

The Exercise of External Self-Determination by Indigenous Groups: The Republic of Lakotah and the Inherent Sovereignty of American Indigenous Peoples

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The authors respectfully note the passing of Russell Means, who was instrumental to the vision of the Republic of Lakotah, on October 22, 2012.

Abstract

This article examines the implications of the choice made by the Republic of Lakotah to rely on international treaty law rather than the exercise of self-determination in declaring its independence from the United States in 2007 and 2010. States have long expressed resistance towards the granting of the principle of self-determination to minorities and indigenous groups. States fear that granting this right would lead to groups taking action to secede from the state. This article considers whether state fears of secession are realistic, and whether there is, in fact, a credible claim to external self-determination under international law for indigenous groups, or whether state fears of indigenous self-determination are grounded in other issues.

Introduction

State resistance to minority and indigenous rights has been persistent and continuous over time. The resistance and opposition by states has been rooted in fear of the exercise of collective or group rights to the detriment of the state.¹ In its extreme form, the fear was that the exercise of a collective set of rights would lead to the evisceration of the state.² The granting of collective rights to minorities was seen as something that would endanger states. Statist interpretation of the events that preceded and followed both World Wars were seen as

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[±] The authors would like to thank Professor Bob Watt for his very helpful comments on this article.

¹ See on this point Asbjorn Eide, 'Minority Situation: In Search of Peaceful and Constructive Solutions' (1991) 66 *Notre Dame Law Review* 1311, 1312.

² Will Kylicka, 'Beyond the Indigenous/Minority Dichotomy' in (Allen and Xanthaki eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 202-023.

proving fear of the danger of collective rights as well-founded.³ So it was that when minority rights instruments were approved in international law, they provided individual, not collective rights, and most certainly shied away from the recognition of minority groups as “peoples” under international law.⁴ As international law developed, a sort of common wisdom grew up that to recognise a group as a “peoples” was to grant them the legal right to self-determination, which would inexorably lead to the secession of that group from the state.

The state allergy to the recognition of either collective rights or of groups as “peoples” is evident in the growth of a separate indigenous rights regime in international law. The International Labour Organisation Convention 169 makes a qualified use of the word “peoples”—and is quick to clarify that the use of that word in no way signifies a recognition of indigenous groups as “peoples” as having a right to self-determination nor yet a recognition of any indigenous group right to secede from the state through an exercise of self-determination. The drafting of the United Nations Declaration on the Rights of Indigenous Peoples spanned over two decades and even then the instrument nearly fell at the last hurdle. A scheduled vote for approval at the UN General Assembly was delayed to address state fears that recognition of indigenous groups as “peoples” in the instrument would lead to their exercise of self-determination to secede from states. It was only after amendments were made to the instrument to assure that no right to secede from states was granted that a vote to approve the instrument carried forward. Even then, the four states that voted against approval of the instrument cited fears of indigenous secession from the state as part of their reason for opposing the Declaration.⁵

Shortly after the Declaration approval, in September 2007 the state fear of indigenous declarations of statehood became a reality. The Republic of Lakotah announced its existence

³ Jennifer Jackson Preece, ‘National Minority Rights vs. State sovereignty in Europe: Changing Norms in International Relations?’ (1997) 3(3) *Nations and Nationalism* 345, 346-347.

⁴ Preece, above n 3, 353.

⁵ Karen Engle, ‘On Fragile Architecture: The United Nations Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22(1) *European Journal of International Law* 141, 144-145; Sheryl Lightfoot, ‘Indigenous Rights in International Politics: The Case of “OverCompliant” Liberal States’ (2008) 33 *Alternatives* 83; Sheryl Lightfoot, ‘Selective Endorsement Without Intent to Implement: Indigenous Rights and the Anglosphere’ (2012) 16(1) *The International Journal of Human Rights* 100, in particular see Table 1, 117-118 showing the changes in position on the UNDRIP of Australia, Canada, New Zealand and the United States.

as a sovereign, independent state; laying claim to land that is within the borders of the United States.

The Republic of Lakotah, however, did not base its position on the international community's recognition of indigenous groups as "peoples" or any iteration of the principle of self-determination. Instead, its claim is based entirely on international treaty law. While indigenous independent statehood might have been the stuff of nightmares for states in contemplation of indigenous rights, the reaction to the Republic of Lakotah's declarations and claims of independent statehood based on a combination of inherent sovereignty and international treaty law have been remarkably muted.

This article examines the choice made by the Republic of Lakotah to select international treaty law to support its claims for independent existence in international law, rather than self-determination in its different iterations in international law. It considers the reasons that might support this choice, and the consequences of these, and whether, in fact, a credible claim to external self-determination for an entity such as the Republic of Lakotah exists.

The first section examines the claims that the Republic of Lakotah has made to statehood, the background of events leading up to its initial statement in 2007 and second statement in 2010. The second section examines the likely reasons for the Republic of Lakotah's choice of international treaty law rather than other available legal doctrines for asserting statehood. It considers the intertwined legal doctrines of inherent sovereignty, self-determination, and state plenary power. The third section provides an analysis of the self-determination principle in current international law and whether any claim by the Republic of Lakotah to self-determination—or of any indigenous group to external self-determination—would have a credible basis in contemporary international law.

This article concludes that state fears of the assertion of external self-determination and secession from the state by indigenous groups do not take into account the modern international law position on the exercise of external self-determination. Secession is not widely available to all "peoples", but rather available only in limited circumstances. The self-determination limitations in the UNDRIP are not unique, but rather reflective of the contents of many other international instruments that provide for internal self-determination. The inherent sovereignty position of American indigenous groups is perhaps a unique domestic

positioning of indigenous groups, and one not widely available to groups outside of the United States. Inherent sovereignty—as defined by the United States government through the use of its claimed plenary powers over indigenous groups-- is a far cry from the status of sovereignty that would be obtained as an independent state. It is, in fact, difficult to distinguish the differences between inherent sovereignty and internal self-determination. At the same time an important distinction is to be drawn as to the implications of the use of self-determination as restoring a sovereignty lost—and claims of an inherent and existing sovereignty which has never been extinguished.

The Republic of Lakotah

The “existence” of the Republic of Lakotah is in itself a somewhat nebulous discussion. It could be said to have come into being with the declaration and notification that it sent to the United States in 2007⁶, with that existence underscored by another notification sent in 2010.⁷ Then again, the Republic of Lakotah itself claims to have always been in existence, albeit known by another name at least to the United States government. Its assertion of inherent sovereignty makes it impliedly a successor to the “Sioux Nations” that were parties to the 1851 and 1868 treaties.⁸ The Republic of Lakotah has asserted two international law treaty principles as the basis and support for claims to exclusive control of territory that was originally granted to “the Sioux Nation” in treaties of 1851 and 1868.⁹ Its arguments in sum are that the United States has breached the treaties, and under international law, the other party to the treaty—the Republic of Lakotah standing in the shoes of the “Sioux Nation”—is therefore entitled to not only withdraw from the treaties but to be restored to its position before entering into the treaties.¹⁰ No claim has been raised against the Republic of Lakotah not having sufficient nexus with the treaties. There is no question of treaty validity or enforcement—at least to some extent. The United States has made this clear in the ruling

⁶ *Lakotah Unilateral Withdrawal from All Agreements and Treaties with the United States of America* at <http://www.republicoflakotah.com/2009/2007-lakotah-unilateral-withdrawal/>.

⁷ *Letter to President Barack Obama and Secretary of State Hillary Clinton*, 22 June 2010, <http://www.republicoflakotah.com/wp-content/uploads/2010/11/ROL-letter-to-President-of-the-United-States2.pdf>.

⁸ *Ibid* (2010 letter).

⁹ *Ibid* (2010 letter).

¹⁰ *Ibid* (2010 letter).

from the US Supreme Court that found severe treaty breaches.¹¹ It was willing to find that the breaches were compensable. But the question remains as to whether the remedy is adequate. It offers only monetary compensation. The “Sioux Nation” groups have all rejected the monetary judgment and it remains uncollected.¹² Money is seen to be not only inadequate but wholly unsatisfactory as a form of compensation for land and the claims of treaty breaches. Corntassel comments on the inadequacy of state approaches to compensating for the loss of indigenous lands (and it should be noted that very often the United States has determined no compensation of any sort is due for the loss of land, even when the land had been ceded to an indigenous group via treaty and was taken in breach of that treaty)¹³:

“Rather than assessing cultural loss as a strictly compensatory claim, meaningful restitution should be remised on paying the cost necessary to generate specific land-based and water-based practices.”¹⁴

A brief examination of the history leading up to the declarations by the Republic of Lakotah is necessary for understanding its claims. In 1868 the United States sent peace commissioners to broker treaty agreements with the “Sioux Nation”.¹⁵ The United States having come out the loser in battles with the indigenous groups¹⁶, in what was to become known as “Red Cloud’s War.”¹⁷ The United States had engaged in a three year long conflict with the Sioux

¹¹ See generally *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980) at <http://supreme.justia.com/cases/federal/us/448/371/case.html>.

¹² See comment at the Indian Land Tenure Foundation, at <http://www.iltf.org/resources/land-tenure-history/court-cases/us-sioux>

¹³ See discussion in *United States v Sioux Nation of Indians*. The United Nations Declaration on the Rights of Indigenous Peoples provisions recognise the inadequacy of monetary compensation in its structuring of reparations for lost land in Article 28, where the preferred form of compensation is “lands, territories and resources equal in quality, size and legal status.” “Monetary compensation” is the lesser preferred method of compensation.

¹⁴ Jeff Corntassel, ‘Cultural Restoration in International Law: Pathways to Indigenous Self-Determination’, (2012) 1(1) *Canadian Journal of Human Rights* 93, 125.

¹⁵ Dee Brown, *Red Clouds War, in Bury My Heart at Wounded Knee: An Indian History of the American West* (Vintage Books 1991), 141-146.

¹⁶ The United States Supreme Court noted that “The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux.” footnote 4, *Sioux Nation v United States*.

¹⁷ There had been repeated efforts over three years by the United States government to reach a treaty with the Sioux Nation. See Brown, above n 15, 122-123, 128-132, 141-146. In the end a treaty was concluded in 1868, only after the United States abandoned several forts in land that was to be designated to the Indians. Only after the forts were abandoned did Red Cloud sign the treaty. Brown, above n 15, 145-146.

Nation over land in what now includes South Dakota and Montana.¹⁸ The US finally admitted defeat in this conflict and withdrew not only its army and forts from the contested territory, but ceded the land to the Sioux Nation.¹⁹ The treaty that was negotiated to settle the conflict provided in part:

ARTICLE II.

the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians,*
And

ARTICLE XVI.

The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn mountains *shall be held and considered to be unceded. Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same;*²⁰

However, this was not to last for long, as gold was discovered in the Black Hills, land held to be sacred by the peoples of the Sioux Nation.²¹ By 1875, the United States President Ulysses Grant had ‘rescinded enforcement’²² of the treaty terms to keep white people out of the land held by the tribes under the treaty.²³ The government was actively pursuing an amendment to the 1868 Treaty,²⁴ and when that was not successful, attempted to procure a lease to the Black

¹⁸ See generally, Brown, above n 15, 122-146.

¹⁹ Brown, above n 15, 145-146.

²⁰ <http://www.pbs.org/weta/thewest/resources/archives/four/ftlaram.htm>. Emphasis added.

²¹ According to Dee Brown, “In 1868 The Great Father considered the [Black Hills] worthless and gave them to the Indians forever by treaty. Four years later white miners were violating the treaty. They invaded *Paha Sapa*, searching the rocky passes and clear-running streams for the yellow metal which drove white men crazy...By 1874 there was such a mad clamor from gold-hungry Americans that the Army was ordered to make a reconnaissance into the Black Hills. The United States government did not bother to obtain consent from the Indians before starting on this armed invasion, although the treaty of 1868 prohibited entry of white men without Indians’ permission.” Brown, above n 15, 276.

²² Alexandra New Holy, “The Heart of Everything That Is: Paha Sapa, Treaties and Lakota Identity (1998) 23 *Oklahoma City Law Review* 317, 326.

²³ *Ibid.*

²⁴ *Ibid*; Brown, above n 15, 278-280.

Hills.²⁵ When this did not work, the US government simply enacted a unilateral and illegal amendment to the treaty depriving the indigenous groups of their lands.²⁶ Eventually the Great Sioux Reservation, diminished from the original lands ceded in the 1868 Fort Laramie Treaty, was further broken up.²⁷ A great deal of reservation land, even land that technically remained as part of the reservation lands of the Sioux Nation ended up in the ownership of non-tribal members. This was not an accident, but rather, part of the government plan to promote the assimilation of indigenous groups into the dominant white society. Pommersheim explains:

“...the reservations became checkerboarded with tribal, individual Indian, individual non-Indian and corporate ownership... Coordinate with the allotment and assimilation process which facilitated the loss of so much tribal land was the related process of diminishment. The diminishment issue focuses not on who *owns* the land, but more precisely on whether the process through which the federal government obtained “surplus” unallotted tribal lands for non-Indian homesteading resulting in a corresponding reduction of the reservation’s boundaries.”²⁸

In the meantime, the fact of the treaty violation was not forgotten. Indigenous groups repeatedly seeking redress for the treaty breach.²⁹ After surmounting numerous hurdles and

²⁵ Ibid; Brown, above n 15, 280-284.

²⁶ *United States v Sioux Nation of Indians*, Syllabus: “...in 1876, an “agreement presented to the Sioux by a special Commission but only signed by 10% of the adult male Sioux population [treaty amendments required agreement by three-quarters of the adult male Sioux population], provided that the Sioux would relinquish their rights to the Black Hills and to hunt in the unceded territories, in exchange for subsistence rations as long as they would be needed. In 1877, Congress passed an Act... implementing this “agreement” and thus, in effect, abrogated the Fort Laramie Treaty.”

²⁷ Dee Brown explains that “The Great Sioux Reservation was broken into small islands around which would rise the flood of white immigration.” Brown, above n 15, 431; Frank Pommersheim, ‘The Reservation as Place: A South Dakota Essay’ (1989) 34 *South Dakota Law Review* 246, 255-256.

²⁸ Pommersheim, above n 27, 259.

²⁹ For instance, Black Hills Treaty Council, 1911 formation, in the *US v Sioux Nation* US Supreme Court decision. New Holy writes: “Even before the massacre at Wounded Knee [1890], councils were called by the Lakota to strategize some sort of redress for the abrogation of the 1868 Treaty...the first documented treaty meeting occurred in 1887. By 1891, the Oglala had established an official treaty rights organization—the Oglala Council.” New Holy, above n 22, 331. The United States Supreme Court notes: “...the Sioux, in 1923, filed a petition with the Court of Claims alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. This claim was dismissed by that Court in 1942...In 1946, Congress passed the Indian Claims Commission Act...creating a new forum to hear and determine all tribal grievances that had arisen previously. In 1950, counsel for the Sioux resubmitted the Black Hills claim to the Indian Claims Commission...” *Sioux Nation v United States*, 385.

persisting with court claims, in 1980 the United States Supreme Court heard the claims of the Sioux Nation about the treaty breach and awarded monetary compensation.³⁰

The Republic of Lakotah (ROL) has made two announcements on its existence and the nature of its sovereign status. The first of these announcements was made in December 2007, a few months after the UN General Assembly voted to approve the United Nations Declaration on the Rights of Indigenous Peoples.³¹ The second announcement was made in 2010.³² The second announcement set out in great detail international legal doctrines that supported the ROL claims to its declared boundaries and the need for the United States to adhere to the ROL position.³³ The ROL argued that the United States had materially breached two treaties that the United States had entered into with the “Sioux Nation” in 1851 and 1868. This material breach meant that, under the Vienna Convention of the Law of Treaties and customary international law, the ROL was entitled to withdraw from the treaties and demand a return to the *status quo ante*. In short, the ROL asserts its inherent sovereignty and its independent statehood.

At first blush, this might appear to be an exercise of self-determination, of secession from a state and declaring a separate sovereign existence. But nowhere in either of the announcements from the ROL is there any reference whatsoever to the principles of self-determination. Those who feared that indigenous groups would secede from states if granted recognition as ‘peoples’ in international law might have seen the ROL move as their worst fears come to pass. But a closer inspection of the ROL position suggests just why such an exercise of external self-determination was abjured in favour of the use of international treaty law principles. Key to this is the ROL assertion of inherent sovereignty, something that this article argues is at odds with a claim of a right to exercise external self-determination.

Inherent Sovereignty and United States Congressional Plenary Power

³⁰ Stephen Cosby Hanson comments that “The Sioux lawsuit over the taking of the sacred Black Hills vividly demonstrates how long and difficult the road to justice has been for Indians. For the Sioux, it has required four special acts of Congress, more than ten million dollars in attorney fees, and fifty-seven years in court.” Stephen Cosby Hanson, ‘United States v Sioux Nation: Political Questions, Moral Imperative and the National Honor’ (1980) 8 *American Indian Law Review* 459, 461.

³¹ Unilateral Withdrawal of Lakotah, above n 6.

³² 2010 letter above n 7.

³³ *Ibid.*

After several permutations of what the relationship between itself and indigenous groups should be, the United State finally seemed to settle on something akin to a ward/trusteeship relationship.³⁴ This is referred to as the “plenary power” of Congress over indigenous groups and individuals. This power is not seen as acting to extinguish inherent sovereignty of indigenous groups, but diminishes the sovereignty in those areas where the United States government has pre-empted the exercise of indigenous authority.³⁵ The plenary power was announced in a 1903 United States Supreme Court decision, *Lone Wolf v Hitchcock*.³⁶ Frickey explains this:

“The Supreme Court in *Lone Wolf* attributed to Congress a “plenary authority” over Indian affairs, including the capacity to break Indian treaties at its discretion.”³⁷

It is this power that Congress relies upon when invalidating the terms of treaties that the United States government has entered into with indigenous groups. Perhaps ironically, the plenary power is also used by Congress to recognise tribal authority and inherent tribal sovereignty. The existence and exercise of the plenary power does not deny the existence of indigenous sovereignty *per se*. It simply tries to limit it or place controls on its exercise. But it is a far cry from an outright denial of sovereignty. Rather, it might be seen as the US government’s attempt to accommodate the existence of indigenous sovereignty whilst still in search of a legal doctrine that would justify the breach of treaties as legal and the taking of land as non-compensable.

Felix Cohen, in his classic canon on the rights of indigenous groups comments on the inherent nature of indigenous sovereignty. He phrases this in terms of self-government, stating that:

The right of self-government is not something granted to the Indians by any act of Congress. It is rather *an inherent and original right* of the Indian tribes, recognized by the courts and legislators, *a right of which the Indian tribes have never been deprived*.³⁸

³⁴ See for instance, comments by Matthew L M Fletcher, ‘Politics, History, and Semantics: The Federal Recognition of Indian Tribes’ (2006) 82 *North Dakota Law Review* 487, 489-490.

³⁵ *Ibid*.

³⁶ 187 US 553 (1903).

³⁷ Philip Frickey, ‘Doctrine, Context, Institutional Relationships and Commentary: The Malaise of Federal Indian Law through the Lens of *Lone Wolf*’ (2002) 38 *Tulsa Law Review* 5, 6.

³⁸ Felix Cohen, ‘Indian Rights and the Federal Courts’ (1940) 24 *Minnesota Law Review* 145, 147.

In this, the nature of inherent tribal or indigenous sovereignty differs very little from that of internal self-determination.

Internal and External Self-Determination

The principle of self-determination is clearly established as an important principle of international law. It is given clear expression in Article 1(2) and 55 of the UN Charter; the Declaration on the Granting of Independence to Colonial Territories and Peoples; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR);³⁹ the 1970 Friendly Relations Declaration⁴⁰ and the OSCE Helsinki Final Act.⁴¹ Furthermore this right is firmly entrenched in customary international law.⁴² The first question to be addressed is, what does self-determination mean?

The 1970 Friendly Relations Declaration defined the right of self-determination as extending to ‘all peoples’ and:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external influence, their political status and to pursue their economic, social

³⁹ See *International Covenant on Civil and Political Rights* art. 1, 999 U.N.T.S 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); *International Covenant on Economic Social and Cultural Rights* art. 1, 933 U.N.T.S 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

⁴⁰ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* G.A Res 2625, Annex, 25 U.N. GAOR, Supp. (No.28), U.N. doc. A/5217, 121 (1970).

⁴¹ *The Final Act of the Conference on Security and Co-operation in Europe*, 1st August 1975, 14 I.L.M 1292 (Helsinki Declaration) This states:

The participating States will respect the equal rights of peoples and their rights to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and the relevant norms of international law including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

⁴² *Western Sahara (Advisory Opinion)* [1975] I.C.J. Rep.12, para. 56; Jure Vidmar, ‘International Legal Responses to Kosovo’s Declaration of Independence’, (2009) 42 *Vanderbilt Journal of Transnational Law* 779, 807; Robert McCorquodale, ‘Self-Determination: A Human Rights Approach’, (1994) 43 *International & Comparative Law Quarterly* 857, 858.

and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.⁴³

This definition was subsequently re-iterated in the Helsinki Final Act of 1975.⁴⁴ Despite rhetoric to the contrary, there is no settled agreement on the meaning of self-determination. Despite the fears expressed by states during the drafting and approval of the UN Declaration that recognition of as “peoples” and access to the principle of self-determination meant a default position of the ability to indigenous groups to secede from the state, this is simply not so. That position is not only overly simplistic but also highly inaccurate. The various international instrument content on the principle of self-determination requires taking an approximate view of the scope of its definition. According to Professor Susanna Mancini for example self-determination ‘roughly’ equates to:

‘the freedom for all peoples to decide their own political, economic and social regimes. It is, therefore, both a collective right of peoples to decide autonomously the course of their nationals life and to share power equitably, and a right of all individuals to participate fully in the political process.’⁴⁵

Professor Mancini’s definition provides a nuanced analysis of the concept of self-determination taking into account both the collective and individual nature of the idea of self-determination. For Professor Mancini the concept of self-determination recognises the “collective” in the sense of it providing a right for a group of “peoples” to self-determination and the “individual” in that the individual within the group of “peoples” has a right to participation in the collective right, with both facets facilitating equal and autonomous participation in political, economic and social regimes. Mancini’s view is underpinned by the individual right to participate in the political process guaranteed to all “people” under Article 25 ICCPR.⁴⁶ However, for the purposes of self-determination it is the collective right of a group that accounts for the doctrine. An individual whilst having his/her right to participation

⁴³ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* G.A Res 2625, Annex, 25 U.N. GAOR, Supp. (No.28), U.N. doc. A/5217, 121 (1970).

⁴⁴ *The Final Act of the Conference on Security and Co-operation in Europe*, 1st August 1975, 14 I.L.M 1292 (Helsinki Declaration); See also the *African (BANJUL) Charter on Human and Peoples’ Rights* Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

⁴⁵ Susanna Mancini, ‘Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination’, (2008) 6 *International Journal of Constitutional Law* 553, 554.

⁴⁶ *International Covenant on Civil and Political Rights* art. 1, 999 U.N.T.S 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

in the political process guaranteed under the ICCPR could not realistically claim a right to self-determination. Nonetheless, the guaranteed individual rights of people contained in the ICCPR underpin the collective rights that are enforced by the doctrine of self-determination.

Initially the right of self-determination was applied in the colonial context becoming a legal norm which could override the related principles of sovereignty and territorial integrity.⁴⁷ The process of decolonization led to the creation of over one hundred states with the principle of self-determination playing a central role. The importance of the principle of self-determination was highlighted in the *Namibia Opinion*:

In the domain to which the present proceedings relate, the last fifty years... have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.⁴⁸

Outside the context of colonialism, however, there has been resistance to the suggestion that the right self-determination might have any application, in particular on the part of the emerging Third World and Eastern European states. Yet, despite such resistance the idea of the right of self-determination being applicable outside colonialism has been fostered by a number of international declarations and political instruments notwithstanding any resistance on the part of some states. The 1970 Friendly Relations Declaration⁴⁹ and the Helsinki Final Act of 1975⁵⁰ have already been noted, added to which is also the African Charter on Human and Peoples' Rights.⁵¹ Moreover, in 1988 the International Law Commission expressed the opinion that the principle of self-determination was of universal application.⁵² Therefore, that

⁴⁷ *Declaration on the Granting of Independence to Colonial Territories and Peoples* G.A. Res. 1514 (XV). December 14, 1960. GAOR 15th Sess., Supp. 16, 66.

⁴⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1970] I.C.J. Rep 16, 31, para. 53.

⁴⁹ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* G.A Res 2625, Annex, 25 U.N. GAOR, Supp. (No.28), U.N. doc. A/5217, 121 (1970).

⁵⁰ *The Final Act of the Conference on Security and Co-operation in Europe*, 1st August 1975, 14 I.L.M 1292 (Helsinki Declaration).

⁵¹ *African (BANJUL) Charter on Human and Peoples' Rights Adopted 27 June 1981*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) see Article 20.

⁵² M Shaw *International Law* (Cambridge University Press 2008) 270; R Higgins *Problems & Process* (Oxford: Clarendon Press, 1994) 116; Yearbook of the International Law Commission, 1988, vol.II, Part 2, 64: 'The principle of self-determination, proclaimed in the Charter as a universal principle, had been applied mainly in eradicating colonialism, but there were other cases in which it had been and could and should be used. By not tying it exclusively to colonial contexts, it would be

international law recognises the right of all peoples to self-determination is a well-established principle of international law. The normative meaning of self-determination has been split into two—internal and external self-determination. Internal self-determination operates within the boundaries of existing states. In particular “as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against.”⁵³ External self-determination is an exercise that results in the secession of a group from the state, and the establishment of a new independent state. As discussed in the following section, the definition of self-determination ultimately approved in the United Nations Declaration on the Rights of Indigenous Peoples was that of internal self-determination. It is not often recognised in the context of discussions on indigenous rights that internal self-determination is *not* a concept unique to the Declaration or to indigenous rights. Similar statements as to the meaning of self-determination are other law instruments. But this is rarely pointed out in relation to the content of the United Nations Declaration.

The issues of indigenous self-identification and self-determination raised great concerns for states when the time came to vote on the United Nations Declaration on the Rights of Indigenous Peoples. There is no binding or universal definition that determines who is “indigenous” for purposes of international law. The UNDRIP deliberately left out any defining criteria for determining who was “indigenous” and therefore would come under the auspices of the Declaration.⁵⁴ This lack of definition raises state fears that groups may try to claim that status and thus, the right to self-determination and attempt to secede from the state.

applied much more widely. In that connection, all members of the Commission believed that the principles of self-determination was of universal application.’

⁵³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)* [2010] ICJ Rep, Separate Opinion of Judge Yusuf, 3 paragraph 9.

⁵⁴ Although there is no binding and universal definition of “indigenous” at international law, Corntassel points out that “working definitions...offer some generally accepted guidelines for self-identifying Indigenous peoples and nations”.⁵⁴ He references the working definition of the United Nations Working Group on Indigenous Populations:

“(a)self-identification as Indigenous peoples at the individual level and accepted by the community as their member; (b) historical continuity with pre-colonial and/or pre-settler societies; (c) *strong link to territories and surround[ing] natural resources*; (d) distinct social, economic, or political systems; (e) distinct language, culture and beliefs; (f) form non-

The document had been drafted, re-drafted, negotiated and reviewed and refined through a very lengthy process. It was over twenty years from its inception to arrival at the floor of the United Nations General Assembly for a vote. But even after all of that time, the vote was delayed because of an eleventh hour concern raised about by African states.⁵⁵ This was over the intertwined issue of indigenous identification⁵⁶ and the principle of self-determination. It was only after assurances were made as well as amendments to the Declaration instrument that clarified that the self-determination of indigenous peoples was limited to a special normative meaning limited to that of internal self determination that the vote went forward on the floor of the General Assembly.⁵⁷

A bloc of nations, including African nations, raised a fear that if granted recognition as “peoples” in the non-binding soft law Declaration that indigenous groups would use this as a means to secede from the state. Given as well the principle of self-identification-- which means that there is no defined criteria in the Declaration for determining who is indigenous—states feared that groups would lay claim to being indigenous for the purposes of secession from the state—is embodied in the Declaration gave fuel to fears what it would mean to at long last give indigenous groups recognition as “peoples” in international law. Accordingly, the draft Declaration was amended to include the language of now Article 46 that made clear that an exercise of self-determination by indigenous peoples would not harm the territorial integrity of states.⁵⁸ In short, right to self-determination provided for in Article 3 of the

dominant groups of society; and (g) resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.”⁵⁴

⁵⁵ Siegfried Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples’ (2008) 41 *Vanderbilt Journal of International Law* 1141, 1159-1162

⁵⁶ Ibid. The UN Declaration does not set out a definition of who is indigenous, giving rise to fears that minority groups would lay claim to being indigenous and thus exercise a right to secede from the state.

⁵⁷ Wiessner, above n 55, 1159-1162. See also comments of Timo Koivurova, ‘From High Hopes to Disillusionment: Indigenous Peoples Struggle to (re)Gain Their Right to Self-Determination’ (2008) 15(1) *International Journal on Minority and Group Rights* 11 commenting, ‘...the process of adopting the UN Declaration came to a halt when a non-action resolution by the Namibian delegation was supported by the majority of the Third Committee of the UN General Assembly. One likely reason for this was precisely Article 3, which was still there stating that indigenous peoples have a right to freely determine their political status.’

⁵⁸ Article 46 in relevant part states:

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations

Declaration was tempered by the language of Article 46 to provide for internal self-determination. The self-determination in the Declaration is that of ‘internal’ self-determination, which gives rights more akin to self-governance and autonomy within the state boundaries.

As the last-minute flutter of activity on Declaration content shows, states fear the exercise by indigenous peoples of self-determination in any of its many guises. Accordingly States feared that if indigenous groups were given recognition in international law as ‘peoples’⁵⁹ and thus gained a claim to a legitimate exercise of self-determination in accordance with the principle in the UN Charter⁶⁰ and in the joint Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights.⁶¹ Is this, however, a realistic fear of states? The following section considers examines whether a group recognised as ‘peoples’ under international law then have a right to exercise external self-determination.

A right to external self-determination?

International law and international practice has provided guidance with respect to self-determination as a right of an entire population of a state to determine its own political and social destiny within a state or as a defined peoples which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against. These rights are to be exercised within the State in which the population or the ethnic or indigenous group live, and thus constitute internal rights of self-determination.⁶² Where international law provides less coherent guidance is where a ‘peoples’ wish to exercise a right of external self-determination that is, where a people/group/minority seek to secede from the metropolitan state.

or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

⁵⁹ For instance, the International Labour Organisation Instrument 169 tempers its use of the word ‘peoples’ in the instrument by explaining this use does not suggest access to the principle of self-determination.

⁶⁰ Article 1, Charter of the United Nations 1945

⁶¹ Above n 39

⁶² *Kosovo* [2010], Separate Opinion of Judge Yusuf 3 paragraph 9; see *Declaration on the Granting of Independence to Colonial Territories and Peoples* G.A. Res. 1514 (XV). December 14, 1960. GAOR 15th Sess., Supp. 16, 66

In more recent times minority groups within states have sought to claim that they have a right to self-determination and that that self-determination entails secession.⁶³ This is referred to as ‘external self-determination’.⁶⁴ Claims to external self-determination by a minority group are seen as posing a challenge to international law as well as to the metropolitan state and also to the wider community of states.

Professor Dame Rosalyn Higgins suggests that the question of whether a minority group has a right of external self-determination requires understanding ‘the relationship between self-determination and national unity.’⁶⁵ Contemporary understandings of the normative content of self-determination after the decolonisation era have emphasised that there is no automatic right of a group to secede from the state.⁶⁶

That self-determination poses no threat to the territorial integrity of the state is stressed in the Friendly Declaration.⁶⁷ This instrument was produced towards the end of the era of decolonisation, perhaps prescient of the continuing importance that the principle would have in international law. The Declaration’s inclusion of the principle consists of two components. First, it employs the principle of territorial integrity as a limit to the scope of the right of self-determination.⁶⁸ Thus, a racially or ethnically distinct group within a State, even if it qualifies as a peoples for the purposes of self-determination, does not have the right to unilateral secession simply because it wishes to create its own separate State.⁶⁹ The prevailing view amongst States is that the availability of such a right would reduce to nothing the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos, as evidenced by the dissolution of the former Federal Republic of Yugoslavia. There is no general right under international law or international practice which entitles any ethnically or

⁶³ Higgins, above n 52, 121

⁶⁴ Vidmar, above n 42, 808

⁶⁵ Higgins, above n 52, 121

⁶⁶ According to Higgins: ‘The evolving norms on self-determination contained – undeniably and consistently – an anxious refrain whereby self-determination is to be harnessed to, and not the enemy of, territorial integrity.’ Higgins, above n 52, 121.

⁶⁷ According to the *Friendly Relations Declaration 1970*: “Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

⁶⁸ Vidmar, above n 42, 808.

⁶⁹ Mancini, above n 45, 556.

racially distinct group within an existing state to claim a right to secede from the metropolitan state.

Secondly, however, the Friendly Declaration may be understood to suggest that under certain circumstances the territorial integrity limitation on the right of self-determination will not arise.⁷⁰ Put another way, while self-determination should normally be enjoyed and exercised inside the existing framework of states, are there circumstances which would exceptionally legitimise secession? It is clear that the wish of a group to secede from the metropolitan state – whether to form their own independent state or to join another state – will be at its most intense where their human rights have been infringed and suppressed.⁷¹ Higgins is of the view that minorities do not have a “right” of self-determination and in effect have no “right” to secession.⁷²

According to Professor James Crawford the key consideration is how the minority group has been treated by the metropolitan state:

The question is whether... a State that does not conduct itself in compliance with the principle of equal rights and self-determination of peoples; e.g., in the case of total denial to a particular group or people within the State any role in their own government, either through their own institutions or the general institutions of the state. At least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State, and that the ‘safeguard clause’ in the Friendly Relations Declaration... recognize this even if indirectly.’⁷³

In 1998, the Supreme Court of Canada in the *Reference Re Secession of Quebec* case took the opportunity to address itself to a number of these implications, including the implications of the right to external self-determination. In particular, it considered whether ‘when a people is blocked from meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.’⁷⁴ The Court declared that ‘international law expects that the right to self-determination will be exercised by the peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of

⁷⁰ Vidmar, above n 42, 808.

⁷¹ Higgins, above n 52, 124.

⁷² Ibid, p 124.

⁷³ James Crawford, *The Creation of States in International Law* (Oxford 2nd Edtn 2006) 118

⁷⁴ (1998) 115 ILR 536

those states'.⁷⁵ The Court went on to say that the right of external self-determination, that is secession, 'arises only in the most extreme of cases and, even then, under carefully defined circumstances'.⁷⁶ Antonio Cassese suggests somewhat controversially that such circumstances might be where the group in question is subject to 'extreme and unremitting persecution' combined with a the 'lack of any reasonable prospect for reasonable challenge'.⁷⁷ The conclusion to be drawn from both international law and international practice is that there is little support for the application of self-determination as conferring the right of identifiable groups within a state to secede from a metropolitan state outside the colonial context.⁷⁸

The Republic of Lakotah: External Self-Determination, Restored Sovereignty and Inherent Sovereignty

This therefore is where the ROL finds itself in respect of asserting a claim on the basis of its right as an indigenous people to self-determination. However, within the existing international legal framework the right of a group recognised as "peoples" to self-determination extends to the exercise of the right of 'internal' self-determination. This is wholly consistent with the self-determination provisions of the UNDRIP.

However to the extent that the ROL wish to exercise the right to self-determination contained within the UNDRIP externally then they face the problem of neither international law or international practice providing any clear support for this right. At best there is an arguable position touch upon by the Supreme Court of Canada in its examination of self-determination in the *Reference Re Secession of Quebec* case that external self-determination is lawful where as Cassese suggests the group or people wishing to secede have been subject to 'unremitting persecution'. It would therefore be for the ROL to demonstrate the circumstances where this has occurred and that would seem to be a position that is difficult to sustain.

The ROL did not make any statement as to why it makes no reference to the UNDRIP and so any analysis carries more than some speculation. It is clear from the ROL announcements

⁷⁵ (1998) 115 ILR 536, 582

⁷⁶ (1998) 115 ILR 536, 584

⁷⁷ Antonio Cassese, *Self-Determination of Peoples* (Cambridge, 1995) 120

⁷⁸ Crawford, above n 73, 127

that the ROL does not see its position in the law different to as any other sovereign that has entered into treaties with another sovereign.

Even if the ROL had made a conscious choice to abjure the Declaration as the basis for its independent statehood, why did it not resort to the principle and exercise of external self-determination, absent any reference to the Declaration? Possible reasons for this can be gleaned from the following observations by Rupert Emerson. His commentary suggests that the claims of inherent—and therefore existing rather restored-- sovereignty is at odds with the exercise of external self-determination. Emerson remarks on the nature of external self-determination, arguing that the act of formerly colonised groups establishing independence is not an exercise of secession, even though it is an exercise of self-determination:

“If the right of secession is eliminated and the maintenance of the territorial integrity of states takes priority over the claims of “peoples” to establish their own separate political identity, the room left for self-determination in the sense of the attainment of independent statehood is very slight, with the great current exception of decolonization. It need scarcely be added that the transition from colonial status to independence is not regarded as secession, whether or not it is achieved through force of arms, but rather as the *restoration of a rightful sovereignty* of which the people have been illegitimately deprived by the colonial Power concerned.”⁷⁹

If colonisation meant the extinguishment of indigenous sovereignty, then grounds for a claim of external self-determination might be supported by external self-determination. Where a group claims inherent sovereignty, and the continued existence of sovereignty, external self-determination by its very nature is at odds with this claim, as it is based upon the restoration of sovereignty extinguished in colonialism. This was at odds with the treaties that were formed with the Republic of Lakotah’s predecessor, the Sioux Nation of Indians.

It is the nature of the exercise of self-determination as a *restoration* of sovereignty that stands at odds with the claims of the ROL to inherent and continuous sovereignty. If the exercise of external self-determination is seen as a restoration of something lost, then by its very nature it cannot be exercise alongside claims of inherent sovereignty. And claims of inherent and persisting sovereignty are fundamental to the nature of the treaty claims being made by ROL. Thus, the ROL international treaty claims as well as claims to independent statehood are

⁷⁹ Rupert Emerson, Self Determination (1971) 64 *American Journal of International Law* 459, 465. Emphasis added.

based in part upon the existence of inherent sovereignty that precludes the use of external self-determination.

Whether that inherent sovereignty can transcend the limitations of the United States self-proclaimed and questionably sound plenary power doctrine to permit recognition of the Republic of Lakotah's claim of independent statehood is debatable. That turns on the question of the enforceability of the international treaty claims raised; a matter which is the subject of on-going research and future publication.

Conclusion

The right to exercise self-determination does not in itself mean an automatic right to secede from a state and establish a separate and independent state. The examination of the current international law position has demonstrated several important facets on the normative meaning of the principle self-determination. Firstly, identifying a group as a 'peoples' does not imbue them with the right to secede. Self-determination is a far more complex concept. Internal self-determination is a concept that is neither unique to nor that originated with the UN Declaration on the Rights of Indigenous Peoples. The concept of internal self-determination is found in other international instruments that pre-date the UNDRIP by several decades. It is not new. The ability to exercise external self-determination occurs in only limited and prescribed circumstances. International law is concerned with the maintenance and stability of states, not as providing a tool for threatening that. The ability to exercise self-determination is an exceptional circumstance and not the rule in international law.

Secondly, the question might be rightly raised then about why states had such a concern over the right to self-determination within the United Nations Declaration. Was this in fact a genuine concern borne out of ignorance of the current international law provisions on self-determination? This, while possible, is also perhaps disingenuous. It is difficult to fathom that the state machinery of the four states that opposed the UNDRIP were uniformly and simultaneously in ignorance of international law. Perhaps there were other reasons for the position that states took—a platform of rhetoric to resist indigenous rights of any sort as a matter of international rather than domestic law.

That said, it is curious that the Republic of Lakotah chose not to reference the UNDRIP at all in its two declarations. But upon a closer inspection, the nature of the ROL claims stand in conflict and opposition to the UNDRIP. The UNDRIP says that indigenous groups lack the ability to assert sovereign status in the form of independent statehood. But that is a matter hardly settled by the UNDRIP itself. A separate analysis of international law reveals a circumscribed ability to exercise external self-determination as a means of establishing an independent state. This requires a demonstration of continuing oppression or persecution—and given the statistics cited by the ROL as to the condition of indigenous peoples of the Sioux Nations- this would not be an impossibility to prove. Does an indigenous acceptance of internal self-determination then sweep away the possibility of indigenous groups raising state abuse as a reason for ceding—in the event that a group would wish to secede from the metropolitan state? Does the acceptance of internal self-determination somehow minimise claims that might be raised about state abuse in any context other than indigenous secession?

The claims of the ROL, whilst thus far largely ignored by both the international community and the United States, highlight several important facets about the operation self-determination in international law. It also highlights the aim of international law to provide stability and consistency to state existence, not to be a means of de-stabilising it. It highlights the widespread misunderstanding of the exercise of self-determination as a means to secede, and also the limitations of the self-determination provisions within the UNDRIP.

State unease with either internal or external self-determination is perhaps reflective of state unease with the idea of indigenous groups seeking redress of state violations in international rather than domestic forums. The decision of the Republic of Lakotah to raise its claims as matters of international, rather than domestic law, and outside of the provisions of the UNDRIP also point to the unresolved question of where indigenous claims are to be raised. The ROL position on this is unequivocal: it is to be a matter of international law on equal footing with states. Perhaps more than anything, it is this standing in international law that is something that states wish to see not proceed—that indigenous groups should never have the ability to challenge states on equal legal footing—whether the group is recognised under international law as a state or not.

In trying to assess the rather murky justifications for legal positions taken and not taken, this much appears to be discernable. States would prefer to control indigenous issues and claims at a domestic level, while indigenous groups would prefer the option of international forums.

States will continue to resist the idea that they are not the final arbiter of indigenous claims and status.