

The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?

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Abstract

In this article I seek to identify and explore some of the legal consequences that flow from the various normative levels that have been ascribed to the right of self-determination in international legal doctrine. Four normative levels are considered: human right, association with sovereignty, *erga omnes* and *jus cogens*. A particular focus of the article is on how the doctrinal debate surrounding each normative level might impact on the willingness of states to help improve the determinacy of the scope and content of the right. I argue that there is a haziness surrounding the normative status of the right to self-determination and that this can help to explain the reluctance of states to publicise their views on the scope and content of the norm in international law. The article concludes with suggestions as to how a clearer understanding of the normative status of the right to self-determination might be achieved.

Keywords: international law – self-determination – *jus cogens* – *erga omnes* – sovereignty

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'Much of the support for the principle of self-determination as a legal right and as a peremptory norm is couched in generalisations and little attempt is made to define the content of the right with any precision.'

John Dugard, *Recognition and the United Nations* (Cambridge: Cambridge University Press, 1987) at 160.

1. Introduction

The right of self-determination has been identified by the International Court of Justice (ICJ or 'the Court') as 'one of the essential principles of contemporary international law'.¹ Yet it also remains one of the most unsettled norms in international law.² This is most true of its application beyond the colonial context, which has been described by Drew as 'plagued by an excess of indeterminacy both in terms of scope and content'.³ But even though the scope and content of the right is now relatively settled for the colonial context,⁴ international lawyers continue to be troubled by the question of whether or not any aspect of the legal norm has *jus cogens* status.⁵ This article addresses both the legal meaning of the right and its normative status. More specifically, the article concentrates on how the various normative levels that have been ascribed to self-determination in international legal doctrine relate to the willingness of states to help the scope and content of the right become more determinate.

International legal norms are not static. Rather their scope and content can change over time.⁶ Central components in any development of an international legal norm are the practice and views of states. This is likely to be either as evidence of the nature of a rule of customary international law,⁷ or as support for a particular interpretation of a treaty provision.⁸ Thus, although a norm might be formulated in vague terms, a more definite meaning can develop over time.

It is strikingly clear that the right to self-determination was introduced into international law in vague terms. For instance, paragraph 1 of common Article 1 of the International Covenant on Civil and Political Rights 1996

- 1 *Case Concerning East Timor (Portugal v Australia)* Merits, Judgment, ICJ Reports 1995 4 at 102, para 29.
- 2 See Cass, 'Rethinking Self-Determination: A Critical Analysis of Current International Law Theories' (1992) 18 *Syracuse Journal of International Law and Commerce* 21.
- 3 Drew, 'The East Timor Story: International Law on Trial' (2001) 12 *European Journal of International Law* 651 at 658.
- 4 *Ibid.*
- 5 See Summers, 'The Status of Self-determination in International Law: A Question of Legal Significance or Political Importance' (2003) 14 *Finnish Yearbook of International Law* 271 at 283.
- 6 Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 302 at 307 and 316.
- 7 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* Merits, Judgment, ICJ Reports 1969 3 at 44.
- 8 Article 31(3)(b) Vienna Convention on the Law of Treaties 1969, 1115 UNTS 331; 8 ILM 679 (1969), entered into force 27 January 1980.

(ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (together 'the Human Rights Covenants') reads: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'⁹ Still, given the passage of time since this clause was agreed upon, it might have been expected that a more determinate understanding of the scope and content of the right would have emerged, or at least be on its way to emerging. This is not the case. The doctrinal debates, on the meaning of 'peoples' and the contents of the right that 'peoples' enjoy, have no end in sight.¹⁰

Clarity on the meaning of self-determination as a legal norm is perhaps hindered more than other norms by the controversial nature of the topic. This must be central to why 'the actors [states] themselves rarely venture opinions on the nature of the right in their resolutions, reports, or diplomatic exchanges on the subject'.¹¹ Yet the controversial nature of some of the subject matter that the right to self-determination has been suggested to include, such as the right of a group within a state to secede and form a new state,¹² might not be the only reason that states have not made more effort to make their views on the scope and content of the right known. It is possible, for instance, that states place some value in the vagueness of the law of self-determination because it permits a broad range of plausible interpretations and is therefore able to accommodate unforeseen circumstances.¹³ It is also possible that doctrinal debates about the right's normative status could be deterring states from suggesting content for fear of the consequences that will follow from a more determinate norm coupled with a particular normative status.

Summers has suggested that discussions about the elevated normative status of the right to self-determination, even if not yet reflective of the true position in international law, serve to underline the political importance which is placed on compliance with the right at the international level.¹⁴

9 999 UNTS 171, entered into force 23 March 1976, and 993 UNTS 3, entered into force 3 January 1976, respectively. On the debates at the time of the drafting of Article 1 of the ICCPR, see Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 19–21.

10 See, for example, Summers, *Peoples and International Law: How the Right of Self-Determination and Nationalism Shape a Contemporary Law of Nations* (Leiden: Brill, 2007) at 372–4, highlighting the uncertainty surrounding the question of whether 'Article 1 [ICCPR] has developed into a distinct peoples' right to democratic government.'

11 Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?' (1995) 16 *Michigan Journal of International Law* 733 at 780.

12 See McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857 at 862.

13 See Sheeran, 'International Law, Peace Agreements, and Self-Determination: The Case of the Sudan' (2011) 60 *International and Comparative Law Quarterly* 423 at 458. For a critical account of how the indeterminacy of external self-determination has been dealt with by scholars of international law and international judicial bodies, arguing that indeterminacy has emancipatory potential, see Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002).

14 Summers, *supra* n 5 at 292.

Political importance could be a reason for states to prefer that the right remains ill-defined. This is because the international community are more likely to respond to the breach of a norm that is perceived as politically significant, but if the norm is kept ill-defined, states will retain a leeway to resist claims that they are not fulfilling obligations to peoples under their authority. However, there are also established and potential legal consequences attached to the acceptance of a particular normative status for self-determination. To illustrate, if the legal right to self-determination was to be accepted as a *jus cogens* norm, any treaty that contravened an aspect of the right would be void.¹⁵ It is not unreasonable to suspect that this type of consequence might deter states from activity that would help to make the legal meaning of the right more determinate.

This article seeks to contribute towards a fuller understanding of the significance of the uncertainty surrounding the normative status of the right to self-determination. It does so by identifying and exploring some of the legal consequences that flow from the various normative levels that have been ascribed to the right to self-determination in legal doctrine.

The article proceeds with an account of the scope and content of the right. This includes analysis of the limited contribution that states have made to the clarification of the scope and content of the law at the ICJ, in the political organs of the UN, and in reports to the Human Rights Committee (HRC), since initial formulations set the development of the legal right in motion in the 1960s. Next, attention is drawn, through analysis of a recent case before the African Commission on Human and Peoples' Rights and the first two Opinions issued by the Badinter Arbitration Commission, to some general reasons why states might want the law of self-determination to remain indeterminate. Subsequently, the focus of the article turns to the debates surrounding four different normative levels that have been ascribed to the right of self-determination in international legal doctrine—human right, association with sovereignty, *erga omnes*, and *jus cogens*—and the attendant implications for the emergence of a more determinate understanding of the scope and content of the norm in international law. This is followed by some comments on the way in which states have addressed the normative status of the right to self-determination in international fora. A central argument is that there is a haziness surrounding the normative status of the right to self-determination, which must contribute to the reluctance of states to suggest content for the right as a matter of international law. It is also contended that one way to counter the effects of this haziness would be for commentators and states alike to strive to present the normative status, especially in relation to *jus cogens*, with as much precision as is practicable.

15 Articles 53 and 64 Vienna Convention on the Law of Treaties.

2. The Scope and Content of the Right to Self-Determination

The commitment of the international society of states to the self-determination of all peoples was demonstrated with the signing of the United Nations (UN) Charter in 1945. Article 1(2) of the UN Charter states that one of the purposes of the United Nations is to pursue the development of friendly relations among nations 'based on respect for the principle of equal rights and self-determination of peoples'.¹⁶ Nevertheless, the backdrop to the emergence of the legal right to self-determination was the movement for decolonisation during the 1960s.¹⁷ This helps to explain why, in spite of self-determination as a political principle having a number of different dimensions,¹⁸ the core meaning of the legal right to self-determination centres on the idea of freedom from subjugation. For instance, the UN General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 states that '[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights, is contrary to the Charter of the United Nations . . .'¹⁹ And provides that '[a]ll peoples have the right to self-determination; by virtue of their right they freely determine their political status and freely pursue their economic, social and cultural development'. This is the basis for a people subject to colonial rule to be given the choice of how they wish to be constituted: independence, integration or association with another state.²⁰ It is also possible to identify, from the various international instruments that have addressed self-determination, rights that fall upon a people before they go through the process of determining their status. These have been identified by Drew, who notes:

[W]hile its normative contours are yet to be definitively settled, the following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination in the decolonization context: (a) the right to exist – demographically and territorially – as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to

16 UNTS 993, entered into force 24 October 1945. See Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1995) at 112.

17 See Weller, *Escaping the Self-Determination Trap* (Leiden: Martinus Nijhoff, 2008) at 35; and Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?', in Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993) 253 at 254–5.

18 See Waldron, 'Two Conceptions of Self-Determination', in Besson and Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 397.

19 GA Res 1514 (XV), 14 December 1960, at paras 1 and 2.

20 Ibid. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion*, ICJ Reports 1971 16 at 31–2, paras 52–3.

cultural integrity and development; and (e) the right to economic and social development.²¹

It is now accepted that the legal right to self-determination also applies beyond the colonial context.²² However, the broad formulation of ‘all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development’, which is repeated in a similar manner in almost all the relevant UN documents—including the Declaration on Principles of International Law Concerning Friendly Relations²³ and common Article 1 of the Human Rights Covenants—is central to why its meaning has been and continues to be the source of considerable contestation away from the colonial context.²⁴ In particular, there is controversy as to ‘who else [other than the population of an overseas colony] is a ‘people’, whether other peoples have a right to self-determination, and, if so, how they can exercise their right of self-determination.’²⁵ These questions have spawned an ever-growing scholarly literature.

The scholarly literature is ‘organised around the notions of external and internal self-determination, where external self-determination refers to the choice of international status and internal self-determination to some—authors differ as to what—range of political entitlements within the state.’²⁶ This literature is replete with scholars coming to contrary conclusions as to the accurate position on aspects of self-determination in international law. One aspect that illustrates this is the debate about the association between the right to self-determination and democracy.²⁷ For instance, the latest edition of Harris, *Cases and Materials on International Law*, includes the suggestion that the right to self-determination ‘may require that governments generally have a democratic base’.²⁸ In contrast, Vidmar has recently concluded that the right to self-determination does not include a right to democratic

21 Drew, *supra* n 3 at 663 (footnotes omitted).

22 See Gareau, ‘Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (2005) 18 *Leiden Journal of International Law* 489 at 505.

23 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625, 24 October 1970.

24 Weller, *supra* n 17 at 23; see also Cass, *supra* n 2 at 22–3 (‘The point has been reached where, borrowing from [the legal theorist] Hart, the “penumbra of uncertainty” surrounding the concept of self-determination is so pronounced that it obscures the term’s “core of settled meaning”.’)

25 Knop, *supra* n 13 at 18.

26 *Ibid.*

27 This has been fuelled in part by the inclusion in the Declaration on Principles of International Law of the ambiguous requirement that a government must be representative: ‘[only] a government representing the whole people belonging to the territory without distinction as to race, creed or colour’.

28 Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 2010) at 104.

government.²⁹ This article does not engage directly with any of the debates about the meaning of the right to self-determination.³⁰ Rather the wide-ranging debates about the legal meaning of self-determination provide the backdrop to the problem that is to be highlighted. This is that in spite of plentiful opportunities for states to expand on how they understand the scope and content of the right beyond the colonial context—and thereby help to ease debate about the meaning of the legal norm—these have not been utilised to anywhere near the fullest extent possible.

3. The Views of States on the Scope and Content of the Right to Self-Determination

In recent years, there have been two requests by the UN General Assembly for advisory opinions from the ICJ on matters that relate to the right to self-determination. The first opinion dealt with the legal consequences of the construction of a wall in occupied Palestinian territory.³¹ The second opinion addressed the accordence with international law of the unilateral declaration of independence in respect of Kosovo. Both requests provided opportunities for the ICJ to set out their views on the scope and content of the right. While the Court in the *Wall* Opinion hardly provided a comprehensive account of the legal meaning of self-determination, it has been credited with confirming 'previous jurisprudence concerning self-determination, reaffirming its status as an essential principle of international law and rooting it unquestionably in the Charter itself.'³² In the *Kosovo* Opinion, the Court highlighted the extensive debate about whether a right to secession, as part of the law of self-determination, exists 'outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.'³³ The Court, though, felt that in the light of the question asked there was no need to attempt to resolve this debate.³⁴ More significant, for present purposes, are the state submissions.

29 Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 *Human Rights Law Review* 239 at 268.

30 See Wilson, 'Self-Determination, Recognition, and the Problem of Kosovo' (2009) 56 *Netherlands International Law Review* 455 at 463–6.

31 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, ICJ Reports 2004 136.

32 Gareau, *supra* n 22 at 520.

33 *Accordence with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* Advisory Opinion, International Court of Justice, 22 July 2010, at para 82.

34 *Ibid.* at para 83. For commentary on the approach taken by the Court, see Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 *American Journal of International Law* 60 at 61; and 'Kosovo Symposium' (2011) 24 *Leiden Journal of International Law* 71.

When asked to provide an advisory opinion, the ICJ will invite states to make written and oral statements on the issues at stake. State submissions are particularly important when the question asked of the Court relates to an aspect of law that attracts a divergent range of views on doctrine. In such instances, as the representatives of the Netherlands noted in their oral statement to the Court for the purposes of the *Kosovo* Opinion, doctrine is ‘informative but it may not be authoritative.’³⁵ This puts the onus on the Court to interpret relevant treaty provisions and to ‘ascertain the [relevant] legal opinions and the practice of States’ for itself.³⁶ As these tasks are facilitated by the information that states provide in their submissions, it would be fair to assume a state that favours a progressive reading of a relevant aspect of international law would provide an especially detailed account of its position, in an attempt to persuade the Court to adopt the same position. However, this assumption is challenged by a review of the written statements from states that proposed a progressive reading of the law of self-determination in relation to the *Kosovo* Opinion. For instance, a number of states put forward that the independence of Kosovo could be justified on the basis of the concept of remedial secession,³⁷ but, as Serbia noted in response, provided little to substantiate this position as a matter of international law.³⁸ Possible reasons for this reticence can be found through consideration of the approach taken by such states to the definition of the term ‘people’.

If the idea that a denial of self-determination to a people within a state can trigger a right to remedial secession is to gain fuller acceptance as a point of international law,³⁹ there will first need to be greater clarity on the meaning of the term ‘people.’⁴⁰ This makes it interesting that although states such as

35 The Netherlands, Oral Statement, 10 December 2009, at para 9 (all written and oral statements related to the *Kosovo* Opinion are available at: <http://www.icj-cij.org> [last accessed 25 July 2011]).

36 Ibid.

37 See Written Statements from Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia and Switzerland, 19 April 2009. Remedial secession is a reference to the idea that the oppression of a group within a state can eventually lead to a right of secession from the state for the group: see Vidmar, ‘Remedial Secession in International Law: Theory and (Lack Of) Practice’ (2010) 6 *St Anthony’s International Review* 37.

38 Serbia, Written Comments, 17 July 2009, at para 312.

39 To illustrate the uncertain position in doctrine, compare Independent International Fact-Finding Mission on the Conflict in Georgia, Vol I, at 17, para 11, available at: <http://www.ceig.ch/Report.html> [last accessed 25 July 2011] (there is no right to remedial secession); with Tomuschat, ‘Yugoslavia’s Damaged Sovereignty over the Province of Kosovo’, in Kreijen (ed.), *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) 323 at 342–3 (there could be a right to remedial secession). It should be stressed that the question of whether or not there is a right to remedial secession was left open by the Supreme Court of Canada in the often cited *Reference Re Secession of Quebec* [1998] 2 SCR 217 at paras 135 and 138.

40 On the disputed meaning of this term, see Kohen, ‘Introduction’, in Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 1 at 9.

the Netherlands and Albania identified the concept of remedial secession as part of the right to self-determination, they did not address in any detail how they understand the meaning of the term 'people'. Instead, they proceeded on the basis that it was sufficient that the population of Kosovo had been referred to as a 'people' in the Rambouillet Accords (the Netherlands) and the constitutional framework for provisional self-government of Kosovo promulgated by the Special Representative of the UN Secretary-General (Albania).⁴¹ This approach reduces the value of the submissions for the clarification and development of international law. It could be a sign that the states in question remain uncertain about what they see as an acceptable definition of the term.⁴² But, it must also be seen in context. If these states had proposed criteria for the identification of a people in this setting, it might have encouraged the Court to engage in a detailed evaluation of the meaning of the term, the outcome of which, given the uncertainty surrounding this point of law, may not have suited the interests of the states in question. This highlights another reason why what a state includes in a submission to the Court is significant.

What a state chooses to disclose about how it views a particular aspect of international law can influence how the Court interprets the law, but it might also influence whether the Court even addresses an aspect of law in the first place.⁴³ Support for the idea that states take this possibility into consideration is found in the United States (US) policy not to reveal its views on the scope and content of the law of self-determination in its submissions to the Court in relation to the Kosovo Opinion.⁴⁴ The US adhered to this policy even in the face of a host of submissions from other states, such as Serbia's statement that 'there can never be a remedial/external right to self-determination that applies to any situation', that might have been expected to prompt the US to clarify its views on the law.⁴⁵ This suggests that the US was aware that this policy of no direct expression of its views on the meaning of the right to self-determination strengthened the persuasiveness of its call to the Court not to consider the law of self-determination.

41 The Netherlands, Written Statement, 17 April 2009, at para 3.3; and Albania, Written Statement, 17 April 2009, at para 84.

42 For an approach that was available to be adopted, see UNESCO experts, *infra* n 66.

43 On the strategy of Serbia in framing the question that was set before the Court, see Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion?' (2011) 24 *Leiden Journal of International Law* 127 at 130.

44 United States, Written Comments, 17 July 2009, at 21.

45 Instead, the US responded by highlighting to the Court how 'even some of Serbia's staunchest supporters argue that there is, in fact, a right of remedial/external self-determination under certain circumstances', before reiterating that it would not express a view on 'the issues of who is a "people", whether there is a remedial/external right to self-determination in certain egregious situations, or to whom such a right could flow': see United States, Written Comments, 17 July 2009, at 21-2.

The main point here is not to suggest that state submissions in relation to advisory opinions do not have a role to play in the clarification of the meaning of a legal norm. A review of the oral statements in the *Kosovo* Opinion, for instance, provides insights into the views of states on a number of important aspects of the debate about the meaning of the right to self-determination, such as the existence of a right to remedial secession,⁴⁶ the meaning of the term people,⁴⁷ and the sort of constitutional arrangements that are required by the right to self-determination.⁴⁸ Rather the main point is that the usefulness of state submissions as a source for clarification of the scope and content of legal norms is limited, because of the interest that states have in influencing the approach taken by the ICJ in advisory opinions, which is likely to affect what a state is willing to disclose about its views on a particular aspect of law.

The political organs of the UN have also provided numerous opportunities in recent years for states to publicise their understanding of the scope and content of the right to self-determination.⁴⁹ In particular, there have been a host of large-scale international interventions in conflict and post-conflict situations, which raise issues related to the right to self-determination. In Haiti in 2004, for example, the UN was a central actor in the initiative that saw, amidst a worsening security situation, the elected president step down, an international military presence deployed, and the establishment of a part internationally selected interim government.⁵⁰ There is scope for reading this international initiative as a contravention of the right of the people to self-determination, in the sense that the people were not left to determine their own affairs; or as an attempt to enable the people to exercise self-determination, by bringing an end to circumstances that were preventing the

46 Compare, for instance, China, Oral Statement, 7 December 2009, at para 23 ('States have referred to the foregoing as "a safeguard clause" and interpreted it, by a *contrario* reading of the text, as embodying a right to the so-called "remedial self-determination" or "remedial secession". China does not think such understanding and interpretation are correct and does not believe there is such a right under international law.') with Russia, Oral Statement, 8 December 2009, at para 8 ('It is widely acknowledged that, outside the colonial context, secession without consent of the parent State may only occur in the exercise of the right of a people to self-determination and only in exceptional circumstances.')

47 See, for example, Azerbaijan, Oral Statement, 3 December, 2009, at para 36 ('The term "people" entitled to the right of self-determination under international law obviously means the whole people, the *demos*, which is to benefit from self-determination, not the separate *ethnoses* or other groups, which at the same time together form the *demos*.')

48 See, for example, Germany, Oral Statement, 2 December 2009, at para 39 ('denial of the democratic right to internal self-determination').

49 For an historical overview of the treatment of the right to self-determination at the United Nations and how this relates to the debate on the meaning of the right in the literature, see Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 *International and Comparative Law Quarterly* 537.

50 See Saul, 'From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law' (2009) 11 *International Community Law Review* 119.

people from determining their own affairs in any meaningful way. Yet in an extensive debate at the UN on how to respond to the situation, there was no explicit mention of the right of the Haitian people to self-determination. Rather the guiding principles for action put forward by various states, such as Jamaica (on behalf of the Caribbean Community (CARICOM)) and the UK, concentrated on the importance of respect for democracy.⁵¹ One might read the omission of reference to self-determination as a sign that states did not see this situation as raising issues of self-determination. Alternatively, it might be seen as a reflection of states not wanting to complicate matters, in terms of gaining agreement on a plan of action amongst a group of states with a diverse range of interests and outlooks. However, states have also been reluctant to expand on the meaning of the right to self-determination in a context where they are asked specifically about the right with reference to no other situation than their own.

This is a reference to the approach that has been taken by states when providing information concerning Article 1 of the ICCPR in the reporting procedure to the HRC. Under Article 40 of the ICCPR states parties are required to submit an initial report, and periodic updates, on what they are doing to fulfil each of the rights in the ICCPR. The process allows the HRC to raise any issues of concern with the state in question, but it also is intended to feed into the general comments of the HRC, which deal with the scope and content of the rights in the UN Charter.⁵² Thus, it would at least not be inappropriate for states to comment explicitly on what they see as the requirements of Article 1. For instance, does Article 1 require particular constitutional arrangements or not? On rare occasions this has been the case. India, for example, has identified that Article 1 includes a right to democracy.⁵³ However, the majority of states that have addressed Article 1 in their reports have chosen to limit their comments to a brief account of what has been undertaken at the domestic level to fulfil the right.⁵⁴ The apparent reticence to contribute to the determinacy of the norm in this context might be explained by the fact that self-determination of peoples is a politically sensitive issue for certain states at the domestic level.⁵⁵ However, it is also possible to think of other more general reasons for states to want to keep the law of self-determination indeterminate.

51 UN Security Council debate on 'The Question Concerning Haiti', S/PV.4917, 26 February 2004.

52 See General guidelines regarding the form and contents of reports from States parties under Article 40 of the Covenant, Annex IV, Documents of the first to fifth sessions, Yearbook of the Human Rights Committee 1977–1978, Vol II, CCPR/1/Add. 248, at paras 1 and 6.

53 India, Report to the Human Rights Committee, CCPR/C/76/Add.6, 17 June 1996, at para 32.

54 See McGoldrick, *The Human Rights Committee, Its Role in the Development of the ICCPR* (Oxford: Clarendon Press, 1991) at 246–68; Scheinin, 'The Right to Self-Determination under the Covenant of Civil and Political Rights', in Aikio and Scheinin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2000)179 at 198; and Quane, 'A Right to Self-Determination for the Kosovo Albanians?' (2000) 13 *Leiden Journal of International Law* 219 at 221.

55 See Scheinin, *supra* n 54 at 188.

4. Reasons for States to Value Indeterminacy in the Law of Self-Determination

There is no definition for the term ‘people’ in the African Charter on Human and Peoples’ Rights 1981 (‘African Charter’).⁵⁶ It was reported at the time the African Charter was drafted that the term ‘people’ was left undefined to avoid a difficult discussion for the drafters.⁵⁷ This has been described as an ‘abdication of responsibility’,⁵⁸ but it has also been interpreted as an attempt to avoid limiting the scope of the collective rights in the Charter, including the right to self-determination (Article 20),⁵⁹ to the types of groups that could be envisaged as coming within the remit of the rights at the time of drafting.⁶⁰ In a recent case at the African Commission, *Kevin Mgwanga Gunme et al v Cameroon*,⁶¹ Cameroon had the opportunity to clarify how it views the meaning of the term ‘people’ for the purposes of the right to self-determination.⁶² Consideration of this case can help to shed light on why states might value indeterminacy in the law of self-determination.⁶³

The case related to the circumstances surrounding the creation of the state of Cameroon. A key feature of the complaint was that the people of Southern Cameroon had been deprived of the right of self-determination during the 1961 UN plebiscite on independence and in the subsequent federal constitution of Cameroon. The most interesting aspect for present purposes is Cameroon’s submission in relation to the claim by the applicants that the people of South Cameroon were a people for the purposes of the right to self-determination. Cameroon challenged the claim on the basis that ‘[n]o ethno-anthropological argument can be put forward to determine the existence of a people of

56 1520 UNTS 217.

57 Report of Organisation of African Unity (OAU) Secretary-General, Draft African Charter on Human and Peoples’ Rights, CM/1149, 1981, at para 13, cited by Addo, ‘Political Self Determination within the Context of the African Charter on Human and Peoples’ Rights’ (1988) 32 *Journal of African Law* 182 at 184.

58 *Ibid.*

59 The provisions on collective rights are found in Articles 19 to 24 of the African Charter.

60 Ouguergouz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Martinus Nijhoff, 2003) at 205.

61 266/2003, 26th Annual Activity Report of the ACHPR (2009); 17 IHRR (2009) 798.

62 Other African Commission cases in which the application of the right to self-determination has been considered include 75/92, *Katangese Peoples’ Congress v Zaire* 8th Annual Activity Report of the ACHPR (1995); 3 IHRR (1996) 136; 147/95; and 149/96, *Jawara v Gambia* 13th Annual Activity Report of the ACHPR (2000); 8 IHRR 243 (2001). Cases in which the application of collective rights under the Charter other than the right to self-determination have been considered include 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003); and the joined cases of 279/03, *Sudan Human Rights Organisation v Sudan* and 296/05, *Center on Housing Rights and Evictions v Sudan* 28th Annual Activity Report of the ACHPR (2009).

63 For further analysis of this case, see Shelton, *supra* n 34 at 67–71.

Southern Cameroon, the Southern part being of the large Sawa cultural area, the northern part being part of the Grass fields' cultural area.⁶⁴ This submission implies that Cameroon is of the view that an 'ethno-anthropological' argument is required for a group to be considered a people for the purposes of the right to self-determination. However, the likelihood of this submission persuading the Commission must have been reduced by the lack of detail that Cameroon provided on what was meant by ethno-anthropological and why it should be seen as the determinate factor in the interpretation of the term 'people'.⁶⁵ This can help to explain why the Commission chose to adopt a broader approach to the definition of people in line with an approach that has been proposed by a group of UNESCO experts.⁶⁶ The Commission found that the southern Cameroonians could be accepted as a people 'because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity.'⁶⁷

In offering only a thin account of how they interpret the term people, Cameroon did little to persuade the Commission to follow its position, but it also avoided making a significant contribution to the development of international law on this point. This supports the view that states place some value in the vagueness of the law of self-determination. Moreover, Cameroon's decision to opt for a narrower approach to the definition of people, when as the Commission demonstrated there was scope for a broader approach, is also revealing. This suggests that vagueness in the law is more likely to be valued by states for the scope it provides for interpretation in line with changing political priorities, rather than because it increases the possibility that the law will have some relevance in even the most unforeseen set of circumstances.

Another potential reason for states to value indeterminacy in the law of self-determination is the scope it creates for selective application of different aspects of the law depending on the context. Support for this idea can be found through consideration of events surrounding the breakup of Yugoslavia in the early 1990s.

64 *Kevin Mgwanga Gunme et al v Cameroon*, supra n 61 at para 168.

65 Ibid. at para 178 ('Ethno-anthropological attributes may be added to the characteristics of a "people". Such attributes are necessary only when determining indigenology of a "people" . . . but cannot be used as the only determinant factor to accord or deny the enjoyment or protection of peoples' rights. Was [sic] it the intention of the State Parties to rely on ethno-anthropological roots only to determine . . . "peoples' rights", they would have said so in the African Charter? As it is, the African Charter guarantees equal protection to people on the continent, including other racial groups whose ethno-anthropological roots are not African.')

66 Ibid. at para 178, citing Final Report and Recommendations, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, SHS-89/CONF.602/7 (1990).

67 Ibid. at para 179.

Key occurrences in the crisis that unfolded in Yugoslavia were the declarations of independence on the part of Slovenia and Croatia in 1991. These declarations were forcibly resisted by the federal government. The ensuing conflict put pressure on other states, particularly other European states, to act, and a central issue that arose was whether or not to recognise as states the entities which sought this status.⁶⁸ This raised a number of difficult legal issues, in relation to which the EC Peace Conference on Yugoslavia chose to set up an Arbitration Commission (known as the Badinter Commission) to provide a forum for ‘relevant authorities to submit their differences.’⁶⁹

The Badinter Commission was made up of five presidents of European national constitutional courts (three members selected by EC states and two by Yugoslavia). The Commission was not created to speak for states, nor were its Opinions legally binding on states.⁷⁰ This must reduce the significance of the Opinions for the development of international law. Accordingly, its creation might be depicted as a means of states reducing the scope for the crisis to lead to a clarification of the law of self-determination. This is in the sense that the creation of the Badinter Commission reduced the need for interested states to publicise their own views on the meaning and relevance of the law of self-determination.⁷¹ A more apparent rationale for the creation of the Commission is that it ‘was established to avoid the arbitrary application of the recognition criteria by states and thereby to limit the influence of political expediency in defining recognition policy.’⁷²

68 Craven, ‘States and Recognition in International Law’, in Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010) at 235.

69 Joint Statement, 24 EC Bulletin No 7/8, 28 August 1991, 115, cited in Harris, *supra* n 28 at 115 (footnote 155).

70 As Radan has noted, ‘[i]ts [the Badinter Commission’s] opinions were not directed to, nor binding upon, any of the states concerned. Rather, they were delivered to the EC Conference on Yugoslavia in a consultative capacity.’ See Radan, ‘Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission’ (2000) 24 *Melbourne University Law Review* 50 at 52, fn 10.

71 Perhaps telling in this respect are the key documents produced by the European states. European Community: Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, S/23293 Annex 2 (1991), (1992) 31 ILM 1486 (this declaration acknowledged the importance of self-determination by refereeing to it in the preamble but added no detail); European Community: Declaration on Yugoslavia, S/23293 Annex 1 (1991), (1992) 31 ILM 1485 (this was an invitation for states to apply for recognition of statehood in accordance with the guidelines, it included no direct mention of self-determination). On the tone and contents of the debates on this topic at UN Security Council, see Weller, ‘The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia’ (1992) 86 *American Journal of International Law* 569 especially at 577–80.

72 Tierney, ‘In a State of Flux: Self-Determination and the Collapse of Yugoslavia’ (1999) 6 *International Journal on Minority and Group Rights* 197 at 212; see also Craven, ‘The European Community Arbitration Commission on Yugoslavia’ (1995) 66 *British Yearbook of International Law* 333 at 334, describing the Opinions of the Commission as ‘non-binding but authoritative statements of the relevant law’.

A striking feature of the 10 Opinions that the Commission issued during the disintegration of Yugoslavia is the general absence of direct reference to the law of self-determination,⁷³ in spite of the obvious centrality of considerations of self-determination to the situation. For present purposes, the first two Opinions that the Commission provided are particularly instructive. Opinion No 1 dealt with whether the situation was to be viewed as one of secession from the Socialist Federal Republic of Yugoslavia or disintegration.⁷⁴ In identifying that the Federation was disintegrating, the Badinter Commission gave the Republics a basis to stake a claim for independent statehood regardless of the right to self-determination.⁷⁵ As Craven has noted, it would have been plausible for the Commission to link the claim 'to the emerging idea that self-determination is legitimate in cases of abusive or totalitarian exercises of power'.⁷⁶ In not addressing the matter, the Commission left open the question of whether or not the Republics would have had a case for secession based on the law of self-determination.⁷⁷ In Opinion No 2 the Commission was required to answer a more direct question about the law of self-determination: 'Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?'⁷⁸ This Opinion has been heavily criticised by international lawyers for the way the Commission dealt with the meaning of right to self-determination, in particular for its apparent synthesis of the right to self-determination with minority rights.⁷⁹ What is also striking, though, is the absence of mention of the content that has been proposed for the right of self-determination elsewhere in legal doctrine, such as a right to democratic government. Again it can appear as though the Commission purposefully evaded consideration of aspects of the law of self-determination that could be seen as relevant for the question it had been asked. A possible reason for this having been the case is that a fuller exposition on the law of self-determination might have aggravated

73 Following the international conference on the former Yugoslavia in 1993 the Commission was reconstituted and issued a further five opinions, Advisory Opinions Nos 11–15, issued on 16 July 1993 and 13 August 1993, appear at (1993) 32 ILM 1586 (these Opinions dealt with the principles upon which 'succession of states would be effected between the Socialist Federal Republic of Yugoslavia, as the predecessor state, on the one hand, and the secessionist former Yugoslav republics, as successor states, on the other')

74 *Opinion No 1 of the Arbitration Commission of the Peace Conference on Yugoslavia*, 29 November 1991, (1992) 31 ILM 1494.

75 Craven, *supra* n 68 at 236.

76 *Ibid.* at 235.

77 *Ibid.* at 236; see also Crawford, 'Report by James Crawford: 'State Practice and International Law in Relation to Unilateral Secession', in Bayefsky (ed.), *Self-determination in International Law: Quebec and Lessons Learned: Legal Opinions Selected and Introduced* (The Hague: Martinus Nijhoff, 2000) 31 at 42, 48, and 50, noting that the lack of direct mention of the right to self-determination in Opinion No 1 removes its value as a precedent for a right to secession as part of the law of self-determination.

78 *Opinion No 2 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1992) 31 ILM 1497.

79 See Craven, *supra* n 72 at 392–3; also Knop, *supra* n 13 at 177.

the situation in the disintegrating Yugoslavia, by providing further justification for continuing inter-ethnic violence in the name of national self-determination.⁸⁰ This way of thinking brings into focus the relevance of the uncertainty in the law of self-determination.

Given that Opinion No 1 was in response to a request to comment on the secession of entities such as Slovenia and Croatia that had invoked national self-determination in their declarations of independence,⁸¹ if the law of self-determination had been clearer on the issue of remedial secession, the Commission would have found it more difficult from the perspective of its own legitimacy to exclude this aspect of the law from consideration. Similarly, if the law had been more definite in terms of constitutional arrangements that are required by the law of self-determination, it is apparent that there would have been more of an onus on the Commission to raise this aspect of the law, in Opinion No 2, when discussing how the Serbian population were to exercise their right to self-determination. The uncertainty in the law meant that there was less of an impetus for these aspects to be raised and can therefore be seen to have facilitated the attempts of states to implement a clear recognition policy whilst also preventing hostilities from spreading.⁸²

It is important to stress, though, that uncertainty in the law of self-determination can also help to explain the occurrence of certain armed conflicts. As Charney has pointed out, it can be argued that ‘uncertainty [in the law of self-determination] has itself contributed to many human tragedies the world has witnessed in the post-World War II period by giving false hope to minority groups that they have rights to autonomy or independence against the states in which they are found, even absent a colonial history.’⁸³ This is a strong reason why, even in the light of the benefits that states might derive from the indeterminacy of the law, it would be reasonable to expect states to have been more forthcoming than they have been to date with regard to publication of views on the meaning of the right.

The rest of this article explores whether the debate surrounding the normative status of the right to self-determination might also be a factor in the explanation for the reluctance of states to suggest interpretations of the right that would help to flesh out its scope and content with greater determinacy.

80 Craven, *supra* n 68 at 236; see also Tierney, *supra* n 72 at 212.

81 Craven, *ibid.* at 235.

82 This is how Tierney describes the objectives of the European states, *supra* n 72 at 212.

83 Charney, ‘Self-Determination: Chechnya, Kosovo and East Timor’ (2001) 34 *Vanderbilt Journal of Transnational Law* 455 at 458.

5. The Normative Status of the Right to Self-Determination in International Law

The debate about whether self-determination was in fact a legal norm or still only a political principle took a considerable time to subside.⁸⁴ Still, the pronouncements from the ICJ on the legal status of the norm can be seen as an end to this debate.⁸⁵

There has also been debate about whether self-determination in international law is a legal rule or a legal principle. In this respect, the position that it is both a legal principle, which posits that '[p]eoples must be enabled freely to express their wishes in matters concerning their condition',⁸⁶ and serves as an umbrella principle for a collection of more specific legal rules, seems accurate.⁸⁷

Whether there is a difference in the rules of self-determination that are found in customary international law and those in the Human Rights Covenants has also been given some consideration.⁸⁸ The fact that there are now 167 states parties to the ICCPR⁸⁹ reduces the need for enquiry along these lines. As even if this quantity of states parties does not result in Article 1 being seen as customary international law, it still means that the vast majority of states will be bound by the full plethora of rules that it is possible to bring under the principle of a right of self-determination in international law. Moreover, the HRC has indicated that '[i]n connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination'.⁹⁰ This suggests that the HRC has not attempted, in its pronouncements, to develop Article 1 of the ICCPR as a stand alone, conventional right to self-determination. These factors can help

84 For discussion, see Laing, 'The Norm of Self-Determination 1941–1991' (1991–2) 22 *California Western International Law Journal* 209 at 220; on the change in the UK's position, see McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1995) 66 *British Yearbook of International Law* 283 at 287.

85 See *Namibia* case, supra n 20 at 31.

86 Cassese's words, see Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 128. Self-determination is also considered by some scholars to be a fundamental principle of international law which informs the development of other aspects of international law, see Mullerson, *Ordering Anarchy in International Society* (The Hague: Martinus Nijhoff, 2000) at 166.

87 See Crawford, 'Book Review: Self-Determination of Peoples. A Legal Reappraisal' (1996) 90 *American Journal of International Law* 331 at 331; and Cassese, *ibid.*

88 See Cassese, supra n 86 at 159–62 and 310–1; and Crawford, *ibid.* at 332.

89 As at 12 September 2011, see United Nations Treaty Collection database at: <http://treaties.un.org/> [last accessed 12 September 2011].

90 Human Rights Committee, General Comment No 12: The right to self-determination of peoples (art 1), 13 April 1984, HRI/GEN/1/Rev.1 (1994); (1994) 1–2 IHRR 10 at para 7. See also McCorquodale, supra n 12 at 858–9, suggesting that subsequent articulations of the right to self-determination in international instruments - specifically the Declaration on Principles of International Law and the African Charter on Human and Peoples' Rights - have clarified the content of the right expressed in Article 1 of the Human Rights Covenants.

to explain why scholars and states alike have also made little effort to distinguish between customary and conventional rules of self-determination in their accounts of the law.⁹¹

The present concern is with the manner in which the legal right to self-determination has been elevated beyond a basic normative status in international law. Here, as will be seen, the umbrella principle aspect of the norm and the question of customary law or conventional legal norm are not without potential relevance. Four different normative levels for the right to self-determination can be identified from the literature: human right, association with sovereignty, *erga omnes* and *jus cogens*. In setting out the strength and consequences that follow from these claims, a particular interest is in the implications that categorisation of the right at a certain normative level, and the debate surrounding it, might have for the willingness of states to suggest and expand on legal content for the right.

6. Self-Determination as a Human Right

The first General Assembly Resolutions that were central to the emergence of self-determination as a legal norm, GA Res 1514 and 1541, were passed in 1960. Still, it was not, as Wilde has noted, ‘until 1966, with the two UN human rights covenants, that self-determination was articulated as a ‘human right’ in a UN instrument’.⁹² While its characterisation as a human right has been criticised,⁹³ it is far from controversial as a matter of international legal doctrine.⁹⁴ This is not to suggest that acceptance of self-determination as a human right, rather than a general international legal norm, has not been without consequences for the nature of the norm.

Wilde, for example, has highlighted how the characterisation of self-determination as a human right arguably had an impact on the requirements related to the exercise of an entitlement to self-determination in the colonial context. The emphasis in the more fledgling legal norm was on delegitimising colonialism exclusively, and this had meant that only when an option other than independence was being considered, something more akin to colonialism,

91 On this point, see Craven, *supra* n 72 at 382–3.

92 Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (Oxford: Oxford University Press, 2008) at 160.

93 See, for example, Bhalla, ‘The Right of Self-Determination in International Law’, in Twining (ed.) *Issues of Self-Determination* (Aberdeen: Aberdeen University Press, 1989) 91 at 97.

94 This is not to suggest that it has always been common place in doctrine or practice to refer to self-determination as a human right, see Kingsbury, ‘Restructuring Self-Determination’, in Aikio and Scheinin (eds) *Operationalising the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2000) 19 at 34.

had consultation been deemed necessary.⁹⁵ Articulating self-determination as a human right refocused the emphasis in the norm on to the right of a people to determine its external status. This meant that there was no longer a strong basis for prioritising independence over other forms of integration with other states. Hence, consultation became a requirement for all options that were available to a people that had been subject to colonial rule.⁹⁶

Articulating self-determination as a human right also brings it into the specific legal framework of human rights. Key rules of this legal framework that have conditioned the development of the norm have been identified and summarised by McCorquodale.⁹⁷ In particular, as a non-absolute human right, the exercise of self-determination must be subject to limitations. These include limitations of the sort indicated by Article 5(1) of the Human Rights Covenants which provides that 'nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein'. It follows from Article 5 that the exercise of the right of self-determination must be balanced with the other human rights, such as freedom of expression and freedom of religion. The solutions that arise from this balancing will not necessarily be secession for a group within a state claiming a right to self-determination. Rather, in light of the need to accommodate the individual rights of inhabitants within a territory, other options, such as the creation of a federation, might be deemed more appropriate.⁹⁸ Viewed in this light, the articulation of self-determination as a human right can be seen as a part of the explanation for the development of the concept of internal self-determination as an alternative to external self-determination.⁹⁹

None of the legal consequences that have flowed from the characterisation of self-determination as a human right are clear reasons for states not to want to see the scope and content of the right develop further. In fact, one might expect the contrary to be true. For instance, in terms of balancing the right to self-determination and other human rights, the human rights

95 Wilde, *supra* n 92 at 160.

96 *Ibid.* at 160–1.

97 McCorquodale, *supra* n 12 at 873 ('(1) Human rights are interpreted in the context of current standards. (2) Any limitations on the exercise of human rights are: (a) limitations to protect other rights, and (b) limitations to protect the general interests of society. (3) The limitations on human rights are considered narrowly, with consideration given to the circumstances of the relevant society. (4) A victim of a violation of human rights must bring the claim.' (references omitted)).

98 McCorquodale, *supra* n 12 at 877.

99 See also Wilde, *supra* n 92 at 161; and Anaya, 'Self-Determination as a Collective Human Right under Contemporary International Law', in Aikio and Scheinin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2000) 3 at 12; on the value of internal self-determination in comparison to external self-determination, see Gareau, *supra* n 22 at 495.

framework allocates this responsibility to the state.¹⁰⁰ Thus, even if the right to self-determination were made more determinate, states would retain a legal device—the responsibility for balancing the right—that could help them to evade what might be deemed, from their perspective, non-desirable implications of a more determinate right. Moreover, international human rights law instruments can lack formal mechanisms for enforcement.¹⁰¹ In such instances, adequate implementation can rest on other states parties raising the matter with the state in question. This is something which states have not traditionally been inclined to pursue;¹⁰² a result perhaps of the tradition for states to view human rights as a domestic issue.¹⁰³ Such consequences suit the interests of states, and can help to explain why states have been willing to accept self-determination as a human right.¹⁰⁴ As will be seen, states have not been so forthcoming with regard to some of the more elevated aspects of normative status that have been ascribed to the right.

7. The Association of Self-Determination with Sovereignty

Drew has commented that, '[d]espite its textbook characterisation as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be 'human rights.''¹⁰⁵ This is a reference to substantive elements of the law of self-determination, other than the right to a free choice, that apply in the decolonisation context, such as the right to permanent sovereignty over natural resources. But, it is also possible to identify a different type of relationship between the right to self-determination and sovereignty beyond the colonial context. The concept of popular sovereignty has long been used as a rhetorical device to legitimise governmental authority, by depicting it as something granted by the people rather than obtained through a

100 McCorquodale, *supra* n 12 at 878.

101 On mechanisms for enforcement of self-determination under the ICCPR, see Conte, Davidson and Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations* (Aldershot: Ashgate, 2004) at 33; in relation to the African Charter on Human and Peoples' Rights, see Addo, *supra* n 57 at 192.

102 See Hathaway, *Do Human Rights Treaties Make a Difference?* (2002) 111 *Yale Law Journal* 1935; and Teitel, 'The Law and Politics of Contemporary Transitional Justice' (2005) 38 *Cornell International Law Review* 837 at 861 ('Even in the concededly enhanced climate for international human rights law, its enforcement still remains *ad hoc*, reflecting the risk of law's politicization.').

103 See Simmons, 'Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights"' (2009) 16 *Indiana Journal of Global Legal Studies* 437 at 443.

104 Albeit some states were reluctant at the outset, in this respect McGoldrick, *supra* n 54 at 14, describes self-determination as '[p]erhaps the most controversial provision included in the ICCPR'.

105 Drew, *supra* n 3 at 663.

display or threat of force.¹⁰⁶ Nevertheless, it has traditionally been difficult to find support for popular sovereignty as a point of international law. The right to self-determination provides a basis for arguing that popular sovereignty has now been legalised.¹⁰⁷ This is possible when one accepts that the population of a state as a whole are a people for the purposes of the right to self-determination.¹⁰⁸ This gives the people a continuous right to 'freely determine their political status and freely pursue their economic, social and cultural development', and, in so doing, provides an ethically more convincing explanation for sovereignty, than the traditional explanation based on effective control of territory.¹⁰⁹ Scholars have used this type of argument to identify/suggest changes in aspects of international law that reflect the traditional conception of sovereignty.

One aspect of international law that has received attention in the light of the emergence of the right to self-determination and its association with sovereignty is the principle of non-intervention. The principle of non-intervention has traditionally been presented as a corollary of state sovereignty that exists in its own right to protect those matters reserved by sovereignty.¹¹⁰ The scope of the prohibition on intervention is not susceptible to a precise standard.¹¹¹ Debate about what is permissible has tended to be about intervention from a distance, such as political influence over an existing regime.¹¹² A number of scholars have suggested that the right to self-determination of the people of a state should be treated as the basis for the principle of non-intervention.¹¹³ If this is accepted, then one might start to see the scope and content of the right to self-determination as conditioning when intervention in the affairs of a state is permissible. Ratner, for example, has used the link between

106 See Roth, 'Popular Sovereignty: The Elusive Norm' (1997) 91 *American Society of International Law Proceedings* 363 at 370.

107 See, for example, Benvenisti, *International Law of Occupation* (Princeton: Princeton University Press, 1993) 215. For an alternative legal foothold for popular sovereignty, see Article 21 of the Universal Declaration of Human Rights 1948 (UDHR), GA Res 217A(III), 10 December 1948.

108 General Comment No 12, supra n 90 at paras 1 and 4; Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London: Routledge, 1994) at 90–1; Higgins, supra n 16 at 104; and Cassese, supra n 86 at 59. For criticism of the concept of people that this generally accepted aspect of the right to self-determination reflects, see McCorquodale, supra n 12 at 867.

109 See Roth, 'The Enduring Significance of State Sovereignty' (2004) 56 *Florida Law Review* 1017 at 1042; and Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International And Comparative Law Quarterly* 241 at 245.

110 *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports 1986, 14 at 108, para 205.

111 See Shaw, *International Law* (Cambridge: Cambridge University Press, 2008) at 213–4; and Abi-Saab, 'Some Thoughts on the Principle of Non-intervention', in Wellens (ed.), *International Law: Theory and Practice* (The Hague: Martinus Nijhoff, 1998) 228 at 228–31.

112 See Damrosch, 'Politics Across Borders: Non-intervention and Non-forcible Influence over Domestic Affairs' (1989) 83 *American Journal of International Law* 1.

113 See, for example, Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Receuil des Cours* 9 at 165; and Mullerson, supra n 108 at 90–1.

sovereignty and self-determination to support an argument for humanitarian intervention leading to international control of a state to be permissible in situations where domestic control of a territory is lacking. Ratner argues that rather than being in conflict with sovereignty, such intervention can be seen as a means of furthering sovereignty in the sense of giving the people (eventually) the ability to exercise the continuing right of self-determination.¹¹⁴ This argument is made *lex ferenda*, but it highlights how the link between sovereignty and self-determination creates the possibility for significant changes in the nature of some of the fundamental precepts of international law.

Scholarly attention has also been given to the impact of the right to self-determination on the law of occupation.¹¹⁵ The law of occupation is a regulatory framework that applies in warfare if a state comes into uninvited effective control of the territory of a third state.¹¹⁶ The content of the law has been informed by rationales, which include servicing the humanitarian needs of the people and preservation of the occupied state's sovereignty.¹¹⁷ The content of the vast majority of the law was established well before the emergence of the legal right to self-determination.¹¹⁸ This helps to explain why the law prioritised the interests of the ousted government. This is seen most clearly in the *raison d'être* of the law of occupation: the 'conservationist principle'.¹¹⁹ This principle is found in Article 43 of Hague Law and requires that the existing laws must be respected unless absolutely prevented in pursuit of 'public order and safety'. Pellet's argument, which is shared to some extent by Cohen and Benvenisti, is that as a consequence of sovereignty being vested in the people,

114 Ratner, 'The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?', in Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993) 241 at 267.

115 See, for example, Pellet, 'The Destruction of Troy Will Not Take Place', in Playfair, (ed.), *International Law and the Administration of Occupied Territories* (Oxford: Oxford University Press, 1992) 186; Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations"' (2006/07) 51 *New York Law School Review* 498; Benvenisti, *supra* n 107; and Saul, 'The Impact of the Legal Right to Self-Determination on the Law of Occupation as a Framework for Post-Conflict State Reconstruction', in Quéniwet and Shah-Davis (eds), *International Law and Armed Conflict: Challenges in the 21st Century* (The Hague: TMC Asser Press, 2010) 398.

116 *Prosecutor v Naletilić et al.* IT-98-34-T, Judgment, Trial Chamber, ICTY, 31 March 2003, at para 217.

117 See Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 *American Journal of International Law* 44 at 46.

118 The vast majority of the law of occupation is found in the Regulations annexed to the Hague Convention IV 1907 and the Geneva Convention No IV 1949; see, in particular, Articles 42–56 Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations (1907) 36 Stat 2277; Bevans 631; 295 Consol TS 2773; and Articles 27–34 and 47–78 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (IV) (1949) 75 UNTS 287.

119 See McCoubrey and White, *International Law and Armed Conflict* (Aldershot: Dartmouth, 1992) at 286.

the principle of conservation no longer sets the limit to what is permissible in terms of changes to the state infrastructure by the occupier in the pursuit of humanitarian interests. Rather the limit is set by the law of self-determination. This, for Pellet, would allow such changes up to the point of 'physical character, demographic composition, institutional structure, or status of . . . territories.'¹²⁰ If one were to accept this argument, then any development in the law of self-determination would feed directly into the law of occupation.¹²¹

At a conceptual level, the arguments for the consequences that have been highlighted as potentially flowing from identifying self-determination at the core of sovereignty are compelling. Moreover, it is difficult to imagine that any clear development in the right to self-determination would not also become subject to such argumentation. For instance, if it were made clear that self-determination requires a democratic form of government, one would expect the traditional doctrine on governmental status in international law, which is based on effective control, to be challenged.¹²² Thus, it is not unreasonable to suggest that the association between sovereignty and self-determination—which arguably raises it above some other human rights in the normative hierarchy of international law—could deter states from helping the scope and content of the right become more determinate. However, the significance of this point should not be overstated. This is because, even though there is a conceptual basis for self-determination to have an impact on traditional approaches to international law, any changes in the law would still require state practice and *opinio juris*. In this respect, it is important to highlight that there is little evidence that states are in favour of a merging of the rights of peoples and the rights of states.¹²³ This might also help to explain why the connection between sovereignty and self-determination has generated relatively little comment in legal doctrine. In contrast, it has become common place for scholars to highlight the *erga omnes* status that has been ascribed to the right of self-determination.

8. Obligations *Erga Omnes*

In the *Barcelona Traction* case of 1970, the ICJ identified that there are obligations in international law that are owed by states 'towards the international community as a whole', and that, consequently, 'all States can be held to have

120 Pellet, *supra* n 115 at 202; see also Cohen, *supra* n 115 at 525.

121 See also Saul, *supra* n 115.

122 *Ibid.* at 408.

123 Jamnejad and Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 345 at 369.

a legal interest in their protection.¹²⁴ This is the concept of obligations *erga omnes*. The concept has since been the subject of scholarly attention.¹²⁵ To the extent that there is agreement on the nature of concept, it is encapsulated in Cassese's definition:

[O]bligations which (i) are incumbent on a State towards all the other members of the international community, (ii) must be fulfilled regardless of the behavior of other states in the same field, and (iii) give rise to a claim for their execution that accrues to any other member of the international community.¹²⁶

This is in contrast to obligations that '(i) only arise as between pairs of States and (ii) are reciprocal or 'synallagmatic' in kind, in that their fulfillment by each state is conditioned by that of the other state.'¹²⁷ That the right of self-determination has *erga omnes* status is relatively uncontroversial as a matter of international legal doctrine. The ICJ has identified that the norm has this status,¹²⁸ and commentators often cite it as an example.¹²⁹

The ready acceptance of self-determination as a norm with *erga omnes* status is perhaps a reflection of the fact that the legal consequences that follow appear to be almost nominal. This is a reference to the fact that the norm of self-determination has emerged in international law—in the sense of the formulations in key international instruments—as one that all states have an obligation to promote and respect.¹³⁰ Thus, the central idea of *erga omnes*, that all states are entitled to demand an obligation be respected, can be seen as already part of the norm.¹³¹

In this respect, it is useful to highlight that the way the concept of *erga omnes* was dealt with by the International Law Commission (ILC) in its work

124 *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* Merits, Judgment, ICJ Reports 1970 3 at 32, para 33.

125 See, for example, Katselli, *The Problem of Enforcement in International Law: Countermeasures, The Non-Injured State and the Idea of International Community* (Oxford: Routledge, 2010).

126 Cassese, supra n 86 at 134.

127 Ibid.

128 *Case Concerning East Timor*, supra n 1 at 102 para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra n 31 at paras 88 and 156; for criticism of the approach taken by the ICJ in the *Wall* Opinion for appearing to merge the *erga omnes* concept with the concept of *jus cogens*, see Crawford, 'International Crimes of States', in Crawford, Pellet and Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 405 at 411–2; see also Gareau, supra n 22 at 520.

129 Cassese, supra n 86 at 134.

130 See, in particular, Declaration on Principles of International Law, supra n 23, and General Comment No 12, supra n 90 at para 6. Cassese has noted, though, that actual invocation of this aspect of self-determination by states in practice is more difficult to find, see supra n 86 at 134.

131 This has caused Cassese to wonder what classifying self-determination as a source of obligations *erga omnes* actually adds, Cassese, supra n 86 at 134.

on state responsibility offers little reason for states to become more wary of the norm of self-determination in the light of its *erga omnes* status.¹³² The ILC acknowledged that there is a close relationship between the concepts of peremptory norms (*jus cogens*) and obligations owed to the international community as a whole (*erga omnes*), but found that there is a difference in emphasis. 'While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance.'¹³³ Thus, by Article 48 of the ILC Articles, the ILC set out that for an obligation that is owed to the international community as a whole, it is permissible for any state to invoke responsibility and call for reparation for the injured party, but did not find that any additional obligations flow from this categorisation.¹³⁴

Moreover, the ILC Articles also suggest that the lawfulness of coercive countermeasures to ensure compliance is more uncertain in relation to human rights instruments and obligations owed to the international community as a whole, than other multilateral instruments where states can be directly injured (for example, the Vienna Convention on Diplomatic Relations 1961). This suggestion is found in the fact that Article 54 of the ILC Articles, when a state is not directly injured, refers only to lawful countermeasures, rather than the more open approach set out in Article 49, when a state is directly injured, which refers simply to countermeasures.¹³⁵ However, this has not stopped states taking, and international toleration of, coercive countermeasures in extreme situations of human rights violations.¹³⁶ And by highlighting the political importance of the right to self-determination with the heading of *erga omnes* status,¹³⁷ the impetus for states to take some action in relation to a denial of self-determination must be increased. Thus, it would not be unreasonable to suppose that the accepted status of self-determination as *erga omnes* has been a factor in the reluctance of states to help make the scope and content of the right more determinate. In this respect, though, it is the purported *jus cogens* status of the norm that seems most significant.

132 International Law Commission's Draft Articles on State Responsibility, with Commentaries, Report of the International Law Commission, 53rd session, A/56/10 (2001).

133 *Ibid.* at 112.

134 The same applies (with regard to states parties) for obligations found in human rights instruments.

135 Article 49 permits suspension of other obligations owed to the state in question; see also Tams, 'Unity and Diversity in the Law of State Responsibility', in Zimmermann and Hofmann (eds), *Unity And Diversity In International Law* (Berlin: Duncker & Humblot, 2006) 435 at para 31.

136 See Tams, *ibid.*

137 See Summers, *supra* n 5 at 292.

9. A Norm of *Jus Cogens* in its Entirety, a Qualified Manner or Just Possibly?

The establishment of the concept of *jus cogens* norms (peremptory norms) in international law has occurred through the 1969 Vienna Convention on the Law of Treaties (VCLT).¹³⁸ Article 53 of the VCLT provides:

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 53 also indicates the consequence that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' Scholarly attention has since been given to other legal consequences that appear to follow from the acceptance of a norm as *jus cogens*.¹³⁹ In the view of the ILC, if a state fails to fulfil an obligation that has a *jus cogens* status in a gross or systematic manner, all other states are prohibited from recognising as lawful the resulting situation, and from rendering aid or assistance in maintaining the situation.¹⁴⁰ *Jus cogens* has also been contemplated as a possible limitation to national legislative processes,¹⁴¹ and identified by some as a constraint on the scope of state immunity.¹⁴²

The significance of the established and potential consequences of the *jus cogens* concept is mitigated to some extent by the demanding test that must be satisfied for a norm to achieve this status. It is not enough that the norm is accepted as an international legal norm, it must also be accepted as a peremptory legal norm,¹⁴³ and this latter aspect must be based on evidence of acceptance by an overwhelming majority of states.¹⁴⁴ There is, though, a tendency for scholars to fall back on the natural law method¹⁴⁵ – in which the concept

138 As at 12 September 2011 ratified by 111 states, see UN Treaty Collection database at: <http://treaties.un.org/> [last accessed 12 September 2011].

139 See Cassese, *International Law* (Oxford: Oxford University Press, 2005) at 205–8; and Shaw, *supra* n 111 at 127.

140 ILC, *supra* n 132 at Articles 40 and 41.

141 See, for example, de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97.

142 See, for example, *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [1999] WLR 827, 119 *International Law Reports* 136, at 231–2 per Lord Millett.

143 See Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) *European Journal of International Law* 853 at 862; also Green, 'Questioning the Peremptory Status of the Prohibition of The Use of Force' (2011) 32 *Michigan Journal of International Law* 215 at 244.

144 Akehurst, 'The Hierarchy of the Sources of International Law' (1974–75) 47 *British Yearbook of International Law* 273 at 284–5.

145 See Verdross, 'Jus Dispositivum and *Jus Cogens* in International Law' (1966) 60 *American Journal of International Law* 55.

of *jus cogens* has its origins – to strengthen, or sometimes make, the case for a particular norm to be seen as *jus cogens*.¹⁴⁶ This helps to explain why it can be difficult from a review of literature to gain clarity on what norms have been accepted by states as *jus cogens*. In particular, it can help to explain why it is possible to identify a range of approaches to the depiction of how self-determination relates to the *jus cogens* concept.

A. The ‘Entirety’ Approach

One approach is to discuss or to highlight the question of normative status in such a way that the legal right to self-determination in its entirety, in the sense of all aspects of the norm, is portrayed as *jus cogens*. An example of this is found in Orakhelashvili’s wide ranging study of the legal effects of peremptory norms. For Orakhelashvili, ‘[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance’.¹⁴⁷ Thus, Orakhelashvili has argued that ‘[i]n order to validly commit the Iraqi people through the allocation of oil contracts, the government in question must be elected by the people, as required by the right to self-determination and the attendant permanent sovereignty over natural resources’.¹⁴⁸ This argument serves to highlight the significance of the ‘entirety’ approach. It remains, as was noted above, debatable whether self-determination requires a democratic form of government. There simply has not been sufficient agreement amongst states to establish this proposal as a point of law. Yet, the ‘entirety’

146 See Weisburd, ‘The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina’ (1995) 17 *Michigan Journal of International Law* 1 at 32–40; Barnidge Jr, ‘Questioning the Legitimacy of Jus Cogens in the Global Legal Order’ (2008) 38 *Israel Yearbook on Human Rights* 199 at fn 54.

147 Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) at 51. Other authors that appear to adopt the entirety approach include Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Oxford University Press, 2008) at 511 and 582; Castellino, *International Law and Self-Determination* (The Hague: Martinus Nijhoff, 2000) at 99, 101 and 123; Raic, *Statehood and the Law of Self-Determination* (The Hague: Martinus Nijhoff, 2002) at 289 fn 254 (but also see 146); Commentaries on ILC Articles, supra n 132 at 113, para 5; Clapham, ‘Secession, Terrorism and the Right of Self-Determination’, in Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 46 at 58; and Weller, supra n 43 at 137–8; also compare Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 1979) at 81 (where the *jus cogens* status of self-determination is identified as difficult to accept because it is seen as controversial even in terms of *jus dispositivum*), with Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Oxford University Press, 2006) at 101 (‘To this list we must now add self-determination’), but see also Crawford, supra n 128 at 411.

148 Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ (2005) 16 *European Journal of International Law* 59 at 81; and Orakhelashvili, ‘The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law’ (2003) 8 *Journal of Conflict and Security Law* 307 at 313; see also Wheatley, ‘The Security Council, Democratic Legitimacy, and Regime Change in Iraq’ (2006) 17 *European Journal of International Law* 531 at 539–41.

approach, as Orakhelashvili's argument demonstrates, carries with it the implication that as soon as the requirement of a democratic form of government is established as an aspect of the law of self-determination, it will be instantly elevated to peremptory status. From a natural law perspective, this implication seems correct. If one accepts that a norm has peremptory status purely on moral grounds, there is no basis for according different aspects of the said norm a lower normative status.

However, from a positive law perspective it is more troubling. As has been set out, there is a demanding two stage test for a norm to achieve *jus cogens* status. It first must be accepted as law, and then it must be accepted as having peremptory status by an overwhelming majority of states. This encourages one to think that the chance of a norm being accepted by states as having *jus cogens* status must be influenced by the level of specificity in the norm. That is, it is more likely to be a specific norm, rather than an umbrella type norm in its entirety, that will be accepted as *jus cogens*. This stems from the interest that states must have in retaining control over what aspects of international law are elevated to peremptory norm status. If the overwhelming majority of states were to accept an umbrella type norm, such as the right of all peoples to self-determination, in its entirety, then an opportunity would be created for a newly emerged point of law to be fast-tracked to peremptory status. This is in the sense that it would not be necessary to show that the new law in itself had been accepted as a peremptory, only that it was part of the umbrella norm with *jus cogens* status. To the extent that there is evidence of peremptory status in relation to the norm of self-determination, the work addressed in the next section suggests that it is found in relation to more specific aspects of the norm. This casts doubt on the accuracy of the presentation of the norm of self-determination in its entirety as one with *jus cogens* status. Still, it does not, as will be expanded on below, remove the potential for such depictions to deter states from helping to make the scope and content of the norm more determinate.

B. The 'Qualified' Approach

Another approach is to accept that the right to self-determination is a norm of *jus cogens* in a qualified manner. A prominent example is found in the often cited study prepared by Espiell, as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1980, titled 'The Right to Self-Determination: Implementation of United Nations Resolutions'.¹⁴⁹ The mandate of the Special Rapporteur was limited to consideration of the right to self-determination as applied to peoples under colonial

149 E/CN.4/Sub.2/405/Rev.1 (1980).

and alien domination.¹⁵⁰ Consequently, Espiell's views on *jus cogens* must be seen as limited to this aspect of the norm. Espiell provides an account of statements by states on the *jus cogens* status of self-determination.¹⁵¹ In particular, Espiell highlights statements made in favour of *jus cogens* status, in 1966 in discussion of the draft articles of the ILC on the law of treaties in the Sixth Committee of the General Assembly, by representatives of Czechoslovakia, Pakistan, Peru, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics;¹⁵² Espiell also highlights how similar statements were made at the UN Conference on the Law of Treaties (1968-69),¹⁵³ where 6 out of the 26 delegations that gave examples (66 delegations in total) identified self-determination as an example of a *jus cogens* norm.¹⁵⁴ This is hardly evidence of the acceptance by an overwhelming majority of states.¹⁵⁵ And this might help to explain why Espiell decided to couch his conclusion in favour of the *jus cogens* status of the norm from his natural law theoretical viewpoint.¹⁵⁶ It is worth highlighting that this did not accord with the view of another Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities who completed a similar study, titled 'The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments', around the same time as Espiell. Cristescu's view was simply that '[n]o United Nations instrument confers such a peremptory character on the right of peoples to self-determination.'¹⁵⁷

Whereas Espiell's account of self-determination as *jus cogens* was limited to the colonial and alien domination aspect of the right by his mandate as Special Rapporteur, Hannikainen's approach, in another study that is often cited by scholars who support the *jus cogens* status of self-determination in its entirety, was qualified in the same way for another reason. Hannikainen suggests that although '[m]any international instruments speak of 'the right of self-determination of all peoples' . . . the international community of States has not really required the realisation of *internal* self-determination within *existing* states.'¹⁵⁸ This leads Hannikainen to only explore state practice in relation to the implementation of the right of dependent peoples to external self-determination, defining 'dependent peoples' as those living in territories under

150 Ibid. at para 42.

151 Ibid. at paras 71–87.

152 Ibid. at para 71.

153 Ibid. at para 73.

154 See Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Wien: Springer-Verlag, 1974) at 119.

155 Espiell does stress the lack of denial of the *jus cogens* by states at supra n 149 at para 72.

156 Ibid. at paras 84–5.

157 Cristescu, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments*, E/CN.4/Sub.2/404/Rev.1 (1981), at para 154.

158 Hannikainen, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing Co, 1988) at 357.

colonial or other alien rule. Hannikainen accepts a similar sample of statements as Espiell as sufficient to establish the peremptory status of the norm.¹⁵⁹ The bulk of his investigation is then concerned with identifying the specific content for the peremptory norm from a review of practice in relation to situations in Namibia, Palestine, Portugal's Colonies in Africa, Western Sahara and East Timor.¹⁶⁰ Hannikainen's review concentrates on 'UN activities and of the great number of UN resolutions affirming and specifying that right and of the obligations of states vis-a-vis that right'.¹⁶¹ On this basis, Hannikainen concludes:

[It] appears that all states are under the peremptory obligation: 1) not forcibly to subject alien peoples to a colonial-type domination; 2) not to keep alien peoples by forcible or deceitful means under a colonial-type domination; and 3) not to exploit the natural resources of those alien territories, which are under their colonial-type domination, to the serious detriment of the people of those territories.¹⁶²

However, the fact that Hannikainen had already accepted the peremptory status of the norm can help to explain why there was little effort in the review of practice to find evidence of support for the peremptory status claim. Thus, while his review of practice serves to help develop understanding of the scope and content of the legal norm, it provides little to substantiate the claimed peremptory status of the norm. This is not to comment on the usefulness of the evidence that the body of practice might hold about the position of states, it is only to suggest that scholars should perhaps be cautious before relying upon Hannikainen's work as the definitive study on the peremptory status of the norm of self-determination.

Although the outcomes of both Espiell's and Hannikainen's studies are only support for the peremptory status of the norm in relation to the colonial and alien domination context (and so should only be cited as such), it is noticeable that neither explicitly addresses what their respective findings would mean for other aspects of the norm. Espiell does not consider other aspects because of his mandate. Nevertheless, Espiell's natural law stance would make it difficult for him to deny the status to any other established aspect of the right to self-determination.¹⁶³ Hannikainen does not consider other aspects of

159 Attention is also drawn by Hannikainen, *ibid.* at 382, to a clause in GA Res 35/118 (adopted by a vote of 122-6-20): ('...categorically rejects any agreement, arrangement or unilateral action by colonial and racist Powers which ignores, violates, denies or conflicts with the inalienable rights of peoples under colonial domination to self-determination and independence...') Hannikainen suggests that '[h]ere the GA had apparently *jus cogens* in mind.)

160 *Ibid.* at 385–416.

161 *Ibid.* at 421.

162 *Ibid.*

163 The same must be true for Dugard, *Recognition and the United Nations* (Cambridge: Cambridge University Press, 1987) at 159, who has written that '[o]nce the right to self-determination is

self-determination because he perceives that there has only been meaningful practice of the law of self-determination in the colonial and alien domination context. This does not necessarily imply that once other aspects of the right to self-determination become more determinate they will also have *jus cogens* status, but it also does not exclude such a consequence.

C. The 'Possible' Approach

A third approach that can be found in the literature involves scholars highlighting that the norm of self-determination only possibly has *jus cogens* status. This has been the case in relation to the norm in its entirety. For instance, Burchill has commented, in the context of an explanation of why the contribution of the HRC to the development of the right has been limited, that '[e]ven though self-determination is an essential right for the exercise of all other rights or even a norm possessing *jus cogens* status, it is also a site of extreme controversy as it is too commonly seen as a threat to the territorial integrity of states or an issue at the core of a state's sovereign existence'.¹⁶⁴ Other scholars think that it is possible that self-determination has *jus cogens* status but only certain aspects. McCorquodale, for instance, has commented that the right of self-determination may represent a norm of *jus cogens*, 'at least to the extent of non-self-governing territories'.¹⁶⁵ Scholars in the 'possible' category have tended not to provide an explanation for why they are hesitant about proclaiming that either the norm as a whole or only certain aspects have *jus cogens* status. This could be for various reasons, such as a lack of confidence in the case that has been made by other scholars for self-determination to be treated as *jus cogens*. Or the fact that the central purpose of a particular study has not been to develop a clearer understanding of the normative status of the right. However, by not setting out reasons for the hesitancy, such scholars do little to reduce the projection—which stems from other scholarly opinion

recognised as *jus* it would seem to follow by necessary implication that it is *jus cogens* in the light of the pivotal position it occupies in the contemporary international public order.' Dugard goes on (at 161–2) to identify the '*jus*' of self-determination as limited to 'a bar on the disruption of the territorial integrity of a self-determination unit without the free consent of the people of the unit.'

164 Conte, Davidson and Burchill, *supra* n 101 at 41; see also Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991) at 14; Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008) 207–8; and Sheeran, *supra* n 13 at 453.

165 McCorquodale, *supra* n 84 at 326; see also McCorquodale, 'Rights of Peoples and Minorities', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010) 365 at 372–3; Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Oxford University Press, 1986) at 91; and Craven, *supra* n 72 at 382–3 ('However, even if it is accepted that self-determination operates as a peremptory norm in the context of decolonization, it is not yet clear whether its application outside that limited context can be said to be peremptory in nature.')

that is more definite on the *jus cogens* status—that once an aspect of the norm of self-determination becomes more determinate it too will automatically have *jus cogens* status.¹⁶⁶

D. Does the Status as a Customary or Conventional Norm Matter?

Given the scope for debate about the relationship between the norm of self-determination in customary law and in convention law, it might be thought that the debate about whether or not a *jus cogens* norm can only be created from customary international law or whether it can also be initiated by a treaty might be relevant here.¹⁶⁷ For instance, one might think that if it were accepted that *jus cogens* can only come from custom and that common Article 1 of the Human Rights Covenants is not coextensive with the norm in customary international law, that there would be less reason for states to be hesitant about helping to clarify the meaning of Article 1 of the ICCPR. This is because there would be less chance of a more determinate Article 1 being invoked against a state as a norm of *jus cogens*. This sort of thinking could be used to explain the approach taken by Cassese to the normative status of the right to self-determination. Cassese is of the view that ‘the whole cluster of legal standards (the general principle and the customary rules) on self-determination should be regarded as belonging to the body of peremptory norms.’¹⁶⁸ This would include aspects of internal self-determination as part of the *jus cogens* norm, such as the right of racial groups to have access to government,¹⁶⁹ but it would exclude Cassese’s reading of Article 1 of the ICCPR, which includes the Article 25 of the ICCPR right to political participation.¹⁷⁰ Still, the likelihood of this line of reasoning convincing states to be more vocal on the meaning of Article 1 is slim for a number of reasons. In particular, there is the fact, noted above, that states and commentators are not in the habit of separating the customary norm from the conventional one. Thus, there would still be a danger of any comments made in relation to the scope and content of Article 1 being taken as a view on the position in custom.

166 This is not aided by commentators who deny the peremptory status of the norm of self-determination on the basis of its indeterminacy: see, for example, Salo, ‘Self-Determination: An Overview of History and Present State With Emphasis on the CSCE Process’ (1991) 2 *Finnish Yearbook of International Law* 268 at 309 (‘The primary reason for excluding self-determination from any class of *jus cogens* norms is the, perhaps inherent, obscurity of the term.’)

167 Compare Brownlie, *supra* n 147 at 510, who indicates that a *jus cogens* norm must come from a rule of customary international law, with Akehurst, *supra* n 144 at 283, who accepts that *jus cogens* norms could come from a treaty.

168 Cassese, *supra* n 86 at 140.

169 *Ibid.*

170 *Ibid.* at 53.

E. Consequences of the Debate on Jus Cogens Status

It is apparent, then, that whether or not self-determination is a norm with *jus cogens* status, and which aspects therein, is hardly more settled than the questions that persist about its scope and content. This in itself could be a reason for states to be deterred from helping to clarify the meaning of the right. This is because when the norm is kept ill-defined, states retain a leeway to resist claims that they are acting in breach of their self-determination obligations. Such leeway would perhaps be even more prized were the purported *jus cogens* to be confirmed, as then the consequences of a breach would multiply in scope and deepen in severity. But, it is also possible to see the way in which the *jus cogens* status is treated in the literature as exacerbating the issue.

This is in the sense that scholars who highlight the relation between self-determination and *jus cogens*, apart from some of those that deny it has this status,¹⁷¹ often do so in a manner that portrays that any aspect of the norm that becomes more determinate will automatically become *jus cogens*. This is most clear with scholars who indicate that the norm in its entirety has *jus cogens*, but it is also found in the work of those who limit the *jus cogens* element to the colonial context, and it has been suggested that scholars in the 'possible' category could also be contributing to the issue. To address this issue, scholars should strive to be more precise about the aspects that they see as having *jus cogens* status¹⁷² and clearer about the reasons for this position. This could go some way to encouraging states to make suggestions about the scope and content of the right. As it would hopefully paint a clearer picture that it is only with regard to aspects of the norm that relate to the colonial and alien domination context that there is a feasible argument from a positive law perspective that self-determination has *jus cogens* status. And that, consequently, any concretisation of legal meaning in relation to other purported aspects of the norm, such as a right to democracy, would not automatically entail *jus cogens* status – there would still be a need for a second level of *opinio juris* to establish *jus cogens* status.¹⁷³

171 See, for example, Czaplinski, 'Jus Cogens and the Law of Treaties', in Tomuschat and Thouvenin (eds), *Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (The Hague: Martinus Nijhoff, 2006) 83 at 88.

172 See also Craven, *supra* n 72 at 383 ('This problem [of determining whether self-determination has *jus cogens* status] may be addressed either by severely limiting the definition of the entitlement holders (i.e. the 'peoples' to which the principle refers) or by accepting that it is an umbrella principle embodying a range of subsidiary rights and principles each of which might have differential status in international law (customary, conventional or peremptory). If the latter is the case, it is perhaps better to start speaking of discrete forms of self-determination, rather than using it as all encompassing notion.'): Craven's comments were made in response to the ambiguous reference to peremptory norms in the Badinter Commission's Opinion No 2, *supra* n 78 at 1498 ('the - now peremptory - norms of international law require states to ensure respect for the rights of minorities.')

173 On the second level of *opinio juris*, see Linderfalk, *supra* n 143.

10. The Role of States

Much of the confusion about the *jus cogens* status of self-determination stems from a lack of practice in which states have clearly relied upon the claimed peremptory status of the norm, but also from the fact that only a limited number of states have made their position on the *jus cogens* status known in a clear manner.¹⁷⁴ Scholars who make the case for the *jus cogens* status of the norm regularly draw attention to the six states that proposed self-determination as *jus cogens* at the UN Conference on the Law of Treaties (1968–69). Significantly, less attention has been given to the fact that during the preparation of the Declaration on Principles of International Law, the Netherlands and the United States spoke out against a proposal from Iraq that the fundamental principles of international law contained in the Declaration could be seen as *jus cogens*.¹⁷⁵ This lack of scholarly attention can be explained by the fact that the objection was on the grounds that the Declaration was intended to be heterogeneous, and therefore could not be couched in terms of *jus cogens*, as not all the propositions had this status.¹⁷⁶ This is not a clear-cut denouncement of the *jus cogens* status of self-determination. Rather, its significance lies in the failure of states to take the opportunity to publicise their views on the *jus cogens* status of the right to self-determination.

This trend for states not to comment on the peremptory status of the right has continued with the recent *Kosovo* Advisory Opinion.¹⁷⁷ Although most state submissions addressed the meaning of the right to self-determination in some way, very few drew attention to their views on its purported peremptory status. The reasons for this can perhaps be traced to the comments made above about the strategies that states deploy in submissions to the ICJ, but it could also be connected to the severity of the consequences that flow from the *jus cogens* concept. To the extent that it is the latter, then this would favour the view that the norm is not viewed by states, at least not in its entirety, to have peremptory status. However, by not explicitly addressing the issue, states have done nothing to help the haziness that surrounds the normative status of the right to disappear.

174 Cassese, *supra* n 86 at 140 ('whenever states have referred to self-determination as belonging to *jus cogens*, they have not specified either the areas of application of self-determination, the means or methods of its implementation, or the permissible outcome of self-determination.')

175 Official Records of the General Assembly, 25th session, Sixth Committee, Summary Records of the meetings, 1180th meeting (Iraq's comments) and 1183th meeting (the Netherlands's comments); and Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Summary Records of the 110th to the 114th meetings, A/AC.125/SR.110-114, 114th meeting (USA's comments).

176 See Espiell, *supra* n 149 at para 75.

177 See also Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (2011) 24 *Leiden Journal of International Law* 355 at 372.

As a first step towards enhancing the determinacy of the scope and content of the right, states should start using the opportunities they have to publicise their views on the right to deal with its normative status. As a clearer picture of the *jus cogens* status is formed, it can be hoped that states will become more inclined to suggest interpretations of its scope and content. In this respect, the submission of the Netherlands to the ICJ in the Kosovo proceedings is welcomed for the willingness of the state to express an opinion on the *jus cogens* status of the right.¹⁷⁸ The Netherlands submitted that ‘the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law’.¹⁷⁹ Publication of this view, by a state that previously denied the *jus cogens* status of self-determination could be a spark that leads more states to start setting out their own positions.¹⁸⁰

11. Conclusion

The right to self-determination is one of the most unsettled norms in international law. This is true of both its legal content and its normative status. This article has shown that there is reason to believe that the way the normative status has been presented in legal doctrine could be deterring states from publicising their views on the scope and content of the right. In particular, the presentation of the norm as one of *jus cogens* has been highlighted. It has been suggested that because the identification of the case for the norm to be seen as *jus cogens* is often made in a general manner, states might form the impression that any aspect of the right to self-determination that becomes more determinate will automatically also have *jus cogens* status. This has been argued to not be the case, but it still might be enough, in the light of the consequences that follow from *jus cogens* status, to deter states from contributing to the determinacy of the scope and content of the right to self-determination.

To address this concern, it has been suggested that as a first step towards states making more effective use of the opportunities they have to present their views on the scope and content of the right to self-determination, states should be encouraged to make a conscious effort to use these opportunities to

178 See also, identifying the right to self-determination as having *jus cogens* status, Jordan, Oral Statement, 9 December 2009, at para 24; and Albania, Oral Statement, 2 December 2009, at para 4.

179 The Netherlands, *supra* n 41 at para 3.2.

180 The earlier position of the Netherlands was against the idea that the norm of self-determination had peremptory status in international law, see Hannikainen, *supra* n 158 at 383, who cites Kuyper and Kapteyn, ‘A Colonial Power as Champion of Self-Determination: Netherlands State Practice in the Period 1945-1975’, in van Panhuys et al. (eds), *International Law in the Netherlands, Vol III* (The Hague: T.M.C. Asser Institute, 1980) 149 at 213–4.

publicise their understanding of the normative status of the right. The idea is that clarity on the normative status issue might make states more willing to discuss the scope and content of the right to self-determination.

It has been suggested that out of the opportunities presented by submissions to the ICJ, debates in political organs of the UN, and state reports to the HRC, it is the latter that would seem most likely to be adopted as a site for states to publicise their understanding of the right to self-determination. However, a review of statements by states to the HRC has shown that states are not making use of this opportunity. The likelihood of states starting to make fuller use of the HRC reporting procedure to help clarify the meaning of the law of self-determination, given the past record, can hardly be assumed. Hence, this article should also be seen as a call for a responsible approach by legal scholars to the identification of the normative status of the right to self-determination. In particular, scholars can strive to bring clarity to the question of normative status, by expressing their position on the aspects of the norm that are perceived as having *jus cogens* status, and the legal basis for this view, with as much precision as is practicable.