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Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium

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HERETICAL REFLECTIONS ON THE RIGHT TO SELF-DETERMINATION: PROSPECTS AND PROBLEMS FOR A DEMOCRATIC GLOBAL FUTURE IN THE NEW MILLENNIUM

J. OLOKA-ONYANGO*

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*Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
And no religion too
Imagine all the people
Living life in peace*

John Lennon¹

INTRODUCTION

Recently, few subjects in the study of international human rights law, international relations theory, or contemporary international politics have captured as much attention as the phenomenon of self-determination. Although self-determination is a topic in and of itself,² it

1. JOHN LENNON, *Imagine*, on IMAGINE (Emd/Capitol 1971) (second stanza).

2. The literature attesting to this fact is substantial. For a sampling of articles that were written on the subject between the years 1994 and 1995, consider the following, which includes only those articles that employ the term "self-determination" in their titles: See W. Ofuately-Kodjoe, *Self-Determination*, in UNITED NATIONS LEGAL ORDER 349 (Oscar Schachter & Christopher C. Joyner eds., 1995); James A. Graff, *Human Rights, Peoples, and the Right to Self-Determination*, in GROUP RIGHTS 186 (Judith Baker ed., 1994); Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 1 (Louis Henkin & John Lawrence Hargrove eds., 1994); Jeff J. Corntassel & Tomas Hopkins Primeau, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self Determination,"* 17 HUM. RTS. Q. 343 (1995); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133 (1995); Sam Blay, *Self-Determination: A Reassessment in the Post Communist Era*, 22 DENV. J. INT'L L. & POL'Y 275 (1994); Bill Bowring, *The Rule of Law as an Instrument of Oppression? Self Determination and Human Rights*, 5 LAW & CRITIQUE 3 (1994); Richard Falk, *Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars*, 15 MICH. J. INT'L L. 591 (1994); Markus B. Heyder, Note, *The International Law Commis-*

also relates to myriad other issues, including nationalism,¹ women,⁴ minorities,⁵ statehood,⁶ group rights,⁷ indigenous peoples,⁸ ethnicity,⁹

sion's Draft Articles on State Responsibility: Draft Article 19 and Native American Self-Determination, 32 COLUM. J. TRANSNAT'L L. 155 (1994); Frederic L. Kirgis, Jr., Comment, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994); Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153 (1994); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857 (1994); Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323 (1994); V.T. Thamilaran, *Self-Determination: A Minorities Perspective*, 6 SRI LANKA J. INT'L L. 271 (1994).

3. See, e.g., William A. Schroeder, *Nationalism, Boundaries and the Bosnian War: Another Perspective*, 19 S. ILL. U. L.J. 153 (1994); ELIE KEDOURIE, NATIONALISM (1993) (discussing nationalism issues as they relate to self-determination).

4. See generally Karen Knop, *Why Rethinking the Sovereign State is Important for Women's International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 153 (Rebecca J. Cook ed., 1994); GENDERED STATES: FEMINIST (RE) VISIONS OF INTERNATIONAL RELATIONS THEORY (V. Spike Peterson ed., 1992); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993); Christine M. Chinkin & Shelley Wright, *The Hunger Trap: Women, Food, and Self-Determination*, 14 MICH. J. INT'L L. 262 (1993) (relating women's issues to self-determination).

5. See generally Thamilaran, *supra* note 2 (commenting that self-determination also relates to minorities).

6. See Frederick W. Jjuuko, *The State, Democracy and Constitutionalism in Africa*, 2 E. AFR. J. PEACE & HUM. RTS. 1 (1995); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995); *Unmaking and Remaking the State*, 36 AFR. CONFIDENTIAL 1 (1995) (explaining that literature discussing the decline or the transformation of statehood has captured the fancy of a number of writers, particularly after the traumatic post-cold war examples of Somalia, Liberia, the former Yugoslavia, and the former Soviet Union, in addition to other states that seem more stable); cf. Vivien Schmidt, *The New World Order Incorporated: The Rise of Business and the Decline of the Nation-State*, 124 DAEDALUS 75 (1995) (analyzing the same notion with respect to states in the so-called "North").

7. See generally Graff, *supra* note 2 (applying self-determination to the issue of group rights).

8. See generally Julian Burger & Paul Hunt, *Towards the International Pro-*

and secession.¹⁰ These issues are just a few that have been appropriated to the cause of self-determination.¹¹ At the same time, one can clearly discern the ebb and tide of interest in the concept over the past several decades, during which self-determination became an issue of topical concern. For the purposes of this article, the volatile phases of self-determination are divided into three parts. First, this Essay will discuss the aftermath of the two World Wars and the period of decolonization. Second, it will comment on the debate over the New International Economic Order ("NIEO") and the promulgation of the Declaration on the Right to Development. Third, this Essay will address the demise of the hostilities of the Cold War, which has been attended by the resurgence of conflictual ethnicity. This demise has also heightened calls for the recognition of the rights of minorities and indigenous peoples, and has created an overall turbulent and unstable situation, particularly for the state.

tection of Indigenous Peoples' Rights, 12 NETH. Q. HUM. RTS. 405 (1994); Elsa Stamatopoulou, *Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic*, 16 HUM. RTS. Q. 58 (1994); Erica Irene Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993); Mâivan Clech Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603 (1992).

9. See Asmelash Beyene, *The Nationality Question, Secession and Constitutionalism: The Case of Ethiopia*, in STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY 129 (Issa G. Shivji ed., 1991).

10. See, e.g., Minasee Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479 (1994); Angela M. Lloyd, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT'L L. 419 (1994); Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT'L L. 655 (1993) (applying self-determination to the issue of secession).

11. See Lâm, *supra* note 8, at 615-16 (noting that such an appropriation of the notion is possible, in part because of the international community's ambivalence about the meaning and content of self-determination and also due to the international community's desire to keep a lid on what is largely viewed as a veritable global Pandora's Box).

The discussion of the first two parts fits within the relatively clear legal boundaries of positivism.¹² However, the contemporary discourse regarding the rise of problems in the former Yugoslavia, Chechnya, and Somalia, and the impotence of the international community's response to these crises, is more reflective of our times—anarchic, indeterminate,¹³ and highly ambivalent.¹⁴ Furthermore, despite the profound development of capitalism and technology, and the phenomenal extension of neo-classical models of economic order—reflected domestically in Thatcherite and Gingrichian economics and internationally in

12. Positivism denotes the debate regarding whether or not the right to self-determination was contained in “the law.” The League of Nation’s approach to the phenomenon of self-determination was that no such right existed, whereas the United Nations brought the right to prominence in its Charter.

13. See Dencho Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 EUR. J. INT’L L. 1 (1993) (reviewing the literature attesting to this “indeterminacy”). Georgiev asserts that the indeterminacy of our times is:

prompted by the observation that the end of the cold war has not only occasioned democratization throughout the world, it has also released long-frustrated nationalist aspirations. By no mere logic did democratization require the reunification of Germany or the dissolution of the Soviet Union. Granting that the Soviet government was evil, did it follow that the Soviet Union was an evil empire, its people not just oppressed but conquered and colonized?

Id. Cf. Guyora Binder, *The Kaplan Lecture on Human Rights: The Case for Self-Determination*, 29 STAN. J. INT’L L. 223, 224 (1993) (asserting that this era has produced a distinction between “universalist” and “nationalist” components of self-determination).

14. See Richard DeGeorge, *The Myth of the Right of Collective Self-Determination*, in ISSUES OF SELF-DETERMINATION 1, 2 (William Twining ed., 1990) (employing a Levi-Straussian method of analysis to illustrate how the notion of self-determination is in part a myth which “both reveal[s] and hide[s] parts of reality, and serve[s] to make sense of and validate certain actions”). At the same time, self-determination is highly ambiguous in part because of the difficulty of specifying exactly what it means and how it is to be ascertained:

[s]ometimes the right of self-determination is used with respect to and forms part of consent theories. Sometimes it is used with and forms revolutionary theories. And at still other times it is used with and forms part of democratic theories. Each of these variants is part of the myth, and all together form the myth-system of which it belongs.

Id.

the World Bank's and International Monetary Fund's ("IMF") Structural Adjustment Programmes ("SAPs")¹⁵—the discussion has drawn little that is new from the notion of economic self-determination.¹⁶ It is as if self-determination has been shorn of all its economic elements¹⁷ and has become solely concerned with borders, territory, and nation-statism.¹⁸ The failure to relate self-determination to human rights—the conceptual and philosophical regime from which the subject derived inspiration—is particularly disturbing.¹⁹

15. See Phillip Alston, *The Universal Declaration in an Era of Globalization*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY 29 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1998). See generally AUTHORITARIANISM, DEMOCRACY AND ADJUSTMENT: THE POLITICS OF ECONOMIC REFORM IN AFRICA (Peter Gibbon et al. eds., 1992). Structural Adjustment Programmes are economic measures designed by the IMF and the World Bank to restructure the economies of developing countries, which were largely perceived to be mismanaged and bankrupt. Although these programs have existed since the 1970s, they have only gained momentum and application in the 1980s and 1990s. Overall, the austerity measures that the IMF and World Bank introduced are widely considered to have made the situation worse in countries where they have been applied.

16. See International Covenant on Economic, Social, & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 4.

17. See generally Chinkin & Wright, *supra* note 4.

18. See *id.* Chinkin & Wright have also argued that:

This right to self-determination may be too narrowly defined. Political cohesion sufficient to exercise a right of self-determination is generally defined in terms of language, religion, race, or ethnic origin. This can in turn lead to irredentist claims, aggressive practices toward "others" (who may be long-term neighbors as in Bosnia-Herzegovina), and violent fragmentation within any wider sense of Community. Serbia's intransigent pursuit of "self-determination" has directly led to this "people's" increasing isolation from the rest of the international community. But a "self" cannot solely consist of territories, boundaries, and political instruments.

Id. at 293.

19. See Paul Goble, *The Role of International Law in the Twenty-First Century: Back to Biafra?: Defending Borders and Defending Human Rights in the Post-Cold War Environment*, 18 FORDHAM INT'L L.J. 1679, 1680 (1995) (criticizing the tendency to omit the issue of individual human rights from the discussion of self-determination by focusing solely on the group or collective). Goble reasons that:

The former (human rights) is broader than the latter (self determination), be-

This Essay is a modest attempt to fill in some of the gaps that continue to pervade discussions about self-determination today. In particular, it analyzes the relationship between self-determination and statehood as we move toward the next millennium. Of special concern is the need to develop novel and dynamic angles to the principles underlying the right. Such concern is dictated by a number of distinct limitations in previous theory, particularly with reference to the historiography and dominant perceptions and presumptions about self-determination within international law and in general theoretical discourse.²⁰ The concern is also directed to an understanding of the tremendous and varied pressures being brought to bear on the twentieth century state and the need to critically revisit the second part of self-determination, namely, the NIEO and the Declaration of the Right to Development. Paramount in a reorientation of the concept is the need to “degender” self-determination’s predominant male focus, by bringing women directly into the discussion on the subject and by firmly enconcing feminist perspectives into the conceptualization of statehood

cause the former explicitly recognizes that groups may form and seek exit from states for other ethno-national reasons, and because it allows for a discussion of the consequences of state-sponsored attacks on individuals and their response instead of limiting the issue to state attack on groups.

Id. Even the vision of human rights must be seen in a holistic fashion—not merely as civil and political rights but as economic, social, and cultural rights—rights that Goble unfortunately omits from his discussion of the issue. *See id.*; *see also* J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT’L L.J. 1 (1995) (examining the need for a comprehensive approach).

20. Among the perceptions, presumptions, and prejudices (both declared and implicit in the literature) are the following: (1) the doctrine of self-determination originates in the context of Euro-American liberation and revolutionary struggles; (2) questions of gender and class are of no consequence to the exercise of the right; (3) economic, social, and cultural self-determination is less important than the political; (4) self-determination does not apply to non-colonial peoples; (5) the dominant forces fostering the post-Cold War upsurge in demands for self-determination and secession are ethnic or “primordial”; (6) the right to self-determination does not extend to secession; and (7) no right of self-determination exists within the context of a “democratic” state and representative government. Throughout this paper, these perceptions are interchangeably referred to as the “dominant” or “traditionalist” perspectives.

and self-determination.²¹ A deeper consideration of these inherent limitations in the concept of self-determination will hopefully draw us closer to a more holistic and complete vision of the problems and prospects for a democratic twenty-first century future.²²

To accomplish the aforementioned objectives, this Essay addresses several questions. First, what is self-determination, or the "official" version of the concept, and how have the various biases that scholars brought to the subject influenced the conceptualization of self-determination and its expression in international human rights law? Second, how has the law viewed self-determination and its relation to the doctrine, or is the law irrelevant to self-determination? Finally, how do the political and economic elements of self-determination relate to each other and come together to help us effectively reach *beyond* self-determination? In other words, how can we arrive at a holistic interpretation of the right to self-determination that is both true to the fact of present-day realities and constraints, while simultaneously keeping the flame of democratic aspirations alive? Accordingly, this Essay is not concerned with the usual specifics of particular claims or generalized theories about legitimacy, capacity, territory, or government that are the usual focus of most discussions on the subject. Rather, this Essay mainly considers the development of the political economy and epistemology of self-determination.

At the peril of repetition, and recognizing the fairly worn path already trodden by others in the intellectual maze of self-determination, the Essay proceeds in the following fashion: Part I revisits the historical origins of self-determination. Part II critically examines the debate regarding the need for new methodologies of considering international law in general and self-determination, human rights, and statehood in particular. The second part also recapitulates the arguments developed in the earlier sections of the Essay with a *précis* of the challenges facing us in the twenty-first century, includ-

21. See Chinkin & Wright, *supra* note 4, at 301-02 (describing the inadequacy in drafting and interpreting international legal regulations regarding the right to exist because the regulations focus on the world of white European men).

22. See Ranee K. L. Panjabi, *Human Rights in the 1990s: Promise or Peril?*, 28 CORNELL INT'L L.J. 229, 230 (1995) (attempting to deal with the profound intellectual pessimism and even defeatism that pervades intellectual discourse on human rights issues today).

ing a particular focus on the issues raised by the phenomenon of secession.

I. THE POLITICAL ECONOMY OF TWENTIETH CENTURY SELF-DETERMINATION DOCTRINE

A. THE ORIGINS OF THE DOCTRINE OF SELF-DETERMINATION: THE "OFFICIAL STORY"

1. *Self-Determination before the Second World War*

Most theorists assert that self-determination was not considered a legal right until after the Second World War.²³ This view emanated in part from the International Committee of Jurists' study established in 1920,²⁴ which examined the question of whether the people of the Aaland islands had a right to conduct a plebiscite on the issue of the territory's potential separation from Finland and amalgamation with Sweden.²⁵ The Committee's view was that although self-determination was important in modern political thought,²⁶ it was not incorporated into the Covenant of the League of Nations, and, therefore, was not a part of the positive rule of the Law of Nations.²⁷

United States President Woodrow Wilson attempted to incorporate the notion of self-determination into international law, or at least into international practice,²⁸ an effort that resulted only in allowing for the

23. See Armen Tamzarian, Note, *Nagorno-Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-Determination*, 24 SW. U. L. REV. 183, 193-95 (1994) (describing the emergence of self-determination).

24. See *The Aaland Island Question. Report of the Committee of Jurists*, LEAGUE OF NATIONS, O. J. Spec. Supp. 3, at 5 (1920).

25. See Tamzarian, *supra* note 23, at 193 (noting that the International Committee of Jurists adopted the traditional view of the principle of self-determination).

26. See Kolodner, *supra* note 2, at 154 (detailing a brief history of the rise of self-determination).

27. See *id.* (noting that commentators agreed that the concept of self-determination commenced after World War I).

28. See *id.* at 154-55 (quoting Wilson's 1917 proclamation that "[n]o peace can

adoption of special treaties for the protection of minorities.²⁹ Essentially, Wilson's notion of self-determination was the recapitulation of the concept of government by consent of the governed.³⁰ However, given the outcome of Wilson's efforts³¹ (now finding expression in the collapse of Yugoslavia and the rise of Bosnia-Herzegovina and its attendant problems),³² the Wilsonian connection may well be one that should not be overemphasized.³³

Such caution is particularly necessary since, as Mâivam Lâm points out in regards to the League, "the peoples protected by these treaties played no formal role in either their construction or implementation."³⁴ Nevertheless, the intransigence of the colonial powers ensured that the exercise of self-determination would be contained, at least for the interim, forcing a telling silence on the issue of the self-determination of

last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right exists to hand people about from sovereignty to sovereignty as if they were property").

29. See Thamilmaran, *supra* note 2, at 272 (commenting on President Wilson's support of minority rights as distinct in international law).

30. Cf. Richard F. Iglar, Comment, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, XV B.C. INT'L & COMP. L. REV. 213, 222 (1992) (discussing the Allies' adoption of self-determination following World War I); UMOZURIKE OJI UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 13-20 (1972).

31. Wilson has been both praised and damned for his particular contribution to the development of the notion of self-determination and the settlement at Versailles in 1919. See Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT'L & COMP. L.Q. 99 (1994) (rigorously attempting to rehabilitate Wilson). Unfortunately, even those who come to Wilson's defense, like Whelan, are blind to the fact that Wilson wholly ignored the denial of human rights and the discrimination—especially of the racial kind—in his own backyard, although he told the world to clean up theirs.

32. See generally Schroeder, *supra* note 3, at 154 (discussing the secession of Slovenia, Croatia, and Bosnia from Yugoslavia).

33. This is especially the case in light of the fact that Wilson simply borrowed and modified the concept from Lenin. See Lâm, *supra* note 8, at 614; see also V. I. LENIN, THE RIGHT OF NATIONS TO SELF-DETERMINATION (1968) (providing Lenin's own views on self-determination).

34. See Lâm, *supra* note 8, at 614-15 (discussing the League of Nations' attempt to rearrange European borders after World War I).

non-European peoples, still trapped within the vise of imperialism.”

The short existence of the League of Nations³⁶ may only in part be on account of its failure to confront the issue of self-determination in a direct manner.³⁷ However, fascism and war soon eclipsed the League of Nation’s recalcitrance and brought the issue of self-determination back to the fore.³⁸ Consequently, in the League of Nation’s successor organization, the United Nations (the “UN”), the doctrine of self-determination gained a fairly significant foothold.³⁹ This advancement of the concept of self-determination in the UN obviously had as much to do with the devastation of Hitler’s hegemony as it did with the rumblings in India, the fractures inflicted to colonial preeminence by nationalist agitation, and the greatly strengthened United States and Soviet Union.⁴⁰ All of these factors contributed to and determined the

35. See Iglar, *supra* note 30, at 223 (stating that during the post-World War II decolonization process, self-determination was exercised by former colonies, rather than by people).

36. See generally Phillip Vuciri Ramaga, *The Bases of Minority Identity*, 14 HUM. RTS. Q. 409 (1992) (analyzing the history of the drafting of United Nations Article 27 and its treatment of racial identities).

37. See Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT’L L. 199, 239-44 (1992) (recounting the history of the many definitions of self-determination, leading up to the modern formulations of self-government).

38. See *id.* at 244 (discussing the Atlantic Charter, signed by both President Roosevelt and Prime Minister Churchill on August 14, 1941, which affirmed the principle of self-determination and, which was accepted in the Declaration of the United Nations in 1942).

39. See generally T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3 (Catherine Brolmann et al. eds., 1993). Professor Franck specifically states that:

[a]fter World War Two the imperfectly applied European principle of self-determination lease of life as it was applied to former colonies and trust territories through the text of the UN received a new Charter. At the San Francisco charter-drafting conference, it was the Soviet Union, which first pressed for the inclusion of a clause specifying, among the Organization’s purposes, the fostering of relations among states, “based on respect for the principle of equal rights and self-determination of peoples.”

Id. at 7.

40. See generally *id.* at 3-27. The issue of self-determination was perhaps the last on which the two, soon-to-become world superpowers agreed—albeit for dif-

shape that self-determination assumed in the new organization.

2. *The United Nations and Self-Determination*

As a firm concept in international law, self-determination gained the most acceptance under the framework of the UN, established in the aftermath of the Second World War.⁴¹ A principal factor in the drive towards the recognition of the concept was the formulation in the UN Charter, which stressed “the respect for the principle of equal rights and self-determination of people” as one of its paramount purposes.⁴² During the initial years of its existence, the UN presided over the simultaneous dismantling of the European colonial empire and the evolution of the doctrine of self-determination as a firm component of international human rights law.⁴³

The year 1960 represented the pinnacle in the development of the legal framework of self-determination at the UN, with the Declaration on the Granting of Independence to Colonial Countries and Peoples⁴⁴

ferent reasons—before the Cold War chill blew in to freeze any common understandings on international issues.

41. See generally *id.* at 8-16. (discussing the meaning of self-determination after World War II in such places as Africa, Europe, India, etc.).

42. See U.N. CHARTER art. 1(2). See also U.N. CHARTER art. 55 (listing economic and social conditions that are necessary for positive relations among nations based on the principle of self-determination of peoples).

43. See Rosalyn Higgins, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29 (Catherine Brodman et al. eds., 1993) (taking a contrary view on this matter). Rosalyn Higgins asserts that:

it is one of the great myths that the UN Charter provided for and required self-determination in the form in which it evolved. It did not, and to ignore the development of the concept in ways quite unintended by the Charter is historically false. The very few references in the Charter to self-determination—Articles 1(2) and 55—refer to friendly relations based on “equal rights and self-determination.” In each the context was clearly the rights of peoples of one state to be protected from interference by other states or governments. It is revisionism to ignore the coupling of “self-determination” with “equal rights”—and it was the equal rights of states that was being provided for, not of individuals. The concept of self-determination, as envisaged by the drafters of the Charter, did not refer to the right of dependent peoples to be independent, or indeed, even to vote.”

Id.

44. See G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N.

and the promulgation of the Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter.⁴⁵ While these instruments were the first to expressly enshrine the right of self-determination, they did not, as Iorns points out, “expand the scope of the right ... to include minorities or indigenous peoples within states.”⁴⁶ It is also worth adding that the constraints extended even further, as they did not recognize women, refugees, children, or other marginalized social and political groups.

Perhaps the more important normative expression of the notion of self-determination at the UN came in 1970, with the elaboration of the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN (The Principle of Equal Rights and Self-Determination of Individuals).⁴⁷ What was clear in the evolution of the instrument is the fact that the UN (and the states controlling the institution) still sought to have it both ways, by acknowledging the right to self-determination on the one hand but significantly limiting its application on the other. On the whole, the international community has approached the issue of self-determination on an *ad hoc* basis, particularly in relation to the threat of secession. The acceptance of a claim is largely dependent on the degree of destabilization portended and the extent to which the responding government represents the people belonging to the territory.⁴⁸

By remaining addicted to the concept of *uti possidetis*,⁴⁹ however,

Doc. A/4684 (1960) [hereinafter 1960 UN Declaration].

45. *See id.* at 29.

46. Iorns, *supra* note 37, at 253-54 (stating that the Declaration of the Granting of Independence to Colonial Countries and Peoples neglected to apply the right of self-determination to minorities and indigenous people and that its purpose was to achieve independence and self-government of colonies).

47. *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), *reprinted in* 9 I.L.M. 1292 (stating the importance of the Charter of the UN in maintaining peace, security, and friendly relations among states).

48. *See* Iorns, *supra* note 37, at 310 (arguing that modern applications of the self-determination doctrine may actually deny indigenous peoples the opportunity to determine their own destiny).

49. *See* BLACK'S LAW DICTIONARY 1546 (6th ed. 1990) (defining “*uti pos-*

the UN gave with one hand what it took away (or at least held at a distance) with the other⁵⁰ and has constrained many to seek recourse by force. The foregoing demonstrates that even during the UN era, there is a great deal of contestation over the scope and extent of self-determination as a legal principle.⁵¹ Frederic Kirgis has commented that self-determination in the UN era “has a great many faces.”⁵² According to Kirgis, the one notion that virtually everybody now agrees upon is that self-determination is freedom from colonial domination, “at least when the domination is of people of color in their homeland by racial groups.”⁵³ In fact, the degree of self-determination ascertainable (and accepted by the international community) can be discerned in degrees, culminating in 1993 with “the recognition that the right had arguably expanded to be assertable against a government that is unrepresentative of people who are defined by characteristics not limited to race, creed or color.”⁵⁴

Discussions on self-determination also address the meaning of the terms “self”⁵⁵ and “peoples.”⁵⁶ Recent literature has attempted to draw a

sidetis” under international law as “a phrase used to signify that the parties to a treaty are to return possession of what they have acquired by force during war”).

50. See J. Klabbers & R. Lefeber, *Africa: Lost between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 57-58 (Catherine Brolmann et al. eds., 1993) (discussing how the doctrine of *uti possidetis* can be read into the 1963 Charter of the Organization of African Unity).

51. See generally Blay, *supra* note 2, at 275-92. Despite the assertion by many prominent scholars that self-determination should be considered a peremptory norm of international law (*jus cogens*), the debate is almost always joined by those who write on the topic. It does not appear to be an extremely fruitful debate to engage in and is thus omitted from consideration in this Essay. For a consideration of the issue, see Robert McCorquodale, *South Africa and the Right of Self-Determination*, 10 S. AFR. J. HUM. RTS. 4, 4-5 n. 4-6 (1994), which considers whether self-determination should be deemed a peremptory norm of international law.

52. Kirgis, *supra* note 2, at 305.

53. *Id.*

54. *Id.* at 306.

55. See, e.g., R.S. Bhalla, *The Right of Self-determination in International Law*, in ISSUES OF SELF-DETERMINATION 91-101 (discussing the various meanings of the term “self” in international law).

56. See generally Richard N. Kiwanuka, *The Meaning of “People” in the Afri-*

much closer linkage between self-determination and human rights." For example, Robert McCorquodale points to the framework of international human rights law as being one that is adequate to ensure such protection:

In resolving these competing rights the human rights approach, by using the international human rights law framework, aims to protect all rights and not the right of self-determination in isolation. Rights can then be balanced and a solution can be found which protects both rights as far as possible in the circumstances.⁵⁸

However, McCorquodale is skeptical about the "peoples" approach adopted in the two Covenants and the African Charter on Human and Peoples Rights (the "Banjul Charter")⁵⁹ and urges that we should not view self-determination as an absolute.⁶⁰ According to McCorquodale, there is a need to place restrictions on its exercise in order to ensure that there is a fluid operation of the phenomenon.⁶¹ We shall return to this issue, but suffice it to note that the institutions of the international community have been reluctant to uphold the right to self-determination,⁶² although the International Court of Justice (ICJ) has

can Charter on Human and Peoples' Rights, 82 AM. J. INT'L L. 80 (1988) (discussing four definitions of "people" addressed in the Charter).

57. See, e.g., Lung-Chu Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Michael Reisman & Burns Weston eds., 1976) (proposing that the quest for self-determination is integrally associated with considerations of human rights and dignity).

58. See McCorquodale, *supra* note 2, at 877 (stating that there are other options, in addition to secession, whereby peoples would be able to exercise their right of self-determination). The other options include: "the creation of a federation; guarantees of political power to defend or promote group interests; the giving of special assurances (as with minority rights); providing for a specific recognized status to a group; or by 'constitutional democracy.'" *Id.*

59. See CAB/LEG/67/3/Rev.5. (1981), reprinted in 21 I.L.M. 59 (1982). The Charter was intended to be a human rights instrument reflecting African legal philosophy and responsive to African needs. See *id.*

60. See McCorquodale, *supra* note 2, at 874-76 (arguing that absolute rights to self-determination must be limited to protect other rights and should be construed within the context of constitutional and societal realities).

61. See *id.* at 876-78 (arguing that the protection of competing rights requires limitations on the absolute construction of self-determination in international law).

62. This is the case, for example, with Hong Kong. See Patricia A. Dagati, Note, *Hong Kong's Lost Right to Self-Determination: A Denial of Due Process in the United Nations*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 153 (1992) (discussing

given several opinions on the issue.⁶³

Unfortunately, self-determination is not recognized as a right that can be pursued by an individual and has thus so far been met with a negative response when raised at the Human Rights Committee.⁶⁴ This position has remained fairly constant for a number of years despite attempts to bring the issue up for attention.⁶⁵ The principle reason is that, in the observation of Mary Ellen Turpel, the area is "politically charged."⁶⁶ Similarly, recent analyses of the situation of social and political minorities in Western countries such as the United States, have used the term to attempt to present their claims for greater autonomy

UN Resolution 1514, The Declaration on the Granting of Independence to Colonial Countries and Peoples, which is considered a highly authoritative source on the principle of self-determination and is the legal basis for the UN's decolonization policy). See generally B.G. Ramcharan, *Security Council Patterns for Dealing with Ethnic Conflicts and Minority Problems*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOUR OF ASBJORN EIDE 27, 27-42 (Donna Gomien ed., 1993) (concerning the operation of the Security Council, with particular respect to the issue of minority rights).

63. See generally Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323 (1994). See, e.g., South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), 1966 I.C.J. 4 (July 18); Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. 554, 662 (Dec. 22) (separate opinion of Judge Abi-Saab) (discussing the meaning of "boundary" and the principle of *uti possidetis*); Advisory Opinion No. 61, Western Sahara, 1975 I.C.J. 12 (Oct. 16) (answering questions on the colonization of the Western Sahara).

64. See Klabbers & Lefeber, *supra* note 50, at 49-50 n.45 (explaining that the individual communication procedure of Optional Protocol No. 1 to the International Covenant on Civil and Political Rights denies an individual the opportunity to assert the right of self-determination); see, e.g., Ominayak and the Lubicon Lake Band v. Canada H.R.C. Report Doc.A/45/40, Vol. II, Annex IX, p. 1 at p. 27 (para. 32.1).

65. See Klabbers & Lefeber, *supra* note 50, at 49.

66. See Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579, 585-86 (1992) (claiming that the UN Human Rights Committee is reluctant to consider the question of self-determination). The Committee fears that states whose participation is optional will withdraw their support. See *id.* Further, international law requires defining a "people" when considering self-determination, requiring evaluation of controversial and subjective topics of politics, anthropology and law. See *id.*

and socioeconomic liberation, and not necessarily in terms of the quest for statehood.⁶⁷ Of course, such contexts illustrate that there is still contestation over the breadth of the concept,⁶⁸ since states such as Australia and the United States trace their very existence and perpetuation to the denial of self-determination to the indigenous populations of the lands which they now occupy.

So-called "internal" self-determination is an issue of increasing, albeit parallel, importance to the evolution and understanding of the concept under consideration.⁶⁹ Nowhere is the ambivalence and sometimes outright hostility of states more acutely reflected than in their response to the self-determination of indigenous peoples and women and over the question of secession.⁷⁰ It is for this reason that the application of the concept to minorities and indigenous peoples, as Manfred Nowak points out, is by no means a settled issue.⁷¹ The completion of a draft Declaration on the Rights of Indigenous Peoples,⁷² which is presently doing the rounds of the various UN institutions,⁷³ will hopefully project

67. See Ali Khan, *Lessons From Malcolm X: Freedom by Any Means Necessary*, 38 HOW. L.J. 29 (1994) (describing Malcolm X's dedication to advancing self-determination for blacks in the US); see also Yussuf Kly, *African Americans and Self-Determination*, 17 HAMLINE L. REV. 1, 4-44 (1993) (discussing evolution of self-determination from a search for statehood to a search for civil and human rights); Elizabeth Pierce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L. REV. 361 (1991) (analyzing the state of Native Americans and their need for increased self-determination).

68. See Kirgis, *supra* note 2, at 305-06 (pointing out the inconsistencies in UN documents about whether self-determination requires secession from a State).

69. See generally *A.D. v. Canada*, Communication No. 78/1980 (1984); Chief Bernard Ominayah v. Canada, Communication No. 167/1984 (1990).

70. See Higgins, *supra* note 43, at 33 (stating that the right to secession is not protected by international law and, therefore, international organizations do not always pursue that avenue to self-determination).

71. See M. Nowak, *The Right of Self-Determination and Protection of Minorities in Central and Eastern Europe in Light of the Case-Law of the Human Rights Committee*, 1 INT'L J. GRP. RTS. 7-8 (1993).

72. See Burger & Hunt, *supra* note 8, at 410-13 (providing authoritative text and analysis of the Draft United Nations Declaration on the Rights of Indigenous Peoples).

73. See Robert T. Coulter, *The Draft Declaration on the Rights of Indigenous*

the issue into more prominence in the future.⁷⁴ State sovereignty will obviously be the biggest impediment to the further development and extension of the right.⁷⁵

In the final analysis however, even for those, like Kurgis, who are prepared to push the concept further, self-determination still retains an overtly statist dimension. In other words, self-determination is employed primarily as a notion of *state*-determination, or (at best) of internal self-determination, which is principally designed to forestall a more aggressive assertion of the right, and the possibility of its ultimate culmination in secession.⁷⁶ There is no halfway house. To understand why the majority of theorists and international law as a whole adopts this view entails an examination of the nature of the state as we reach the close of the twentieth century. To conduct such an examination, we must revisit the premises upon which the notion of self-determination is based beyond the "official story" recounted above. That analysis is undertaken after considering the economic dimensions of self-determination.

Peoples: What is It? What Does it Mean?, 13 NETH. Q. HUM. RTS. 123 (1995) (providing an account and analysis of the Draft). The Draft was adopted by the UN Sub-Commission of Prevention of Discrimination and Protection of Minorities on August 26, 1994 and transmitted to the UN Commission on Human Rights. The latter decided to create a new Working Group to meet annually to consider the Draft Declaration and report to the Commission.

74. *See id.* at 131 (stating that indigenous peoples want the application of the right of self-determination to be applied to the same extent as other peoples). Self-determination includes freedom of self-government and control of each aspect of society including freedom for the government from external countries, free legal relationships with their government and foreign governments and control over their own economic welfare. *See id.*

75. *See Iorns, supra* note 37, at 211 (stating that government representatives support self-determination as long as it does not involve secession from the State).

76. *See W. Ofuatey-Kodjoe, The United Nations and the Protection of Individual and Group Rights*, 47 INT'L SOC. SCI. J. 315, 317 (1995) (stating that self-determination is a right every person holds). Self-determination is the right to govern one's self, yet it may only be claimed by those not governing. *See id.*; *see also* Hanauer, *supra* note 2, at 133 (explaining that though there are many laws ensuring the right of self-determination, it is still only a political ideal, and not a moral ideal).

B. ECONOMIC SELF-DETERMINATION: NOTES ON THE LIFE OF A
POOR SECOND COUSIN

1. *Self-Determination and the ICESCR*

The dominant discussions of economic self-determination normally take as their point of departure the common appearance of an article on self-determination in the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)⁷⁷ and the International Covenant on Civil and Political Rights (“ICCPR”)⁷⁸—the two human rights covenants.⁷⁹ Unfortunately, even when the discussion is extended to examine the implications of self-determination for human rights, the treatment of economic, social, and cultural human rights is merely an afterthought.⁸⁰ In part, this treatment stems from the historic context in which the two categories of rights covenants evolved and the attendant belief that economic, social, and cultural rights were “Socialist” or “Soviet” rights.⁸¹ As such, they were dismissed as either unworthy of consideration, “subversive,” or defraying attention from the more im-

77. See G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

78. See G.A. Res. 2200, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200A (XXI) (1966) [hereinafter ICCPR] (setting forth civil and political rights for citizens of nations that sign the non-binding agreement).

79. See Iorns, *supra* note 37, at 281 (pointing out that the aspects relating the pursuit of economic, social and cultural developments are often relegated to the political dimension of the right). This discussion, though enlightening and one of the few articles that attempts to deal comprehensively with the issue still suffers from the same problem of emphasis by relegating the discussion to a section entitled “Other Substantive Aspects of the Right of Self Determination” and only devotes 5 of the 60 pages in the article to this issue.

80. See James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT’L L.J. 209, 232-34 (discussing briefly the UN International Covenant on Economic, Social and Cultural Rights).

81. See Chinken & Wright, *supra* note 4, at 295 (explaining that a split in perceptions of rights occurred with the Western States embracing civil and political rights and the Socialist States pursuing the rights of a reasonable standard of living, employment, health care and education).

portant and “real” civil and political rights.⁸² This particularly American perception of economic, social, and cultural rights—a veritable Cold War “hangover”—unfortunately continues to pervade intellectual discussion and explains the dearth of attention to this category of human rights in comparison to the on-going fixation with civil and political rights.

Although absent from the Universal Declaration,⁸³ several statements in the preamble can be taken to constitute a reference to an underlying belief in the exercise of the right of self-determination.⁸⁴ In fact, James Falkowski asserts that Article 21, which concerns the right to take part in government, is an implicit recognition of “the natural law principal upon which self-determination is based.”⁸⁵ Being conceptually fixated with political self-determination, Falkowski typically overlooks Article 22, which states, in part, that everyone is “entitled to the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free devel-

82. See Klabbers & Lefeber, *supra* note 50, at 42 (stating that it is justifiable to focus on political aspects because such political self-determination serves as the condition *sine qua non* for social, cultural and economic self-determination). *But see infra* Part II.B.1 (explaining that focusing on the expansion of political rights is not only reducing capacity to meet societal needs but is also causing a loss of identity to minority societies).

83. See Iorns, *supra* note 37, at 249 (declaring that there was no general statement on self-determination in the Universal Declaration of Human Rights because the drafters could not agree on its formulation). The lack of a statement was primarily due to the beginning of the Cold War.

84. See, e.g., Universal Declaration of Human Rights, U.N. GAOR Hum. Rts. Comm., Res. 217 A (III) Preamble para. 2 (1948) (implying a reference to economic determination) [hereinafter Universal Declaration of Human Rights]. “Disregard and contempt for human rights have resulted in . . . the advent of a world in which human beings shall enjoy freedom speech and belief and freedom from fear and want . . .” *Id.* “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and *have determined to promote social progress and better standards of life in larger freedom.*” *Id.* para. 5 (emphasis added).

85. Falkowski, *supra* note 80, at 228 (stating that self-determination is implicitly addressed in the Universal Declaration of Human Rights).

opment of his personality.”⁸⁶ Together, these two articles are the progenitors of the right of self-determination in international human rights law, with Article 22 providing the basis for economic self-determination.⁸⁷ Given this background, it is worth analyzing more deeply how economic self-determination has fared at the UN.

2. *Revisiting the New International Economic Order and the Roots of the “North/South” Divide*

In the several decades that have passed since the second phase of self-determination (decolonization), it has become clear that in primarily focusing on the political aspects of colonialism (i.e. on the political domination exercised over their territories), the anti-colonial nationalists left out of the paradigm the extensive linkages that the system (as an economic phenomenon) had created between colony and colonized.⁸⁸ Kwame Nkrumah’s dictum to his colonized brethren and sisters—“seek ye first the political kingdom”⁸⁹—was a serious underestimation of what was actually involved. As Muranga points out in a discussion of the African Economic Community:

these foreign powers that invaded Africa set goals for the continent based on foreign interests. Africans could no longer determine their own fates because their destinies had been placed in someone else’s hands. It was at this time that Africa was manipulated, programmed and specially prepared to serve the colonial authorities as opposed to African domestic interests. Gold Coast farmers for example, did not choose to produce cocoa for export but were mandated . . . to do so by the British Crown. To make money as a farmer in Gold Coast . . . one has no other option but to grow cocoa.⁹⁰

86. Universal Declaration of Human Rights, *supra* note 84, art. 23.

87. *See id.* arts. 27-28 (granting the right to freely participate in the cultural life of the community and entitlement to a social and international order in which the rights and freedoms in the Declaration can be fully realized).

88. India and Vietnam are exceptional examples. However, the Cold War did not allow for the adoption of “alternative paths” to become viable.

89. *See* JAMES MAYALL, NATIONALISM AND INTERNATIONAL SOCIETY 116 (1990) (quoting Kwame Nkrumah’s theory that by creating a stable political foundation, economic and social modernization would inevitably follow). The theory is “seek ye first the political kingdom, and all else will be added unto it.” *Id.*

90. Theophilus F. Maranga, *The Colonial Legacy and the African Common*

Accordingly, colonialism invested much more in the creation and maintenance of the coercive instrumentalities of the state than it did in social and economic amenities.⁹¹ Even under the relatively less virulent forms of colonial control, such as that of the British, the proportion of resources expended on law and order far exceeded that spent on education, health, and social welfare combined.⁹² Despite claims about colonial subventions to support the “White Man’s Burden,” as a matter of fact, more resources were leaving the colonial enclaves than were coming in.

Ultimately social, economic, and cultural rights remained a privilege to be bestowed and withdrawn at the will of the colonial master.⁹³ Such realities explain the attention within the post-colonial African leadership to social and economic issues, following the realization that the “political kingdom” was in fact a hollow edifice of neocolonial control. In fact, just before his overthrow, Nkrumah published an appropriate *mea culpa*, with his famous tract—Neocolonialism.⁹⁴

Attention to economic self-determination within the framework of the UN⁹⁵ actually pre-dates the ICESCR, although this is a fact not often recounted. Only three years following its establishment in 1945, the UN set up the Economic Commission for Latin America (“ECLA”), whose studies on trade, production and comparative advantage challenged the dominant Rostowian “take-off” models⁹⁶ and brought the

Market: Problems and Challenges Facing the African Economic Community, 10 HARV. BLACKLETTER J. 105, 109 (describing the state of affairs in a powerful country’s colony in the 19th century).

91. See, e.g., WINSOME J. LESLIE, *ZAIRE: CONTINUITY AND POLITICAL CHANGE IN AN OPPRESSIVE STATE* (1993) (setting forth an account of Belgium colonialism).

92. See, e.g., RAMKRISHNA MUKHERJEE, *THE PROBLEM OF UGANDA: A STUDY IN ACCULTURATION* 180 (1956) (explaining that the British development fund was established more to further ease exploitation of Uganda’s resources and less to ease the British neglect of the basics of human welfare).

93. See generally Oloka-Onyango, *supra* note 19 (providing an overview of Africa’s colonization and its related problems).

94. See generally KWAME NKUMAH, *NEO-COLONIALISM, THE LAST STAGE OF IMPERIALISM* (1966) (explaining the neo-colonialism of Africa).

95. See Ofuately-Kodjoe, *supra* note 2, at 363-67 (offering a history of the UN’s involvement in making self-determination a public interest).

UN to the fore as the major forum for intellectual debate and contestation over the right to economic self-determination.” Indeed, as Professor Smouts points out, development “gradually came to monopolize the best part of the time, personnel, and resources of the United Nations.”⁹⁶

Two General Assembly resolutions in 1952 adverted to the issue of permanent sovereignty over natural resources as a fundamental aspect of the right of self-determination.⁹⁹ In 1958, a Commission on Permanent Sovereignty over Natural Resources was created.¹⁰⁰ The Seventh paragraph in the Preamble to the 1960 Declaration on the Granting of Independence to the Colonial Countries and People¹⁰¹ states that “the continued existence of colonialism prevents the development of economic cooperation, impedes the social, cultural, and economic development of dependent peoples and militates against the United Nations ideal of universal peace.”¹⁰² The passing of the ICCPR and Optional Protocol¹⁰³ in 1966 was followed by the Second United Nations Devel-

96. The Rostowian theory is based on the belief that over time the benefits of economic development that naturally flow from international trade will eventually filter through (“trickle down”) to countries that are relatively less developed or disadvantaged by the international economy. It was a theory that came into vogue in the 1950s and 1960s, and was reflective of the enthusiasm that greeted the spate of independence of numerous countries in Africa, Asia, and Latin America. The theory has been largely discredited by the stark reality of continued marginalization and impoverishment for those countries that were projected to “take off” under the impetus of international trade.

97. See Marie-Claude Smouts, *International Organizations and Inequality Among States*, 47 INT’L SOC. SCI. J. 229, 236-38 (1995) (explaining that despite other’s efforts, the UN was the first international organization to successfully address issues of human development).

98. *Id.* at 237.

99. See G.A. Res. 523, U.N. GAOR, 6th Sess., U.N. Doc. A/RES/523 (VI) (1952); see also G.A. Res. 626, U.N. GAOR, 7th Sess., U.N. Doc. A/RES/626 (VII) (1952).

100. See G.A. Res. 1314, U.N. GAOR, 13th Sess. Doc. A/RES/1314 (XIII) (1958) (establishing the Commission on Permanent Sovereignty over Natural Resources). The Commission was charged with the mandate to conduct an in depth survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination. See *id.*

101. 1960 UN Declaration, *supra* note 44.

102. *Id.* para. 7.

103. See G.A. Res. 2200, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200A

opment Decade¹⁰⁴ and its International Development Strategy, which led to the Declaration on a NIEO.¹⁰⁵ While one may argue about its outcome,¹⁰⁶ there was no shortage of studies on the issue,¹⁰⁷ and the debates were sharply drawn, bringing into bold relief the "North/South"¹⁰⁸ dimensions to international contact that were to subsist to the present time. Following the lull and setbacks of the 1980s, the issue of development found a rebirth of sorts at the World Summit for Social Development, held in Copenhagen in March 1995.¹⁰⁹ On the face of it, economic self-determination appears to have been as much a concern at the UN as the political.

Unfortunately, there is a distinct pattern ascertainable in the foregoing developments, which demonstrates that the right to economic self-determination still concentrated on states as the primary elements and beneficiaries of that right,¹¹⁰ despite the clear reference to "peoples" in

(XXI) (1966).

104. See G.A. Res. 2626, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2626 (XXV) (1970).

105. See G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (1974).

106. See Raul Ferero, *The New International Economic Order and the Promotion of Human Rights*, U.N. Doc. E/CN.4/Sub.2/1983/24/Rev.1 (1986) (offering results of a study commissioned by and prepared for the UN).

107. See *New International Economic Order: A Third World Perspective* (Pradip K. Ghosh ed., 1984) (analyzing the progress of the new international strategy for the development of third world countries); Gabe Shawn Varges, *The New International Economic Order Legal Debate: Background, Status and Alternatives* (1983) (examining the content, development, and strategies of the New International Economic Order); Lars Anell & Birgitta Nygren, *The Developing Countries and the World Economic Order* (1980) (providing an overview of the New International Economic Order and suggesting possible ways for developing countries to secure a larger share of the world's resources).

108. The "North/South" divide is both the geographic and economic division between the industrialized developed economies and those that are basically subsistent and less developed or "developing." Although there are certainly examples of both types of economies in each geographical sphere, the divisions largely follow the North/South pattern described.

109. See United Nations, *Draft Declaration and Program of Action on the World Summit for Social Development*, A/Conf. 166/L.1, Feb. 2, 1995.

110. See G.A. Res. 3281 (XXIX), U.N. GAOR Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) (culminating in the promulgation of the *Charter of Economic Rights*

the Covenants and other international instruments on the issue.¹¹¹ This led to the parallel development—intermittently brought together in Teheran in 1968¹¹² and Vienna in 1993¹¹³—of economic self-determination and individual human rights. At the same time, however, such developments did not lead to an improvement in the context of the realization of the right to economic self-determination. Philip Alston makes this point succinctly by stating that:

Whether one takes the number of resolutions adopted, the length and incisiveness of the relevant debates, the emphasis adopted in fact-finding, the focus of the studies undertaken, the emphasis in the Advisory Services Programme, the topics with which Fact Sheets and other forms of public information have been concerned, or some other measure, economic, social and cultural rights continue to be very highly neglected or ignored. This is not to deny the importance of the achievements that have been recorded, including especially, the creation of the Committee on Economic, Social and Cultural Rights in 1987.¹¹⁴

The failure of the UN to develop a cogent and comprehensive approach to human rights and development illustrates how self-determination across the board (of groups, individuals, peoples, and minorities) is under threat from much more than the rise in ethnicity.¹¹⁵

and Duties of States).

111. See Ofuately-Kodjoe, *supra* note 2, at 364-66 (discussing the beneficiaries of the right to permanent sovereignty over natural resources).

112. See Proclamation of Teheran, adopted at the International Conference on Human Rights, Teheran, Iran, May 13, 1968 (visited Oct. 23, 1999) <<http://heiwwww.unige.ch/humanrts/instree/12ptichr.htm>>.

113. See United Nations World Conference on Human Rights: *Vienna Declaration and Program of Action*, U.N. Doc. A/CONF. 157/24 (Part I), Oct. 13, 1993, reprinted in 32 I.L.M. 1661 (1993).

114. Philip Alston, *Denial and Neglect*, DEVELOPMENT: BUSINESS AND HUMAN RIGHTS 111 (Richard Roech ed., 1993).

115. See Anthony Carty, *From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory*, cited in LAW AND DEVELOPMENT 265 (Anthony Carty ed., 1992) (analyzing the tensions between human rights law and self-determination). Carty argues that part of the problem lies in the reduction of the legal principle of economic self-determination primarily into an ideological representation. See *id.* As such, the concept:

has its roots in a Western tradition of legal voluntarism which cannot open the way out to either national or international economic or social transformation.

This threat extends to the core of humanity, and endangers individual human existence as we know it.¹¹⁶

Moreover, this failure on the part of the UN to acknowledge economic self-determination has been juxtaposed to the unchallenged dominance of the neo-classical application of monetarist philosophies to development in the South,¹¹⁷ the absence of a mechanism (akin to the Optional Protocol under the ICCPR) of an individual complaints mechanism under the ICESCR, and continuing international impotence in the face of civil conflict and conflagration. These developments are mirrored at the domestic level with the backlash against the welfare state in the North, the emergence of restrictive and manifestly racist immigration policies,¹¹⁸ and an overall attack against affirmative ac-

It restates the basic Western concept of 'subjective right' and applies it to the state. In such a view of legal order, the basic structure of law is subject/property/contract The consequence is a language of state rights which restricts attention to the authority and power of the state, without reference either to the nature of the international economy or to the needs and aspirations of peoples.

Id.

116. See Chinkin and Wright, *supra* note 4, at 294 (discussing the tensions in human rights law and the meaning of self-determination). Nowhere was that threat more dramatically illustrated than in the case of Somalia—a country absent the cleavages of language, religion or ethnicity that have characterized the other “postmodernist” hot-spots. See *id.* Chinkin and Wright mince no words in pointing to the culprit: First world exploitation, massive arms sales, autocratic rule, the collapse of democratic institutions, and worsening economic conditions, compounded by environmental degradation and drought, has driven Somalia to the point where it can no longer be described as a viable political unit under international law.” *Id.* But, there is more to the story, “[i]t is ironic that the only solution to chaos and the starving deaths of millions of Somalis . . . is military intervention by the United States—the country which is principally responsible for the arms build-up and the aberrant development that has caused the present crisis.” *Id.*

117. See Smouts, *supra* note 97, at 239 (stating that the major multicultural forums “no longer serve as places where weak nations may challenge the more powerful.”). Smouts points out that, “[n]ot only have the forums that lent themselves to expressions of anti-Western feeling and protest fallen silent, but also, since the end of the cold war, with the [partial] exception of Cuba and North Korea, no state has objected to the ideology of the free market economy and widespread free trade, and especially not China.” *Id.*

118. See generally J. Oloka-Onyango, *The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced*

tion,¹¹⁹ the UN and multiculturalism.¹²⁰ Collectively, what do all these developments mean in terms of the right to self-determination? An attempt is made in the following pages to provide some answers through an overall critique of the dominant approaches to the doctrine.

II. SELF-DETERMINATION AND THE NOTION OF STATEHOOD: A CRITICAL REVIEW

A. A SECOND LOOK AT SELF-DETERMINATION THEORY

The preceding overview of the official position on self-determination allows us to commence a critical examination of both the underlying premises upon which the right has developed within intellectual analysis at the UN and in concrete practice. A number of preliminary points need to be made to inform the discussion. Scholars almost invariably commence their analyses of self-determination with the Peace of Westphalia, or the Jeffersonian or Wilsonian assertions that found normative expression in the United States Constitution and in the Peace of Versailles respectively.

From whatever point in time theorists have retraced the concept of self-determination, it has been drawn through the labyrinth of Western history and development—from the Greco city-states to Westphalia, to the French and American Revolutions, to the Wilsonian claim that “[e]very territorial settlement involved in the First World War must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states.”¹²¹ The interesting point of both the descriptions

Women in Africa, 24 DENV. J. INT’L L. & POL’Y 349 (1996) (providing a critique of international and regional law regarding refugee policy).

119. See CORNEL WEST, RACE MATTERS 47-68 (1993) (discussing the “new black conservatism”).

120. See Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. Summer 1993, 22 (exemplifying anti-multiculturalism and hypothesizing that the one dominating source of conflict will be cultural rather than ideological or economic). See generally SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996) (responding to the debate on his earlier article in the journal *Foreign Affairs*).

121. THOMAS A. BAILEY, WOODROW WILSON AND THE LOST PEACE 335 (1944) (citing Address to the United States Congress by Woodrow Wilson on Feb. 11, 1918).

and the application of self-determination in all of these instances, is the omission of the parallel experience of self-determination of non-Western peoples.¹²² At the same time, very little discussion focuses on the blinkers that marred the vision of each of these exemplars of Western enlightenment.

Moreover, the so-called founding fathers of the right to self-determination used that right to achieve their own freedom while preventing others from asserting that very same right. In the twentieth century rendition of the United States Constitution's eighteenth century guarantee that "[a]ll men are created equal . . .," Native and African-Americans hankered for freedom. In only one respect was the United States Constitution true to its promise: it affirmed that all *men* had the right to participate in government, thereby establishing the legal basis for denying people of color and women the right to vote.

Accordingly, American leaders like Wilson left us with one conclusion regarding the demand that the right of self-determination be recognized following both world wars: such demand for the right to self-determination was simply the stirring of "Open-doorism," the phenomenon pursued by the United States alongside the demand for independence. In short, self-determination was the quest for more open markets, and the removal of colonial monopolies, which constituted a major impediment to that quest. Self-determination, in a nutshell, was no more than the next logical stage to territorial imperialism.¹²³

122. See, e.g. C.L.R. James, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (2d ed., rev. 1963). No theorist in the area deigns to mention, to cite one example, the case of Toussaint L'Ouverture—the Haitian General who defeated Napoleon's armies—and the invocation of the ideals of liberty, freedom and self-determination deployed in that struggle: "[m]en make their own history, and the black Jacobins of San Domingo were to make history which would alter the fate of millions of men and shift the economic currents of three continents." *Id.*

123. See Jason W. Clay, *States, Nations and Resources: An Interdependent Relationship?*, 19 *FLETCHER F. WORLD AFF.* 11, 11-12 (1995) (claiming that states are rarely created by those who are governed by them). Clay asserts that the states that came into existence as a result of decolonization were essentially designed to perpetuate colonial hegemony in a different form. He stated the following:

Colonial empires gave way to an obligatory international state system in which the decolonized world had no choice but to adopt the centralized governing structures left behind by the colonial powers. Without the cost of

The belief in the superiority of the Eurocentric models of international law comes through even in the most radical scholarship, as the following excerpt from an examination by David Kennedy of refugee law so aptly illustrates:

European scholars, who wrote in the early era, did not distinguish international from municipal law, natural from positive law or the law which binds sovereigns from that which binds citizens. Unlike those who wrote subsequently about issues of world order, these early scholars did not place a public sovereign at the center of their system. As a result, they did not draw sharp contrasts between sovereigns and citizens and certainly did not assimilate one to the other. Individuals were thought to exist within a relatively unified legal structure, bound by law wherever they found themselves geographically or bureaucratically. While away from home one remained a human being subject to universal legal provisions and owing allegiance to the sovereign in whose territory one found oneself. The idea of losing protection of having to apply for a new protector did not arise. Allegiance, in the sense of obedience, was owed to sovereigns, and although problems of conflicting allegiances to home and host sovereign arose, the sharp boundaries of legal jurisdiction and sovereign protection had not yet been developed.¹²⁴

The essential point to note is that non-European experiences are given short shrift—if mentioned at all. Such histories of international law (in this instance refugee law) thereby simply omit—at the stroke of a pen—centuries of the histories and experiences of nations and peoples on the continents of the Americas, Africa, Asia, and Australia.¹²⁵

maintaining empires, the West was able to preserve global stability and a dominant position in world trade. In essence, developed countries successfully sought trading partners who could ensure politically stable economic systems and the free flow of goods.

Id. at 13.

124. David Kennedy, *International Refugee Protection*, 8 HUM. RTS. Q. 1, 23-24 (1986).

125. In an article that is noteworthy for its clarity, although still constrained by the dominant focus, S. James Anaya argues that “[c]ore human rights values associated with the concept of self-determination, however, clearly are not solely within the province of the history of Western thought.” See S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT’L L. & CONTEMP. PROBS. 131, 134 (1993) (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 1971 I.C.J. 16, 31 (June 21, 1971) (discussing the character and scope of self-determination)). Citing Justice Ammoun’s concurring opinion in the *Namibia Case*, Anaya points out that the

Indeed, self-determination can be retraced to before the time that Moses allegedly led the Israelites from Egypt. The quest for liberation, and the desire to freely determine one's economic, social and political life, is a sentiment intrinsic to all individuals and peoples. That theoretical analysis confines its discussion to the point in time when certain (white) people arrange themselves in certain types of collectivities (Euro nation-states) and not others, raises a number of questions. The larger problem, of course, is that Western monopolization of the debates directly results in a marginalization of alternative visions of society. Nothing more clearly reveals that the UN's agenda is not simply epistemological.¹²⁶ Scholars like Samuel Huntington are not simply worried about the scourge of the "Other" (those of non-European descent) abroad, but are concerned—along with so many of the spokespeople for the ideologies of the political right—that this "Other" will take over America.¹²⁷

The theoretical biases of Western scholars may not be of singular importance to the present discussion, especially since the evolution of the doctrine of self-determination has seen its greatest development in more recent times. What is crucial, however, to both the conceptualization and the present-day implementation of the right of self-determination is that it continues to be pursued through the same framework. That framework differs in no fundamental respect from that presented as having its origins in Western thought and epistemology, namely, liberal conceptualizations of representative democracy. Consequently, even though the debate moved in the 1960s to focus on the self-determination of countries within a non-Western context, it was couched within the framework of yet another Western

concept is both older than is usually asserted in the literature, and comprises two streams of thought "established on the two opposite shores of the Mediterranean." *Id.*

126. See HUNTINGTON, *supra* note 120 (introducing the next pattern of conflict of civilizations). Thus, for example, Samuel Huntington's "Clash of Civilizations" resurrects the traditional fears of Western society being overrun and engulfed by the "East," and the "South," but also repeats the oft-asserted view that the African culture is not a "civilization." His "civilizations" include: "Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and possibly African civilization." *Id.* at 25 (emphasis added).

127. See Samuel Huntington, *If Not Civilizations, What? Paradigms of the Post-Cold War World*, 72 FOREIGN AFF. 186, Nov.-Dec. 1993, at 190 (wondering if the "de-Westernization" of the United States will lead to "de-Americanization").

phenomenon—colonialism—and biased towards the dominant brands of international law—statehood.

As Rolf Knieper has stated, those movements which today try to “[c]reate an Islamic or Jewish or Christian or Hindu State or one of pure blood, do perhaps not know how much they are prisoners of Eurocentric thought”¹²⁸ In the movement to decolonize, the emphasis also focused on political self-determination, while resisting the economic dimensions of that concept. In this way, self-determination from colonial domination failed to address the experiences of the new states before colonialism as well as those of the various communities, peoples, and individuals who now comprised them.¹²⁹ In certain significant respects, the peoples of the former colonized territories are today reaping the fruits of the truncated self-determination of decolonization, just as the rigors of the same conceptualization are being afflicted on the Balkans and the territory of the former Soviet Union. Those fruits are the overt extension of a Eurocentric vision of the world made in its own image.¹³⁰

The implications of the application of such a Eurocentric frame-

128. ROLF KNEIPER, *THE CONCEPT OF NATIONAL SOVEREIGNTY AND DEVELOPMENT* (1992).

129. Before the MacMillan “winds of change” had blown across the length and breadth of the continent, there were some attempts to examine the issue of the colonial borders. According to Sam Blay:

In the late 1950s leading African nationalists appeared to have accepted that this was desirable. In 1958, with less than ten independent states in Africa, the All African Peoples Conference meeting in Accra denounced what was described as “the artificial boundaries drawn by imperialist powers to divide people of the same stock . . . [the Conference subsequently called for the] . . . adjustment of such frontiers at an early date.”

S.K. Blay, *Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights*, 29 J. AFR. L. 147, 149 (1985). Klabbers and Lefeber deny that the conference had much legitimacy, or “international legal value” because it was “a non-governmental conference of political parties (thus by definition not empowered to create international legal rules), and apart from that, at the time of its adoption only a few African states had attained their independence.” See Klabbers & Lefeber, *supra* note 50, at 57. Of course such a view is overly state-centric, and dismisses the influence of nongovernmental actors on the evolution of international legal principles. See *id.*

130. See wa Mutua, *supra* note 6, at 1175 (recognizing that Europe’s involvement in Africa has “only brought misery”).

work of analysis are acutely manifest in the case of African-Americans and other people of color in the United States. Under Jeffersonian self-determination, African-Americans never merited attention.¹³¹ Instead, their gift was a Supreme Court-sanctified slap in the face that confirmed that what was separate was also unequal.¹³² The Wilsonian doctrine was applicable to the minorities of reconstituted Europe, but not to the diasporan minorities of “liberated” America. Decolonization applied to Africa, Asia, and the Caribbean, but never reached American shores. Is it a surprise that African-Americans today experience an acute sense of alienation?¹³³ As Henry Richardson states:

the totality of African-American interests under international law, including sufficient representation of important individual interests, cannot be adequately achieved under restrictive interpretations of the rights of peoples encapsulated in national states. The self-determination rights of African-Americans are sufficiently wide to give them the right to participate—even as, in a factual sense, they are inescapably a participant—in the international law process and to make claims involving the full scope of rights, obligations and policies encompassed by international law.¹³⁴

There is, however, another dimension to the analysis. The significance of the movement from natural law to positivism coincided with the transformation of capitalism and the entrenchment of that ethnocentric moment in history which spurred the modern day crusades—the “flight” of the missionaries—and the consequent termination of the independence of the vast majority of non-Western peoples. Imbued in the

131. See Falkowski, *supra* note 80, at 237 (arguing also that the United States implies that Native-Americans are unable to govern themselves by acting as their trustee, and consequently exclude Native-Americans from representing their race in international organizations, such as the UN).

132. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

133. See Henry J. Richardson, *Gulf Crisis and African-American Interests under International Law*, 87 AM. J. INT'L L. 42 (1993) (arguing that African-Americans see the “critical moment” arising from “Operation Desert Storm” differently than other American citizens). Richardson makes the point that today in the United States “there is now considerable and widespread, though not total, alienation among African-Americans from the majority of political and judicial leaders of the country, especially in the executive and the Supreme Court.” *Id.* at 59.

134. *Id.* at 48.

spirit of the nation-state, scholars and missionaries alike could envisage no alternative to the *single* God (in a heaven situated *above* earth) and no alternative to the hierarchical, ostensibly monolithic, and dominant Euro-nation state.¹³⁵

Given such limitations, it is necessary to examine the full parameters of the underlying premises of theoretical discourse on the doctrine of self-determination before making any conclusions about its continuing applicability.

1. Ideology as Praxis: The Impact of Self-Determination as a Western Construct

The preceding points can be better understood if we simply take a few examples of societal organization before the onslaught of Western imperialism. Isabelle Gunning discusses societal organization through an analysis of refugee law that draws much inspiration from an examination of pre-colonial African social formations.¹³⁶ One corollary to the creation of the Western nation-state was that the individual was denied a juridical identity in relation to the political divisions entailed by nation-statehood.¹³⁷ People who identified with a state and its territory were presumed to be “protected” by the state even while away from it.¹³⁸

By contrast, the African conception of the ideas of “person,” “self,” and “statehood” was different—a difference reflected in part in the definition latterly adopted by the 1969 Organization of African Unity

135. See Kennedy, *supra* note 124, at 24 (noting the radical change the opinion of jurists underwent with the rise of positivism). Kennedy states:

The sovereign was the center of the legal structure. In addition, municipal and international as well as positive and natural law were sharply distinguished. In the era of high positivism, nothing could be more different than the respective situations of citizens and sovereigns. Individuals, for purposes of international law, were more or less fully assimilated to sovereigns who, it was thought, gave them “nationality” and “protection.”

Id.

136. See Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 *FORDHAM INT’L L.J.* 35 (1989-90).

137. See *id.* (discussing the European concept of the “nation-state”).

138. See *id.* (providing a comparison indicating that a state owes no duty to people who left the state if these people cannot identify with the state).

("OAU") Convention on Refugees,¹³⁹ and in the 1981 Banjul Charter which incorporated self-determination as a right of individual human beings and peoples.¹⁴⁰ Gunning summarizes the difference in the following way: "[w]hile territory, itself, has been sometimes jealously guarded, people have not been associated with a territory to the extent they have been in European experiences. African history is a product of community relationships that are not territorially based."¹⁴¹ Gunning continues to point out that studies of the nomadic Fulani "have shown that their 'disrespect' for territorial borders did not make them 'aliens' within the communities in which they interacted; [r]ather, the Fulani, who moved to the Central Sudan as part of their customary search for pastures, by 1804 had come to be regarded as equal citizens of that region" as well.¹⁴² In fact:

In African history, where territorial boundaries were much more fluid than in the traditional nation-state construct, nomads were not mere visitors to the communities through which they traveled. Often times the nomads' herds were essential to the economic life of these communities and the nomads would also participate in the political life of their communities. The responsibility of the government to the individual, then, transcended territorial borders.¹⁴³

One of the great ironies of history is that the Fulani (and hundreds of other groups and communities) were forced, by the creation of a nation-state under the colonial model, to choose between citizenship of Mali, Chad, the Congo, or the Sudan, a decision that sometimes rendered them a minority (without juridical rights) whereas previously they had enjoyed such rights.¹⁴⁴ And yet, pursued to its logical

139. See *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, concluded at Addis Ababa, Sept. 10, 1969, 1001 U.N.T.S. 45 (1976) (providing the text of the convention).

140. See Blay, *supra* note 129.

141. Gunning, *supra* note 136, at 73-74.

142. *Id.* at 74.

143. *Id.* at 74-75.

144. Western scholarship generally elicits a complete lack of comprehension for this peripatetic element among some African peoples. Hanauer, for example, speaks of the Sahrawi peoples of Western Sahara as "unwittingly crossing internationally-recognized borders. . ." See Hanauer, *supra* note 2, at 134 (discussing the problems of peoples who have no officially recognized state).

conclusion, the spirit of the Refugee Convention that is derived from the African notion that I am my brother's (and sister's) keeper¹⁴⁵ would essentially eliminate the constraining doctrine of *uti possidetis*. At a minimum, it would inform refugee policy and practice elsewhere, particularly in the xenophobic North. The African notion would also enhance the rights to self-determination of this category of marginalized individuals. In sum, an alternative vision, recognizing the right of movement as essential to the right of self-determination, would have produced a very different application of the concept under discussion.¹⁴⁶ Unfortunately, with a conceptualization fixated with territory, it is of little surprise that the issue of the scope of the right to self-determination has so vexed and confused the UN.

The parallel dimension of the self-determination question must not be forgotten, namely, the self-determination of groups such as women, children, and a variety of social and political minorities who have attempted to claim the right, either by exercising autonomy or by seeking greater accommodation within the construct of the state. Curiously, only a handful of the literature speaks to this aspect of self-determination. In fact, almost none of the literature mentions the gender-specific elements that comprise twentieth century self-determination theory and practice, and it is important to understand why such a gap in the literature exists.

2. *Feminism, Gender, and Women in Theories of the State and Self-Determination*

The theoretical development and application of the doctrine of

145. See generally Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 359-64 (discussing a wide-ranging and forcefully argued synopsis of the various dimensions to the African conception of solidarity).

146. See Shashi Tharoor, *The Universality of Human Rights and the Relevance to Developing Countries*, 60 NORDIC J. INT'L L. 139, 142-43 (1991) (paraphrasing John Mbiti and Niara Sudarkasa in pointing out how the philosophy of existence in Africa is "I am because we are, and because we are therefore I am."). Tharoor notes that identity in the African context goes beyond the nuclear family. The African structure entails a more complex set of communal entitlements and obligations grouped around respect, restraint, responsibility, and reciprocity. See *id.* Regardless of the idea, there have been insufficient attempts to listen to these contending voices. See *id.*

self-determination, like statehood,¹⁴⁷ sovereignty,¹⁴⁸ and even human rights,¹⁴⁹ have completely skirted the gender dimensions inherent in the doctrine.¹⁵⁰ Accordingly, the state itself is hostile to women and their autonomous existence within domestic fora¹⁵¹ and such biases are transferred onto the international scene, often with a vengeance. One such instance can clearly be discerned in the transmutation of the rape phenomenon. For centuries, rape has been a fundamental aspect of the political economy of women's subordination, but has never been accorded the seriousness, weight, or moral abhorrence that it obviously entails.¹⁵²

Rape, although an intrinsic part of war, was traditionally dismissed alongside the takings of the other "spoils" of war, with neither mention nor redress for the individual victims. The horrors of recent years, however, have projected attention to the issue of rape in war onto the international agenda, largely on account of forceful intervention of women's human rights activists in the issue.¹⁵³ Notwithstanding, the traditional position on rape is grounded both in the ethnocentric and sexist evolution of Western society and philosophy, as

147. See generally Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 25 (Dorinder G. Dallmeyer ed., 1993) (defining "statehood" as an international term of open texture).

148. See Sandra Whitworth, *Theory as Exclusion: Gender and International Political Economy*, in POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER 116 (Richard Stubbs & Geoffrey Underhill eds., 1994).

149. See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993) (condemning the human rights framework for blending the public life with the private sphere of familial relationships).

150. See Charlesworth & Chinkin, *supra* note 4, at 73 (noting how women's struggle for self-determination is invalidated in the context of a collective right).

151. See Linda S. Greene, *Feminism, Law and Social Change: Some Reflections on Unrealized Possibilities*, 87 NW. U. L. REV. 1260 (1993) (using the empowerment perspective to transcend the isolated social phenomenon).

152. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994) (arguing that rape in domestic partner abuse is a type of torture).

153. See Oloka-Onyango, *supra* note 118, at 349 (noting the insensitivity of African human rights to the plight of refugee and internally displaced women).

well as in the twentieth century dominance of patriarchal forms of organization throughout the world.¹⁵⁴ The imposition of a development and statehood model by Western society is simply the recreation of the rest of the world in its own image.¹⁵⁵ Additionally, relations between the sexes has also significantly influenced the structure of Western society and the conceptualization of self-determination, or the absence of a need for its precise legalistic articulation.¹⁵⁶

In an analysis of the nature of relations in an indigenous (so-called "native") American community before the onslaught of colonialism, Eleanor Leacock¹⁵⁷ remarks importantly that although the hierarchical perspective of the roles of men and women suits this ethnocentric paradigm perfectly, defining gender roles is a global practice and is not always indicative of superiority or inferiority. Leacock continues by stating that the anthropologist rarely contemplates the possibility that women and men could be separate but equal. In fact, even the term "tribe," meaning a territorially bounded and politically controlled entity, is merely the spawn of colonial relations, deliberately separating "public male authority" from "private female influence,"

154. See Hilary Charlesworth, *Human Rights as Men's Rights*, in *WOMEN'S RIGHTS, HUMAN RIGHTS, INTERNATIONAL FEMINIST PERSPECTIVES* 103 (Julie Peters & Andrea Wolper eds., 1995) (arguing that the current international human rights structure is male-dominated and thus creates obstacles to the advancement of women).

155. See Andrea Bear Nicholas, *Colonialism and the Struggle for Liberation: The Experience of Maliseet Women*, 43 U. N.B. L.J./REVUE DE DROIT DE L'UN-B 223, 227-28 (1994) (attributing the change in Maliseet society from a dispersed system of decision-making that included women to a centralized system that excluded women to Western colonial influences). Nicholas documents the astonishment a French missionary experienced on a visit to an Indian pre-colonial settlement in the Americas: "What was most astounding and alien to him was the egalitarianism, the high degree of harmony and personal autonomy, and the concomitant dispersed nature of decision-making among both men and women" *Id.* at 227.

156. See *id.* at 227 (remarking how leadership roles were relative). "Leadership arose out of personal influence, and only for as long as a task required it. It was decidedly not dependent on the power to force compliance by giving or withholding resources, as in the European sense." *Id.*

157. See *id.* at 224, 228 (quoting Eleanor Leacock, who studied the Innus Indians, a tribe very similar to the Maliseet, and based her writing on the writings of Paul Le Jeune, a Jesuit Priest who lived among the Innus).

and labeling the separation of resultant hierarchy as universal.¹⁵⁸ Leacock concludes that society has “models of development that move from band to tribe to chiefdom to state, all related to a movement from dispersed decision-making to the western ideal of centralized power and authority.”¹⁵⁹

The principal international instrument characterizing statehood in international law, the Montevideo Convention on the Rights and Duties of States,¹⁶⁰ clearly maps the above stipulations. Theories of statehood have essentially taken the attributes listed in the Convention as a given and have paid little attention to the contradictions that such a position entails when placed alongside a holistic analysis of various aspects of international law.¹⁶¹

Faced with such analyses, feminist scholarship¹⁶² has critiqued prevailing analyses of the state as flawed because they take the state as a given and essentially monolithic entity.¹⁶³ It is apparent in the final analysis that the state in its present form cannot provide the basis upon which a serious and liberating feminist agenda for self-determination can be prosecuted. Such a construction of statehood is

158. *See id.* (quoting Eleanor Leacock and her comments on the flimsy notion of “separate but equal” between the genders).

159. *See id.* at 228 (discussing the paradigmatic shifts toward Western ideals of power and authority).

160. *See* Convention on Rights and Duties of States, 49 Stat. 3097 (1933) [hereinafter Convention].

161. *See id.* art. 1 (asserting that statehood is confirmed through the possession of a permanent population, a defined territory, a government, and the capacity to enter into relations with other states).

162. *See e.g.*, J. Ann Tickner, *Foreword to GENDERED STATES: FEMINIST (RE) VISIONS OF INTERNATIONAL THEORY* ix (V. Spike Peterson ed., 1992) (contending that such analyses ignore the fact that states are quite different, that there is a need to explore the politics of state action, and that they “ahistorically project an image of the present back onto the past”).

163. *See* Knop, *supra* note 4, at 154 (noting statehood’s independence). As Knop points out, if defined by exploring the politics of state action and projecting the present onto the past, statehood would in no way depend on whether the state observes human rights, including women’s rights; or whether it represents the population, judging by liberal, feminist, or other criteria or representation. *See id.* A regime that grossly violates women’s rights can be recognized as a state and can participate in the creation of international law. *See id.*

positively inimical to the self-determination of women. Given such a framework, one must also wonder whether the increased presence of women *per se* within such a gendered structure would fundamentally transform the situation of women's domination and subordination.¹⁶⁴ Such a question suggests the need for a review not only of the basic premises upon which principles of the rule of law (both domestic and international) are constituted, but also of the fashion in which society is organized. Given the above factors, it is of little surprise that male-dominated perceptions of statehood and international law have not spared the right of self-determination from their ambit.¹⁶⁵

In light of the foregoing, the doctrine of self-determination must be reconstituted so that it does not simply take "the group" (or "the state") as a given. Indeed, the exact content and application of the doctrine of self-determination must be revisited and reconceptualized as a whole.¹⁶⁶ Mere critique of the dominant perspectives of the state is unsatisfactory.¹⁶⁷ Women have a radical claim to entitlement.¹⁶⁸

164. See generally SANDRA HARDING, *WHO'S SCIENCE? WHO'S KNOWLEDGE?: THINKING FROM WOMEN'S LIVES* (1991) (arguing that the increased presence of women within the gendered structure has a minimal effect on women's subordination); IRIS YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 200 (Princeton Press Univ. ed., 1990) (same).

165. See Charlesworth & Chinkin, *supra* note 4, at 73 (noting the paradox between free choice and the validity of women's self-determination). According to Charlesworth and Chinkin:

[t]he problematic structure of traditionally asserted *JUS COGENS* norms is also shown in the more controversial 'collective' right to self-determination. The right allows 'all peoples' to 'freely' determine their political status and freely pursue their economic, social and cultural development. Yet the oppression of women within groups claiming the right of self-determination has never been considered relevant to the validity of their claim or to the form self-determination should take.

Id. at 73.

166. See Chinkin & Wright, *supra* note 4, at 263 (examining and reconceptualizing self-determination with the concept and culture of food).

167. See Knop, *supra* note 4, at 158 (suggesting ways in which the doctrine can be challenged and effectively transformed).

168. See *id.* at 159 (defining the radical claim of entitlement of women). Knop explains this claim of women as: "A recognition as limited subjects of international law with the right to participate directly in the formulation of international and regional norms of particular concern to them and, the right to direct recourse to

Knop and Richardson arrive at the same conclusion with respect to African-Americans.

In sum, the issue of women's self-determination needs to be taken to a higher level. We must ensure, however, that an exercise such as the one Knop suggests does not simply degenerate into a duplication of both the hierarchical models of representation that currently dominate the international scene and the masculine construction of statehood. In other words, any such reconceptualization must also ensure that the varied interests of the full range of women—not simply middle-class, white, Western women¹⁶⁹—are taken into account.¹⁷⁰ The failure to do so would basically amount to a return to the point from which the struggle commenced, namely, continuing Western hegemony with a “feminist” face.¹⁷¹ The same caveat obviously applies to the struggles by African-Americans and other people of color.

In short, we need to conduct inquiries addressing a number of questions: who is involved in the development of self-determination, what is the nature of involvement, and who benefits from such in-

global and regional mechanisms to protect their rights.” *Id.*

169. This was a problem, for instance, when white and Aboriginal women clashed over the inclusion of Aboriginal men in their struggles against the suppression of their rights by white men. For an account of the foregoing, see Ann Curthoys, *Citizenship, Race, and Gender: Changing Debates over the Rights of Indigenous Peoples and the Rights of Women, in Suffrage and Beyond, in INTERNATIONAL FEMINIST PERSPECTIVES 102-03* (Caroline Daley & Melanie Nola eds., 1994) (noting how Aboriginal women and their culture were rooted in colonization, orientalizing, and racism).

170. Such a need cannot be over-emphasized, particularly on account of the tendency—even within feminism—of Western structures seeking to dominate and control the discourse and the agenda. See J. Oloka-Onyango & S. Tamale, “*The Personal is Political, or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*,” 17 *HUM. RTS. Q.* 691 (1995) (discussing the contradictions of Western feminism and its relationship with other, especially African, communities).

171. See generally Adetoun Ilumoka, *African Women's Economic, Social and Cultural Rights, Toward a Relevant Theory and Practice, in HUMAN RIGHTS OF WOMEN: NATIONAL & INTERNATIONAL PERSPECTIVES 320* (Rebecca Cook ed., 1994).

volvement?¹⁷² Knop's formulation would still be inadequate unless it is also married to a holistic conception of self-determination, a conception that considers both the political, and the socioeconomic and cultural facets of the phenomenon.¹⁷³ This is particularly necessary in light of the fact that women have been historically marginalized, and suffer disproportionately from the relegation of this category of rights to a second-class level.¹⁷⁴ Moreover, self-determination has suffered from the same theoretical problems that have plagued liberal concepts such as freedom, choice, and autonomy, which "impose a particular kind of order, a structure that violently suppresses those details that do not fit—in particular, the details surrounding the persistent domination of men over women, rich over poor, and whites over blacks."¹⁷⁵ As Razack points out, in our conceptualization of such notions, unless we come to terms with covert regulation and with power as an effect, we will be unable to determine who is being oppressed and what should be done about it:

Oppression in liberalism, means the imposition of unjust constraints . . . [w]hen one departs from the notion of choice and freedom . . . and comes to see power as a net organizing how individuals are constituted in any one context, oppression becomes a story of struggle and submission, of how what is present is made possible by what is absent.¹⁷⁶

For women, the foregoing point is of particular relevance, both in the sense of external and internal self-determination and can only be understood by examining the structure of relationships in concrete terms and not through abstract notions.¹⁷⁷ Unfortunately, the domi-

172. See Linda Mayouz, *Beyond Naiveté: Women, Gender Inequality and Participatory Development*, 26 DEV. & CHANGE 235, 251 (1995) (examining the same issue with respect to women's participation in development projects).

173. See Oloka-Onyango, *supra* note 118, at 94 (analyzing the need to both re-conceptualize and reinvigorate attention to this category of rights).

174. See Charlesworth & Chinkin, *supra* note 4, at 69 (distinguishing between public and private dichotomy).

175. See Sherene Razack, *Collective Rights and Women: 'The Cold Game of Equality Sharing'*, in Group Right 66, 72 (Judith Baker ed., 1994) (explaining also fundamental collective rights as "seeing" and "not seeing").

176. *Id.* at 72.

177. See generally Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1

nant trends in both international legal theory and in the application of economic self-determination do not appear to strengthen such possibilities. To illustrate this assertion, this Essay concludes by examining how the political economy of the late twentieth century is the single most important factor now influencing the fashion in which concepts such as statehood, sovereignty, development, and ultimately, self-determination, are evolving as we proceed toward the next millennium. These developments do not bode well for the future prospects of democracy.

B. TOWARD HOLISTIC CONCEPTIONS OF SELF-DETERMINATION

1. *Back to the Future: Twenty-First Century "Statehood" and Its Implications*

Current scholarship is caught between deciding whether we have arrived at the "end" of the nation-state or whether the state is at its epitome.¹⁷⁸ Whatever one concludes, a consensus appears to be emerging that the state has undergone a considerable metamorphosis even within the space of the last decade of the century.¹⁷⁹ Rather than focusing on the state as such, it might, for the moment, be more useful to examine those elements outside of the state in order to arrive at a comprehensive consideration of their impact on the phenomenon of statehood.¹⁸⁰ No other more prominent non-state actors exist today than international businesses in alliance with multilateral finance. In an insightful, albeit ethnocentric analysis of the decline of the nation-

REV. CONST. STUD. 1 (1993).

178. See Ahmednasir M. Abdullahi, *The Refugee Crisis in Africa as a Crisis of the Institutions of the State*, 6 INT'L J. REFUGEE L. 562 (1994) (supporting the "death-to-the-state" position and noting state failures in Somalia and Liberia). See generally Jjuuko, *supra* note 6; wa Mutua *supra* note 6; Strange, *infra* note 187 (discussing "end-of-the-state" theories).

179. See Jjuuko, *supra* note 6, at 1 (examining the dwindling role of the state in the economy and in the provision of basic social services).

180. A number of these can be usefully identified, although they would have to be more critically examined elsewhere. They include nongovernmental organizations, guerilla movements, multilateral development and finance institutions, and transnational corporations.

state,¹⁸¹ Vivien Schmidt argues that the eclipse of the state has been marked by the concomitant emergence of business as the dominant world force.¹⁸² As a consequence, this rise in international business has dwarfed traditional sovereignty and has created additional problems.¹⁸³ While international business has greatly strengthened transnational corporations, it has also marginalized the state with considerable implications for society at large:

By liberalizing their trade policies, by deregulating their economies, and by privatizing their enterprises, national governments have much less control over what goes on in their own territory or what their multinationals do elsewhere, and they no longer have the resources they had in the past to solve social problems. At the same time, multinational corporations are less bound economically, politically, and morally to nation-states, while supranational bodies such as GATT, NAFTA, and the EU, by concentrating on trade have given scant attention to the social spillovers.¹⁸⁴

Schmidt explains that deliberative democracy will suffer as a result of the changes wrought by the new economic world order, depending upon a nation's particular characteristics.¹⁸⁵ Overall, Schmidt argues that "democracy is at risk,"¹⁸⁶ and with good reason. The po-

181. The supra-national arrangements of most concern to Schmidt are the NAFTA and the EU (and the General Agreement on Tariffs and Trade ("GATT")/World Trade Organization ("WTO") to a lesser extent). Even though she refers to the decline of the "Nation-State," it is clear that her parameters are limited to only a few. The specific countries she analyzes in greater depth include: the "smaller" European countries (i.e., the Netherlands, Belgium), and Sweden, Austria, Germany, France, Great Britain, Italy, Japan, and the United States. Needless to say, many of the effects she speaks of directly affect the phenomenon of statehood in non-Western or industrialized contexts, and indeed with significant repercussions, especially since the peoples of such countries have not received the benefits of "a larger market, higher standards, better protections for all citizens of the EU, and greater economic stability."

182. See generally Schmidt, *supra* note 6.

183. See *id.* at 75 (pointing out that "[c]apital has become increasingly mobile and business increasingly international as borders that act as barriers to trade fall and as regulations that constrain commerce are lifted.").

184. *Id.* at 76-77.

185. See *id.* at 77.

186. *Id.*

litical implications are evident in terms of traditional civic and political exercises like voting, political associations, freedom (and capacity) of expression, and even movement, which are all fundamental to the right of self-determination.¹⁸⁷

In addition, there are serious problems for the realization of economic self-determination, considered in the two dimensions of its manifestation under international law, *viz.*, control over natural resources, and the individual realization of economic, social, and cultural rights. These include rights to education, health, shelter, and an adequate standard of living and food. In the North, this has meant a diminution in the largesse of the welfare state, a process facilitated in the United States by a Republican Congress infused with Gingrichian political and economic theory, and by the implementation of the North American Free Trade Agreement (“NAFTA”).¹⁸⁸ Elsewhere—even in states that hitherto prided themselves on being able to meet the welfare necessities of the poor, such as Sweden and Germany—such traditionally assumed economic and social guarantees (of a job, health care, or an adequate living standard) are rapidly deteriorating. Schmidt points to the German experience as an illustration that:

187. See Susan Strange, *The Defective State*, 124 DAEDALUS 55, 56 (1995) (pointing out that profound damage is being afflicted upon the state). She writes: “The proposition in short, is that state authority has leaked away, upwards, sideways, and downwards. In some matters, it seems even to have gone nowhere, just evaporated. The realm of anarchy in society and economy has become more extensive as that of all kinds of authority has diminished.” *Id.* at 56. Strange writes:

States are obliged by structural change to seek commercial allies rather than military ones. Some of these allies will be other states in regional economic associations. Others will be foreign-owned firms. And the agendas for interstate discussion and bargaining are also changing, as are the issues arising in domestic politics.

Id.

188. See Jill Hills, *Dependency Theory and its Relevance Today: International Institutions in Telecommunications and Structural Power*, 20 REV. INT'L STUD. 169, 174 (1994) (asserting that international financial liberalization, led by the United States, produced a “tightening of credit and shortage of capital” which contributed to the recession of the early 1990s). This, in turn, increased protectionism, as well as greater exports from industrialized countries, which, when combined with a drop on commodity prices, led to a trade imbalance for the world’s poorest nations, thus undermining their attempts at autonomy. See *id.*

Even multinationals from countries such as Germany, where corporations have traditionally felt a social obligation to the community in which they operate, have increasingly been relocating with an eye to lower taxes and wages. And whether they stay or move, multinationals successfully use their mobility to pressure workers and gain wage concessions.¹⁸⁹

The aforementioned developments, however, not only have economic or political implications; they affect policies on immigration as well as the perception of people of color, both in the popular medium and in the domain of public discourse. Such people, in both the North and South, are beginning to share their experiences as well as their complexions: they too are being dispossessed—socially, politically and economically.

These processes are being perversely duplicated at the international level. While the UN of the 1960s had been subsumed by the idea of development, this is no longer the case.¹⁹⁰ Now, the organization's very existence is a more pressing concern. Smouts contends that despite a profusion of international institutions, multilateralism is suffering.¹⁹¹ What prevails instead is a kind of "collective bilateralism," with each state applying "individually to the donor countries, which, for their part, form a group ... [t]he disproportion is alarming."¹⁹² Accordingly, business is the only institution that emerges strengthened.

Business generally has become stronger, more independent and mobile, and less in need of the close relationships with government or of the compromises with labor that it had developed throughout the postwar years. Labor, by contrast, has become weaker with respect to business at the same time that it has increasingly been shut out of policy-making proc-

189. See Schmidt, *supra* note 6, at 79 (describing how the global organization of multinational corporations led them to defy any characterization or sense of obligation based on national origin).

190. See BOUTROS BOUTROS-GHALI, AGENDA FOR PEACE 6 (1995) (asserting that many modern conflicts arise, not from military threats between states, but from claims of nationalism and sovereignty, as well as from ethnic, religious, social, cultural, and linguistic despair).

191. See Smouts, *supra* note 97, at 240 (explaining that some states, such as those in Eastern Europe and Africa, do not have access to a forum where they can properly address their grievances with international financial institutions).

192. See *id.* (illustrating the imbalance between the financial donors and the recipients).

esses by liberalizing governments.¹⁹³

The ultimate result of business' growing influence is that "societal interests, with the exception of business interests, have less access to decision-making at the national level, let alone at the supranational level."¹⁹⁴ Further, "as national governments continue to deregulate and privatize, to reduce taxes and to diminish their own control over economic policies generally, they have increasingly less capacity to meet societal needs in the face of economic downturn, especially in such areas as employment and social welfare."¹⁹⁵ Those interests and needs which are marginalized become correspondingly a "potentially disruptive force."¹⁹⁶

If the foregoing is indicative of the situation in the North, then the situation in the South is even more disturbing. Under the yoke of SAPs, Paris and London Club Rescheduling, and the quest for a greater return on investments, developing countries are at their most vulnerable since independence.¹⁹⁷ Even if political self-determination is assured, the absence of economic self-determination creates the possibility of its eventual forfeiture. In symbolic terms, the high point of the marginalization process was the capitulation of India to the dictates of the neoclassical economics of the market—India, which, even more than China, was long perceived as the lone Third World country holding out in stoic—if naïve—resistance.¹⁹⁸

There is yet an additional (and more ominous) dimension to this marginalization. As Adekanye points out, there is a close link between the rise of the ethnic tensions that often fuel demands for self-

193. See Schmidt, *supra* note 6, at 86 (suggesting that, due to outside economic pressures, there is a growing imbalance between business and labor influence).

194. *Id.*

195. *Id.*

196. See *id.* (asserting that any societal interests that the government ignores as a result of privatization will become disillusioned, thus disrupting the stability of state sovereignty).

197. See *id.* at 90 (noting how European integration has disrupted France's "statist" pattern of policy-making).

198. See generally TARIQ ALI, AN INDIAN DYNASTY: THE STORY OF THE NEHRU-GANDHI FAMILY (1989) (providing an account of India's resistance movement and the family who led it).

determination and secession on the one hand, and the increasing economic disenfranchisement of the masses on the other.¹⁹⁹ Even as technological advancement (via the information super-highway) reaches unparalleled levels of sophistication and access, the rate of disenfranchisement grows apace.

Much of the responsibility for this situation lies with the despotic leaders who pillaged and plundered the coffers of public financial institutions and economic enterprises until they drained them dry. However, during the Cold War, external sponsors assisted these leaders in their endeavors. Despite the fact that institutions like the World Bank and the IMF have admitted that their past mismanagement contributed to the current crises,²⁰⁰ neither have attempted to atone for their mistakes through reparations.²⁰¹ Concurrently, there is a direct link to the resulting austere measures that are being imposed with scant attention to the creation of social supports for those on the margins of society. Adekanye argues that:

the international community has not yet made the logical and necessary connections which would permit it to recognize that the very programmes and activities of some of its agencies in Africa, particularly the IMF and the World Bank, may be one of the factors encouraging these tensions One of the implications of the foregoing analysis is that since ethnic and regional tensions have been rising due to the conditions created by debts, economic crisis and adjustment, no strategy of conflict resolution will prove adequate and sustainable unless it tackles these underlying conditions.²⁰²

This means that the concept of self-determination—both economic and political—may be under less attack than it appears from the more

199. See Adekanye, *supra* note 181, at 371 (asserting that demands for democratization and coinciding ethnic tensions combine to intensify the struggle against the State itself).

200. See WORLD BANK, *SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH* 27 (1989) (admitting, for the first time, that foreign financial institutions and donor agencies, including the World Bank itself, participated in “badly chosen and poorly designed” public sector investments which contributed to economic crisis in Africa).

201. See KNIEPER, *supra* note 128, at 5-7 (analyzing the implications of both the World Bank’s admission and its failure to make reparations).

202. See Adekanye, *supra* note 181, at 372 (highlighting a link between international financial support and the resulting conditions).

readily identifiable forces, such as ethnicity, religion, or Prof. Franck's "postmodernist tribalists."²⁰³ Instead, if self-determination is defined as a people's right to "freely determine their political status and freely pursue their economic, social and cultural development,"²⁰⁴ it becomes evident that only the international and finance community is enjoying that right.

Faced by a context where the international and domestic political economies are hostile to the genuine realization of self-determination, should we not revisit our conceptions of the right to secession, even absent preconditions of gross and consistent human rights violations demanded by scholars such as Hannum?²⁰⁵ In other words, if the socio-economic and political conditions are such that their deterioration could result in a situation such as that which occurred in Bosnia or Somalia, why not allow them the option of succession before they demand it?

2. *Being Heretical: Some Radical Thoughts on Secession*

Traditional international law theorists have a deeply ingrained aversion to contemplating the right to secede even in the abstract.²⁰⁶ Few are

203. See Franck, *supra* note 39, at 3-4 (asserting that "post-modern tribalists" contribute to a global phenomenon whose purpose is the "break up" of existing sovereign states).

204. 1960 UN Declaration, *supra* note 44, at 67.

205. Such a suggestion is only partly rhetorical. Poppovich and Pinheiro assert that economic growth alone is a guarantee to "change the power relations in countries where structural imbalance is deeply ingrained in the social fabric" and thus paves the path to development and democracy. They assert further that the distribution of economic growth and of resources should be of first priority. "This means that countries which have adopted a democratic political system of free elections and political freedoms will have to implement measures of economic equality and freedoms to effectively consolidate their democracy." See Malak Poppovich & Paulo Sergio Pinheiro, *How to Consolidate Democracy? A Human Rights Approach*, 143 INT'L SOC. SCI. J. 75, 86 (1995) (arguing that, without such efforts, democracy would solely be available to a ruling minority).

206. This is most evident in the views of those who deny that there is even a right to self-determination for colonized peoples, but it is also evident in the views of ostensibly liberal scholars like Lloyd and Hannum. See, e.g., Lloyd, *supra* note 10, at 434-35 (arguing that Southern Sudan should be allowed to secede from the rest of the country). Lloyd states:

willing to infer that the right to succession even exists at all, and suggestions to the contrary immediately draw a retraction.²⁰⁷ Allen Buchanan, for example, in a paper which begins by speaking of “expanding options,” refers to the need for “articulating principles and building legal institutions designed to bring secession within at least the minimal constraints of the rule of law,” and distinguishes between secession, and “other, less extreme forms of self-determination.”²⁰⁸

Paul Goble asserts that several alternatives to secession can be attempted, including federal power-sharing and the establishment of alternative and more comprehensive identities upon which democratic citizenship can rest. However, in an age when the state is becoming an even larger player in society, Goble asserts that “the question of who controls it becomes ever more important.”²⁰⁹ Gottlieb echoes Goble’s assertion when he suggests that threats of secession should be met with a new formulation that goes beyond self-determination, but does not provide for full secession, essentially serving as a stalling tactic.²¹⁰

Thus the presence of systematic oppression and the threat of decimation of the population establish relatively objective indices by which to identify a ‘people’ vested with the right of self-determination. If such a ‘people’ is found to occupy a demarcated territory, to have exhausted any national remedies [they should have a] demonstrable legal right to secessionist self-determination.

Id. at 431-35.

207. One brave exception to this view is Gebre Tesfagiorgis, who asserts that international law actually recognizes the right to secession. However, this view may be based more on wishful thinking than on reality. See Gebre H. Tesfagiorgis, *Self-Determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea*, 6 WIS. INT’L L.J. 75, 92-93 (1987) (arguing that, according to the United Nations Charter, self-determination is a right afforded to two groups: colonized peoples and peoples subjected to foreign domination).

208. See Allen Buchanan, *Federalism, Secession and the Morality of Inclusion*, 37 ARIZ. L. REV. 53 (1995) (articulating the need for an international institutional response to “secession crises”).

209. See Goble, *supra* note 19, at 1683 (asserting that “unless th[e] state is to become less important, an unlikely development in most regions, secession must remain an option.”).

210. See Gidon Gottlieb, *Nations Without States*, 73 FOREIGN AFF., May-June 1994, at 100 (arguing that most modern national and ethnic conflicts cannot be re-

The UN has always sought to have it both ways. For instance, even the 1960 Declaration that first recognized the right to self-determination contained an effective limitation clause.²¹¹ As in the case of Gibraltar and Spain, the state's response to claims of self-determination has traditionally been guided by the threat of "disruption of the national unity and territorial integrity" articulated in the UN Charter, rather than by a discussion of the right to self-determination, or even an affirmative recognition of such a right.²¹²

The roots of this bias are reflected in the rather fatalistic view that secessionists have no greater horizons than the dominant perceptions of the state from which they have departed:

After all, secession is merely an attempt to diminish the territorial scope of one state's authority and replace it by the authority of another state. Thus secession does not challenge the dominant conception of the nature of sovereignty; it merely seeks to replicate sovereignty without questioning it. In that sense, secession is inherently conservative. It calls into question neither the dominant conception of state authority nor the international order, so far as the latter takes states as the fundamental elements of the international system.²¹³

The foregoing viewpoint assumes that secessionists are born and not made. Rasheed asserts that the urge for autonomy is often fostered by

solved by merely moving national boundaries and advocating unions between peoples rather than between territories). Gottlieb says:

States bent on extinguishing smoldering embers of ethnic strife without the traumatic surgery of secession must make it possible for restive nations to carry on their life free from alien rule. The principle of self-determination must be supplemented by a new scheme that is less territorial in character and more regional in scope.

Id.

211. See 1960 UN Declaration, *supra* note 44, at 67 (recognizing the right to self-determination, but simultaneously placing severe restrictions on its implementation). This Declaration states "[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the United Nations Charter." *Id.*

212. See J.J. Bossano, *The Decolonization of Gibraltar*, 18 FORDHAM INT'L L.J. 1641, 1642 (1995) (arguing that the right of self-determination should extend to Gibraltar, a British colony since 1713). Bossano is the Chief Minister of Gibraltar, and the head of the Gibraltar Socialist-Labour Party. See *id.* at 1641.

213. Buchanan, *supra* note 208, at 54.

deliberate marginalization, such that “demands by ethnic groups for power-sharing, political freedom, greater political autonomy, and the right to self-determination have on occasion led to large-scale reprisals and atrocities against these groups and have often driven them to insurrection.”²¹⁴ Rather than reaffirming the notion of statehood, which has produced these various problems, we should consider how to make the State more flexible, as the first stage to “statelessness.”

Thus, while Buchanan’s critique may be true—that some secessionists are simply born that way—he also illustrates his bias by refusing to consider how a secessionary movement could challenge the “dominant conceptions” of sovereignty and statehood.²¹⁵ Instead, he plunges into a discussion of “federalism,” constructed in the image of the country he knows best, the United States, as if that is a global model to which we should all aspire. But the worst aspect of his critique of secession is that it sounds like the case of the shop steward who has been promoted to manager: after getting in, s/he shuts the door.²¹⁶ Christiano at least addresses two situations in which secession might be considered an option in theory, even though he is generally opposed to the idea of secession in practice:

First, cases of persistent minorities would have to be specially examined. Cases of persistent minorities are pathologies of democracy which undermine the sense that each individual’s interests are being given equal consideration. Second, cases where a highly unified majority treats opponents as inferiors or as mere incompetents or with simple hatred would have to be evaluated differently. Northern Ireland may be a case of this sort.²¹⁷

214. Sadiq Rasheed, *The Democratization Process and Popular Participation in Africa: Emerging Realities and the Challenges Ahead*, 26 DEV. & CHANGE 333, 338 (1995).

215. See Buchanan, *supra* note 208, at 55-56 (discussing Federalism as either an alternative to secession, or as a “way-station” on the road to it).

216. See Bowring, *supra* note 2, at 77-78 (suggesting that states are more willing to claim the right of self-determination for themselves than they are for others). Thus, “even those states which may arguably have conceded the right of self-determination as applicable against themselves apparently accepted decolonization as a matter of expediency rather than as legal obligation.” *Id.* Accordingly, it is not inappropriate to agree with Bowring’s view here.

Louis René Beres can hardly conceal his disdain for succession, which he sees as resulting only in “violence and death.” Beres states that:

Reaffirming individual commitments to life in the “herd,” these claims contradict the idea of global oneness and cosmopolis. From identification as Moslem Azerbaijanis or Christian Armenians or Croats or Serbs, individuals all over the world surrender themselves as persons being told again that meaning derives from belonging. Not surprisingly, these individuals are too often willing to do anything that the group commands—even the mass killing of other human beings, as long as the victims are “outsiders.”²¹⁸

Yet, many secessionist movements have emerged from situations that make Beres’ rendition sound like a tea party. The problem, thus, is more fundamental than the act of separation *per se*; it is directly linked to the fundamental reasons for the commission of human rights violations, and such violations are linked, in turn, to a host of varying factors. Underlying the various views—whatever the perspective—is a profound pessimism, reflecting in part the uncertainty and devastation of the times. One cannot help feeling, however, that this is also a profoundly illiberal sentiment that seeks to continue the glorious days of “cohesion,” “oneness,” and “conformity.”

The objections to secession appear to be based much more on sentiment, chauvinism, and the desire for outright hegemonic control, than on a logical, moral, or legally indisputable premise.²¹⁹ As Nihal

217. Thomas Christiano, *Secession, Democracy, and Distributive Justice*, 37 ARIZ. L. REV. 65, 71 (1995) (suggesting although the international community should discourage “non-consensual secession” from democratic states, there are limited exceptions to this rule).

218. Louis René Beres, *Self-Determination, International Law and Survival on Planet Earth*, 11 ARIZ. J. INT’L & COMP. L. 1, 4 (1994) (suggesting that those who seek to achieve self-determination must also accept participation in the brutal and deadly means that are often necessary to achieve it).

219. See Binder, *supra* note 13, at 225 (asserting that the post-war West is uncomfortable with group identity). Thus, “despite its apparent endorsement of self-determination, international law incorporates these skeptical attitudes toward group identity and group separatism. The continuing controversy over its nationalist component is the reason that the principle of self-determination needs defense.” See *id.* (suggesting that self-determination “embodies an inherent tension between majority rule and minority separatism,” thus making the concept vulnerable to cri-

Jayawickrama tells us, the boundaries that states claim as sacrosanct, "are man-made, having been demarcated at peace conferences during this century by victors of the great wars." Jayawickrama argues further that the boundaries of most colonial territories, particularly those in Africa, were drawn arbitrarily,

slashing across ethnic settlements regardless of the cultural affinities that had existed from time immemorial. Indeed, it is true to say that most ethnic groups precede contemporary national boundaries by hundreds, if not thousands, of years. This desire to sanctify and perpetuate a few artificial lines drawn on a map of the world by a succession of politicians, diplomats, explorers and even adventurers, often without reference to the people living on the land, appears to be misconceived in the context of the international human rights regime which exists today.²²⁰

In concluding his Essay on minorities, Hannum asserts the need to review the context and intent of several different international law principles, including self-determination. He suggests that the Committee on Economic, Social and Cultural Rights should adopt a General Comment on self-determination (Article 1 of the Covenant), and that the Human Rights Committee should revisit its refusal to address self-determination complaints brought to it under the Optional Protocol to the Covenant on Civil and Political Rights. Hannum further proposes that "an independent nongovernmental Commission might be convened to examine the meaning of self-determination in the post-Cold War era and to recommend ways in which self-determination claims can be judged by the international community before they descend into violent confrontations."²²¹ Jayawickrama goes further by stating that:

tique).

220. Nihal Jayawickrama, *The Right of Self-Determination—A Time for Re-invention and Renewal*, 57 SASK. L. REV. 1, 11 (1993) (criticizing the modern rationale for restricting the right of self-determination, which appears to be based solely on a desire to maintain existing national boundaries).

221. Hannum, *supra* note 2, at 12. This appears to be a major *volte-face* in Hannum's thinking. In an earlier article he stated in no uncertain terms that:

Justifying secession by a 'nation' or 'people' in response to anything less than the most serious human rights violations assumes a principle to which there has never been agreement. It assumes that each ethnic group or culture has the right to exercise power within its own 'sovereign' state. International law should recognize a right to secession only in the rare circumstance when the physical existence of a territorially concentrated group is threatened by gross violations of fundamental human rights.

there is now an urgent need for the establishment of a commission or a high commissioner to which or to whom the "people" will have a right of access whenever their exercise of self-determination is either disputed or denied. This institution should be able to evaluate upon proper legal criteria, offer assistance where it appears necessary, and intercede where the situation so warrants, and refer to the appropriate authority a matter that requires to be adjudicated upon.²²²

These sentiments are echoed by Deborah Cass, who favors incorporating the "controversial" view of self-determination (a right extending beyond the colonial context) into the "criteria to be applied in assessing a claim, or resolved at the domestic level, rather than automatically preventing the right from being exercised."²²³

In light of the foregoing, I offer two basic suggestions for consideration. First, the right of secession should be duly recognized under international law, even if the exact circumstances and contours of its exercise must be the subject of a participatory examination. Second, national conventions should clearly stipulate the existence of such a right, or, at a minimum, should debate the content and ambit of its application.²²⁴ Further to my first point, that the right of secession should be recognized under international law, the words of Holly Osterland are particularly instructive. Osterland explains that:

On the one hand, the potential for recognition of secessionist demands will encourage multi-cultural states to preemptively rectify any abuses of

See Hurst Hannum, *ReThinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).

222. See Jayawickrama, *supra* note 220, at 14 (suggesting that there is a need for an international commission on self-determination).

223. See Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 39-40 (1992) (arguing that the right of self-determination must be expanded for the sake of its own survival as a viable concept in international law).

224. This is not a new or radical proposition, and some national constitutions specifically provide for it. See Alemante G. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L., 1, 46 (1992) (delineating that the constitutions of several Eastern European countries allow for its republics to secede). The new Ethiopian constitution incorporates this right, but it has drawn mostly negative responses. See *id.* at 47-49 (articulating the reasons why creating a constitutional right to secede is both ill-advised and ill-conceived, but at the same time admitting that such a right might deter governments from violating a minority group's human rights because the threat of secession is too great to risk).

the ethnic minorities, whether they amount to a nation or not. On the other hand, potential recognition of their right to secede may encourage separatist groups to go to the international legal community before resorting to armed conflict with the unified government.²²⁵

Osterland's last point—that the degree that a minority, having been denied the right to secede, will be willing to remain only if international human rights mechanisms are operative—is of paramount importance.²²⁶

CONCLUSION: BEYOND SELF-DETERMINATION?

The central thesis of this Essay is that while the phenomenon of self-determination is both nebulous and indeterminate in its theory, it is often rigid and illiberal in practice. Whether racial, sexual, class, ethnic, or group oppression gives way to genuine liberation or simply degenerates further into a microscopic duplication of the initial oppression depends upon a number of factors.

It is my contention that the international community needs to depart from its current conceptualization of statehood. This means shearing statehood of both its ethnocentric and hierarchical attributes and simultaneously confronting the negative impact multilateralism and globalization have had upon the developing world's attempt to attain popular sovereignty. In sum, the international community must narrow the framework of political nexus so as to expand the content of economic liberation. Central to the narrowed political nexus is a liberalized approach to the free movement of peoples, which in turn must be linked to a reinterpreted notion of the concepts of development and sovereignty, both jointly and individually. The phenomenon of globalization must likewise be the subject of concerted analysis and progressive action if the detrimental effects of its ramifications are to be minimized.

From the preceding analysis, a holistic discussion of modern self-determination today must address a number of factors. First and

225. See Osterland, *supra* note 10, at 702 (presenting arguments for bringing the principle of self-determination within the jurisdiction of the international legal community).

226. See *id.* (asserting the need for international involvement to ensure protection of minority rights).

foremost, it must consider the issue of class interest, crystallized in the ownership and domination of the means of production, regardless of whether in the United States or Mali. Self-determination (political and economic) has always existed primarily to serve the ruling class, regardless of whether it undermines the autonomy and interests of the ruled. Today (and into the foreseeable future), self-determination primarily serves to benefit the private industrial interests of the Northern states and continues to undermine the autonomy and interests of minorities and women.

Secondly, states in modern times serve less to facilitate the dynamic of self-determination than they serve to impede it. Their most important function is as a direct competitor with their own peoples for the resources of the territories they govern. This has led states to invest in and expand upon their monopoly over the means of violence. Furthermore, race, ethnicity, and sexual discrimination today constitute the primary foundations upon which the hegemony of Western-style statehood is based and extended.

It is also essential to consider how the dual phenomena of global migration and population control, as well as the selective admission of refugees, are the latest weapons deployed in the battle to limit popular sovereignty and self-determination.²²⁷ The world has gradually become more intensively subordinated to the multi- and bi-lateral dictates of the economics of the New World Order, an order manufactured by transnational corporations and implemented by the major multilateral institutions, *viz.*, the World Bank and the IMF. The new

227. See KNIEPER, *supra* note 128, at 4 (discussing the notion of national sovereignty and arguing that it serves to perpetuate many of the world's problems by marginalizing them). Knieper states that the notion of national sovereignty allows for:

the grossly uneven distribution of private and public investment throughout the world, the discretionary fixing of terms of trade by vertically integrated transnational companies, the lack of social and physical infrastructure in many countries and the malnutrition, the spread of diseases, the lack of education, the violation of basic human rights, and the attendant misery are not perceived as global problems so long as the hungry, the sick, the uneducated the tortured and the miserable are confined to their [respective] territorial states. This perception is legitimized by the concept of national sovereignty, which automatically binds a given population to a given State.

Id.

multilateral trade regimes from the NAFTA to the World Trade Organization are both contributing to and simultaneously undermining the realization of the right to self-determination.²²⁸

The foregoing postulations are made with full anticipation of being rejected by both states and scholars alike, but that is precisely why they are worthy of serious discussion. If the state is not withering away, at a minimum, we should accept that the historic weight of its multifarious functions has become too heavy. Some of those functions need modification, others should be ceded to institutions better equipped to carry the burden of their execution, and still others should be confined to the dust heap of history. Statehood, state determination and traditional sovereignty are all strong candidates for this last option.

Of course a singular problem that confronts the world as a whole, and not just the issue of the self-determination of peoples, is the issue of violence, whether monopolized in the state or dispersed among a variety of non-state actors, such as guerilla groups and drug and arms merchants. As Allan Rosas states:

With the demise of feudalism and the establishment of the Hobbesian centralized state, the permanent army and the sovereign state entered into a symbiotic relationship. At the very end of the day, the constitutional independence inherent in sovereignty has been backed up by the monopoly of military force.²²⁹

Nowhere is this clearer than in the on-going conflict in the former Yugoslavia, and in the Russian routing of the Chechnyan liberation

228. See THE RIGHTS OF SUBORDINATED PEOPLES 3 (Upendra Baxi & Oliver Mendelsohn eds., 1994) (asserting that the phenomenon of globalization plays an essential role in this process). There is "a need to create a sense of common struggle rather than [to] reinforce divisions between people. There [is] concern that we avoid creating hierarchies of suffering, such that one people's bitter experience can be ranked relative to others." See *id.* (suggesting that to compare the struggles of different peoples serves only to antagonize them).

229. Allan Rosas, *Towards Some International Law and Order*, 31 J. PEACE RES. 129, 132 (1994) (articulating Thomas Hobbes' view of sovereignty). "[C]ommand of the militia, without other Institution, make him that hath it Sovereign." See generally THOMAS HOBBS, LEVIATHAN 119 (J.C.A. Gaskin, ed., Oxford U. Press, 1996) (explaining the importance of the military to the stability of the sovereign).

fighters.

This Essay offers no fixed guidelines or a developed theoretical framework on how we should approach the right of self-determination in the twenty-first century, as this is not its objective. Indeed, such an approach would defeat the participatory elements that were decried in this Essay as being absent from the conceptualization, development, and application of the right to self-determination. In fact, this Essay has not even sought a consensus on an issue that has divided nations, peoples, and even individuals in its practical manifestations. Rather, this Essay has sought to provoke discussion and introspection, and to challenge commonly held perceptions on the right to self-determination. This Essay has also sought to flesh out the major fault lines that must be revisited as we move to a new millennium. In doing so, perhaps it is useful to return to the last stanza of the lyrics to the song "Imagine," quoted at the beginning of the paper:

Imagine no possessions
I wonder if you can
No need for greed or hunger
A brotherhood of man
Imagine all the people
Sharing all the world²³⁰

If we can take the time to imagine these possibilities, we have at least taken the first steps toward the much-needed reconceptualization of the notion of self-determination, an essential ingredient to the realization of a positive and progressive democratic future in the twenty-first century.

230. LENNON, *supra* note 1 (third stanza).