

Self-determination in New Contexts: The Self-determination of Refugees and Forced Migrants in International Law

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Keywords

Self-determination, Refugees, Migrants, Definition of Peoples, Human Rights, Ethnicity

Abstract

The international movement of people as a result of conflict, natural disaster, and famine is increasingly challenging for States. The Refugee Convention and its additional protocols have proven to be inadequate for protecting many people from human rights abuses. Accordingly this paper seeks to ascertain whether self-determination may operate to protect permanent refugee and forced migrant communities. Self-determination is a human right that has attracted considerable controversy. However, its universal applicability and the strength of the right make it an attractive means of limiting the power of a State in respect of refugee and forced migrant communities. Drawing from historical analogy this article concludes that in limited circumstances self-determination may be available for permanent refugee or forced migrant communities.

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Merkourios 2012 – Volume 28/Issue 75, Article, pp. 36-52.

URN:NBN:NL:UI:10-1-112856

ISSN: 0927-460X

URL: www.merkourios.org

Publisher: Igitur, Utrecht Publishing & Archiving Services

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I. Introduction

Self-determination may be broadly defined as a right of peoples under international law to exist and have access to government. This right has created controversy because it may challenge the State system through a derogation of the principle of territorial integrity. There is a resulting tension in the principle between the interests of the States and the interests of the peoples it seeks to protect. This tension has led to the creation of a principle that is both multifaceted and ambiguous.

International refugee law has faced similar problems. Refugee and forced migrants (that is, people who are forced to flee from their home States, but do not fit within the Refugee Convention¹ definition of refugees) challenge notions of territorial supremacy and State sovereignty.² These notions compete with the issues that arise under international human rights law and international humanitarian law.

The purpose of this article is to ascertain whether refugees and forced migrants may possess a right of self-determination in international law. In three chapters, the paper will survey the relevant literature, drawing on case studies to compare and contrast with the article subject. The first chapter will analyse the definition of peoples to see whether a refugee or forced migrant community may fit within that framework. The next chapter will examine the nature of self-determination as a principle of international law, including threshold requirements in light of its application to refugee and forced migrant groups. The final chapter will investigate the content of self-determination, with particular focus on how the obligation may be breached and the potential remedies that are available to refugee and forced migrant groups who meet the definition of peoples.

II. The Definition of Peoples

This chapter will explore the definition of peoples with a right to self-determination under international law through an examination of legal and sociological literature as well as select case studies. The debate surrounding the definition of peoples largely centres on ethnicity.³ This is problematic as ethnicity is both an abstract and fluid construct. Historically, the League of Nations, the United Nations and many States have favoured a definition based on ethnicity, as has academic commentary. However, even the United Nations Charter ('the UN Charter'), (which is a primary source of law for the principle) and its preparatory work, provide little clarity on the matter. International case studies are also inconsistent, with some cases appearing to favour a definition based on ethnicity, while others seem to reject it. Other definitions outside the context of ethnicity exist but have not been widely accepted. This chapter will craft a working definition from the debate and analyse the ramifications for forced migrant and refugee and forced migrant communities.

A. What Is Ethnicity?

Ethnicity as a term in the legal literature has played a fundamental role in the debate on self-determination. Ethnicity is generally used to describe minority groups that are culturally distinguishable from the majority. *Prima facie*, it is a temptingly easy means of simplifying the debate. However, further examination reveals that a reliance on ethnicity to define peoples is fraught with tension and potential contradictions.

Ethnicity has often been confused with national identity in international legal discourse. Both ethnicity and national identity are relative, formed in response to the presence of another group.⁴ As Eriksen states: 'ethnicity occurs when cultural differences are made relevant through interaction. It thus concerns what is socially relevant, not which cultural differences are "actually there."⁵ Therefore, ethnicity cannot be objective because it is self-defining. The difference between ethnicity and national identity lies in the political nature of nationalist movements. Smith demonstrates that nationalism may either work to

1 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1.

2 G Goodwin Gill and J McAdam, *The Refugee in International Law* (OUP 2007) 1.

3 For example, see I Brownlie, 'The Rights of Peoples in Modern International Law' in J Crawford (ed), *The Rights of Peoples* (Oxford University Press 1988) 1, 5; Cf T D Musgrave, *Self-Determination and National Minorities* (OUP 1997) 154-167.

4 T Hylland Eriksen, *Small Places, Large Issues: An Introduction to Social and Cultural Anthropology* (Pluto 2001) 266.

5 *ibid* 263.

reinforce ethnic identity or undermine it by redefining identity along State boundaries.⁶ The case study below explores the evolutionary nature of ethnic identity and demonstrates the role of nationalism.

Prior to European colonisation, there were few ethnic distinctions between the Hutus and the Tutsis in the Great Lakes region of Rwanda in Africa. There was originally a class difference - the Tutsis were wealthy herders, and the Hutus were poorer farmers.⁷ Individuals had the capacity to change their class through changing their means of income, by purchasing or disposing of cattle. It has been argued that through various colonial practices, these identities were transformed and solidified into ethnic distinctions.⁸

This case studies show that ethnicity is not immutable, rather it develops over time in response to political forces. Ethnicity and national identity have been used interchangeably in the dialogue on self-determination, often because ethnic groups spearhead nationalist self-determination movements. In this context the legal ramifications are indistinguishable.

If ethnic identity is a potential element of the definition of peoples, groups of forced migrants and refugees may have the potential to satisfy the definition of peoples. Certainly, there are numerous refugee camps that are largely ethnically homogeneous, with refugee populations confined to a defined, tightly contained area. For example, the refugee camps in Algeria are largely comprised of ethnic Sahrawi refugees from the Western Saharan region.⁹

B. *Historical Considerations*

Although history alone is not a source of international law, it provides context for the development of the provisions within the UN Charter and custom. There are a number of historical factors which support a finding that ethnicity is a critical part of the definition of peoples. In the *Aaland Islands* case, the Committee of Jurists looked at self-determination of 'national groups'.¹⁰ In exploring the legal principles, they maintained the importance of preserving the social, ethnic and/or religious characteristics of the group, looking for characteristics that ethnically distinguished the Aaland Islanders from the Finnish people.¹¹ This suggests that ethnicity played a critical role in the Committee's construction of peoples. The Commission of Rapporteurs also discussed the rights of ethnic minorities to self-determination, expressly referring to ethnicity as a consideration of self-determination.¹² Nevertheless, the Commission of Rapporteurs did not apply this definition because they sought to maintain the territorial integrity of Finland.¹³ When the Aaland Islands reports were written, the principle of self-determination was not a fully developed rule of international law. However, these reports show that an ethnic interpretation of self-determination was already considered long before the formation of the UN. This finding may shed light on subsequent treaty interpretations of the UN Charter, and may be relevant to the development of self-determination under customary international law.

C. *Treaty Interpretation*

The *travaux préparatoires* show that the events of World War II weighed heavily on the minds of the drafters. The Syrian delegate, Farid Zeineddine, indicated that self-determination interpreted in the context of ethnicity is a double-edged sword - it can protect ethnic minorities, but it can also be a means of legitimising the expulsion of ethnic groups who do not conform to national identity.¹⁴ However, he did not dismiss ethnicity as an element of self-determination. Instead, Zeineddine found that the issue lay in the content of the principle, namely that self-determination can only stem from 'a free and genuine expression of the will of the peoples'. He further stated that the principle may support 'the possible amalgamation of nationalities if

6 A Smith, 'LSE Centennial Lecture - The Resurgence of Nationalism? Myth and Memory in the Renewal of Nations' (1996) 47 *British Journal of Sociology* 575, 581.

7 See D Newbury, 'The Clans of Rwanda: An Historical Hypothesis' (1980) 50 *Africa: Journal of the International African Institute* 389.

8 P Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* (Picador 2000) 58. See also J Diamond, *Collapse: How Societies Choose to Fail or Survive* (Allen Lane 2005) Ch 10.

9 See R Farah, 'Refugee Camps in the Palestinian and Sahrawi National Liberation Movements: A Comparative Perspective' (2009) 38 *Journal of Palestinian Studies* 76, 77.

10 *Aaland Islands Case* (1920) League of Nations Official Journal Spec Supp 3.

11 *ibid* 6.

12 Commission of Rapporteurs, *The Aaland Islands Question: Report Submitted to the Council of the League of Nations*, League of Nations Doc B7 [C] 21/68/106 (April 1921) 2, 4, 5, 6.

13 *ibid* 4.

14 United Nations Information Organisation, *Documents of the United Nations Conference on International Organization San Francisco* (Edwards Brothers 1945) VI, 704.

they so freely choose'.¹⁵ This statement implies that the amalgamation of nationalities is an exception rather than the norm. Therefore it does not preclude the interpretation that peoples may be defined by reference to national groups.

The Belgian delegate, Senator Henri Rolin, was concerned that the principle would allow for a breach of the right to self-determination to be remedied by a UN intervention into the domestic jurisdiction of a State.¹⁶ Other States expressed concern that an emphasis on the protection of minority groups would foster civil strife and secessionist movements.¹⁷ Nevertheless, these concerns largely resulted in limiting the content of self-determination rather than its scope. Accordingly, the drafters were fearful that self-determination would operate to destabilise territorial integrity, but were not fearful about whom the right applied to. The suggested amendments of Senator Rolin were not included in the final Charter, indicating that an ethnic interpretation of the right was not necessarily dismissed.

D. *Academic Commentary*

Academics are divided on whether ethnicity should be a part of the definition of peoples. Ian Brownlie suggested that ethnicity is a necessary factor in determining whether a group has a distinct character, and subsequently critical for the definition of people-hood.¹⁸ Brownlie further submits that recognition may be constitutive of people-hood. For this recognition to occur, it is necessary for groups to externally participate in the political process at an international level.¹⁹ Cassese reiterates this argument, suggesting that the political arm of a peoples may come in the form of a national liberation movement or similar political body capable of acting on behalf of the entire group.²⁰

However, there has been extensive criticism of the use of ethnicity to define peoples. Some writers emphasise the fluidity of ethnicity, suggesting that objectivity in ethnic identity is a misnomer.²¹ It may be practically impossible, or undesirable to select peoples who have a right to self-determination on the basis of ethnicity alone.²² It could result in groups emerging and dissolving unpredictably, potentially destabilising the international legal system. Consequently, ethnicity cannot be the only factor in the definition of peoples. However, other elements may be used to strengthen a definition that contains ethnicity, such as political movements that are reflective of the will of a group, as previously mentioned.²³ Additionally, recognition may also be constitutive.²⁴ Ethnicity cannot stand alone as a definitional criterion. However, when combined with other objective elements, it has the potential to form a solid basis for self-determination.

E. *Legal Principle or Political Pragmatism? - UN and State Practice and Case Studies*

It is difficult to reconcile the practice of the UN and individual States with a definable principle under international law. While some cases have indicated a clear preference for ethnic self-determination, others resting on similar merits have been denied self-determination. This apparent contradiction is a fundamental reason why no cohesive definition has developed. There are a number of case studies where the UN has supported ethnic self-determination, even when such a policy has seemingly gone against the principle of *uti possidetis*. The self-determination of Bangladesh is a prominent example. The differences that existed between East and West Pakistan were remarkable. They did not share language, cultural traditions or history and the two regions were geographically isolated by a hostile nation, with religion being their primary commonality.²⁵ The strong ethnic and linguistic homogeneity within Bangladesh, the support and recognition it received initially from India and subsequently from other States and the UN through admission in 1972, and their strong political autonomy, strengthened their case for peoplehood and self-determination. This signifies that political factors such as recognition may play an important constitutive role in defining peoples, in addition to ethnicity.

15 *ibid.*

16 *ibid* 300-301. See also A Cassese, *Self-determination of Peoples* (CUP 1995) 39.

17 *ibid* 41-42.

18 Brownlie (n 3) 5.

19 *ibid* 6.

20 Cassese (n 16) 146-147, 168.

21 Musgrave (n 3) 162.

22 *ibid* 162-164.

23 Cassese (n 16) 146-147.

24 Brownlie (n 3) 6.

25 V Nanda, 'Self-determination Outside the Colonial Context: the Birth of Bangladesh in Retrospect' (1978-1970) 1 *Houston Journal of International Law* 71, 72, 86-87.

Other examples are not so transparent. Resolution 441 discusses the ‘Ewe Problem’ in regards to an ethnic group in West Africa.²⁶ In this resolution, the General Assembly expressed the view that the Ewe were a separate people with a right to self-determination. They stated that the wishes of each region should be ascertained through separate plebiscites. Nevertheless, because of the objections of the administering power (the United Kingdom) the plan was abandoned and a plebiscite was held over the entire region, resulting in the minority Ewe peoples’ views being obscured by the majority.²⁷ Indonesia’s absorption of West Irian and the integration of Ifni with Morocco further exemplify cases where a group has not been accorded the rights of a peoples. Crucially, the groups in these cases had little international support behind their bids for self-determination.

In contrast, the General Assembly was willing to divide the trust territory of the British Cameroons into two regions to reflect the wishes of each ethnic group; a decision repeated on a number of other occasions.²⁸ The ethnic division of former colonial territories was apparent in the partition of Rwanda and Burundi, and the splitting of the Gilbert and Ellice Islands.²⁹ These examples are illustrative of the general trend, rather than a full listing of all the cases that concern these issues. Significantly more case studies have been explored throughout the academic literature.³⁰ The general trend identified is that support is more likely to result in the success of self-determination movements.

Resolutions 1514 and 1541, which emphasise territorial integrity, did not serve to change this pattern.³¹ This indicates that ethnicity cannot be the sole determining factor. From a practical perspective, ethnic groups have historically required the recognition and support of other States to be successful in their claims. However, regard must be given to the doctrine of non-intervention as propounded by article 2(7) of the UN Charter and reiterated by GA Resolution 2131 (XX):

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State [...]. All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure [...]³²

Hence, any support given to an ethnic group vying for self-determination must not violate the doctrine of non-intervention. According to the International Court of Justice (‘ICJ’), self-determination is an obligation *erga omnes*.³³ Such an obligation may allow States to exercise limited countermeasures against States in breach of the principle of self-determination, although the legality of such action must be assessed on a case-by-case basis.³⁴ Thus States may be able to give limited support to ethnic groups seeking self-determination, including permanent refugee and forced migrant populations.

Despite the focus on political pragmatism in relation to self-determination, a legal principle may be distinguished. This paper will rely upon a working definition of peoples based on three criteria: 1) the existence of an ethnic group; 2) the group possesses a political body that is representative of its interests; and 3) the political body is recognised and supported by other States.

F Conclusion

The main premise for this article is that forced migrants and refugees who reside in permanent settlements may have a right to self-determination. It was argued that ethnicity forms a critical element of the definition of peoples subject to certain limitations. Accordingly, if a refugee community possesses a separate ethnic identity it may qualify as a peoples.

For an ethnic group to be in a position to argue for self-determination, it must have a political body that represents the general interests of the group. Arguably, political groups are an inevitable consequence of established communities, including

26 The Ewe Problem, UNGA Res 441 (2 Dec 1950) UN Doc A/RES/441.

27 Musgrave (n 3) 158, n 48.

28 Musgrave (n 3) 158.

29 M Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff Publishers 1982) 19.

30 For example, see I Cismas ‘Session in Theory and Practice: The Case of Kosovo and Beyond’ (2010) 2 Goettingen Journal of International Law 531; H Hannum, *Autonomy, Sovereignty, and Self-Determination* (University of Pennsylvania Press 1996) point II.

31 UNGA, Declaration on the Granting of Independence to Colonial Countries and Peoples, 1514 (XV) (14 Dec 1960) (adopted by 89 votes to none; 9 abstentions) UN Doc A/RES/1514 (Resolution 1514); UNGA, Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for Under Article 73(e) of the Charter, Res 1541 (15 Dec 1960) UN Doc A/RES/1541 (Resolution 1541).

32 UNGA, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, Res 2131 (21 Dec 1965) UN GAOR 91st Plenary Meeting Supp No 14, UN Doc A/RES/2131.

33 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 172 (Wall Advisory Opinion).

34 See J Crawford, *International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentary* (CUP 2002) 168.

refugee and forced migrant camps. Such political groups can be seen in many refugee camps around the world, including Polisario in the refugee camps in Algeria and the various political bodies that have emerged from the Palestinian camps.³⁵ Many political bodies from diaspora communities push for greater minority rights, rather than self-determination. However, as discussed in the Aaland case, minority rights and self-determination may be linked, as they are both designed to enable the human rights of a community to be protected. Accordingly, their goals may be achieved through self-determination.

Recognition and political support for these groups may be practically difficult to achieve, as their cause may appear to lack political legitimacy. Nevertheless, such legitimacy may be accorded to a group over time. Groups that have been forced to flee their country of origin due to intractable conflict or environmental degradation or catastrophe may have no option to return. This may become increasingly relevant in the context of climate refugees. Any long-term refugee and migrant settlements that result, may over time achieve greater legitimacy in their bid for self-determination.

This chapter has found that although ethnicity is sometimes vague and imprecise, it forms the most accepted definition under international law. Consequently, the working definition of peoples for this article is reliant on three substantive criteria: the presence of an ethnic group with a political body representative of its interests, which is recognised and supported by other States in the international community. This chapter has shown that this definition has the potential to include forced migrant and refugee communities.

III. The Threshold Requirements

This chapter will begin by looking at the source of the obligations; establishing the rights holders of the obligation, compared with the beneficiaries. Subtle differences exist between the application of self-determination by treaty and its application through customary international law. These differences have the potential to influence the subsequent enforcement of the obligations. The second part of this chapter will look into whether self-determination is limited to the context of decolonisation. It will consider the circumstances beyond colonialism where the obligation has been applied, and analyse the scope of the law's application. The third part of this chapter will look at the application of self-determination to migrant communities and the impact from their link with a territory.

A. *Self-determination Under Treaty*

Article 1 of the UN Charter specifies that self-determination is one of the core purposes of the United Nations.³⁶ Self-determination is further referenced in similar terms under Articles 55 and 56. Ultimately, this establishes the basic structure of the principle, with both custom and treaty providing much needed nuance and detail.

Self-determination comes under Article 1 of both human rights Covenants.³⁷ Under the Covenants self-determination is presented as a substantive right because, unlike under the UN Charter, individuals are also limited rights holders given their standing under the Human Rights Committee.³⁸ Nevertheless, the Human Rights Committee has ruled that Article 1 is non-justiciable under the First Optional Protocol because it deals with collective rights and the Committee only has jurisdiction to hear individual submissions.³⁹ This has resulted in claims of the violation of self-determination being heard as a corollary to the violation of other substantive rights under the Covenant. For example in *Gillot v France*, the authors claimed that they were victims of breaches to their rights under Articles 25 and 26 of the Covenant. The Committee chose to look at the obligation of self-determination through the lens of these applicable articles. This happened because the above articles relate to specific elements of self-determination, such as rights of political participation, and equality before the law.⁴⁰ Minorities are not necessarily peoples under the principle of self-determination, although minority rights can inform the content of self-determination.

35 *ibid* 77-80.

36 Charter of the United Nations (the Charter) art 1(2).

37 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 19 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

38 First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2004) 9.

39 *Kitok v Sweden* Communication No 197/1985 (Human Rights Committee, 10 August 1988) UN Doc CCPR/C/33/D/197/1985, para 6.3.

40 ICCPR (n 37) arts 25, 26.

Importantly, there are some limitations to the operation of Articles 25 and 27 of the ICCPR that may affect their application regarding refugees and forced migrants. Article 25 only applies to citizens. This article may therefore not be an effective means of protection for the refugees. Nevertheless, other articles in the ICCPR will generally apply to aliens and citizens.⁴¹

Individuals and groups may also have standing under the Convention on the Elimination of Racial Discrimination⁴² through the Committee on the Elimination of Racial Discrimination ('CERD') if States make a declaration under Article 14(1). Although the Convention does not expressly contain a right of self-determination, CERD has found that it exists as an implied right under Article 5(c) of the Convention,⁴³ which concerns equality in political participation.⁴⁴ This may grant refugees and forced migrants a critical means of asserting their potential right to self-determination.

Along with the rights of individuals under the Covenants, States continue to possess rights and duties. This is because of the inter-State complaint mechanisms under Article 41 of the ICCPR. Additionally, obligations under the ICESCR and ICCPR may be framed as obligations *erga omnes inter partes*.⁴⁵ Consequently, other contracting States may raise the obligation under the Covenants in the International Court of Justice, even if their substantive rights have not been violated.⁴⁶ This may prove particularly important in circumstances where a separate State is supporting a peoples in their bid for self-determination. A State may demonstrate support through instituting legal proceedings against a breaching State. This adds weight to the criterion in the definition of peoples used in this article, which stipulates that recognition and support of a group by States is constitutive. Ultimately, if a refugee/forced migrant community is backed by another State it will have a stronger case supporting self-determination.

B. Custom and Jus Cogens

There are several important factors that suggest that self-determination has crystallised into custom. Article 1(2) of the UN Charter as well as Article 1 of the two 1966 Covenants⁴⁷ have arguably generated custom.⁴⁸ Nevertheless, custom is potentially more wide reaching in its scope than these treaty provisions, due to the influence of the UN General Assembly Resolutions. Like the treaty provisions, the UN Resolutions influenced custom through the generation of norms. There are two declarations in particular that created legal standards for self-determination: the Declaration Granting Independence to Colonial Countries and Peoples⁴⁹ and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN.⁵⁰

The ICJ has also played an important role in the development of custom. Numerous cases have discussed the principle adding weight to self-determination as a customary norm, and exploring its application.⁵¹ For example, in the *Case Concerning East Timor (Portugal v Australia)* the ICJ found that self-determination is an obligation *erga omnes*.⁵² These cases have fundamentally shaped how self-determination operates as a right and thus solidified the content of the norm.

1. Self-determination as a Norm of *Jus Cogens*

Self-determination is, according to a number of commentators and jurists, a norm of *jus cogens*.⁵³ The Vienna Convention on the Law of Treaties states that a peremptory norm is a norm accepted and recognised by the international community of

41 Human Rights Committee, 'General Comment No 15: The Position of Aliens under the Covenant' (4 November 1986) UN Doc HRI/GEN/1/Rev.7.
 42 International Convention of the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).
 43 ICERD.
 44 Committee on the Elimination of Racial Discrimination, 'The Right to Self-Determination, General Recommendation No 21' (23 August 1996) UN Doc A/51/18 annex VIII.
 45 See Crawford (n 34) 209.
 46 For the International Court of Justice's competence to hear matters concerning obligations *erga omnes*, see Application for Review of Judgement No 158 of the United Nations Administrative Tribunal (Advisory Opinion) [1973] ICJ Rep 166, 171-172.
 47 ICCPR (n 37); ICESCR (n 37).
 48 See Cassese (n 16) 159.
 49 Resolution 1514 (1960) UN Doc A/RES/1514.
 50 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (24 October 1970) UN Doc A/Res/2625 (Resolution 2625).
 51 For example, see *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16.
 52 *Case Concerning East Timor (Portugal v Australia)* (Advisory Opinion) [1995] ICJ Rep 90, 102.
 53 For example, I Brownlie, *Principles of Public International Law* (OUP 2003) 489; *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase) (*Belgium v Spain*) [1970] ICJ Rep 3, Sep op Ammoun J, 304.

States as a whole.⁵⁴ Nevertheless, self-determination is difficult to characterise as a peremptory norm due to its ambiguous character and political nature. This is because it generates controversy and division within the international community, thereby undermining the universality of the principle. It is also the subject of much political pragmatism. Consequently, defining this norm as an absolute right may be both incorrect and inappropriate.⁵⁵ Looking at the views expressed by States, self-determination as a norm of *jus cogens* has largely been endorsed by developing and 'socialist' States but not by the majority of western States.⁵⁶ The lack of express endorsement from some States does not necessarily defeat the argument that self-determination is a norm of *jus cogens*. The aforementioned General Assembly Resolutions may show general acceptance of the principle by the international community. Western States have often stated that self-determination is a fundamental principle of the international community.⁵⁷ There are strong arguments on both sides. Nevertheless, if self-determination is not currently a norm of *jus cogens*, it may be emerging as one.

Self-determination as a norm of *jus cogens* has the potential to impact the political legitimacy of breaches to self-determination. This is because peremptory norms have a higher moral status within the international community.⁵⁸ Should self-determination become widely recognised as a peremptory norm, it may be easier for groups vying for self-determination to garner international support. It may also prevent States from invoking circumstances precluding wrongfulness. Accordingly, whether or not self-determination is a norm of *jus cogens* will not impact the operation of the law, however it may have practical implications for refugee and forced migrant communities claiming the right.

C. *Application Beyond the Context of Colonialism*

In the early days of the development of the right to self-determination, colonialism was the primary focus of the international community. The Soviet Union, with the support of developing nations, spearheaded numerous resolutions throughout the 1950's and 1960's that invoked self-determination as a means of terminating colonial rule.⁵⁹ This resulted in a widely held view that self-determination only applied to peoples within colonial situations, which were narrowly defined by reference to salt-water colonies.⁶⁰ Many commentators continued to maintain this narrow construction, even after the advent of Resolution 2625,⁶¹ which arguably broadened the scope of the right.⁶² This construction may have simplified the rule, however. As outlined below, the weight of evidence suggests that the principle cannot be categorised exclusively as a principle of decolonisation.

1. Application Within States

A number of authors have posited that self-determination applies to the population of a State, either as a whole people, or as a number of different peoples.⁶³ This construction of the right to self-determination operates in conjunction with the principles of sovereign equality and non-intervention. Consequently, self-determination has the potential to operate as a means of preserving and protecting the integrity of a State from intervention by other States. This model has been largely endorsed by countries which have in some way been affected by the actions of other States.⁶⁴ The main point of contention on this issue lies in the distinction between States intervening to support the self-determination of an oppressed peoples, and States denying self-determination of a peoples through an intervention.⁶⁵ For example, El Salvador complained to the Human Rights Committee that Cuba was engaging in an intervention that violated its peoples' right to self-determination. Cuba argued that it was supporting the self-determination of the disenfranchised population.⁶⁶ Nevertheless, this conflict does not necessarily undermine the value of this construction of self-determination. It simply proves a conflict in the determination of

54 Vienna Convention on the Law of Treaties (adopted 25 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

55 Pomerance (n 29) 70-71.

56 Cassese (n 16) 137.

57 *ibid* 139.

58 D Anton, P Mathew and W Morgan, *International Law: Cases and Materials* (OUP 2005) 234.

59 Resolution 1514 (n 49); Resolution 1541 (1960) UN Doc A/RES/1541; Cassese (n 16) 71.

60 Resolution 1541 (1960) UN Doc A/RES/1541.

61 Resolution 2625 (1970) UN Doc A/RES/2625.

62 Hannum (n 30) 46, 48.

63 J Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff 2007), 167; R Emerson, 'Self-Determination' in Robert McCorquodale (ed) *Self-Determination in International Law (The Library of Essays in International Law)* (Ashgate 2000) 9.

64 Summers (n 63) 168.

65 *ibid*.

66 *ibid*.

the will of the people. This may be relevant for refugee/forced migrant communities that do possess full rights of citizenship within a country. It may be difficult for another State to support the self-determination of refugee communities because of the doctrine of non-intervention.

2. Self-determination of Oppressed Peoples

The application of the principle of self-determination beyond the previously mentioned circumstances is largely dependent upon the characterisation of a breach of self-determination (to be explored in greater detail in the next chapter). One of the most controversial applications of self-determination beyond decolonisation has been its application in the context of oppression. This is the area most relevant to the principle's application to refugees and forced migrants. The breach of self-determination through oppression is one of the most likely scenarios to arise in international law. Since 1960 not one of the major international instruments dealing with self-determination has limited its application to decolonisation.⁶⁷ International focus has seemingly shifted away from colonial self-determination, towards self-determination in the wake of oppression. This language can be seen in numerous instruments including the African Charter⁶⁸ and Resolution 2625,⁶⁹ which according to the ICJ has crystallised into customary international law.⁷⁰ There are numerous cases where the international community has recognised a right of self-determination for an oppressed peoples. Prominent examples include: the Palestinians;⁷¹ non-white South Africans;⁷² and the people of Tibet.⁷³ The main issue with this interpretation of self-determination lies in the potential implication of a right to remedial secession. However, as discussed below, the remedies available for a violation of the right to self-determination often differ. This does not mean that the right does not apply, but that self-determination operates differently according to the circumstances of each case.

Many countries have approached the concept of true universality in self-determination with trepidation, because of its implications for political and territorial instability. Consequently, how the right applies in general cases of oppression is not fully understood. Nevertheless, there is strong evidence that it does apply in circumstances beyond colonialism, even in cases where it has the potential to cause political and/or territorial disruption to a State. The force of this right in light of other international principles remains to be seen. Ultimately the rights of refugees and forced migrants to self-determination will be linked with a myriad of factors, the majority of which will be practical and political. Hence it will always be difficult to determine with accuracy whether a community possesses a right to self-determination.

D. Historical Title

Historical title may be another threshold test in self-determination. Refugee and forced migrant communities are often characterised as temporary communities, bringing into question whether a State may violate the rights of such groups to self-determination. Analysis of this point requires an examination of the historical roots of the principle of self-determination. In the *Aaland Islands* case, self-determination was described as a political principle that only operated when sovereignty was in flux; self-determination was therefore a tool of legitimacy that could be used to consolidate a new State, but could not undermine an existing one.⁷⁴ Evidently, self-determination is deeply connected to the composition and structure of governing bodies within a State. This interlinks with the legal norms governing the definition of a State. Under the Montevideo Convention a State is defined as a permanent population, with a defined territory, possessing a government that has the capacity to enter into relations with other States.⁷⁵ Overlaying these two areas of law, peoples (with a right to self-determination) form the permanent population of a State and thereby accord it legitimacy.⁷⁶ Under this construction a temporary migrant community cannot satisfy the permanence criterion and thereby should not have a right to self-determination.

67 R McCorquodale, 'Self-Determination: A Human Rights Approach' in Robert McCorquodale (ed), *Self-Determination in International Law (The Library of Essays in International Law)* (Ashgate 2000) 477, 481.

68 African [Banjul] Charter on Human and Peoples' Rights (adopted June 27, 1981, entered into force October 21 1986) (1982) 21 ILM 58, OAU Doc CAB/LEG/67/3 rev.5, art 20.

69 Resolution 2625 (1970) UN Doc A/RES/2625.

70 Wall Advisory Opinion (n 33) 171.

71 *ibid* 183; UNGA, Importance of the Universal Realization of the Right of Peoples to Self-Determination and the of the Speedy Granting of Independence to Colonial Counties and Peoples for the Effective Guarantee and Observance of Human Rights, Res 2787 (6 December 1971) UN Doc A/Res/2787.

72 Resolution 2625 (1970) UN Doc A/RES/2625.

73 UNGA, Question of Tibet, Res 1723 (20 December 1961) UN Doc A/Res/1723; McCorquodale (n 67).

74 *Aaland Islands Case* (n 10) 5.

75 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

76 Joshua Castellino, 'Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools' (2007-2008) 33 Brooklyn Journal of International Law 503, 505.

Nevertheless, some refugee and forced migrant communities reside in countries for years or even decades, raising questions about when these groups become permanent and receive a right to self-determination. This issue is analogous to the question discussed by the Human Rights Committee in *Gillot v France*, which questioned whether France had violated articles 2, 25, 26 and by extension Article 1 of ICCPR.⁷⁷ France was in the process of implementing a series of referenda to ascertain the political desires of the people of New Caledonia. France chose to limit participation in the referenda to persons concerned for the future of New Caledonia who had proven strong ties to that territory.⁷⁸ Accordingly, a series of criteria were attached to voting eligibility, including: place of birth and period of residency. Most of the authors had migrated from France to New Caledonia, but did not qualify to participate in the first referendum because their residency was less than ten years. The Committee found that the restrictions were not unreasonable. France had placed the restrictions on voting to ensure that temporary workers from France, who had few interests in the future of New Caledonia, would not distort the referenda and thereby undermine the self-determination of the people of New Caledonia. A period of less than ten years was considered insufficient to establish a connection with a territory. On this rationale refugee and forced migrant communities may need to demonstrate a long period of continuity within a country to pass this threshold.

Some countries have argued that self-determination is only available to an indigenous population, with a long connection to a territory.⁷⁹ Pomerance outlines the difficulty of reconciling competing territorial claims to self-determination in a global system where forced and voluntary population movements remain a constant and prominent feature of international relations.⁸⁰ Claims of indigenity are difficult to verify in all but the most isolated of communities. For example, Britain claims that the population of Gibraltar has been settled in the area for a sufficient time to establish its status as an indigenous community.⁸¹ This was subsequently rejected by Spain, which regards the population as having no roots in the territory despite the fact that the population's residency in the territory is longer than Spain's was previously.⁸²

In regards to competing claims of self-determination based on 'historical legitimacy', note must be taken of the potential for history to be interpreted in numerous ways. Historical ties with a territory often play an important role in the formation of States through the development of nationalism. Smith argues that historical 'resources' are integral to the creation of a national mythology.⁸³ Accordingly, history is used as a tool to strengthen the legitimacy of nationalist movements. These historical resources may be subject to great manipulation, with emphasis placed on facts that legitimise claims, while contradictory facts are discarded. It is difficult to base claims to self-determination on historical legitimacy because human history is fundamentally a story of migration. This leads to the conclusion that the real concern is not which people had the first claim to a territory, but how long a people have been present within a territory and the strength of their connection to it. This test was applied by France in its determination of the peoples of New Caledonia, which was subsequently supported by the Human Rights Committee.⁸⁴

1. What Creates a Sufficient Connection?

The ICJ developed a flexible approach in establishing a peoples' connection with a territory.⁸⁵ Because of migration, the nomadic nature of some groups, and the artificiality of territorial borders, many peoples are not confined to single States. This suggests that the existence of permanent dwellings is not essential in determining a peoples' connection with a territory and whether they are a part of the permanent population of a State.

Subjective ties to territory play an important role in determining if there is a sufficient connection. An intention to leave a territory in the near future may undermine permanence. On the other hand, an intention to remain indefinitely will support a claim of territorial connection. Practically this may not be an issue because a group that is campaigning for self-determination in their adopted State (rather than their homeland) will probably possess the requisite ties to the territory.

77 *Gillot et al v France* Communication No 932/2000 (Human Rights Committee, 26 July 2002) UN Doc CCPR/C/75/D/932/2000.

78 *ibid* 13, 16.

79 For example, both Argentina and Spain have made similar arguments. See Summers (n 63) 75.

80 Pomerance (n 29) 21.

81 *ibid*.

82 *ibid*.

83 Smith (n 6) 585.

84 *Gillot et al v France* (n 77) para 2.6.

85 *Western Sahara* (n 51).

Objective factors may also be important in ascertaining a sufficient connection. The composition of the community is very important. Examples include: communities comprising whole families rather than single individuals, given their potential for greater stability and consequential permanence; the existence of a trade system beyond humanitarian donations or outside support; and the presence of political organisation. For refugee and forced migrant communities, permanence may be solidified by the existence of intractable conflict or irreparable natural disaster in their homeland. If the migrants from such events are too great in number to easily be absorbed into a State's population, the separate communities may become permanent and continue to possess a separate identity. It may take a number of years for conflicts to be identified as intractable. Victims of natural disasters or climate change on the other hand may only be classed as permanent if it is impossible for them to return home, even after a number of years, and there is no possibility that the community could be taken in by other countries.

E. Conclusion

This chapter has explored the application of self-determination. Obligations of self-determination stem from two sources of law - treaty and customary international law. The substantive obligations that exist under the UN Charter, subsequent treaties, and through custom have resulted in the uniform application of this duty to all States. The obligations arising from self-determination have been described as obligations *erga omnes*, with peoples widely recognised as the beneficiaries of the rights. For refugees and forced migrants, this places greater importance upon their relationship with other States in regards to the enforcement of the obligation. Customary international law has been the key to the development of self-determination, with some authors contending that it has become a norm of *jus cogens*. In addition to the legal implications that both customary and peremptory norms have for peoples, a breach of a norm of *jus cogens* may have political implications for a peoples' relationship with other States, thereby strengthening their ability to vicariously enforce the obligations owed to them.

Some connection with a territory is required for self-determination to operate. Nevertheless, discussions about which people have the best right to a territory largely centre on nationalist movements rather than objective discernable criteria. This chapter focused on how a peoples' connection with a territory can be discerned through observable indications of permanence within a population. Factors include: identification with the resident State, the presence of trade networks, political organisation and the presence of whole families rather than individuals. The presence of an intractable conflict in a homeland or a catastrophic environmental disaster may help in establishing permanence.

The last part of this chapter looked at the application of self-determination beyond the context of colonialism. Whilst self-determination initially centred on decolonisation, there are strong arguments for a broader interpretation of the obligation. Self-determination may function within States as a corollary to the obligation of non-intervention. Self-determination is also well established in the context of the collapse or transformation of a State. The application of the principle beyond these limited areas is where the principle receives the greatest criticism. There is strong evidence to suggest that self-determination may apply in the context of oppression, although this is not without controversy.

IV. Breach and Remedies

This chapter will address issues involved in breach of the principle of self-determination and the remedies that are available. Breach of international law may occur through an act or omission that is attributable to a State.⁸⁶ There are two forms of breach of self-determination. The first form concerns acts or omissions that compromise the existence or identity of a peoples. Such acts and omissions can range from acts of genocide to a failure to provide education to minority groups in their own language. This aspect of self-determination exists because only a peoples can exercise self-determination and undermining the integrity of a peoples will hinder their ability to assert the substantive rights created by self-determination. The second type of breach concerns the fundamental altering of a peoples' political position within a State.

This chapter will focus on the characterisation of a breach in the context of the self-determination of refugees and forced migrants. There are a number of critical factors that need to be addressed in order to identify a breach of international law. Attribution is one of the founding principles in identifying breach and consequently must be analysed in the context of the article topic. Self-determination is also a group right and as such operates differently from individual human rights breaches. Issues of intention and purpose of an act may also be relevant in identifying an internationally wrongful act.

86 See Crawford (n 34) 82.

This chapter will look at breach in two contexts - breach through the use of force and breach through discriminatory acts or omissions. The remedies that are available for a breach of self-determination are intertwined with the nature of the breach itself. Remedies under self-determination are commonly grouped into two categories - external self-determination and internal self-determination. This chapter will look at the circumstances which trigger the availability of each type of self-determination.

A. *Breach*

Self-determination operates to protect the identity of a people and ensure that they have participatory access to a State's government.⁸⁷ These obligations require States to adjust their governmental structure and/or composition to reflect the whole of the peoples within its territory.⁸⁸ Policies, laws and other State actions must not undermine the integrity of a peoples' identity. Self-determination is commonly construed as taking two forms - internal and external. These two forms are interlinked with the nature of the breach concerned. Fundamentally, the principle requires that governments not decide the life and future of the peoples at their discretion.⁸⁹ Peoples must have the opportunity to participate in matters that concern their political role in a State.

B. *Attribution*

Acts of a State are internationally wrongful when an act or omission is attributable to the State and constitutes a breach of an international obligation of that State.⁹⁰ Discrimination and/or violence against refugees and forced migrants by citizens and non-governmental organisations acting in a private capacity will not be enough to incur the direct responsibility of the State. The actions must be attributable to the organs of a State, whether or not an individual or organisation is acting in accordance with the internal law of that State, or acting under the instructions or direct control of that State.⁹¹ Nevertheless, if self-determination is construed as an obligation of due diligence, then the failure of a State's organs to adequately protect the interests of a peoples in regards to discrimination may incur the responsibility of that State.⁹² In particular, knowledge of the discrimination by a State's organs will be a relevant consideration in determining if a breach of self-determination has occurred.⁹³ It is therefore likely that States have positive obligations to ensure that refugee and forced migrant communities who meet the definition of peoples are not subject to a violation of their right to self-determination by private actors within the territory.

1. Acts That Affect the Group as a Whole

Self-determination is a group right.⁹⁴ Proving a breach of a collective right hinges not upon the deprivation of the rights of an individual, but of the whole group communally.⁹⁵ As such, breaches of self-determination must affect the group as a whole. The application of this requirement will depend on the nature and size of the group and whether acts committed against individuals will have ramifications on the people to which those persons belong. For example, intentionally killing one person for the purposes of intimidation and coercion may affect the group as a whole. This may be compared with isolated incidents of discrimination against individuals, the effects of which may not affect the wider community. State policies that limit a peoples' access to government, undermine their cultural integrity or deny rights to education or employment, may breach self-determination.

2. Purpose and Intent

The purpose and intention behind an act plays a role in balancing the rights and interests of all peoples within a territory. Self-determination is not an absolute right and it cannot operate to disproportionately compromise the rights of other groups.⁹⁶ The intention behind an act may provide evidence of the rights of these other groups. The effect of an act in maintaining

87 For example, see ICCPR arts 25, 26 and 27 which inform the content of self-determination.

88 Resolution 2625 (1970) UN Doc A/RES/2625.

89 Cassese (n 16) 128.

90 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) UN Doc A/56/10 (Draft Articles) art 2.

91 See Crawford (n 32) Ch II.

92 Crawford (n 34) 82.

93 See *Corfu Channel* (Merits) [1949] ICJ Rep 4, 22.

94 *Kitok v Sweden* (n 39).

95 Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 International and Comparative Law Quarterly 102, 103.

96 H Hannum, 'Rethinking Self-Determination' (1994-1993) 34 Virginia Journal of International Law 1, 33.

the rights of one group is the main consideration. Accordingly, the intention of an act is a factual consideration which may provide evidence of the legal effect of an act. Self-determination of a group within a territory will be balanced against the self-determination of other peoples. If an act to protect one group is not proportional, a breach of self-determination will occur. Such was the case in the Wall Advisory Opinion, where the court considered the role of the wall in preventing terrorist attacks, but found it to be unjustified because it impeded the Palestinians' right to self-determination and breached international humanitarian law.⁹⁷

In the context of refugees and forced migrant communities, governments must be careful in ensuring that policies designed to protect the interests of the domestic population do not adversely affect the self-determination of the migrant communities. It is unlikely that a policy driven by economic considerations, particularly in a country that is relatively wealthy, will justify a breach of self-determination of refugee or forced migrant peoples. While the purpose of an act is not the primary consideration, it may play a role in balancing the interests between States, their citizens, and people vying for self-determination.

3. Violence and the Use of Force in Breach

States are prohibited from using force to deny people their right to self-determination. This principle has been expressed in numerous instruments, including Article 2(4) of the UN Charter, and Resolutions 1514,⁹⁸ 3314⁹⁹ and 2625.¹⁰⁰ The ICJ has further emphasised these principles in numerous cases.¹⁰¹ The use of force may breach self-determination by either undermining the ability of a peoples to exist (for example through acts of genocide), or by compromising a peoples' ability to access government through violence or threat of violence. The presence of such violence may make it easier to identify a breach because it is more likely to affect the whole group and compromise one or both of the elements of self-determination. The use of force to deny self-determination may also make available more remedial options as discussed below. From a practical perspective, moral reprobation stemming from an illegal use of force may spur the international community into recognising the rights of a refugee community to self-determination.

4. Failure to Meet Political Rights

Although the use of force has been one of the most common and prominent breaches of self-determination, the obligation is not limited only to cases of violence. Resolution 2625 expresses that access to political representation forms an integral part of self-determination.¹⁰² It further posits that discriminating between different peoples within a State in regards to their access to government will result in a breach of self-determination.¹⁰³ Nevertheless, this type of breach is generally more difficult to prove. There are several factors that influence a determination of a breach on the grounds of discrimination. The existence of a purely undemocratic government may not breach self-determination. This is because the principle was never designed to dictate the way in which a State organises its political, economic, social or cultural systems.¹⁰⁴ Some commentators have contested this view, suggesting that self-determination must be viewed in light of the political democratic rights expressed in the ICCPR¹⁰⁵. This view has received less State support because it attempts to apply some of the principles of ICCPR to non-contracting States.¹⁰⁶ There is certainly a lack of clarity in the scope of the law. However, the absence of State practice suggests that it is an area of self-determination that has not yet crystallised into hard law.

The above situation may be contrasted with a State whose government is representative of a select group of people, and excludes others, such as in the context of apartheid in South Africa. Exclusion from participation in government on the basis of belonging to a particular people is generally considered a breach of self-determination.¹⁰⁷ The implications for this in the context of refugee and forced migrant communities is that a continued denial of citizenship that has the effect of preventing access to government in a State where other peoples have access may effectively be a breach of self-determination.

97 Wall Advisory Opinion (n 33) 184.

98 Resolution 1514 (1960) UN Doc A/RES/1514.

99 UNGA, Definition of Aggression, Res 3314 (1974) UN Doc A/RES/3314, art 7.

100 Resolution 2625 (1970) UN Doc A/RES/2625.

101 Wall Advisory Opinion (n 33), 172; *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Advisory Opinion) [2005] ICJ Rep 168, 182.

102 Resolution 2625 (n 100).

103 *ibid.*

104 Emerson (n 63) 10.

105 ICCPR (n 37) art 25; Cassese (n 16) 61.

106 Cassese (n 16) 103.

107 See Resolution 2625 (n 100).

More generally, any gross discrimination in regards to the political participation of a peoples may breach self-determination. Consequently, where a refugee or forced migrant community qualifies as a peoples, prolonged denial of participation in government may breach their right of self-determination.

It must be added that although self-determination is in many ways informed by minority rights, the two concepts are distinct. Minorities do not have a right to self-determination unless they meet the definition of peoples.

5. Economic, Social and Cultural Rights

Self-determination as expressed under common Article 1 of the ICCPR and ICESCR states that the right of peoples to freely dispose of their natural wealth and resources is a part of self-determination. This is an area frequently championed by indigenous groups. For example, the Human Rights Committee stated with regard to Sweden that it was concerned that a lack of consultation on decisions which affected the traditional economic activities of the Sami people, such as mining and forestry, were threatening their rights to self-determination.¹⁰⁸ In other words, self-determination may be violated where a State's act substantially compromises the economic activity of a peoples when that economic activity is required for the preservation of their identity. Of course, breach will depend upon the nature of the economic activities of the group. Of particular importance is the reliance of the group on certain activities for their cultural or economic welfare and the manner in which an economic activity has been compromised by a State's act.

Similarly, social and cultural rights may be breached if a State's act fundamentally undermines a peoples' ability to practice and preserve their culture.¹⁰⁹ An example of such an act would be denying peoples' access to education in their own language.¹¹⁰ However, as expressed above, self-determination is essentially a balancing act. If the provision of social and cultural rights to one peoples comes at the expense of another, it is not commensurate with self-determination. In the context of refugee populations it is necessary to examine the level of substantive discrimination in education.

C. Remedies

A State that is responsible for a breach of international law must cease the act (if it is continuing) and make full reparation for the injury caused by the internationally wrongful act.¹¹¹ A breach of self-determination will largely necessitate cessation of the wrongful act and satisfaction. Because the injury inflicted in a breach of self-determination is largely a moral wrong,¹¹² restitution and compensation will often not be appropriate remedies. The main focus in remedying a breach of self-determination has been the question of how best to cease the internationally wrongful act; that is, how to best grant self-determination. Remedies for granting self-determination generally have been described as internal and external - that is, remedies which ameliorate a peoples' position within a State's territorial boundaries, and remedies that alter a State's territorial boundaries.

1. External Self-Determination

The availability of external self-determination is highly contentious. This is because it conflicts with a number of fundamental rules of international law. One of the most prominent examples of these rules is the principle of territorial integrity. Like self-determination, territorial integrity is expressed in the UN Charter under Articles 2(4) and 2(7). This principle suggests that self-determination cannot support an action that would dismember or impair the territory or political unity of a State.¹¹³ However, Resolution 2625,¹¹⁴ which according to the ICJ reflects international legal custom,¹¹⁵ states that the principle of territorial integrity will not act to protect States that breach the principle of self-determination. Numerous authors have

108 Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee Sweden (24 April 2002) CCPR/CO/74/SWE.

109 Joseph, Schultz and Castan (n 38) 753.

110 See *German Minority Schools in Polish Upper Silesia* (Advisory Opinion) [1924] PCIJ Rep, Series A/B No 40, 4; *Minority Schools in Albania* (Advisory Opinion) [1935] PCIJ Rep, Series A/B No 62, 5.

111 ILC, 'Draft Articles' (2001) UN Doc A/56/10, art 1.

112 Because there is no material or quantifiable damage.

113 Resolution 1514 (1960) UN Doc A/RES/1514.

114 Resolution 2625 (n 100).

115 Wall Advisory Opinion (n 33) 171.

contended that rights to external self-determination exist under international law.¹¹⁶ It must be further noted that if self-determination is a norm of *jus cogens*, any argument based on territorial integrity is untenable.

Nevertheless, the General Assembly also reaffirmed in Resolution 2625¹¹⁷ that the maintenance of international peace and security was the main objective of international law. Accordingly, self-determination cannot operate to destabilise otherwise stable States or threaten international peace and security. As Anaya posits: ‘only in limited circumstances would the cure be better than the disease’.¹¹⁸ If solutions exist that would maintain the international *status quo*, and re-establish a peoples’ rights, then those remedies must be primary.¹¹⁹ This suggests that simple breaches of political, social or economic rights will generally not be enough to warrant such an extreme remedy. Of course, the illegal use of force in a breach will likely limit the remedial options available, because the rule of law may not be strong enough to protect a peoples through legal rights. Such is the case in States involved in civil war. External self-determination is, by its very nature, an extreme remedy and as such it will only be available in situations where no other remedy is available. While theoretically possible, this is practically very difficult to justify with refugee communities.

Another fundamental requirement of external self-determination is the existence of a territory that is readily severable. This requirement is often difficult to meet. While a peoples may be a majority within a territory, self-determination cannot compromise the rights of any minorities within the region. Any exercise of external self-determination in those places would compromise the rights of other peoples within those territories. As Dinstein suggests: ‘[w]hen a people is dispersed all over a country - and constitutes a minority in each of its parts - its secession would signify not (legitimate) self-government, but (unjustifiable) domination of others.’¹²⁰ These sentiments are expressed in Resolution 1541, which states that secession can only occur on the basis of complete equality between peoples.¹²¹ For self-determination to be available for refugees and forced migrants, communities would need to be located in segregated communities like camps or ghettos. These would need to be distinct from other cities and communities to ensure that the rights of other peoples are equally respected.

The process involved in implementing a remedy for breach of self-determination is equally as important as the outcome. Self-determination is a right that relates to process and it concerns not just who makes the decisions, but how it is done with regard to accountability and impartial supervision.¹²² External self-determination will only be available if such a process reveals a need and a demand within the community for autonomy. This determination must go beyond the demands of the political groups or national liberation movements that represent the interests of a peoples. In other words, the consent of a peoples is a critical factor in any remedy.

The external self-determination of a refugee community has occurred once before, through the creation of Israel. Nevertheless, the ongoing conflict that has resulted in the denial of the Palestinians’ right to self-determination reveals the practical difficulty in protecting the rights of all peoples affected by secession. The likelihood of a migrant community successfully establishing a claim over a territory without compromising the rights of other peoples to self-determination is small.

2. Internal Self-Determination

Internal self-determination refers to the right of a peoples to choose their political status within a State, to exercise meaningful political participation, or to preserve their cultural system. Internal self-determination is highly intertwined with the nature of the breach in contention. Consequently, remedies may take many different forms.

Resolution 2625 grants a right of equal access to government rather than equal rights.¹²³ The implication of this is that in regards to breach of political representation, a State may not be required to grant full political equality. Self-determination does not necessitate the implementation of democratic representation. In the context of refugees and forced migrant communities internal self-determination may manifest itself in the form of granting citizenship to all members of a peoples. This would

116 Summers (n 63) 340; Nanda (n 25) 89; Cf Hannum (n 96) 42.

117 Resolution 2625 (n 100).

118 S James Anaya, ‘A Contemporary Definition of the International Norm of Self-Determination’ (1993) 3 *Transnational Law and Contemporary Problems* 131, 163. This proposition is further illustrated in *Frontier Dispute (Burkina Faso v Mali)* (Advisory Opinion) [1986] ICJ Rep 554, 567.

119 Cassese (n 16) 120.

120 Dinstein (n 95) 109.

121 Resolution 1541 (1960) UN Doc A/RES/1541.

122 Benedict Kingsbury, ‘Claims by Non-State Groups in International Law’ (1992) 25 *Cornell International Law Journal* 481, 504.

123 Cassese (n 16) 114.

be considered an adequate remedy if it granted access to political representation, equal to that of the rest of the population. Citizenship is not the only remedial option available. Citizenship does not have to be granted if a peoples are given access to government through some other form of representative body or organisation. Although such representation may not entail full substantive equality, it would enable access to government. Such an organisation would need to be acting under the control of the peoples which it represents and play a meaningful role in government. Nevertheless, this solution is probably only a short-term remedy. Entrenching discrimination may ultimately undermine the solidarity of the community. Granting citizenship to refugees may be the most effective remedy in practice.

In terms of economic, cultural and social rights violations, self-determination of one group must be balanced with the self-determination of other peoples within a territory. Of course some rights will not necessarily conflict with the interests of others. For example the right to work and the right to practice religious beliefs will generally not conflict. However, where a peoples are a significant minority within a territory, providing education in a peoples language may divert limited resources from the majority. In this situation, remedies would have to take a more limited form. The critical requirement in this circumstance would be the preservation of a peoples' culture and identity and this may be achieved through a variety of options beyond providing educational facilities that are equal to the majority. For example, providing weekly cultural classes may satisfy this requirement if a minority is relatively small. Where a peoples form a larger proportion of a population or a majority within a region of a State, more steps may needed to preserve their cultural identity.

D. Conclusion

This chapter has discussed the nature of a breach of self-determination and the remedies available. Principles of State responsibility play a key role in the determination of a breach. Attribution of an act to an organ of a State is the first step is ascertaining responsibility. Breach of self-determination is at times difficult to prove because it is a collective right and as such must affect the group as a whole. Self-determination is in many respects a balancing of the competing interests of different peoples. This may prove challenging to the interests of refugee and forced migrant communities particularly if force is involved on both sides. The intention behind an act may be relevant in analysing this balance. This chapter has discussed two types of breach - breach through the use of force and breach through discrimination. Self-determination will often be breached by a State that enters into a conflict for the purposes of suppressing a peoples vying for self-determination, rather than specific acts of force.

Breach through discrimination does not entail a right of democratic representation. It concerns equal rights of access to government and exclusion from such access may result in a breach. Similarly, self-determination will also be violated where a particular peoples is prevented from preserving their cultural and economic traditions and language. Self-determination is often remedied through the cessation of the breaching act and satisfaction. Because of the vulnerability of refugee and forced migrant communities, States may face more stringent obligations in regards to the rights of these communities.

Cessation of an act that breaches self-determination has broadly been categorised into two categories: internal and external self-determination. External self-determination is only available in extreme situations where a territory is readily severable and no other remedial option is available. Internal self-determination has more flexible remedial options and largely concerns access to government by all peoples and balancing competing interests between peoples. The main tenant of any remedy available under self-determination is the preservation of a peoples' identity and enabling equal access to government. This chapter has shown the circumstances where refugees and forced migrant peoples may have their rights breached and thus seek remedies under international law.

V. Conclusion

This article has examined the application of the principle of self-determination to refugee and forced migrant communities. Analysing the definition of peoples under self-determination, a working definition was crafted based on the existence of an ethnic group that possesses a political body and is recognised by other States. It was found that refugee and forced migrant groups may potentially meet this definition.

The third chapter investigated the source of the principle under international law and the threshold requirements of self-determination. It discussed the application of the principle beyond the scope of colonialism and found a more general requirement of oppression. Thus refugees and forced migrants who as a group experience oppression may fit within the structure of self-determination. It further found that a historical connection with a territory is not a necessary precondition

for the exercise of the rights under self-determination. Instead some connection to a territory needs to be established through a test of permanence. This means that any permanent peoples, including the subjects of the paper, may potentially possess a right to self-determination.

The fourth chapter analysed the way in which self-determination may be breached and the remedies that are available. Self-determination may be breached through compromising the existence of a peoples or through preventing them from having access to government. The use of force may breach both aspects of self-determination. Breach of self-determination is not limited to the use of force. It may occur through preventing a people from accessing government, or through policies that fail to preserve the cultural integrity of the group.

The remedies that are available under self-determination are dependent on the nature of the breach. External self-determination and a right of secession may be available where no other option exists under international law. Otherwise internal self-determination, through changing the internal governing structure of a State, will be the most appropriate remedy for a breach.

This paper has shown that self-determination is a right that is difficult to exercise beyond the context of colonialism. Fundamentally, although self-determination may be available to refugee and forced migrant communities, there are high threshold requirements that are difficult for any group to achieve. The fact that there are numerous cases of the right being successfully exercised demonstrates that the right is more than just a theoretical principle. Issues surrounding international law and migration are becoming increasingly topical. There is thus a potential for these issues to become much more prominent in the future. ■