhood as a Broad Concept

Their precise chronology and genealogy aside, it is known that the 'civic' and 'cultural' ideas of 'nation' stand for two analytically different concepts of national identity – one built around the 'political' state and its institutions, the other seeking to capture the substantive features of the community, within or without an existing state.[1] This broad distinction – familiar to

[*] Professor of International Law, Centre for the Study of Law in Theory and Practice, Liverpool John Moores University; Honorary Senior Fellow, University of Liverpool

[1] For an extensive discussion of these general concepts, *see* among others, Anthony Smith, *The Ethnic Origins of Nations*, Blackwell Publishers, Oxford, 1986; Anthony D. Smith, *Nationalism: Theory, Ideology, History*, Polity Press, Cambridge, 2010; Federico Chabod, *L'idea di nazione*, Editori Laterza, Bari, 1962; Ernest Gellner, *Nations and Nationalism*, Blackwell Publishing, Oxford, 1983; David Miller, *On Nationality*, Oxford University Press, Oxford, 1997; Neil MacCormick, 'Nation and Nationalism', in Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Clarendon Press, Oxford, 1982, pp. 247-264; Benedict Henderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London, 1983; Isaiah Berlin, 'Nationalism: Past Neglect and Present Power', in Henry Hardy (ed.), *Against the Current: Essays in the History of Ideas*, The Hogarth Press, London, 1979, pp. 333-355; Yael Tamir, *Why Nationalism*, Princeton University Press, Princeton, 2019; Neil Walker, 'Teleological and Reflexive Nationalism in the new Europe', in Jacint Jordana *et al.* (eds.), *Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, Routledge, London, 2019, pp. 163-180.

political scientists, historians, and other experts – has been far from unknown to international institutions, at least as a general conceptual baseline rather than the expression of specific (let alone entrenched) international law categories.

In 2006, for example, 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.[2] While noting the impossibility of arriving at a common definition of the concept within the Council of Europe membership, the resolution embraces the findings of a survey of state practice by distinguishing the notion of '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:

> "speaking a certain language and characterized by a set of similar cultural and historic traditions, by similar perceptions of its past, similar aspirations for its present and similar visions of its future".[3]

Theoretically, the political ideal of national unity or national identity has been associated with the spatial dimension of the community – the territory within which its members become conscious of, and wish to retain, their identity – and the utilitarian pursuit by the state (whose all-encompassing political unit is the 'nation') of the maintenance of 'law and order' and other broad institutional (and economic) ends. By contrast, the 'cultural' approach to national identity fundamentally appeals to a distinctive historical community bound together by certain traits across generations, and normally linked to a homeland, regardless of the way(s) in which that community manifests itself politically and/or institutionally.[4]

Unsurprisingly, these visions have led to prioritizing subjective or objective factors, respectively, in underpinning national claims and the right to self-determination more broadly. The political approach lays emphasis on a territorially situated set of individuals' free will, on the 'people's choice and aspirations, not their social or cultural identity per se. In the context of territorial changes in sovereignty, plebiscites, and more recently, referenda have been treated as being important (though not exclusive or automatic) methods of articulating that political sentiment through majority rule.[5] The cultural approach outlined above values free choice and critical reflection but does assume national identity to be for the most part historically unchosen

---

[2] Recommendation 1735(2006), *The concept of "nation"*, adopted by the Assembly on 26 January 2006 (7th Sitting).

[3] Id. para. 5.

[4] Alfred Cobban, *National Self-Determination*, Oxford University Press, Oxford, 1944, pp. 59-60. As explained by David Miller, for example, "[a] nation certainly has a territorial homeland, and its political system may be one of its distinguishing traits, but over and above that it has, or is believed to have, distinctive cultural traits". *See* David Miller, 'Nationalism', in John Dryzek *et al.* (eds.), *The Oxford Handbook of Political Theory*, Oxford University Press, Oxford, 2008, p. 532.

[5] In his early 1930s work on the 'principle of nationalities' Robert Redslob found a key dimension to this approach in the rationalist and Enlightenment thinking of the 17th and 18th centuries, resting on "l'axiome de la liberté individuelle" and thus the notion that "la souveraineté du people" entails "le libre choix de ses gouvernants". Robert Redslob, 'Le principe des nationalités', *Collected Courses of the Hague Academy of International Law*, Vol. 37, 1931, pp. 6-8. Rousseau's theory of popular sovereignty played a particularly significant role in this regard. *See* Jörg Fisch, 'Peoples and Nations', in Bardo Fassbender & Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012, p. 32. The most basic (free choice) ideas of political self-determination and participation rights in contemporary international law clearly echo this approach, *see e.g.* Antonio Cassese, *Self-determination of peoples: A legal reappraisal*, Cambridge University Press, Cambridge, 1995, pp. 319-320.

and thus looks at some objective elements that are thought to inform the substance of that identity beyond merely political-institutional mechanisms.[6]

Despite the relative clarity of these visions, conceptual and practical crossovers have been apparent throughout history. The 2006 Council of Europe resolution itself concedes that those different ideas of a nation are sometimes used 'simultaneously' or that the term is sometimes used with 'a double meaning', while in other cases "two different words are used to express each of those meanings".[7] There is no shortage of examples of such crossovers: the 'political' state routinely seeks to foster a sense of tradition and communal values to map onto a set of institutions;[8] plebiscites and/or referenda have either raised issues around the most appropriate electoral unit that can encompass the substantive ('objective') community concerned,[9] or have been questioned as the best way of capturing an 'authentic' people's will,[10] or have been side-lined and eventually abandoned due to underlying geopolitical factors that have dispensed with the 'will of the people' altogether.[11] At the same time, the impossibility of focusing exclusively on objective factors has been equally made clear. The intrinsically political 'self' involved in the community's decision-making requires (or presupposes) an established form of political agency to articulate that community's national identity and is thus inconsistent with any claims rooted in merely social determinism, ethnocentrism, or radical nationalism (and irredentism).[12]

Against this complex backdrop, international law has generally pointed to a certain (implicit) idea of national identity, one largely or primarily defined by territoriality and its attendant political processes.[13] Examples of this line include, but are not limited to, the traditionally instrumentalist (culturally neutral) statehood/sovereignty criteria set out by the Montevideo Convention on the Rights and Duties of States (1933), and the idea of institutional

---

[6] These elements and their combination clearly vary from case to case and none of them is in itself conclusive, but, at their most basic level, they revolve around distinctive national memories and histories, distinctive language factors, or religious traditions, or otherwise a distinctive national public culture that furnishes the community with an overarching and intergenerational sense of belonging. For discussion in political science and international law, *see e.g.* Miller 1997, Chapter 2; Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', *Wisconsin International Law Journal*, Vol. 7, Issue 1, 1988, pp. 90-91.

[7] Recommendation 1735(2006), para. 5.

[8] Cobban, for example, citing thinkers like Rousseau, Burke and Mazzini, notes that the Western political idea of a nation is effectively the product of a combination of "free individual choice with a consciousness of the inherited traditions and values of communal life". Cobban 1944, p. 58. The broader point is that a sense of national identity develops as a historical process and can thus work within the state regardless of the pre-existence of a 'nation' as a cultural community of some kind. Miller 1997, pp. 90-99.

[9] *See e.g.* Berman 1988, p. 93. *See also* below, Sections 3.2 and 4.1.

[10] Redslob cautioned that failure to have due regard to objective attachments to the territory (history, language, *etc.*) as a pre-requisite for suffrage led to plebiscites being merely acts of volatile and momentary decision-making, unable to capture an authentic national sentiment. *See* Redslob 1931, pp. 36-38.

[11] In the context of first-post war territorial settlements, Fisch notes that although some plebiscites were held, such as the one in Upper Silesia, the basic decisions about territorial distribution "remained the result of power, not of the wishes of the peoples (or of nations)". Cobban 1944, pp. 41-42.

[12] Ernest Renan's idea of a nation as a 'daily plebiscite' drew on the political element of mutual recognition. Ernest Renan, *Qu'est-ce qu'une Nation*, Calmann-Levy, Paris, 1882, p. 172. For a small but significant shift in the meaning of 'nation' as a collective political agency conferring authority on political institutions, in line with the ideal of popular sovereignty, *see* Miller 1997, p. 30; *see also* Berman 1988, p. 92, arguing that exclusive reliance on objective criteria makes the democratic dimension to "self-determination […] harder to justify". Somewhat prophetically, Redslob noted in the early 1930s that a purely objective approach usually served as a cover for imperialistic territorial expansion. *See* Redslob 1931.

[13] For a perceptive theoretical discussion of international law's functionalist approaches to jurisdictional control over land, *see* Margaret Moore, *A Political Theory of Territory*, Oxford University Press, Oxford, 2015, pp. 89 *et seq.*

nation-building linked to the decolonization of territorially (not culturally) pre-defined units.[14] And yet, in retrospect, there has been relentless pressure on the international community to address more substantive national identity matters within political communities (at state and sub-state levels).[15] The League of Nations practice around 'national' self-determination, with its earlier antecedents to accommodate distinct nationalities, as well as the various subsequent attempts to inject a measure of protection for culturally defined national groups are obvious illustrations of that.[16] Traditionally, institutional responses and scholarly analyses have been dominated by the need to mitigate the potential or real excesses of nationalism (secessionism, aggressive expansionism, *etc.*), by highly sectoral discussions of the position of specific groups and their members, or, at the other end of the spectrum, by dismissing such matters as 'tribalism'.[17] While national identity disputes continue to proliferate – from secessionist claims to controversial ideas of national autonomy and indigenous sovereignty, despite (or because of) ever greater globalizing processes – there has hardly been any international cross-cutting (theoretically-driven) analysis of national identity issues per se, and hardly any conceptual assessment informed by legal (mainly adjudicatory) international (and international-related) practice.

The aim of the inquiry is to fill this gap by offering a selective intertemporal investigation into and articulation of the hybridity with which international legal discourse has responded to such pressure, particularly in the context of definitional and conceptual matters linked to the right of 'peoples' to self-determination.[18] Drawing on international law and interdisciplinary scholarship and using 'civic' and 'cultural' views of national identity as general parameters, I will seek to uncover the conceptual dimensions of peoplehood (and nationhood) debates in specific judicial/institutional settings, to expose their complexities, and to indicate a way forward. I will subdivide the analysis into five broad areas of discussion: the early 20th century post-war approach (Section 2); the early UN debates and later decolonization

---

[14] The international law principle of 'territorial integrity' is consequently regarded as a way of marking off distinctive physical spaces for the legal exercise of sovereign authority, not a way of representing distinctive communities *per se*. Hans Kelsen famously described sovereignty as the reflection of a legal, not sociological, community, and thus the state as a legal/institutional order of a certain kind. Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', *Harvard Law Review*, Vol. 55, Issue 1, 1942, pp. 64-65; Hans Kelsen, *Principles of International Law*, Holt, Rinehart and Winston, New York, 1967, p. 183. Pasquale Stanislao Mancini, one of the most fervent champions of the principle of nationalities in the second half of the 19th century, distinguished the idea of a nation as a historical/cultural entity (as he saw it) from the idea of a state as a subject of international law. Enrico Catellani, 'Les Maîtres de l'école italienne du droit international au XIXème siècle', *Collected Courses of the Hague Academy of International Law*, Vol. 46, 1933, p. 714.

[15] This is arguably consistent with the historically 'social', as opposed to statist/institutional, conceptualizations of international law, linked to groups of human beings (*gens*, *populus*, and *natio*) some of which frequently (though not always) understood in a substantive sense of communities of common descent or customs. Fisch 2012, pp. 28-30.

[16] The 2006 kin-state minorities resolution of the Council of Europe, together with a plethora of hard and soft law international instruments in the field, have been widely documented.

[17] Thomas Franck, 'Post-modern tribalism and the right to secession', in Catherine Brölmann *et al.* (eds.), *Peoples and Minorities in International Law*, Kluwer Law International, Dordrecht, 1993, p. 3; Thomas Franck, 'Clan and Superclan: Loyalty, Identity and Community in Law', *American Journal of International Law*, Vol. 90, Issue 3, 1996, p. 359. Franck's idea of tribalism chimes with early views of national claims as explosive primitivism in law and other fields. *See* Nathaniel Berman, '"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law', *Harvard Law Review*, Vol. 106, Issue 8, 1993, p. 1793; Berman's view of an early 20th century international legal "matrix of modernism" (Id. p. 1804) is presented precisely as an attempt to control a perceived primitive force that needed to be eradicated or at least considerably tamed.

[18] Indeed, the explicit or implicit focus will be on the law of self-determination from a variety of angles; as discussed later on, the term 'peoples' (from the high status of *populus* in Roman times to the pejorative connotation of common people in the 16th-18th centuries) has arguably come to absorb directly or indirectly the impact of national claims in current international law, while the term 'nations' has predominantly been used to legally signify states as political/institutional entities.

process (Section 3); the 'modern' human rights framework, including specific regional standards (Section 4); the Western Balkans case (Section 5); and the seminal lessons from constitutional adjudication (Section 6).

As I further explain in the reconstructive concluding section, the general argument running through this work is that *(i)* despite the enduring significance of the territorial/civic approach, there has been a move over time towards a more substantive view of national identity in international law, yet no universal or automatic test of peoplehood or nationhood applies to it; and that *(ii)* although substantive national identity issues remain among the most significant socio-cultural determinants of domestic and international affairs, the hybridity of such a move should be regarded as neither a concession to ethnocentrism, nor merely a form of legal argumentation used to soften or even eradicate the 'elemental force' of national claims.[19]

2. The Early Post-War Approach: Taming National Claims in International Law

2.1. National Identity in Times of Disruption: The Aaland Islands Case

While it is safe to consider the early 1920s *Aaland Islands* case the first of its kind, setting the tone of the international law debate over self-determination for decades to come,[20] little has been said of its conceptual implications for national identity. Broadly speaking, the dispute between Finland and Sweden revolved around the question of whether the "inhabitants" of the Aaland Islands should "be authorized to determine forthwith by plebiscite whether the archipelago should remain under Finnish sovereignty or be incorporated in the Kingdom of Sweden".[21] However, the seemingly neutral language used by the League Council to describe the Islanders gave way to a range of important perspectives on national identities as the International Commission of Jurists first, and then the Commission of Rapporteurs, elaborated on the issues at stake.

At least three dimensions of such identities are reflected in the terminology employed by both bodies, and especially by the Jurists: the underlying tension between the 'nation' and the 'state'; the recognition of some of the most typical substantive elements of national identity; and the idea of groups being nested within larger political units.

From an international law standpoint, both the Jurists and the Rapporteurs emphatically stated that the Islanders' secession from Finland (and indeed, any similar claim under those circumstances) would be wholly incompatible with "the very idea" of the state as a framework of stability (Jurists) and "as a territorial and political unity" (Rapporteurs).[22] Although the point focused on territorial separation by a national group and did not rule out other forms of accommodation, 'state' ultimately meant a set of institutions rather than a 'nation' in the sense of a distinctive community of people. The Jurists somehow recognized a 'national' *droit acquis* in favor of the Islanders (equal or akin to the right of the Finnish 'nation' to seek independence from the Russian Empire) at a time when, in their view, the 'normal' rules of positive international law, including traditional prerogatives of sovereignty, did not apply because of

[19] This is a quote from Redslob's work cited by Berman 1993, p. 1810. Berman himself (Berman 1988, p. 94) reduces self-determination legal discourse in this context to a "form of argument".

[20] *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.

[21] Id. (Jurisdiction), p. 3.

[22] Id. p. 5; Id. (Merits), p. 4.

deep political uncertainty.[23] However, neither the Jurists nor the Rapporteurs grounded sovereignty under international law in pre-existing and unilateral national claims.

The Jurists nevertheless acknowledged that, as Finland itself was in a state of flux and transformation, the Islanders had clearly established their political and cultural aspirations, both of which strongly informed their sense of national identity as distinct from Finnish mainland's. They emphasized the Islanders' repeated political mobilization, their cultural homogeneity, and their attachment to a homeland.[24] The Rapporteurs did not deny the Islanders' national identity, but they did place it in the context of a fully constituted state – Finland – of which they now represented a minority – a smaller group within a wider political community.

It is precisely the nesting of the Islanders within wider Finland that can explain the rather tentative terminology occasionally used by the Jurists and the Rapporteurs. On the one hand, the Jurists insisted throughout their legal opinion on the politically significant nationalist aspirations of the Finns and Islanders, respectively, and called for a balanced application of national self-determination against other (geographic, economic, and similar) considerations in times of disruption and dislocation.[25] On the other hand, they pointed to the need to consider, in the interest of peace and stability, self-determination claims "of certain sections of a nation, which are sometimes based on old tradition or on a common language and civilization".[26] This arguably indicated a perceived 'normal' scenario (one to aspire to) in which distinct nationalities are somehow nested within a wider political nation.[27]

The Rapporteurs' comments are much sharper in terms of closely tying the Islanders' legal status to that of a national minority within Finland, but they too straddle political and cultural meanings of national identity by describing the population of the Islands "as a small fraction of the Finnish nation […] a small minority, a small fraction of a people", one not to be put on the same footing "as a nation taken as a whole".[28] More ambiguously, though, they affirmed in no uncertain terms the "Finnish people['s] […] clearly defined territory and a well-developed national life", as well as "the natural right of the Finns, born of inherent justice, to proclaim their independence".[29] The Rapporteurs' vision ultimately seems to be one in which a sub-state national identity (explicitly or implicitly treated as such by both the Jurists and Rapporteurs, alongside a state-wide "national life") becomes recognized within the institutional framework of the state, though it is left unclear how national identities play out at different levels, and amongst themselves, within that framework.

---

[23] In essence, the Jurists argued that given the political and territorial disruption that both Finland and the Islanders were undergoing outside the domain of positive law, the former could not force upon the other national group a political status that the latter refused to accept. Id. (Jurisdiction), p. 10.

[24] Id. p. 12. Importantly, the Jurists began by emphasizing the increasingly 'emphatic' and distinct political demonstrations of the Islanders (separate from Finnish agitation) as central factors in addition to more cultural/territorial elements. The fact that the political agency of the Islanders was seen as being at the heart of the dispute thus precluded any idea of national self-determination rooted exclusively in common tradition.

[25] Id. p. 6, "a solution in the form of a compromise […] may be necessary according to international legal conception."

[26] Id.

[27] The implicit use of the term 'nation' as both a signifier of distinctive communities and the expression of an overarching political community of which the state was the institutional manifestation reflected the overlap of meanings of national identity discussed in Section 1.

[28] Id. (Merits), p. 3. The political/territorial dimension of the concept is apparent.

[29] Id. The focus on the 'natural right' of the 'Finns', their 'national life' and their desire for independence seemed more clearly to speak to a certain substantive (almost pre-political) idea of national identity underpinning the newly emerging state.

2.2. Qualifying National Identity

The League of Nations post-war settlement more generally reflected a similar overlap or interaction of meanings of national identity. Specific provisions concerning Polish sovereignty under the Treaty of Versailles and the so-called Polish Minorities Treaty, respectively, illustrate the point.[30] At one level, the restoration of the 'Polish nation' was made clear in the settlement, in connection with cultural (as opposed to merely political/institutional) criteria.[31] This involved not only Poland's qualified right to refuse citizenship to those Germans who had settled in Poland after January 1908 in the name of protecting the 'Polish' character of the nation, as well as legally entitling Poland to offer citizenship to its kin-nationals based both in Germany and abroad. It also involved a legal right of non-Poles (primarily Germans) in newly restored Poland to opt for 'their own' nationality (in the formal sense of citizenship, but also de facto cultural affiliation) as one significant implication of the new territorial status quo.[32] At the same time, the automatic change of citizenship for a range of non-Polish nationalities (formal 'denationalization') resulting from this change in sovereignty under Articles 3 and 4 of the Polish Minorities Treaty, coupled with specific provisions on the protection of minorities (against cultural 'denationalization'), precluded a nationally chauvinistic model of statehood (as opposed to a territorial/civic one), while still recognizing that national identities must be protected at different levels of the state.[33]

Along broadly similar lines, the PCIJ confirmed the qualified endorsement of national aspirations in the earlier post-war settlement. In the 1923 *Polish Nationality* case,[34] it rejected the claim that it was for Poland, and thus Polish law alone (free of League of Nations supervision), to identify those Polish citizens who would benefit from minority protection under the 1919 treaty (particularly under Article 4), with a view to protecting Poland as a 'national' state. Echoing the kind of political and institutional/sovereignty transition described by the Jurists in the *Aaland Islands* case, the PCIJ upheld the authority of the treaty, including those crucial provisions which established a right to Polish citizenship, as non-derogable, 'fundamental' law. It explained more broadly that the minority protection system was meant to prevent the newly established or enlarged states from refusing their citizenship on 'racial, religious or linguistic' grounds, despite the attachment of the relevant groups to the affected territory.[35]

---

[30] Treaty of Versailles, 28 June, 1919, Article 91; Minorities Treaty Between the Principal Allied and Associated Powers and Poland [Polish Minorities Treaty], 28 June 28, 1919.

[31] Polish Minorities Treaty, first preambular recital. As such, 'nation' did not refer merely to a set of institutions, but rather to a distinctive 'national' majority underpinning the newly formed state. This was consistent with US President Wilson's (eventually rejected) proposal to recognize national minority/majority equality in the preamble to the League of Nations Covenant. David Miller Hunter, *The Drafting of the Covenant*, G.P. Putnam's Sons, New York, 1928, Vol. II, p. 91. Conceptually, a similar double meaning of national identity was implied by a separate Japanese proposal to secure equal protection of 'foreign nationals', whereby 'nation' and 'nationality' carried both political (state-related) and cultural (group-related) meanings. Id. pp. 388-389.

[32] Treaty of Versailles, Article 91 (focusing on the transfer of territories from Germany to Poland).

[33] The underlying legal point was the distinction between Polish aspirations as a specific dominant 'nationality' and Poland as a wider community: the former triggered the latter but did not, and could not, coincide with it. *See also* Catellani 1933, p. 728.

[34] PCIJ, *Question Concerning the Acquisition of Polish Nationality*, Advisory Opinion, 15 September 1923, Ser. B. No. 7, 1923.

[35] Id. p. 14. The Article 4 discussion revolved around a relatively minor point, namely the meaning of 'habitual residence' of the parents of non-Polish nationality (especially German parents) whose children were born in territories now belonging to Poland. The broader issue was the extent to which Poland was allowed to tailor its citizenship laws to 'nationality' criteria. Although its reasoning was at times convoluted, the PCIJ did refrain from elevating Polish 'nationality' to a foundational criterion of Polish citizenship. For discussion, *see* Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 35-37.

This logic also underlies the 1930 *Greco-Bulgarian* case,[36] in which the PCIJ accepted the cultural nationalist definition of 'community' put forward by Greece in the context of the 1919 Greco-Bulgarian Convention on 'reciprocal emigration',[37] but did not accept an expanded role of the kin-state as part of a plan to solve minority problems through total deference to the principle of nationalities (*i.e.* the implications of the Greek argument being that it would be for kin-states to settle communal matters between themselves on purely mono-ethnic grounds). The PCIJ effectively endorsed national/cultural ties within and across borders as a basis for determining the existence and dissolution of certain 'communities', but it did so to the extent that this implied the kin-state assisting, not displacing, the territorial/civic state of its kin-nationals.[38]

It thus seems reasonable to argue that the complex combination of political and cultural dimensions to the national identities encompassed by the post-war legal practice was such that the international community's approach focused primarily on preventing certain excessive variants of nationalism while refraining from endorsing a territorial/political state model in which those identities fell out of view.[39] The dynamic ambivalence of these ideas was bound to persist in later years.

3. Reassessing National Identity: The UN Era

3.1. Debating 'Nations' and 'Peoples' at San Francisco

The *travaux* of the UN San Francisco Conference, particularly in the context of the self-determination provision in Article 1(2) of the UN Charter,[40] offer important conceptual insights. Asked by the Coordination Committee to clarify the meanings of 'nations' and 'peoples', the Secretariat noted that 'nations' captured both states as 'definite' political entities and other political entities of a somewhat lesser (non-state) status, such as colonies, mandates and so forth. By contrast, 'peoples' referred more broadly to "groups of human beings who may, or may not, comprise states or nations".[41]

At one level, the distinction between the two terms – 'nations' and 'peoples' – was presented as a function of the political/territorial/institutional nature (*vel non*) of the entity in question, although the stated partial overlap between "peoples" and "states or nations" arguably diminished the significance of such a distinction. Nevertheless, the Drafting Committee confirmed the intention to proclaim the "equal rights of peoples as such" [as per the final wording of Article 1(2)] and reaffirmed that "equality of rights" in the provision extended to "states, nations, and peoples".[42] It is thus not unreasonable to argue that at least the concept of

---

[36] PCIJ, *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of the 'Communities')*, Advisory Opinion, 17 January 1930.

[37] The PCIJ endorsed the idea of a 'community' as "a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity […] in a sentiment of solidarity" and determined to maintain and preserve such traits. Id. p. 21. Greece had made clear that this idea should be understood to indicate distinct national communities. The 1919 treaty linked the concept of 'community' to such (communal) institutions such as churches and schools that were involved in the process of reciprocal emigration, even though it otherwise referenced "racial, linguistic or religious minorities" to describe its general purposes.

[38] This specifically applied to the allocation of residual proceeds from the liquidation of communal assets: for a general discussion, *see* Berman 1993, pp. 1855-1857.

[39] In other words, although it was impossible for the international community to ignore certain national claims, an opening to such claims came essentially to absorb potentially explosive forces as perceived at the time rather than create the basis for a more systematic engagement with national identities at the international level.

[40] One of the purposes of the UN in Article 1(2) is "to develop friendly relations among *nations* based on respect for the principle of equal rights and self-determination of *peoples*" (emphasis added).

[41] UN Conference on International Organization (UNCIO 1945), Doc. WD381, CO/156, Vol. 18, p. 658.

[42] Id., Vol. 6, p. 704.

'people' was being related but not limited to institutional notions of statehood or specific political entities. There was indeed consensus that an essential element of self-determination would be the "free and genuine expression of the will of the people", but it was doubtful whether that meant anything more than restoring the sovereignty of the territories occupied by Nazi Germany and perhaps ensuring the ability of the people to express their views when given the opportunity to do so. No political right of peoples to democracy or popular sovereignty, let alone statehood or even colonial independence, was implied by the textual connection between 'peoples' and 'nations'.[43]

And yet, there was clearly a sense that terms like these could carry a range of meanings depending on the context in which they were used. Belgium critically queried whether either a nation or a people could mean a national group in the sense of a cultural nationality. Other states such as Colombia and France were adamant that self-determination could not mean a right of parts of the state (nation, people, or a national minority) to secede, echoing the legal standard articulated in the *Aaland Islands* case.[44] For its part, the Drafting Committee indicated *inter alia* that self-determination "as one whole extends as a general basic conception to a possible amalgamation of *nationalities* if they so freely choose".[45] The comment undoubtedly suggested no right of different nationalities from one or more states to merge into a different one under international law, but the very reference to nationalities in response to the aggressive ethnocentrism of Germany and Italy seemed simultaneously to allude to a more substantive, cultural understanding of national identities. *Freely chosen* "amalgamation of nationalities" arguably pointed to legitimate self-determination in a multinational state, some form of democratic blend of political and cultural nationalism within a state, and/or even the less common case of the merger of two states linked by the same nationality (as per the much later reunification of Germany in 1990).[46]

It is safe to conclude that the 'nations' referred to in Article 1(2) ultimately wedded towards (without coinciding with) state identities and reflected political/territorial criteria as a hallmark of that idea. 'Peoples' understood as "groups of human beings which may or may not comprise states and nations" proved arguably inconclusive. That notion was not meant to signify 'states', but neither was it intended to reflect an endorsement of generic forms of civic or cultural nationalism (representative government; mono-ethnic state). Despite the ethnocentric horrors of Nazi Germany and the obvious desire to eradicate aggressive nationalism, the Conference still found it difficult, perhaps impossible, to define 'peoples' other than by appealing (subject to the legal and political caveats of the time) to a variety of beneficiaries to be determined on a case-by-case basis in future instances.[47]

---

[43] Id. p. 455. In the wider context of the UN Charter, specifically Chapters XI and XII on non-self-governing and trust territories, Cassese suggests that the general principle in Article 1(2) reflects the very minimal notion that "[s]tates should grant self-government as much as possible to the communities over which they exercise jurisdiction". Cassese 1995, p. 42. It can be questioned, though, whether there was any meaningful connection in 1945 between this general provision and those parts of the UN Charter addressing the position of the colonies. *See e.g.* Budislav Vukas, 'States, Peoples and Minorities', *Collected Courses of the Hague Academy of International Law*, Vol. VI, 1991, p. 377.

[44] UN Conference on International Organization (UNCIO 1945), p. 300. *See also* UNCIO Debates, 15 May, p. 20. These views, and most clearly the Belgian one, effectively understood 'people' as encompassing the notion of 'nation' frequently used in earlier centuries. Fisch 2012, pp. 28-30.

[45] UN Conference on International Organization (UNCIO 1945), Vol. 6, p. 704. (emphasis added).

[46] In this sense, 'amalgamation' alludes primarily to the political/institutional management of nationalities within the state (against the authoritarianism of the 1930s) rather than the achievement of 'national reunification' in wholly exceptional circumstances. But *see* for a narrower view, Cassese 1995, footnote 22. For discussion, *see e.g.* Alain-G. Gagnon & James Tully (eds.), *Multinational Democracies,* Cambridge University Press, Cambridge, 2001; Cobban 1944.

[47] In its broadest sense, the term 'peoples' was in part meant to reaffirm (without fully articulating it) the lofty 'social' (non-institutional) ideal of international law (*see* Fisch 2012, pp. 28-30) so frequently suppressed

3.2. Colonial Peoplehood: Territorial Units versus Multiple Identities

The process of decolonization was to become one such instance. As the colonies, provisionally understood as non-state political entities (indeed 'nations'), settled their legal status as colonial 'peoples' under the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples, the vague 1945 intimation of their territorial and political profile eventually translated into an idea of statehood as a merely institutional process. As explained by Musgrave, the assumption was that whatever cultural, linguistic, or religious differences existed within such 'peoples', they would be overcome "through a process known as 'nation-building', whereby those differences which exist[ed] amongst various groups [would] be subsumed in an overriding loyalty to the state".[48]

In other words, the idea of a post-colonial national identity was generically built around the (freely expressed) 'will of the people', their desire (however articulated) for self-determination, and not certain specific attributes of that people. However, the traditional subjective standard of self-determination still presupposed or required a prior objective articulation of the self-determination unit. 'People' then came to signify a set of individuals assembled in the same pre-defined tract of land (*uti possidetis*). Under general international law the territorial approach to the colonies' emancipation from foreign rule was unquestionably the dominant one post-1960, yet potentially different outcomes were in principle available in connection with different articulations of 'peoplehood'. Emblematic amongst these (uninfluential) variations from pre-1960 practice was the Belgian argument that 'non-self-governing territories' under Article 73 of the UN Charter should include indigenous peoples within states, or the debate over whether to divide certain trust territories according to cultural/linguistic/national criteria, or even the proposed partition of Palestine along national lines.[49]

Although the underlying (somewhat simplistic) dichotomy in these cases was between a wholly civic/territorial idea and a wholly 'ethnic' idea of self-determination as (primarily) a basis for statehood,[50] those challenges arguably reflected (for pragmatic reasons or otherwise) a more general tension between a vision of the post-colonial state as a set of institutions and a more complex vision of a state capable of accommodating substantive (culturally distinct) group and national identities within.

The *Western Sahara* case before the ICJ[51] signaled these complications as a range of substantive communal identities directly or indirectly claimed some form of legal recognition over and above a pre-defined colonial territory. They included the "socially and politically organized" indigenous tribes of Western Sahara (used by the ICJ to disprove the notion that

---

throughout history. Tellingly, Kelsen drew the opposite conclusion by treating the term as a reaffirmation of his own idea of sovereignty in global affairs, with its underlying legal/institutional community. *See* the references in footnote 14.

[48] Thomas Musgrave, *Self-Determination and National Minorities*, Oxford University Press, Oxford, 1997, p. 150. In his study on self-determination, Aureliu Cristescu, a UN Special Rapporteur of the time, noted more broadly that 'peoples' applied to 'nations' as well, by which he meant "peoples which have not yet constituted themselves as independent States". *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1, 1981, p. 39.

[49] On the Belgian approach to indigenous groups as part of a wider conception of self-determination, *see* U.N. Doc. A/C.4/SR.253, 1952, para. 17; U.N. Doc. A/C.4/SR.402, 1952, para. 46. For these cases, *see* generally Musgrave 1997, pp. 78-79, and 157-158; Berman 1993; Vukas 1991, p. 392. The Netherlands' position on Indonesia and West Irian suggested, at least initially, an understanding of self-determination based on broad cultural criteria. *See* Jamie Trinidad, *Self-Determination in Disputed Colonial Territories*, Cambridge University Press, Cambridge, 2018, p. 27.

[50] For discussion of this watertight divide, *see e.g.* Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices*, Cambridge University Press, Cambridge, 2016.

[51] Advisory Opinion, ICJ Reports 1975, 12.

Western Sahara was *terra nullius* at the time of colonization by Spain), as well as the various ways in which the nomadic patterns of those tribes had revealed, in the ICJ's view, "ties of a legal character" to both Morocco and Mauritania.[52] In a separate opinion, Judge Ammoun went as far as to argue that the ties between Morocco and Western Sahara predated the disruption caused by colonization and thus reflected "the common aspirations which have ultimately constituted the ties which as a matter of law link the elements of one and the same nation".[53]

The ICJ recognized neither separate group rights nor separate (pre-colonial) sovereign titles over Western Sahara. Whatever cultural and legal practices existed within the territory and across the region, they did not, for the ICJ, coalesce around a coherent institutional and political structure – indeed coherent national identities – that could override the territorial paradigm of Western Sahara's decolonization under international law. All of those claimed identities, though, arguably challenged in their own ways the sanitized idea of a self-determination unit as being merely a territorial context for a state-to be.

The example of New Caledonia – a colonial territory of France – offers a very recent illustration of these tensions, but also of potentially creative institutional arrangements. While the independence of New Caledonia (a non-self-governing territory under the UN Charter) remains at the time of this writing an unlikely but still possible outcome, the 1998 Nouméa Accord and related internal legislation have already envisaged a range of nested communities within the framework of the state. New Caledonia has been recognized as constitutionally autonomous from metropolitan France, and the Kanak people within New Caledonia as the colonized indigenous population of the territory, culturally distinct from other individuals and communities in New Caledonia. New Caledonia's common territorial/political identity is nested within a wider overarching French national identity, while the specific Kanak identity and 'prior sovereignty' is nested within a wider New Caledonian regional identity and citizenship.[54]

Tellingly, the subjective (people's will) standard of self-determination has triggered the need for more objective criteria to limit the relevant electoral decision-making unit to those voters with demonstrably strong (cultural and/or political) ties to New Caledonia.[55] While the 'people of New Caledonia' remains (not entirely without controversy) the standard for defining the decolonization context in which self-determination must be achieved, as confirmed in 2018 by the UN General Assembly (and in line with *Western Sahara*),[56] more complex hybrid

---

[52] Id. pp. 39, and 151.

[53] Id. p. 85. Interestingly, Judge Ammoun's claim, based on a blend of subjective aspirations and historical territorial connections, contrasted with Spain's claim that Western Sahara had a separate (essentially civic/territorial) identity of its own.

[54] Paragraph 3 of the 1998 Nouméa Accord recognizes the identity of the Kanak people and their sovereignty prior to French colonization. For a comprehensive assessment of the case, *see* Markku Suksi, 'Self-Determination Through Autonomy or Independence? – On the Current and Future Position of New Caledonia', *Vienna Journal on International Constitutional Law,* Vol. 15, Issue 1, 2021, p. 67.

[55] Restrictions on voting rights in independence referendums and elections to the Congress and provincial assemblies in New Caledonia, based on strong ties to the territory and/or length of residence, have been justified on self-determination grounds by the Human Rights Committee (referendums) and the European Court of Human Rights (elections), respectively. *See Marie-Hèlene Gillot et al. v. France,* Comm. 932/2000, Views of 15 July 2002, UN Human Rights Committee, UN Doc. CCPR/C/75/D/932/2000 (2000); *Py v France,* App. No. 66289/01, Judgment of 11 January 2005. The Human Rights Committee noted that the relevant restrictions were meant to ensure "a sufficient definition of identity" in keeping the nature of a self-determination process that involved "residents who, over and above their ethnic or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory". Concerns about the 'authenticity' of electoral units under these circumstances are not new and go much farther back in history, *see e.g.* Redslob 1931, pp. 36-38.

[56] UN GA Res 75/115 on the Question of New Caledonia, 10 December 2020. The resolution distinguishes the entire population of New Caledonia from the indigenous Kanak people, and to that extent, it does not formally depart from the classical territorial paradigm of decolonization. This is so despite the demographic (pro-

arrangements can now be envisaged to accommodate the multiple identities of the territory, most notably the customary land and social practices of the Kanaks. This holds especially true if New Caledonia were to remain an integral part of France on a permanent basis. It is highly unlikely, though, that current and future special arrangements for New Caledonia, possibly including nested autonomous regimes within the territory itself,[57] will depend on revising the idea of 'peoplehood' in such a multi-layered institutional setting.

4. The 'Modern' Human Rights Framework

4.1. National Identities without 'Peoples'?

While the framing of anti-colonial national claims as claims of peoples pursued the achievement of independence in most cases, 'peoplehood' as a freestanding concept irrespective of 'statehood' has sustained the weight of expressing some form of underlying national identity in international human rights law ever since. In fact, as the term 'nation' became more easily linked to 'state' than 'people' in accordance with initial UN discussions about self-determination,[58] the quest for uncovering national identities arguably remained an important (though controversial) element of discourse from a 'modern' human rights perspective and one that looks at international law more generally.

Two lines illustrate this. One traditional argument identifies national minority groups as 'peoples' if such groups think of themselves as historical cultural nations with a current or past homeland and a solid political consciousness and agency.[59] On this view, 'peoples' and 'national minorities' largely mirror (or can mirror) each other. The other line (to be explored in the next section) proposes an understanding of 'peoples' that could work as an all-encompassing legal category for a variety of national groups in particular geographical contexts.

The first line has been challenged on the basis that (national) *minorities cannot be peoples* entitled to self-determination: the ICCPR sharply distinguishes the former from the latter through a clear distinction between the right of peoples to self-determination in Article 1 and the protection of minorities in Article 27.[60] In this regard, minorities qua minorities are not peoples. As solid as it may be in terms of the context of each of those provisions taken separately (and the secessionist fears by states that largely motivated that distinction during the *travaux* of the ICCPR), the argument is not entirely conclusive. For one thing, there is no logical or conceptual inconsistency in arguing that certain minority groups, though minorities

---

metropolitan France) alterations caused over time by French control over the territory and the recognition of Kanak 'prior sovereignty' under the Nouméa Accord.

[57] Markku Suski rightly points out that Kanak autonomy within the territory should be further enhanced regardless of the final status of New Caledonia, especially in the context of current internal self-determination arrangements benefitting New Caledonia within France. Suksi 2021, p. 37. Arguably the UN approach acknowledges the national identity layers within the relevant unit by making the Kanaks part of an overarching nested framework that moves beyond generic ideas of territorial decolonization and pursues a degree of consistency with contemporary human rights standards (particularly on indigenous rights). On the notion of asymmetrical political arrangements within the state (aside from decolonization), *see e.g.* David Miller, 'Nationality in divided societies', in Gagnon & Tully (eds.) 2001, p. 314.

[58] Fisch 2012, p. 46. Yoram Dinstein captured that predominant terminological shift by noting that "a nation is easy to define inasmuch as it consists of the entire citizen body of a State. All the nationals of the State form the nation." Yoran Dinstein, 'Collective Human Rights of Peoples and Minorities', *International and Comparative Law Quarterly*, Vol. 25, Issue 1, 1976, pp. 103-104.

[59] *See e.g.* Felix Ermacora, 'The Protection of Minorities before the United Nations', *Collected Courses of the Hague Academy of International Law*, 1983, Vol. IV, p. 327.

[60] *See e.g.* Rosalyn Higgins, 'Postmodern Tribalism and the Right to Secession, Comments', in Brölmann *et al.* (eds.)1993, p. 32.

for the purposes of Article 27, can also be peoples for the broader purposes of Article 1. The legal status would thus be a function of the claims involved in each case rather than an *a priori* distinction between peoples and minorities, whether it is grounded in ontological or strictly legal parameters. At the same time, the specific practice regarding indigenous groups has been built around the idea that such communities, though collectively entitled to Article 27 rights, are 'more than' merely minorities or ethnic groups. Indeed, they identify as nations or peoples on cultural/political grounds and can thus benefit *simultaneously* from different sets of relevant human rights provisions.[61] The reiterative nature of the argument is apparent.

That said, the approach taken by the UN Human Rights Committee to indigenous issues under Article 27 arguably blurs the conceptually more pristine lines reflected in those arguments. On the one hand, it has repeatedly asserted that Article 1 can be relevant to interpreting Article 27, contrary to the interpretative logic and rationale of the sharp diving line argument outlined above.[62] On the other hand, it has gradually buttressed a hybrid approach to Article 27 – a *minority* clause – by reading the *right* of indigenous *peoples* to freely determine their political status into it (internal self-determination), thereby blurring the lines between indigenous minorities, indigenous peoples, and peoples more broadly. Due consideration has been given to the (non-binding) UN Declaration on the Rights of Indigenous Peoples rather than Article 1 *per se*, focusing on an expanded autonomous *content* of Article 27 as opposed to an *a priori* finding of indigenous 'peoplehood' under Article 1 as a precondition for discussing indigenous claims.[63] Somehow echoing aspects of the New Caledonian case discussed earlier on, recent Article 27-related cases involving the judicial application of criteria for eligibility to vote in Sami Parliament elections as a Sami in Finland, have also highlighted the connection between the subjective self-determination standard of group decision-making and the need for some objective criteria to underpin that process. The HRC found that diluting genuinely Sami representation in the Sami Parliament by applying overly subjective self-identification criteria by the Finnish Supreme Administrative Court was not consistent with the "right of the Sami people" to meaningful internal self-determination.[64]

While reflecting a reassessment of initial watertight conceptual distinctions (the first line above), at least in the context of indigenous national identities, this hybrid approach taps into a broader pattern of internal self-determination practice under the ICCPR. Aside from acknowledging the framework of the state in which internal self-determination should be achieved, this pattern does not seem to be dependent upon a specific concept of a people or

---

[61] The literature on indigenous rights in law and political science is vast and well-known. As far as I am aware, none of it questions the multidimensionality of indigenous claims: for a useful overview of some central contributions to the field, *see e.g.* Anthony J. Connolly (ed.), *Indigenous Rights*, Ashgate, Surrey, 2009; James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, Oxford, 2004; Stephen Allen & Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, Oxford, 2011; Will Kymlicka, *Multicultural Citizenship*, Oxford University Press, Oxford, 1995.

[62] *J. G. A. Diergaardt et al. v. Namibia*, Comm. No. 760/1997, Views of 25 July 2000, UN Doc. CCPR/C/69/D/760/1996, para. 10.3; *Apirana Mahuika v. New Zealand*, Comm. No. 547/1993, Views of 27 October 2000, UN Doc. CCPR/C/70/D/547/1993, para. 9.2; *Marie-Hèlene Gillot et al. v. France*, para. 13.4.

[63] Despite well-known procedural barriers to adjudicating Article 1 self-determination disputes under the First Optional Protocol to the ICCPR, there is a fundamental difference between applying Article 27 in a way that is sensitive to what the claimant may be entitled under 'external' provisions and directly establishing new substantive content of Article 27. In *Daniel Billy et al. v. Australia*, for example, the Human Rights Committee builds on the UN Declaration on the Rights of Indigenous Peoples to affirm a distinct Article 27 right to land and natural resources: Comm. 3624/2019, Views of 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019, para. 8.13. In *Tiina Sanila-Aikio v. Finland*, Comm. 2668/2015, Views of 1 November 2018, similarly draw primarily on the 2007 UN text to affirm a distinct Article 27 right to the effective political participation of indigenous communities, including their right to internal self-determination (paras. 6.8-6.11).

[64] *Tiina Sanila-Aikio v. Finland*, para. 8; *Klemetti Käkkäläjärvi et al. v. Finland*, Comm. No. 2950/2017, Views of 2 November 2018, UN Doc. CCPR/C/124/D/2950/2017, para. 11. In fact, the Committee variably uses the terms 'community', 'people' and (less frequently) 'minority' throughout its decisions.

nation for upholding national identities. Germany, for example, acknowledges the internal dimension of self-determination, as well as the possibilities of autonomous regimes, but does not elaborate on any distinct legal status that the beneficiaries of such process should possess. Equally, Finland and the UK have reported back to the HRC on the autonomous arrangements in the Aaland Islands and the degree of devolution in Scotland, Wales, and Northern Ireland, respectively, as part of their reporting duties on self-determination, but they have never offered any indication that the relevant historical national communities should be regarded as separate 'peoples' under international law. Likewise, Russia has discussed internal self-determination within the framework of the Russian Federation, with various autonomy arrangements only furnishing 'substance' (culturally and/or geographically) to the notion of internal self-determination, rather than a list of the nations to be internationally classed as peoples.[65]

The broader point is that national identities are ultimately hidden at the intersection of broader (civic) constitutional and political processes (in accordance with the HRC's more obvious minimal endorsement of a 'people' as the general population of the state)[66] and variable, hybrid forms of sub-state national accommodation. However, no national group, or hardly any such group, is distinctly treated or singled out as a 'people'. Even the more generous (albeit *sui generis*) international endorsement of indigenous peoplehood (and nationhood) has generally not translated so far into an automatic constitutional entrenchment of indigenous 'peoples' as a *sine qua non* for advancing indigenous rights (or indeed, international law itself).[67] Indigenous national identity has been increasingly recognized across jurisdictions, yet international (and domestic) practice does not seem to have settled on a single inflexible idea of how to convert that recognition into a uniform approach under international (human rights) law.

4.2. National Communities as 'Peoples'?

These observations do not seem to be confuted by the arguably more pro-active second line sketched out above, namely the one that offers a broader understanding of 'peoples' for a variety of national groups, but only in the context of specific geographical settings. This is the case of the African Charter on Human and People's Rights, whose practical application appears to have enabled both the African Commission and the African Court to incrementally recognize some sub-state groups as 'peoples' in a range of rather high-profile cases, most notably *Endorois, Cameroon, and Ogiek.*[68]

---

[65] For a useful overview of these positions in the overall context of internal self-determination, *see* among others, Kalana Senaratne, *Internal Self-Determination in International Law: History, Theory, and Practice*, Cambridge University Press, Cambridge, 2021, pp. 122-125. In Russia, the Constitutional Court has openly spoken of a single 'multinational' people in relation to self-determination/secession claims, *see* Xabier Arzoz & Markku Suksi, 'Comparing Constitutional Adjudication of Self-Determination Claims', *Maastricht Journal of European and Comparative Law*, Vol. 25, Issue 4, 2018, p. 461.

[66] Cassese 1995, p. 59.

[67] Marc Weller, 'Self-Determination of Indigenous Peoples', in Jessie Hohmann & Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford University Press, Oxford, 2018, pp. 140-143. It should also be noted that most of the indigenous rights developments have emerged within international legal settings with no specific indigenous provisions: for the hybridity of human rights discourse, *see* generally, Gaetano Pentassuglia, 'Group Identities and Human Rights: How Do we Square the Circle in International Law?', in Anna-Maria Biró (ed.), *Populism, Memory and Minority Rights: Central and Eastern European Issues in Global Perspective*, Martinus Nijhoff Publishers, Leiden, 2018, p. 283.

[68] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. No. 276/2003 (2009) [Endorois]; *Kevin Mgwanga Gunme et al. v. Cameroon*, Comm. No. 266/2003 (2009) [Cameroon]; *African Commission on Human and Peoples' Rights v. Republic of Kenya*, App. No. 006/2012, Judgment of 26 May 2017 [Ogiek].

Tellingly, in all such cases the starting point is the contested or undefined notion of 'peoples' and/or 'indigenous peoples', at least for the purposes of the Charter. The point is clearly made that no universal definition or no single definition is available since the practice around such concepts varies "from country to country".[69] Related to that premise is the important clarification that the Charter category of 'peoples' rights' should essentially be taken to signify 'collective rights' in the sense of human rights that are conceptually and operationally distinct from the individual rights recognized under the treaty. This is said to be testament to the "unique" features of the Charter and the fact that it "substantially departs" from other human rights instruments.[70] In the *Cameroon* case the African Commission noted, however, that group members bring their own individual rights with them "on top of what the group enjoys in its collectivity".[71] Where taken together, these comments arguably suggest that the Charter's 'peoples' terminology is intended to emphasize the collective dimension of certain rights (however understood) rather than issues of group status *per se* (*i.e.* issues/distinctions of the kind discussed at the UN over 'indigenous peoples', 'minorities', or 'peoples' themselves).

Against this rather flexible background, both the Commission and the Court have nevertheless identified elements or factors that can underpin a specific notion of indigenous peoples under the Charter. In addition to certain ethnic and cultural features of the group and its almost symbiotic attachment to a homeland (as per the various conceptual elaborations offered by UN and African Commission expert bodies), indigenous 'peoples' have been largely defined in this context by the "historical and present-day injustices and inequalities" they have suffered collectively in both pre- and post-colonial times.[72] So, while the ethnic focus is key to the concept, indigenous groups are not being treated as merely ethnic groups, but rather as groups of a special kind. This jurisprudence has captured a significant range of issues, including the priority in time concerning land occupation, the experience of marginalization, the existence of individual deviations from established communal practices, broader social, religious and/or institutional patterns, and/or the recognition of the group by others.[73] Overall, they reference a set of questions that cannot automatically be decided upon by switching from a generically territorial idea to a generically ethnic idea of 'peoplehood'. In *Ogiek*, the African Court recognized the Ogieks "as an indigenous *population* that is part of the Kenyan *people* having a particular status and deserving special protection deriving from their vulnerability".[74] Despite hotly debated terminological distinctions in UN standard-setting work on indigenous rights ('populations' reflecting the early language used to identify the groups, ranking lower than 'peoples' entitled to self-determination),[75] the Court arguably seeks to offer a holistic approach that pragmatically situates the protection of distinct group identities within the context of an overarching national identity at state level.

In fact, the notion of indigenous peoples is said to operate on the basis that the very Charter concept of 'peoples' should in general be interpreted flexibly "by future users", including the impact of certain objective features of a group.[76] The African Commission has been clear that some such features, as per the UNESCO concept of a 'people' used in *Cameroon*

---

[69] *See e.g. Endorois*, para. 147; *Cameroon*, para. 169; *Ogiek*, paras. 107, 108, and 196.
[70] *Endorois*, paras. 149-150; *Cameroon*, para. 171.
[71] *Cameroon*, para. 176. On the intertwining of group and individual rights in human rights practice, *see* Pentassuglia 2018, p. 67.
[72] *Endorois*, paras. 149, 151.
[73] *Ogiek*, paras. 107-108. While the Court present them as the relevant criteria in international law, the actual scope of some of them may be questioned (*e.g.* on priority in time or recognition by 'state authorities'). The point here is simply to note that consideration of indigenous issues involves a gamut of social and institutional matters that largely set the group apart from generic cultural groupings.
[74] Id. para. 112 (emphasis mine).
[75] *See e.g.* Vukas 1991, p. 425.
[76] *Ogiek*, para. 196.

and *Endorois, may* be taken to indicate the existence of a 'people' within the meaning of the Charter.[77] While the UNESCO general multi-layered test (ranging *inter alia* from common history to cultural homogeneity, to ideological and economic bonds) is a very demanding (potentially even problematic) one for *any* communal identity,[78] the test can be partly used to carve out a relatively more coherent concept of indigenous peoples in the African context.

Yet the suggestion is not to mechanically identify the Charter's 'peoples' with the UNESCO concept. As noted by the Court in *Ogiek*, the relevant inquiry is one that considers if 'peoples' can apply not only to the whole state population but also to "sub-state ethnic groups and communities that are part of the population".[79] Coupled with the idea of 'peoples' as a legal signifier of collective rights under the Charter, the deeper concern is ultimately with the nesting of certain smaller groups within wider state entities regardless of the exact constellation of substantive factors that may justify this in any specific case. As explained in *Cameroon*, some, but not necessarily all, of the UNESCO criteria might be relevant to triggering 'peoples' rights' under the Charter, reaching out to as far as distinct non-ethnic focused nationalities. Indeed, the Commission was satisfied that "the people of Southern Cameroon" constituted a sub-state national identity (with a common history, linguistic tradition, territorial connection, and political outlook) *despite* the people's internal ethnic/anthropological diversity,[80] in the same way that the Commission in *Katanga* judged the precise ethnic profile of the Katangese in construing Katanga's claim to self-determination (*i.e.* whether it consisted of one or more ethnic groups) to be "immaterial".[81] Equally, subjective factors qualify purely objective ones. The identification of the group with a people with a separate and distinct national identity – the element of mutual recognition of its members[82] – offers a basis for the "wishes of the people" to be heard and taken seriously, but it also requires an engagement with the entire population with a view to achieving national (state-wide) consensus through appropriate constitutional arrangements.[83]

Although the unique and seemingly more capacious language of 'peoplehood' under the Charter can potentially accommodate a variety of otherwise variably classified or classifiable groups – from whole populations to various minorities – group matters do not appear to be a function of automatic and restrictive peoplehood tests but rather contextual assessments that can enable the application of standards in a way that is sensitive to group claims. When it comes to national and sub-national identities, the Charter's 'nationalism' is neither solely civic nor solely ethnic. There is hardly an African 'exception' to the hybrid patterns discussed earlier on.

---

[77] *Cameroon*, para. 170; *see also Endorois*, para. 151. The Commission explicitly characterizes the UNESCO concept as only a non-binding guide.

[78] Admittedly, the UNESCO concept does implicitly allow for variations, whereby only some of the indicia can be observed (*International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, Paris, 27-30 November 1989, Final Report and Recommendations, p. 78). However, given the number and depth of the proposed criteria, it is appropriate to caution that no all-embracing and monolithic idea of communal identity, even more so of a national identity, can be compatible with degrees of internal diversity and pluralism within the group, as well as human rights standards more broadly. *See e.g.* Miller 1997, p. 26.

[79] *Ogiek*, para. 198. Indeed, in a traditional anti-colonial vein, the Court notes that the Charter's primary targets are "the populations of the countries struggling to attain independence and national sovereignty." Id. para. 197.

[80] *Cameroon*, paras. 178-179.

[81] *Katangese Peoples' Congress v. Zaire,* Comm. No. 75/92 (1995). In *Namibia* before the ICJ, Judge Ammoun's separate opinion similarly sought to demonstrate the historical and political existence of a unified 'Namibian people' entitled to self-determination over and above a plurality of ethnic groups, and against socially deterministic claims made by South Africa to justify the policy of apartheid as a method of implementing self-determination. Advisory Opinion, ICJ Reports, 1971, 31, p. 85.

[82] *See* the references in footnote 12. *See also* Miller 1997, p. 22.

[83] *Cameroon*, paras. 199, 203 (citing *Katanga*).

5. Iterations of National Identity in Deeply Divided Societies: The Western Balkans Case

The pattern of recognizing some form of national identity – without engaging with precise definitional formulations or despite agnostic spatial approaches to self-determination – can also be observed in the context of divided societies beyond Africa, the most illustrative case being the Western Balkans.

The well-known Opinion No 2 delivered by the Arbitration Commission on Yugoslavia (so-called Badinter Commission) in 1992[84] clearly evidences the hesitations in, but also complications of, blurring the lines between territorial ideas of national identity and more substantive views of national identity beyond merely institutional settings. Asked by the Republic of Serbia if the Bosnian Serbs and Bosnian Croats had the right to self-determination under international law, the Commission did its best to eschew the question of whether the group(s) constituted a people for those purposes and framed the problem as one to be ordinarily considered and resolved within the framework of the newly established borders of the state.

However, in this territorial/institutional context, the Commission simultaneously used variable terminology to accommodate a vision of the Serbs' national identity that could prove somehow consistent with international standards. On the one hand, the Commission's reference to the 'Serbian population' in Bosnia and Croatia, though in line with the way the question had been formulated and put to the Commission,[85] arguably indicated that the focus was on sections of wider state entities, not fragments of a wider Serbian nation that cut across state borders (old or new). In other words, at no point does the Commission recognize the Serbian groups as a people or peoples under international law, even though Serbia had presented that population as one of the 'constituent peoples' of Yugoslavia and that it has typically understood its own national identity in organic terms, irrespective of state borders.[86] At the same time, it is rather apparent that the protection envisaged for those groups by the Commission does not end with the legal entrenchment of territories. Instead, it requires their close embedment within the framework of self-determination as one of its key components, especially in deeply divided societies.

The terminology thus becomes relatively loose as the purpose of accommodating the Serbs' national identity comes to the fore. First, the Commission firmly upholds the right of certain (national) communities "to recognition of their identity under international law". As an overarching premise, this suggests an intrinsic link to the concept of self-determination in (common) circumstances of "ethnic, religious or language" diversity.[87] Second, the affirmation of standards for "minorities and ethnic groups" under general international law (*jus cogens*), treaty law and national law, offers a baseline from which substantive and hybrid regimes can be built and connections drawn, somehow echoing the later (and selective) approach of the UN Human Rights Committee under the ICCPR.[88] Third, the Commission goes as far as to extract

---

[84] European Community Arbitration Commission, Opinion No. 2, 11 January 1992, 31 *International Legal Materials*, 1992, p. 1497.

[85] "Does the Serbian population […] have the right to self-determination?", read the question put by Lord Carrington, the Chairman of the Conference on Yugoslavia, to the Commission.

[86] For discussion, *see e.g.* Vukas 1991, p. 407.

[87] *See* European Community Arbitration Commission, Opinion No. 2, para. 2.

[88] Id. *See* Section 4.1. Discussing the technical accuracy of some of these statements is beyond the purpose of this commentary since the focus is on the conceptual implications of the Commission's approach (and other bodies') to national identity. Suffice it to say that judicial and quasi-judicial practice, particularly within regional frameworks, has been critical to expanding protection for a variety of groups, ranging from traditional national minorities to more sui generic communities such as the Roma in Europe and indigenous peoples across various continents. See generally Gaetano Pentassuglia, 'Protecting Minority Groups through Human Rights Courts: The Interpretive Role of the European and Inter-American Jurisprudence', in A. Vrdoljak (ed.), *The Cultural Dimension of Human Rights*, EUI Collected Courses, Oxford University Press, 2013, p. 73 *et seq.*

from self-determination so construed a (qualified) right of group members to "the nationality of their choice", in addition to their right to be recognized as belonging to a specific community.[89] It is not unreasonable to find traces of this idea in the right of citizenship option offered in several post-World War I minority protection treaties as a way of mitigating or avoiding the effects of new territorial settlements.[90] Derived from a right of "every individual" to community (national) belonging as part of this self-determination process, the Commission seems to suggest a wider entitlement that could even transcend strictly 'minority' classifications, though one that stops short of making one's cultural nation the legal foundation of separate statehood.[91] Be that as it may, some form of cross-border regulative dimension based on a choice and recognition of group belonging was partly endorsed by the Dayton Agreement that ended the war in the former Yugoslavia.[92]

In short, the Opinion treads very carefully in matters of group status while still delivering some idea of how the national identities at stake should be protected. The neutral notion of 'population' becomes increasingly qualified by images of 'community', 'minority', 'ethnic group', even 'individuals'. The underlying theme is not the upgrading of the legal status of the group, but rather the best possible way of nesting distinct national identities within the wider state-level (and possibly cross-border) framework of self-determination.

The wider Western Balkan context somehow reproduces this hybrid picture, both in terms of the reluctance by international bodies to make judicial determinations over the status of a claimant as a 'people or a 'nation' within an emerging or established state, and in terms of seeking to secure some form of protection of national identities that can resonate – however tentatively or imperfectly – with international law. For one thing, the ICJ advised in 2010 that Kosovo's Declaration of Independence was not, in and of itself, at odds with international law, but still refrained from recognizing the population of Kosovo, let alone the Kosovar Albanians, as a people in a legal sense entitled to secede from Serbia.[93] The authors of the Kosovo Declaration were deemed to be persons representing 'the people of Kosovo' outside the framework of the UN interim administration,[94] yet the ICJ's (formalistic) refusal to discuss self-determination matters in the context of the Opinion rendered this language inconclusive. In fact, the same terminology had been previously used by the UN Interim Administration Mission in Kosovo to identify a multi-ethnic institutional structure as a basis for provisional self-government, and the ICJ had used generic language to reference claims to self-determination and/or secession which, it felt, fell beyond the scope of the pronouncement.[95] Tellingly, the Judges who did comment on self-determination in their separate opinions – Judge Trindade and Judge Yusuf – either explicitly noted that a specific legal test of peoplehood was unnecessary[96] or generically conceptualized (internal) self-determination as a broad

[89] *See* European Community Arbitration Commission, Opinion No. 2, para. 3.
[90] Joseph Kunz, 'L'option de nationalité', *Collected Courses of the Hague Academy of International Law*, Vol. 31, 1930, p. 108. Following the post-war practice as discussed in Section 2.2., one should assume that the term 'nationality' used by the Badinter Commission, while technically referencing the option of dual citizenship, simultaneously targeted individuals with distinct cultural ('national') affiliation.
[91] This distinction is rather uncontroversial. *See* the references in footnote 14, and Section 2.1. *See also* Recommendation 1735(2006), para. 6.
[92] For a commentary, *see* Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford University Press, Oxford, 2008, pp. 225-226; for a degree of institutional cross-border exchanges under the 1998 Good Friday Agreement concerning Northern Ireland, *see* p. 115.
[93] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, ICJ, Advisory Opinion, paras. 51, 56, 82, 89, 105, 109.
[94] Id. para. 109.
[95] Id. para. 89, and paras. 82-83.
[96] Id. Separate Opinion of Judge Cançado Trindade, p. 613, pointing to range of subjective and objective factors, while noting that "no terminological precision [exists] as to what constitutes a "people" in international law".

participation-based process involving the entire population of the state, including more distinct racial or ethnic groups.[97]

The domestic context, for its part, reveals an even stronger need for targeted measures, tailoring terminological choices to the relevant political context, even though the focus is on implementing *international* standards. Bosnia's well-known constitutional language of 'constituent peoples' to identify the dominant groups of Bosniaks, Croats, and Serbs reflects the deep political and social divisions caused by a dramatic military conflict rather than a conscious act of revising the idea of peoplehood in international law. Perhaps more interestingly, recent constitutional iterations in the region have increasingly referenced national 'communities' in the context of legislation nominally designed to implement international *minority* rights standards.[98] Indeed, the constitutions of countries such as North Macedonia, Montenegro, Kosovo, and Serbia have all endorsed, in different ways and for different internal reasons, a range of terminological and conceptual variations that point towards a more equalizing language *vis-à-vis* the dominant group(s). However, despite an often unclear and open-ended vocabulary specific to the internalization dynamics of each case (community, minority nation, or less frequently, people),[99] they all represent articulations of the national identity paradigm across the fabric of society.[100]

Like in the case of the African Charter, these constitutions' 'nationalism' is neither entirely civic nor entirely ethnic, striving to achieve a balance between ethnocentrism and civic assimilation inspired by a vision of total (cultural) 'denationalization'. Like in cases discussed earlier on, international law does not, and cannot, settle national identity disputes through definitional fiats, although it can offer a broad (state) framework for addressing them.

6. The *Reference* Case: Towards Nesting National Identities within the State?

In this regard, the *Reference* case before the Supreme Court of Canada can arguably offer a blueprint for articulating not only general notions of external and internal self-determination in international law, but also the broad context for achieving the recognition of national identities.[101] The Court walked a thin line between conventional advocacy of the right of a 'people' to self-determination (*in casu*, Quebec's putative legal entitlement to secession from

---

[97] Id. Separate Opinion of Judge Yusuf, p. 621, pointing to a "variety of entitlements" concerning access to government.

[98] The 1930 *Greco-Bulgarian* case (*Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of the 'Communities')* was the first international adjudicatory intervention looking at the hybrid implications of the term 'community' as an intermediate category. For discussion, *see* Elizabeth Craig, 'The Framework Convention for the Protection of National Minorities and Internalization: Lessons from the Western Balkans', *Review of Central and East European Law,* Vol. 46, Issue 1, 2021, p. 1. The ECHR has shied away from definitional matters in the more generic context of the European Convention on Human Rights, while still broadly acknowledging that the democratic pluralism underpinned by the Convention "is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities" (*Gorzelik* v. *Poland*, Judgment, Application No. 44158/9820, 17 February 2004, paras. 89-93).

[99] Craig 2021, p. 23. *See also* Ljubica Djordjević, 'Conceptual Disputes over the Notions of Nation and National Minority in the Western Balkan Countries', *ECMI Research Paper No. 126*, April 2021.

[100] Outside the Western Balkans, Ukraine offers another significant example of legislation endorsing the national 'community' language (together with 'national minority'): Law on National Minorities (Communities) of Ukraine, 13 December 2022, Law No. 2827-IX of the Verkhovna Rada Ukraine (*see* at https://zakon.rada.gov.ua/laws/file/2827-20). Aside from the (contested) substance of this law, 'community' has been presented as an umbrella term covering a variety of nationalities, including indigenous peoples (protected under a separate law: Law of Ukraine No. 1616-IX "On Indigenous Peoples of Ukraine", 1 July 2021); *see e.g.* at https://hromadske.radio/podcasts/hromadska-hvylya/natsional-na-spil-nota-ie-ob-iednavchym-terminom-i-chynnykom-dmytro-lubinets/amp.

[101] Constitutional Court of Canada, *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217.

Canada) and the recognition of the legitimacy of national claims as a central assumption in structuring constitutional conversations between the central government and Quebec. It did concede that self-determination may benefit a portion of the state's population and that self-determination itself is normally fulfilled through internal arrangements, as opposed to territorial changes in sovereignty.[102] From the point of view of national identities, the Court's key contribution lies less in general restatements of the law of self-determination and more in outlining the conditions under which those identities can be recognized.

There are at least four interrelated elements that support this line in the judgment. *(i)* First, the Court openly acknowledges the uncertainties surrounding the term 'people' (or 'peoples'), despite a tentative commentary on the distinction between the idea of a state as a political/institutional entity and the idea of a people as such (arguably echoing UN 1940s discussions about *political* 'nations' and 'peoples' as separate entities).[103] *(ii)* Second, and more remarkably, the Court notes that, for the problem at hand to be addressed, determining the precise international legal status of the Quebec population as a 'people', or a 'people' amongst other 'peoples' within Quebec, is not necessary. Francophone Quebec's potential identification as a 'people' in international law rapidly turns in practice into an assessment of *how* self-determination could benefit "a portion of the population of an existing state", *regardless* of a possible secessionist outcome.[104] *(iii)* Third, and relatedly, the Court essentially draws upon the 1970 United Nations Friendly Relations Declaration to generically (and consistently) appeal to "*the whole* of the people or peoples resident within the territory"[105] as the proper representative framework for inclusive constitutional arrangements. Having acknowledged certain distinctive cultural/linguistic features of much of the Quebec population, the Court thus implicitly situates Francophone national identity within the wider context of Canada and its other (national and local) identities, arguably accepting that national identities can play out at different levels (an important theme hinted at, but left underdeveloped, by the Rapporteurs in the early *Aaland Islands* case).[106] *(iv)* Fourth, and crucially, the Court's insistence on the interplay of federalism, democracy, the rule of law and the protection of minorities as a basis for addressing Quebec's self-determination claims, while specific to the Canadian constitutional structure,[107] simultaneously speaks to a wider legal practice (some of which I discussed in earlier sections) concerned with general or special access to government and representation, various forms of cultural recognition, and/or the constitutional redefinition of the state itself.[108]

---

[102] Id. paras. 124, and 126.

[103] But equally, *see* the inconclusiveness of those comments in my chapter 'Do Human Rights Have Anything to Say about Group Autonomy?', in Gaetano Pentassuglia (ed.), *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques*, Martinus Nijhoff Publishers, Leiden, 2018, pp. 143-144.

[104] *Reference Re Secession of Quebec*, para. 124. In other words, the Court's key argument was about *internal* self-determination within Canada, including the right, subject to certain conditions, to initiate constitutional change: *see e.g.* James Tully, 'Introduction', in Gagnon & Tully (eds.) 2001, p. 32.

[105] *Reference Re Secession of Quebec*, para. 130 (emphasis mine). Compare with Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970), *The principle of equal rights and self-determination of peoples*, penultimate paragraph.

[106] As noted in Section 2.1, the primary focus of the *Aaland Islands* case was on how best to accommodate a particular group within the state, rather than how the Finnish and Swedish national identities related to one another. In the *Reference* case, the relational dimension to various (civic and cultural) identities (including indigenous identities) was arguably central to the very articulation of each group's position. For discussion from wider angles, *see e.g.* Gagnon & Tully (eds.) 2001; for the concept of nested nationalities, *see* Miller 2001; from a European multi-layered institutional perspective, *see also* Walker 2019.

[107] *Reference Re Secession of Quebec*, para. 49: "No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."

[108] Indeed, other cases have recently made the headlines (there is no space here for a dedicated analysis): in the still unresolved Catalan dispute, for example, the Constitutional Court of Spain does not recognize Catalonia as a

In the end, the significance of the *Reference* case should not be found in the Court's decision not to uphold a unilateral right of Quebec to secede from Canada under both constitutional law and international law, but rather in the constructive legal framework that the Court relied upon to delineate the conditions under which distinct nationalities can be made part of a "meaningful" exercise of self-determination across the state.

The longer-term legacy of this case in terms of approaching national identities under international law remains to be seen, although there is little doubt that the stronger and more established the group's 'will' and its national distinctiveness are, the stronger the legal standing of the group's claim will be.[109] Interestingly, in 2017 the Supreme Court of Sri Lanka affirmed that advocating federalism within a united Sri Lanka by long-standing Tamil nationalists was not in breach of the Constitution since it did not amount to separatism. Crucially, the Court borrowed internal self-determination references from the *Reference* case and ICJ Judge Trindade's separate opinion in the Kosovo Advisory Opinion.[110] Although the respondent had emphatically presented the Tamil minority as a 'people' entitled to self-determination under international law, the Court's quotes from that practice did not require or presuppose a precise international legal concept.[111] In 2022, in a high-profile judgment on devolution issues in Scotland, the UK Supreme Court also relied on the Canadian *Reference* case's holistic approach by discussing "the position of Scotland and the people of Scotland within the United Kingdom"[112] and recognizing the scheme of devolution powers in Scotland as fully consistent with the principle of self-determination[113]

'people' or 'nation' in a legal sense, but does recognize it as a 'perfectly legitimate' 'national reality' (in line with the Constitution's nation/nationality distinction under Article 2; CCJ 31/2010, 28 June 2010): for commentary in light of the *Reference* case, *see* Arzoz & Suksi 2018, pp. 464-475; Eduardo J. Ruiz Vieytez, 'Minority Nations and Self-determination: A Proposal for the Regulation of Sovereignty Processes', *International Journal on Minority and Group Rights,* Vol. 23, Issue 3, 2016, pp. 411-413. Another controversial case is the *Basic Law: Israel – The Nation State* (2018), which was upheld by Israel's Supreme Court in 2021. The Court stated that the recognition of political (national) self-determination for the 'Jewish people' (recognized in the Law as exclusive to them) did not preclude cultural self-determination for minority groups in Israel, and was consistent with the right to self-determination in international law: 'Israel: Supreme Court Affirms Constitutionality of Basic Law: Israel – Nation State of the Jewish People', at www.loc.gov/item/global-legal-monitor/2021-07-27/israel-supreme-court-affirms-constitutionality-of-basic-law-israel-nation-state-of-the-jewish-people/; Tamar Hostovsky Brandes, 'Does Where You (Legally) Stand Depend On Where You Sit?: The Israeli Supreme Court's Decision on the Nation State Law', *Verfassungsblog,* 20 July 2021.

[109] From at least an internal standpoint, this is particularly the case in circumstances of sustained conflict and/or when, by analogy with the *Reference* case, the group's long-established 'clear majority' seeks to achieve a scheme of advanced self-determination within the state. Marc Weller, *Towards A General Comment on Self-Determination and Autonomy,* UN Doc. E/CN.4/Sub.2/AC.5/2005/WP.5, 25 May 2005, pp. 13-16; Giuseppe Palmisano, 'Autodeterminazione dei popoli', *Enciclopedia del Diritto,* 2012, Vol. Annali V, 82, pp. 115, and 120. The Kurdish question in Turkey offers one example of this, *see* Gaetano Pentassuglia, 'Assessing the Consistency of Kurdish Democratic Autonomy with International Human Rights Law', *Nordic Journal of International Law,* Vol. 89, Issue 2, 2020, pp. 201-202.

[110] For an overview of this case, *see* Senaratne 2021, pp. 228-235.

[111] In fact, this borrowing involved the Canadian Court's 'whole people' reference [Pentassuglia (ed.) 2018, pp. 143-144], while Judge Cançado Trindade's separate opinion, as noted, began by pointing to the lack of terminological precision as to what is a people in international law (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion of Judge Cançado Trindade). For a broader discussion of post-colonial practice, *see* Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law,* Cambridge University Press, Cambridge, 2021; and my commentary, 'Sovereignty and Minorities: Towards Reshaping Postcolonial National Identities?', *Nordic Journal of International Law,* Vol. 90, Issue 4, 2021, p. 526.

[112] [2022] UKSC 31, *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, Judgment of 23 November 2022, para. 89.

[113] Id. para. 90. The point implicitly acknowledges the legitimacy of multinational internal self-determination and thus the nesting of civic and cultural nationalities within the state. For the British case, *see* Miller 2001.

7. Conclusions: Taking National Identity (More) Seriously

With a view to filling the gap in scholarly analyses about the conceptualization of national identity issues in international law practice, the foregoing intertemporal assessment has intended to uncover the complications of the interaction of civic/institutional and cultural views of national belonging from which the investigation began. I have sought to demonstrate that, while the enduring significance of the territorial/civic approach can hardly be questioned, cultural dimensions to national identities of one kind or another, particularly in the context of the right to self-determination, are far from uncommon to international law practical responses.

The idea of national identity that transpires from the key strands of such adjudicatory practice – whether it is the early 20th century recognition of Finland's and the Aalanders' national identities in the *Aaland Islands* case, or the more recent, implicit or explicit, judicial acknowledgment of different levels of national identity in countries such as Canada, Cameroon, or Italy,[114] or even the complex arrangements proposed by the Badinter Commission on Yugoslavia on national divides in Bosnia and beyond – is not one that can be limited to territorial and institutional elements. Rather, it comes into view as a set of factual/historical circumstances that speak, directly or indirectly, to more substantive aspects of that identity, however articulated in any specific case. This is arguably (*prima facie*) consistent with the formulation of self-determination provisions in international instruments which allow 'all peoples' to freely pursue their 'cultural' development in conjunction with their political (and economic) one.[115]

The key argument that I have made here is that there has been a move over time towards a more substantive view of national identity in international law, yet no universal or automatic test of peoplehood or nationhood applies to it. Indeed, the hybridity of the practice discussed in previous sections stems from the need to constantly oscillate between the territorial/institutional/subjective elements of the self-determination process and the claimants' more objective features. In other words, the 'subjective/objective' or 'political/cultural' binary (either/or) choices – the typical binaries associated with the different understandings of national identity – have proved in most cases insufficient *on their own* to deliver legal responses. The 'subjective' requires the 'objective' of one kind or another and vice versa, just as the 'cultural' requires the 'political' (political agency) or else both of them are or can be deeply intertwined.[116] The reluctance by adjudicatory bodies to make determinations as to the status of a group as a 'people' (or a nation), yet their increasing willingness to consider and accommodate dimensions of national identity at various levels, including through a range of

---

[114] In *Lautsi v. Italy*, No. 30814/06, Judgment of 18 March 2011, the ECtHR concluded that the manifestation of certain religious symbols in public schools as an integral part of Italy's national identity was not, in and of itself, a breach of the ECHR. The judgment effectively distinguished the mere historical existence of such an identity from the individual right to freedom of, and from, religion. *See* the oral submission by Professor Joseph Weiler on a behalf of various third party intervening states; *see also* Joseph Weiler, 'Lautsi: A Reply', *International Journal of Constitutional Law*, Vol. 11, Issue 1, 2013, p. 230. In an arguably similar vein, international discussions around state-wide language policies have consistently distinguished the protection of the state language as one legitimate cultural marker of national identity from the need to balance this concern with the language protection of distinct nationalities at sub-state level. In the context of Ukraine, *see e.g.* Venice Commission, *Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language*, CDL-AD(2019)032, 6-7 December 2019, para. 134; *Statement by the Committee of Experts on the legal framework for the implementation of the European Charter for Regional or Minority Languages in Ukraine*, MIN-LANG (2023) 15, 26 June 2023.

[115] *See e.g.* common Article 1, UN Covenants on Human Rights.

[116] The centrality of a political will to exercise self-determination does not qualify any political grouping for it, which in turn raises the question of what exactly makes national claims to a particular political status more compelling than other claims in any practical case. On this blend of factors, *see* the references in footnotes 8, and 12.

terminological variations,[117] reflects a shift away from definitional matters towards a more complex view of how the law (the law of self-determination in our case) should respond to the factual circumstances of the case at hand. It speaks to the *evolving substance* of the law rather than a precisely pre-defined and unrelated set of beneficiaries.[118] It suggests that, somehow beyond the UN agnosticism of the 1940s, these beneficiaries may well comprise substantive 'national' claimants, even though this need not always be the case. It captures an underlying minimum *legal obligation* under general international law and treaty law (particularly the ICCPR) to respect, and respond to, substantive national claims if the community's will (choice or aspiration) and its (national) distinctiveness can hardly be disputed.[119] In this regard, the view of national identity that is unveiled by these adjudicatory exercises is neither a wholly civic nor a wholly cultural one.

It is thus important to emphasize that such a move in legal practice is not a national free-for-all. As pointed out by both the Jurists and the Rapporteurs in the *Aaland Islands* case, the state operates as a framework of stability, as a "territorial and political unity".[120] A similar concept transpires from the *Reference* case as the Court anchors the complexities of (internal) self-determination to "the framework of an existing state".[121] The state thus remains the only (or primary) context for addressing national identities, regardless of legal classifications. Conceptually, this has at least two implications. First, it means that substantive national identity matters inevitably stand alongside, and not replace, the more traditional territorial and political approach that underpins a 'civic' conception of the national community. The state retains an institutional logic of its own even in the face of national or multinational diversity, and there is consequently no legal basis for unilateral secession within or across state boundaries on national/cultural grounds and/or electoral grounds (referenda/plebiscites),[122] even though both such elements can (and normally do) contribute to qualifying the group's profile.[123] Second, international law is fundamentally neutral as to the precise cultural trajectory of nation-building (*i.e.* pre-, or post-statehood), to the extent that the national identities in question, at any level within the state, are well-established historical realities.[124]

At the same time, more pro-active practical approaches to national identity should not be seen as a concession to ethnocentrism, despite a degree of overlap between the 'cultural'

---

[117] As noted in Section 5, the increasing use of 'community' in the Western Balkans operates as an intermediate category between 'minority' and 'people', between the individual and the state, and/or between minority rights and self-determination itself. For an early use of the term, *see* the *Greco-Bulgarian* case (*Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of the 'Communities')*.

[118] Quite the contrary, that substance is being shaped precisely by relational dimensions. *See e.g.* Pentassuglia (ed.) 2018, pp. 151-152.

[119] It is for states to first allow the articulation of that will, while neglecting the community's established demands or backsliding on previous forms of national accommodation beyond merely cultural protection, is arguably incompatible with such a minimal obligation: *ibid*., p. 150. As the case of New Caledonia in Section 3.1 suggests, complex arrangements that account for multiple identities and achieve consistency with contemporary human rights standards may be required even in circumstances in which self-determination is nominally construed on a purely territorial basis.

[120] *The Aaland Islands Question* (On Jurisdiction), p. 5, *The Aaland Islands Question* (On Merits), p. 4.

[121] *Supra* note 101, para. 126.

[122] The alternative case of 'remedial' secession remains a contested proposition in international law: see *supra* note 95. Whatever the grounds of secession, secessionists uphold the state framework, though they question how borders are drawn.

[123] Electoral and/or consultative mechanisms are ordinarily instrumental in establishing the quality and democratic legitimacy of the claim, yet they are not in themselves sufficient to effect legal change. See also *supra*, note 109.

[124] In this regard, the analytical distinction between nation-to-state and state-to-nation trajectories (with the latter being historically far more frequent than the former) is largely irrelevant, whatever the scale (state or local) of national belonging. Tellingly, in *Cameroon* the African Commission deliberately focused on the distinct (regional) national identity of the claimants *post*-Cameroon independence, irrespective of whatever identities existed during the colonization of the territory (*supra* note 68, para. 182).

and the 'ethnic' in articulating national claims.[125] There are at least three reasons for that. *(i)* First, a strictly mono-ethnic version of national identity is ordinarily inconsistent with the rights of others, be they individuals or other groups, and there is no indication from the foregoing practice that the resulting ethnic discrimination can be justified under international law. A very early example is the 'restoration' of the 'Polish nation' in 1919: granting special protection to ethnic Poles under the new settlement could not justify an ethnocentric policy of 'de-Germanization' in newly reconstituted Poland.[126] Modern examples would heavily draw on the principle of non-discrimination in human rights law. *(ii)* Second, ethnicity does not have an intrinsically political (let alone national) dimension, since many ethnic groups' claims are generally limited to forms of cultural recognition, not institutional reform.[127] Even indigenous peoples, as noted earlier on, place their specific ethnicity in the context of a much wider (political) narrative regarding their homeland, and the need to institutionally redress the injustices they have suffered, which is what makes them groups (indeed national groups) of a special kind. *(iii)* Third, and more importantly, there is nothing in the very concept of national identity that requires mono-ethnicity per se, even though, historically, a cultural understanding of that identity may have been drawn primarily from a particular ethnic group. In other words, there is nothing in that concept that makes it incompatible with a variety of ethnicities bound together by a common and overarching national identity. This is arguably confirmed by some key adjudicatory practice discussed in earlier sections, especially in contexts such as the African Charter, in which one would probably expect greater emphasis on ethnicity. As noted, in the *Cameroon* case, the African Commission is adamant that "the people of Southern Cameroon" have their own national identity (with a common history and other relevant linguistic, territorial, and political indicia) despite their internal ethnic diversity (which was one central factor the respondent state had insisted upon to challenge the claims).[128] Other important cases openly downplay ethnic factors in addressing the claimant's national claims or implicitly assume broad multi-ethnic and multi-national conditions for addressing those claims.[129] In short, national identity and ethnicity can be related as a matter of history and/or evidence, but are not identical concepts, and should not be treated as such. Therefore, reducing certain national claims to 'ethnic' self-determination – at worst, an aggressive quest for ethnic 'purity' – misses the broader point that underlies the national identity argument.[130]

The hybridity of the practice discussed in this work raises, finally, the issue of the extent to which the international community is prepared to address the legal dimensions of national identities. Frequently paralyzed by (often inflated) concerns for internal and/or international

---

[125] This is partly due to the ethno-cultural element typically linked to the idea of nationality as separate from citizenship, *see* Recommendation 1735(2006), para. 5, and Section 2; *see* more broadly, Smith 1986, and partly related to the (more problematic) theoretical claim that cultural (as opposed to civic) national identity requires ethnic homogeneity, *see e.g.* Gellner 1983, pp. 1-2.

[126] *See* the 1923 *Polish Nationality* case.

[127] *See e.g.* Christian Tomuschat, 'Status of Minorities under Art.27 of the UN Covenant on Civil and Political Rights', in Satish Chandra (ed.), *Minorities in National and International Laws*, Deep & Deep Publications, New Delhi, 1985, pp. 40-41; Miller 1997, p. 112.

[128] *Supra* note 68, para. 168.

[129] *Supra* note 81. The Court's line of reasoning in the *Reference* case (*supra* note 101) clearly endorses those conditions.

[130] Large strands of leading international legal scholarship on self-determination have arguably (perhaps inadvertently) contributed to this conflation by articulating the cultural (as distinct from civic) substance of national identity exclusively or primarily in ethnic terms, *see* among others, Musgrave 1997, Chapter 7; Cassese 1995, pp. 364-65l; David Wippman (ed.), *International Law and Ethnic Conflict*, Cornell University Press, Ithaca & London, 2018. But *see* Ian Brownlie, 'The Rights of Peoples in Modern International Law', in James Crawford (ed.), *The Rights of Peoples*, Oxford University Press, Oxford, 1988, p. 5, importantly noting that exclusively ethnic criteria would not apply to many "long-existing national identities", even though he still articulates the core meaning of self-determination in broadly cultural terms.

instability, states have typically accepted institutional/standard-setting solutions as temporary responses to national disputes perceived as otherwise unmanageable. The various attempts to accommodate national claims in the 1920s and 30s, or even the more recent institutional engineering in the Western Balkans and beyond, can be said to represent *ad hoc* approaches prompted by the sort of transformative 'anomalies' that the Jurists so clearly described in the *Aaland Islands* case. From this perspective, the complexities discussed above (civic/cultural; political/cultural; subjective/objective; *etc.*) can only inform contingent and creative forms of legal argumentation designed to tame potentially destructive (or perhaps even fictitious) nationalist demands.[131] The civic/territorial approach to national identity (and self-determination) would then seek (at least over the longer term) to de-emphasize substantive community issues by locating the source of national allegiance exclusively in a set of common laws and institutions.[132] The 'whole people' approach to self-determination might be taken to embody that idea.

The alternative point that I have sought to offer here is that the multidimensional practice of national group identities being denied or claimed, far from being exceptional or transient, flags up a *systemic* feature of national and international *legal* affairs across time. While crucially political in outlook and especially visible in times of territorial dislocation, national identity claims ordinarily rest on 'stable' *public cultural* dimensions that cannot be subsumed under purely civic/territorial conceptions of the state.[133] This arguably applies to both regional/local (including indigenous) identities as well as state-wide overarching national identities, regardless of the degree of social cohesion or separation linked to specific factual circumstances.[134] International (and national) adjudicators and policymakers would do well to pro-actively engage with such identities, not as intrinsically or necessarily 'abnormal' realities, but as one, by no means the only, way of perceiving one's individual and collective place in the world. Consistent with existing human rights law practice,[135] they should uphold an open *democratic* debate within the state about their content and layers (buttressed by associative freedoms) and set out the legal-institutional terms of inclusive participatory processes that can contribute to their reform or adjustment (buttressed by equal *participation* rights).[136] Future

---

[131] Nathaniel Berman's point about the creative role of legal (especially judicial) analysis in specific cases may be technically correct (*see* Berman 1993) but seems to invite a view of national identity that ultimately collapses into a mere rhetorical pattern of discourse, with no real or intrinsic substance of its own.

[132] For discussion, *see e.g.* Cassese 1995, p. 365; Jeremy Waldron, 'Two Conceptions of Self-Determination', in Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, 397; for a predominant focus on civic (institutional) integration as an overarching narrative within society, *see also* OSCE High Commissioner on National Minorities, *The Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note*, November 2012.

[133] As is known, Will Kymlicka was one of the first contemporary political philosophers to speak of distinctive 'societal' public cultures as separate from the range and depth of social diversity which predominantly characterizes the private sphere. *See* Kymlicka 1995. Certain 'post-national' versions of cosmopolitanism and identity politics are inherently in tension with any meaningful idea of national identity within the state other than perhaps in its most formal of senses; their analysis falls beyond the purpose of this writing. For a (partial) discussion, *see* Pentassuglia 2018, pp. 296-300.

[134] For example, Miller 2001, importantly distinguishes ethnic cleavages (mainly linked to migration) from deep societal divisions and 'nested' nationalities. The first case does not preclude an overarching sense of national identity underpinned by a public culture, unlike the second case in which a high degree of separation (induced by protracted war or violence) is to some extent inevitable, at least in the short and medium term. By contrast, the case of 'nested' nationalities allows for the interweaving of local/regional (national) identity with a wider (state-wide) sense of national belonging.

[135] *See e.g.* Pentassuglia (ed.) 2018, pp. 131-132.

[136] Writing about the early 1990s post-communist transition in Eastern Europe, András Sajó rightly makes a case for democracy *within* (not outside of) the national identity framework as a long-term vision of gradual mutual accommodation and compromise within the state's overarching political nation. András Sajó, 'Protecting Nation

international law research should focus on the conditions under which those identities can be secured at different levels and nested within each other, rather than pursuing definitional purity or questioning their existence and/or legal salience.[137]

To sum up: I have argued that, despite the enduring significance of the territorial/civic approach, there has been a conceptual move over time towards a more substantive view of national identity in international law, yet no universal or automatic test of peoplehood or nationhood applies to it as the operational focus shifts towards the evolving content of the law of self-determination; and that, additionally, the hybridity of such a move should be viewed as neither a concession to ethnocentrism nor merely a form of legal argumentation used to soften (and eventually eradicate) the 'elemental force' of national claims.[138]

States and National Minorities: A Modest Case for Nationalism in Eastern Europe', *The University of Chicago Law School Roundtable*, Vol 1, Issue 1, 1993, pp. 73-74.

[137] Institutional solutions within the state do not rule out cross-border approaches or reallocation of decision-making authority within wider regional spaces, *see* Section 5, and Jordana *et al.* (eds.) 2019.

[138] On outright rejection of these matters as primitivism, tribalism, or (somehow) legal rhetoric, *see* the references in footnotes 17, and 19.