‘LET THE PEOPLE DECIDE’

SELF-DETERMINATION, LIBERATION
FROM THE COLONIAL EXPERIENCE
AND THE HUMAN RIGHTS APPROACH

Amy Michelle Maguire, BA, LLB (Hons)
Thesis submitted for the degree of Doctor of Philosophy
July 2011
STATEMENT OF ORIGINALITY

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying subject to the provisions of the Copyright Act 1968.

......................................

Amy Maguire
I acknowledge the support of Newcastle Law School, and the University of Newcastle Equity Research Fellowship, in my professional life and in the completion of this thesis. Many thanks to my colleagues in the School for their friendship and advice. Particular thanks to my teaching colleague Jeff McGee, for his encouragement and for acting as a very helpful sounding board. Thanks, also, to my students, who have inspired me to explore creative ways of thinking about international law.

Thanks to Dr Deirdre Howard-Wagner and Dr Jackson Maogoto, my initial supervisors, for encouraging me to enter into a life in research, and for assisting me in shaping the path for this project. I am very grateful to Kate Lindsay, of Newcastle Law School, for providing extremely helpful supervision and advice throughout the analytical and writing stages of this thesis, and through to completion. I am also most grateful to Professor Gillian Triggs, of Sydney Law School, for supervising the final stage of my research, and providing me with the great benefits of her expertise, insight and encouragement.

My deepest gratitude is to my family, for their love and support. Thank you to the Harrison clan in Australia, and to the Maguire family in Ireland. My husband, Marty, inspires me every day. He has been a patient and loyal adviser, critic and source of motivation. My mother, Elizabeth, has been a constant source of encouragement and love. I give my very dear thanks to these two most special people. I would like to dedicate my thesis to my daughter, Niamh. She has brought beauty and wonder into my life and changed my perspective on the world, for the better.
**TABLE OF CONTENTS**

**ABSTRACT**

**INTRODUCTION**

* A. Context
  1. Defining self-determination? 4

* B. Problem
  1. Self-determination: Contemporary challenges 10
  2. Contemporary claimants’ experience of colonialism 12

* C. Solution
  1. Aims 14
  2. Contents of the thesis 16
  3. Theory 24

**CHAPTER 1 METHODOLOGY**

* A. ‘Traditional’ Legal Research and Socio-Legal Research 30

* B. Grounded Theory Research
  1. What is grounded theory? 33
  2. How have I applied grounded theory methods in this research? 34

**CHAPTER 2 SELF-DETERMINATION: LEGAL HISTORY**

* A. Self-determination: Origins and twentieth century development 51
  1. Revolutionary Origins: The emergence of the principle of self-determination 51
  2. Wilsonian self-determination: A right of ‘nations’ 53
  5. A Central Element in the Framework of International Law:
     Self-determination in the International Bill of Rights 67
  6. Post-Colonial? Recent manifestations of self-determination 75
CHAPTER 3 SELF-DETERMINATION: CONTEMPORARY CHALLENGES 82
1. Self-determination as *jus cogens* 85
2. How can self-determination be validly exercised? 87
3. ‘Peoples’ v ‘Territories’ v ‘Human Rights’: Do we have to define the ‘self’? 90
4. International Law v International Politics: Problems of implementation and enforcement 95

CHAPTER 4 TRANSFORMING THE LAW OF SELF-DETERMINATION: THE CONTINUING MISSION OF DECOLONISATION 98
A. A Case Study of Self-determination in the Twenty-First Century: Legal consequences of the construction of a wall in the Occupied Palestinian Territory 101
B. The Relationship Between Self-determination and Anti-colonialism 107
1. Key perspectives on the relationship between colonialism and self-determination 107
2. Contemporary perspectives from Irish nationalists and Indigenous peoples in Australia on the meaning of colonialism 113
C. Decolonising the Law of Self-determination 120
1. The variety of legitimate contemporary manifestations of self-determination 121
2. Developing an inclusive international legal system 127

CHAPTER 5 TRANSFORMING THE LAW OF SELF-DETERMINATION: THE HUMAN RIGHTS APPROACH 132
A. Traditional Approaches to the ‘Self’: Territories or peoples? 134
B. Limitations of the Contemporary Human Rights Framework in Protecting the Right of Self-determination 137
C. The Human Rights Approach to Self-determination 140
1. Positive features of the human rights approach in the contemporary legal context 144
2. Implementing the human rights approach: Self-determination as ongoing process
3. Balancing self-determination, minority rights protection and identity through the human rights approach

### CHAPTER 6 SELF-DETERMINATION AND IRISH NATIONALISTS: THE COLONIAL EXPERIENCE, THE GOOD FRIDAY AGREEMENT AND THE ROLE OF INTERNATIONAL LAW

1. The meaning of self-determination from Irish nationalist perspectives
   **A. The Absence of International Recognition of the Colonial Experiences of Irish Nationalists**
   1. International law and the failure to acknowledge colonialism in Ireland
   2. The role of the ‘internal’ self-determination proposal as a means of stifling contemporary claims
   **B. Aspects of the Historical and Contemporary Irish Nationalist Experience of Colonialism**
   1. Foreign administration by Britain
   2. Social imperialism and discrimination
   3. Cultural dominance
   **C. The Good Friday Agreement and Self-determination in Ireland**
   1. The value of the Good Friday Agreement in building self-determination
   2. Key provisions of the Good Friday Agreement and ‘constructive ambiguity’
   3. The Good Friday Agreement as a transitional document – how will it develop?
   **D. The Necessary Role of the International Legal System**
   1. The need for an active role for international law
   2. Proposals for decolonising international law
   3. Using the human rights approach to self-determination in Ireland
   4. How might self-determination manifest in Ireland in the future?
CHAPTER 7 SELF-DETERMINATION AND INDIGENOUS PEOPLES IN
AUSTRALIA: THE COLONIAL EXPERIENCE, EXPERIMENTS IN SELF-
DETERMINATION AND THE ROLE OF INTERNATIONAL LAW 223

1. The meaning of self-determination from the perspective of Indigenous peoples in Australia 225

A. The Capacity of International Law to Promote Indigenous Self-determination 227

1. The status of Indigenous peoples in international law 228

2. The role of the ‘internal’ self-determination proposal as a means of stifling contemporary claims 240

B. Aspects of the Historical and Contemporary Indigenous Experience of Colonialism in Australia 242

1. Indigenous peoples and the Australian state 242

2. Social inequality, racism and discrimination 254

3. Cultural dominance 258

C. Experiments in Self-determination for Indigenous peoples in Australia 261

1. The legitimacy of Indigenous claims to self-determination 262

2. The state of Indigenous self-determination in Australia 264

3. The Aboriginal and Torres Strait Islander Commission and governance 266

4. Post-ATSIC developments in Indigenous affairs 274

D. The Necessary Role of the International Legal System 286

1. The need for an active role for international law 286

2. Proposals for decolonising international law 290

3. Developing the human rights approach to Indigenous self-determination in Australia 293


CONCLUSION 303

BIBLIOGRAPHY 309
ABSTRACT

The most prominent engagement of the right of self-determination to date was in the decolonisation era, when it was asserted to facilitate the emergence to independence of formerly colonised peoples. The newly decolonised states met the ‘salt-water’ test of colonialism, and their boundaries were drawn on the basis of *uti possidetis juris*.

Self-determination is less frequently asserted today, however, contemporary ‘hard cases’ remain. Of these cases, some involve peoples who can demonstrate a continuing colonial experience. For varying reasons, these claimants do not meet the salt-water colonial test and their claims are often overlooked by the international community. Their circumstances are regarded mostly as internal political issues for their administering states. This is unjust and inhibitive of creative self-determination solutions in multi-ethnic states. Self-determination, as a universal human right, retains the potential to meet the needs of these contemporary, anti-colonial claimants. However, it must be interpreted in new ways in order to adapt to the differing circumstances of contemporary claimants.

This thesis examines the significance of the colonial experience for two contemporary claimant peoples; Irish nationalists in the North of Ireland, and Indigenous peoples in Australia. I argue that the contemporary colonial experiences of these claimant groups must be acknowledged and addressed, in order to evaluate their self-determination claims in a context of truth and justice. I also argue that a human rights-based approach to the right of self-determination must be established, to address the circumstances of contemporary claimants and enable the balancing of their rights with those of the peoples with whom they share territory.

Data gathered through in-depth interviews has shaped my findings regarding the colonial experience of contemporary self-determination claimants, and the range of means by which a twenty-first century approach to the right may be developed. This data proves the value of consulting with rights claimants, and the ways in which their perspectives might reshape state responses to self-determination issues. States willing to respond to the perspectives of rights claimants can improve their international standing, strengthen human rights discourse and enhance the wellbeing of all groups in their societies.
INTRODUCTION
'Let the People Decide'

Self-determination is the right of a people to determine its political destiny, and freely pursue cultural, social and economic development. Self-determination is an essential element in the international human rights framework. The most prominent engagement of the right to date was in the decolonisation era, when formerly colonised peoples asserted self-determination as the basis for their claims to independence. The resulting decolonised states met the ‘salt-water’ test of colonialism, and their boundaries were drawn on the basis of *uti possidetis juris*.

Self-determination is less frequently asserted today, and the scope and application of the right continue to be contested. Contemporary ‘hard cases’ remain, some involving the self-determination claims of peoples who can demonstrate a continuing colonial experience. For varying reasons, these claimants do not meet the salt-water colonial test and their claims are often overlooked by the international community, which continues to characterise self-determination as primarily a right concerned with the emergence to independence of ‘traditional’ colonies. The circumstances of contemporary, anti-colonial claimants are regarded mostly as internal political issues for their administering states. This is unjust and inhibitive of creative self-determination solutions in multi-ethnic states. Indeed, international law in this area risks redundancy, and failure on human rights grounds, if it does not adapt to contemporary, anti-colonial claims. Self-determination is a universally applicable human right, which must be interpreted in new ways to adapt to the circumstances of contemporary claimants.

In this thesis, I employ data gathered through in-depth interviews with self-determination claimants, and others with expertise in the field, to explore the contemporary colonial experiences of Irish nationalists in the North of Ireland and Indigenous peoples in

---


Australia. The self-determination claims of these groups ought to be evaluated in the context of their contemporary colonial experiences, in order to promote truth and justice. Once the colonial experiences of claimant groups are acknowledged and addressed, their self-determination claims ought to receive full and fair evaluation. I promote the development of a human rights approach to the evaluation of self-determination claims, in order that the rights and interests of peoples sharing the same territory may be balanced equitably.

Of the right of self-determination, Sir Ivor Jennings famously said:

On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.4

Jennings’ view reflects an archaic characterisation of self-determination, which fails to acknowledge the significance of a claimant group’s particular circumstances or the flexible nature of the right. It also demonstrates the historically disempowered position of self-determination claimants under international law. I have used Jennings’ famous phrase in the title of this thesis in order to subvert its original meaning. Through the use of a human rights-based framework for the evaluation of self-determination claims, the peoples Jennings referred to will be empowered to assume standing as legal persons and rights-bearers within the international legal framework.

This Introduction has three main parts. In Part A, I situate this research within its legal context, by describing the evolving meaning and legal history of self-determination. Part B raises the challenges which limit the capacity of self-determination to meet the needs of contemporary claimants, particularly those who assert a continuing colonial experience. In Part C, I outline the solutions that I will propose to address these problems.5 This final

---

3 These research interviews were conducted in 2005-2006, and the data gathered was coded in 2007-2008. In mid-2009, I took a year’s parental leave. In 2010, I returned to my role as an Associate Lecturer at Newcastle Law School in a part-time capacity. I gratefully acknowledge the assistance of the University of Newcastle Equity Research Fellowship, which has enabled me to spend Semester 1, 2011, engaged entirely in the completion of this thesis.


5 This Introduction is structured according to the context-problem-solution formula, proposed in Wayne C Booth, Gregory G Colomb and Joseph M Williams, The Craft of Research (3rd ed, 2008) and Joseph M Williams and Gregory G Colomb, Style: Lessons in Clarity and Grace (10th ed, 2010).
part introduces the aims of the thesis, contents and methodology, relevant case studies and the theory that I have developed through qualitative and doctrinal research.

A. Context

The right of self-determination is protected by common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.6

Self-determination is essential to the human rights framework, as demonstrated by its centrality in these two key documents of international human rights law. The phrase ‘all peoples’ demonstrates that the right is universal in application.7 In the following section, I explore a range of perspectives on the meaning of self-determination. Some contested aspects of the meaning and scope of the right will be introduced later in this Introduction.

1 Defining self-determination?

The statement of self-determination in Article 1, ICCPR and ICESCR, was interpreted in the Helsinki Final Act of the Organization for Security and Co-operation in Europe:

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.8

This statement indicates that self-determination, like other human rights, does not cease upon its first exercise. Rather, it has an ongoing character, and must be reinterpreted to

---

7 For example see: Importance of the Universal Realisation of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, GA Resolution 3382 (XXX) (1975).
8 Conference on Security and Co-operation in Europe, Final Act of the 1st Summit of Heads of State or Government, Helsinki, 1 August 1975, Article 1 (a) VIII.
meet the shifting circumstances of societies. For this reason, self-determination resists precise definition. Rather, commentary serves to illuminate the various facets of the right.

Self-determination entails the right of a ‘people’ to choose their own form of political organisation and relationship to other groups. However, self-determination goes beyond this ‘essence’ of political control, to extend ‘full rights in the cultural, economic and political spheres’. The right represents the means for a people ‘to preserve its cultural, ethnic, historical, or territorial identity…’ Indeed, the economic, social, cultural and political dimensions of self-determination are inter-linked. Therefore, self-determination has significance far beyond the issues of state territory and sovereignty, and assertions of the right may or may not include claims to independent statehood.

Anaya reflects on the human context of self-determination, stating that the right ‘derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality…’ Thornberry continues on this note by describing self-determination as a ‘concept of liberation’. These more emotive descriptions of self-determination reflect the universal status of the right. As McCorquodale states:

The right of self-determination applies to all situations where peoples are subject to oppression by subjugation, domination and exploitation by others. It is applicable to all territories, colonial or not, and to all peoples.

In this thesis, I will promote this broad conception of self-determination, in the context of its continuing mission of decolonisation.

Self-determination is a central principle in the international human rights framework. According to the UN Rapporteur on self-determination, Héctor Gros Espiell,

---

...the effective exercise of a people’s right to self-determination is an essential condition or prerequisite...for the genuine existence of the other human rights and freedoms. Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the full enjoyment of all rights, and the political, economic, social and cultural progress of all human beings, without any form of discrimination. Consequently, human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. …\(^\text{16}\)

Anaya has echoed this characterisation of self-determination, describing the right as a 'standard of legitimacy' and 'configurative principle or framework complemented by the more specific human rights norms'.\(^\text{17}\) The central importance of self-determination in the human rights framework requires the continued evaluation of the meaning and scope of the right. As global and local political, economic and cultural circumstances shift, self-determination must be capable of adjustment to meet those circumstances.

Self-determination is the most commonly asserted collective human right. James Crawford identifies four distinguishing characteristics of the right:

1. It is a right of a people against the government which administers it;
2. It is also a right of a people against other governments which seek to assist the administering government in denying the people's right to self-determination;
3. The right is vested in a people, never in a government; and
4. It is a 'genuinely collective' right, vested in the people as a group.\(^\text{18}\)

Elsewhere, Crawford describes self-determination as 'the collective expression of the individual rights of the members of each political society'.\(^\text{19}\) Unlike the majority of human rights, which are framed in individualistic terms, self-determination presents a challenge to the dominance of states in the international legal system. The right legitimates expressions of group identity\(^\text{20}\) and recognises communities of people as constituents in the international legal community.

In the *Western Sahara* case, Judge Dillard identified the ‘cardinal restraint’ imposed by self-determination: ‘It is for the people to determine the destiny of the territory and not the territory the destiny of the people.’

The capacity of a people to determine the future of a territory has manifested in a variety of ways since the right of self-determination has been enshrined in international law. Judge Dillard’s finding that a people must be entitled to determine its own destiny continues to resonate, and must be understood to apply to the range of self-determination solutions, from independent statehood to forms of autonomy within a state.

As was made clear in the interpretation of self-determination in the Helsinki Final Act, self-determination is a process, rather than any single outcome of that process. Therefore, self-determination may be described as a right with many ‘faces’, several of which have been identified by Kirgis. These include freedom from colonialism, secession, reunification of formerly divided states, limited autonomy within the state, protection as a minority group, and choice of form of government. Each people exercising self-determination must shape the manifestation of the right in their particular circumstances, in accordance with international law. All peoples may continue to aspire to a greater degree of self-determination in the future, whether through changes to borders, changes to governments, or changes to social and economic structures.

There are at least four schools of thought in relation to self-determination: a ‘colonial school’ which limits the right to the strict colonial context and thus sees it as of diminishing relevance today; an ‘historical school’ that defines peoples as ‘historical collectivities’; a ‘human rights school’ which seeks to promote global peace through the extension of self-determination to all oppressed peoples; and a ‘political school’ which adjudicates on the right on the basis of *realpolitik* concerns rather than international law.

More restrictive approaches to the right reflect concern over self-determination’s ‘demonstration effect’; that is, the potential for the right to be exercised in an extremely...
broad range of cases, and the splitting of the globe into an unmanageable number of political units through several claims to secession. Some also argue that self-determination movements can manifest in violent conflict, even though many recent secessionist movements for self-determination – for example in the former Czechoslovakia and in Quebec – have been peaceful and democratic. This thesis is located within the human rights school. I argue that self-determination extends to peoples outside the typical colonial context, and that rights claims must be evaluated in the context of the broader human rights framework.

The universal and ongoing nature of the right to self-determination mandates careful evaluation of any people’s claim to the right, or any claim that the right is being violated. Anaya argues that evaluation of such claims should consider the questions:

1. Has there been a violation of self-determination?
2. If so, what is the appropriate remedy?

Such an approach opens the debate to the perspectives of all affected parties, and enables a range of self-determination solutions, many of which may pose no threat to the sovereignty of established states. In this thesis, I explore two cases in which the right to self-determination is being violated, and suggest appropriate remedies.

I argue that the right to self-determination maintains emancipatory potential in the twenty-first century. Indeed, the main objective of self-determination is

the protection, preservation, strengthening and development of the cultural, ethnic and/or historical identity or individuality (the ‘self’) of a collectivity…and thus guaranteeing a people’s freedom and existence.

Conceived of from this perspective, self-determination must be continually re-evaluated in terms of its scope and meaning, in order that it may maintain its central role in the framework of international human rights law. Especially considering the ‘hard cases’ of

self-determination in the twenty-first century, the continued legal relevance of the right ‘depends on its expansive redefinition’.29

Such a project of expansive redefinition is in line with the process of ‘constant evolution’ which self-determination has undergone since the late eighteenth century.30 Throughout its history, the story of self-determination has been

the story of adaptation to the evolving struggles of peoples attempting to achieve effective control over their own destinies, especially in reaction to circumstances that are discriminatory and oppressive.31

The history of global politics is characterised by conquest, annexation, subjugation, union, and colonialism; in this context, self-determination has evolved as the twentieth century’s (and potentially the twenty-first century’s) ‘primary expression of disapproval of involuntary political association’.32 As such, self-determination has taken on key roles in almost all the re-drawings of maps to take place over the past 150 years, from the successive waves of decolonisation, to Germany, to Yugoslavia, and into the present.33 In Chapter 2, I explore the legal history of self-determination, with particular focus on the role the right has played in international affairs in the past six decades. In the following section, I introduce some of the challenges self-determination faces, in maintaining its mission of decolonisation. A key challenge for the law of self-determination, in the twenty-first century, is to meet the aspirations of claimant groups that do not fit the traditional colonial paradigm.

---


B. Problem

Despite its central status in international human rights law, self-determination has been, and remains, a contested principle. Uniquely within the human rights framework, assertions of self-determination have the capacity to challenge the power and status of states. Consequently, states have sought to limit the capacity of peoples to assert self-determination, particularly where such assertions threaten existing state borders. There is a disjunction between self-determination in law and self-determination in state practice. In this section, I introduce the contemporary problems of self-determination relevant to the position of the claimant peoples I have studied. These contemporary challenges are examined in more detail in Chapter 3.

1. Self-determination: Contemporary challenges

The International Court of Justice has confirmed that self-determination has *jus cogens* status; it is a non-derogable principle of international law, which all states are bound to recognise and protect.34 However, some commentators have raised the question of whether the *jus cogens* status of self-determination extends beyond its decolonisation aspect.35 If not, claimant groups whose circumstances do not fit the traditional characterisation of ‘salt-water’ colonies36 may be denied full realisation of the right. As I will discuss in Chapter 2, the exercise of self-determination peaked during the decolonisation period of the 1960s and 1970s. Some contemporary commentators assert that self-determination has a limited role to play in international affairs in the twenty-first century.37 There is a risk that decolonisation will be regarded as an historical phenomenon, rather than an ongoing imperative.

Alongside the claim that the role of self-determination has significantly diminished in recent decades, the right has also been challenged as incapable of adequate definition. For

---

34 *Case Concerning East Timor (Portugal v Australia)* ICJ Rep 1995 90, International Court of Justice at [29].
36 That is, colonies administered by a distant metropolitan power.
example, Hannum regards self-determination as vague and imprecise,\textsuperscript{38} while Crawford describes it as obscure law, weakened by uncertainties.\textsuperscript{39} In this sense, the very flexibility of self-determination, designed to ensure context-specific exercises of the right, is characterised as a weakness of the right. Arguably, this criticism reflects a positivist perspective, which demands certainty and verifiability in legal principles. As I will demonstrate in this thesis, such a positivist approach will produce injustice, by excluding legitimate self-determination claims on the basis that they do not match an archaic paradigm.

Some contemporary commentators have sought to limit the meaning and scope of self-determination by proposing a distinction between ‘external’ and ‘internal’ self-determination, and the types of people entitled to exercise a particular form of the right.\textsuperscript{40} For example, the Canadian Supreme Court rejected the claim of Quebec to secede from Canada, finding that self-determination is ‘normally fulfilled’ through an internal exercise within existing state boundaries.\textsuperscript{41} The risk of this categorisation is that existing geographical and political boundaries will be reinforced, regardless of their legitimacy.

The recognition of self-determination for certain claimant groups has been limited by the maintenance of a threshold test, requiring that claimants meet a definition of ‘peoplehood’. This approach reflects the famous comment made by Jennings, referred to in the title of this thesis.\textsuperscript{42} In Chapter 3, I argue that the imposition of a threshold test, narrowing the category of potential self-determination claimants, undermines the universal and ongoing status of the right under international law. No state or group of states is entitled to set an arbitrary limit on the constitution of the international

\textsuperscript{38} Hurst Hannum, \textit{Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights} (Revised ed, 1996), 46.
\textsuperscript{40} See, for example, \textit{Reference re Secession of Quebec} 37 ILM 1340 (1998) (Supreme Court of Canada), Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005), Noel Pearson, 'Uses of layered identities', \textit{Weekend Australian} 18-19 November 2006, 28. Christine Bell is a legal academic, with origins in the British unionist community in Northern Ireland.
\textsuperscript{41} \textit{Reference re Secession of Quebec} 37 ILM 1340 (1998) (Supreme Court of Canada) at [126]
community, particularly in light of the dramatic transformation of that community from 60 United Nations member states in 1950 to 192 states in 2011.43

The range of contemporary challenges to the meaning and scope of self-determination result from the subjectivity of human rights law to international politics. The interests of superpowers and other states have been allowed to dominate over some self-determination claims in the evaluation of those claims’ legitimacy.44 Claimant peoples have been powerless to prevent this imbalance, because states dominate power relations with non-state entities, particularly Indigenous peoples,45 and are typically able to marginalise self-determination claims when they consider this politically expedient.46 In the absence of an international governmental structure, states may choose to violate the international law on self-determination, with minimal risk of sanction. Thus, states have often interpreted self-determination in a ‘selective, inconsistent and manipulative manner’, promoting the view that self-determination is confusing and inarticulate.47 The unresolved ‘hard cases’ of self-determination, including claims advanced by Irish nationalists in the North of Ireland and Indigenous peoples in Australia, continue to suffer as a result of state practice.

2. Contemporary claimants’ experiences of colonialism

In the previous section, I introduced significant conceptual problems facing self-determination in the twenty-first century. It is crucial to acknowledge, however, that those conceptual problems have practical consequences. Some contemporary claimants to self-determination raise hard cases, because they do not fit the traditional colonial model to

43 As Mick Dodson questions: ‘What is the point of a world order that supports self-determination, if the right’s exercise is generally disallowed?’ Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006). Mick Dodson is a Yawuru man, legal academic and former member of the UN Permanent Forum on Indigenous Issues.
45 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006). Irabinna Rigney is an Aboriginal educationalist, and a member of the Narungga, Ngarrindjeri, Andynamathanha and Kaurna language groups.
46 Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006). Terry Enright is a member of the Irish nationalist community in Belfast, and a long-time community worker and human rights activist.
which self-determination has frequently been applied over the past 60 years. Yet, these 
claimants can prove a contemporary colonial experience that justifies renewed evaluation 
of their claims to self-determination. In Chapter 3, I will argue that self-determination 
maintains a mission of decolonisation into the twenty-first century.

Irish nationalists in Northern Ireland have lived under British administration since the 
partition of Ireland in 1920.48 Partition and the subsequent modes of governance have 
delivered institutionalised discrimination against Irish nationalists in all spheres of social 
life. Yet, this part of the island has been settled by a large population of British people, 
over a period of several centuries. Therefore, Northern Ireland is not generally regarded 
as a traditional colonial case. It has not been treated as such by the international 
community; instead, it has been seen as an internal matter for Great Britain and Ireland. I 
will explore the contemporary colonial experience of Irish nationalists in the North of 
Ireland in Chapter 6, with particular focus on partition, the role of the British state in the 
political conflict, social imperialism and discrimination, and cultural dominance.

Similarly, Australia is largely a settler society, and the Indigenous inhabitants now 
constitute a very small proportion of the population. Since the arrival of Europeans, 
Indigenous peoples in Australia have been subjected to dispossession, violence and 
entrenched discrimination. However, as the position of Indigenous peoples in Australia 
does not conform to the traditional colonial model, their circumstances are largely 
regarded as a matter for the Australian state. I will explore the contemporary colonial 
experience of Indigenous peoples in Australia in Chapter 7, focusing on settlement and 
subsequent dominance, dispossession, discrimination, and cultural rights.

Conclusion

The idea of self-determination faces several conceptual challenges. It is subject to claims 
that its major objective – decolonisation – is almost or entirely complete. It is pilloried as 
vague and incapable of clear definition. Some have proposed categories of self-
determination, which would restrict many claimants to an ‘internal’ exercise of the right. 
Claimant groups continue to face a test of ‘peoplehood’, at odds with the status of self-

48 The entire island of Ireland was under British administration prior to partition.
determination as a universal human right. Each of these challenges reflects the broader problem of the subjectivity of international human rights law to the dominance of states in international politics.

It must be acknowledged that self-determination, and the entire human rights framework, is designed to protect and empower human beings. The conceptual challenges faced by self-determination produce a significant practical problem: international law is not adequately addressing the rights claims of peoples who do not conform to a traditional colonial paradigm, yet continue to experience the effects of colonialism. International law on self-determination risks conceptual redundancy, and practical failure on human rights grounds, if it does not adapt to contemporary, anti-colonial claims. In Part C of this Introduction, I outline the solutions I will propose to these challenges.

C. Solution

In order to retain relevance, rights must be reinterpreted over time, in accordance with changing circumstances. In Part A of this Introduction, I showed that self-determination is a central element in the international human rights framework. In Part B, I argued that self-determination faces a range of problems, and that these inhibit the capacity of the right to meet the needs of contemporary claimant groups who assert a colonial experience. In this part, I introduce my proposed solutions to these problems. This part sets out the aims of my research and this thesis, introduces my methodology and describes the contents of the thesis. I also explain my choice of case studies, and define my use of key terms. Finally, I introduce the two central elements of the theory I have generated through grounded theory research.

1. Aims

I decided to research the right to self-determination for several reasons. First, the right is central to the framework of human rights, yet its meaning and scope remain contested. So long as the right is labelled as uncertain or indeterminate, it deserves continued evaluation. Second, self-determination has been less prominent in international legal

commentary in recent decades, despite the persistence of several ‘hard’ cases. Third, some of these hard cases are advanced by groups claiming a contemporary form of colonial experience. Self-determination was essential to the process of decolonisation that peaked during the 1960s and 1970s. However, contemporary, anti-colonial assertions of self-determination do not fit the mould of those earlier cases of decolonisation. For these reasons, I decided to consider whether a new approach to self-determination is required, in order to address the particular circumstances of contemporary, anti-colonial claimants.

The central aim of this thesis is to propose a more just and effective approach to the evaluation of contemporary, anti-colonial self-determination claims. I pursue this aim through two key proposals. First, I argue that evaluations of contemporary self-determination claims must acknowledge the significance of the colonial experience for some claimant groups. Second, a ‘human rights approach’ must be pursued, to ensure that claimants’ rights are balanced with those of other individuals and groups sharing the same territory.

In all my research, I am interested in the social effects of law. Although I take doctrinal legal research as a starting point, I then situate law in its social context. In this research, I consider self-determination in context, through consideration of two case studies. By exploring two contemporary, anti-colonial claims to self-determination, I aim to assess the utility of self-determination for the claimant groups, and consider whether the right ought to be interpreted differently to meet twenty-first century demands. As I will explain in Chapter 1, my methodology has included research interviews with participants in Ireland and Australia. I have also chosen a significant legal event to consider in both sites; the Good Friday Agreement\(^\text{50}\) in Ireland, and the demise of the Aboriginal and Torres Strait Islander Commission and subsequent experiments in representative governance in Australia. My approach is non-traditional, in that it is not a positivist, doctrinal analysis of the state of international law. Rather, I aim to create space for the voices of self-determination claimants, and consider what their perspectives contribute to a contemporary understanding of the right.

\(^{50}\) Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement)
In order to pursue the central aim of my research, I developed a list of research questions. I have pursued these questions in my doctrinal research, my interviews with research participants, and in my reflections on the research as it evolved. My research questions are:

1. What is the role of law in facilitating the realisation of self-determination by claimant peoples?
2. Are there ways in which contemporary evaluations of self-determination claims could be improved and, if so, how?
3. What light do different case studies shed on the role of self-determination in the twenty-first century?
4. What is the significance of the colonial experience for the two contemporary claimant groups studied?
5. How should international law deal with contemporary, anti-colonial self-determination claims?
6. Is there an approach to self-determination capable of balancing the competing rights of different groups sharing the same territory?

In answering these questions, I have developed a thesis which meets my central aim. In the following section, I identify how I have organised my proposals in this thesis.

2. Contents of the thesis

This thesis contains seven substantive chapters, along with this Introduction, a Conclusion and a Bibliography. Chapter 1 is a methodology chapter, in which I explain my chosen methods of research and data analysis. In Chapter 2, ‘Self-Determination: Legal History’, I trace the development of the right in international law. Chapter 3, ‘Self-Determination: Contemporary Challenges’, builds on this discussion of the evolution of the right, identifying contemporary problems relating to its realisation. In Chapter 4, ‘Self-Determination and the Mission of Decolonisation’, I demonstrate that the right retains a role in decolonisation for contemporary rights claimants. Qualitative data is used extensively from this point in the thesis, as my findings are grounded primarily in that data. Chapter 5, ‘Self-Determination and the Human Rights Approach’, serves as a complement to Chapter 4. Whereas Chapter 4 raises the problem of the contemporary influence of colonialism on self-determination claimants, Chapter 5 proposes a human rights solution to the evaluation of those claims.
Chapters 6 and 7 include extensive reference to the qualitative data gathered through research interviews. These two chapters explore self-determination in the context of two case studies; Irish nationalists in the North of Ireland, and Indigenous peoples in Australia. Each chapter considers the historical and contemporary colonial experience of the claimant group under study. Chapter 6 explores the case study of the Good Friday Agreement, as the primary legal tool for building self-determination on the island of Ireland. Chapter 7 discusses the demise of the Aboriginal and Torres Strait Islander Commission, its successors and the future of Indigenous representative governance. Each chapter concludes with a section focusing on the role of international law in facilitating the realisation of self-determination by the claimant group in question.

(a) Methodology

At the outset of this research, I developed my research questions and methodology simultaneously. A methodology serves as a plan of action, linking the chosen research methods with the desired outcomes for the research.\(^{51}\) I have used a combination of doctrinal legal research and qualitative socio-legal research, with particular emphasis on data gathered through in-depth research interviews with 28 respondents in Ireland and Australia. The doctrinal legal research has helped me to situate self-determination in its historical and legal context, and to identify key challenges facing the right in the twenty-first century. The use of qualitative research methods has been essential in exploring the contemporary colonial experiences of self-determination claimants, and their aspirations for the realisation of the right.

In Chapters 2 and 3, I explore the data gathered through doctrinal legal research into the meaning and scope of self-determination, providing a context for my qualitative research. As I will explain in Chapter 1, Methodology, this thesis is primarily an interpretivist study, and my findings are largely grounded in the qualitative data gathered through research interviews. Interpretivist means that I have sought to understand the concept of self-determination in the context of its specific operation for contemporary claimants.\(^{52}\)


\(^{52}\) Ann Chih Lin, 'Bridging Positivist and Interpretivist Approaches to Qualitative Methods' (1998) 26(1) *Policy Studies Journal* 162, 162.
Therefore, the qualitative data is heavily emphasised throughout the thesis, particularly in the later chapters.

(b) Case studies in the thesis

In this research I consider two case studies; Irish nationalists in the North of Ireland and Indigenous peoples in Australia. I will discuss my choice of terminology in section (c) below. These two cases are vastly different, in terms of location, cultures, languages, historical experience and demographics. In this section, I consider some of the similarities and differences between these two case studies, and explain my reasons for choosing them. Throughout the thesis, I will demonstrate how these two case studies, individually and collectively, support my argument in favour of a new approach to self-determination in the twenty-first century. I will consider methodological issues relating to the use of case studies in Chapter 1. In Chapter 2, I mention several other contemporary case studies in self-determination, and distinguish these from the two cases I have chosen.

The two cases I have studied in this research diverge significantly in terms of the form of self-determination they claim. One reason for this is that there is a much larger degree of homogeneity of experience and culture among Irish nationalists on the small island of Ireland, than there is among Indigenous peoples in Australia, who are dispersed across a massive land mass in both remote and urban areas. Irish nationalists claim self-determination in the form of a reunited Ireland, requiring the separation of Northern Ireland from the United Kingdom. Indigenous peoples in Australia have generally sought self-determination solutions within the framework of the existing Australian state. As Linda Burney explains, Indigenous peoples have not surrendered their claims to sovereignty, however, each people claims ‘sovereign rights to our own tribal lands, not to the whole of Australia’. This distinction between the two case studies is helpful in terms of this research, as it enables me to consider a range of possible self-determination solutions. Consideration of different types of self-determination claims illuminates the adaptable nature of the right, and challenges the typical statist view that self-determination necessarily entails a claim to secession and a challenge to a state’s territorial integrity.

---

53 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006). Linda Burney is a Wiradjuri woman and Labor politician.
However, there is an important similarity between these cases, justifying their comparison. Irish nationalist and Indigenous Australian self-determination claims are heavily influenced by a colonial experience which has not been adequately recognised, either at the domestic or international level. Irish nationalists in the North of Ireland and Indigenous peoples in Australia claim a continued experience of ‘settler colonialism’.\(^{54}\) This experience is distinct from the ‘salt-water’ colonialism experienced by the many nation states formed after the Second World War, whose claims to self-determination were upheld by international law through the project of decolonisation. Contemporary legal commentators have recognised that the salt-water test of colonialism, which aimed to impose predictability by ruling out claims from peoples not separated by an ocean from their colonisers, was manifestly unjust\(^ {55}\) and indefensible.\(^ {56}\) The maintenance of the salt-water test throughout the project of decolonisation has marginalised peoples who have experienced other forms of colonialism.

During my qualitative research, I interviewed Professor John Maynard, an historian of the Worimi people whose traditional lands surround Port Stephens in New South Wales. Maynard has published research relating to black activism around the globe post-World War One, with particular emphasis on the origins of Aboriginal activism in Australia.\(^ {57}\) He confirmed my decision to compare the cases of Irish nationalists and Indigenous peoples in Australia, citing the shared experience of colonialism and settlement, and the emphasis each group places on the value of cultural identity and land. He claims these shared experiences have forged a kinship link between the groups.\(^ {58}\) Maynard acknowledges a link between Irish efforts to achieve self-determination in the 1920s and Australian Aboriginal activism at that time.\(^ {59}\) As Linda Burney notes, many Indigenous

\(^{58}\) Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006). John Maynard is a Worimi man and an Indigenous historian.
\(^{59}\) Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006)
people also have Irish heritage, and this has formed a kinship connection important in Indigenous cultures; ‘the bond is historical, metaphorical and spiritual’.

Indigenous academic Megan Davis concurs with Maynard’s view:

> We grew up with the constant comparison between what has happening in our family and community and what was happening in Northern Ireland. I remember going on marches in Brisbane and we’d have Irish people marching with us behind the Irish flag. There’s always been that understanding or allegiance between the two peoples…there was always that parallel. There’s a kinship link…
> Unless you’re affected by the same conditions, you wouldn’t recognise the value of the comparison you’re making, but to me it’s the most natural thing in the world – most Aboriginal people would have some idea what has and is still going on in Ireland…

By privileging the data gathered through in-depth research interviews in Ireland and Australia, I aim to ensure that this thesis reflects the significance of the settler colonial experience for both claimant groups I have studied.

I also have personal reasons for choosing to consider self-determination for Indigenous peoples in Australia and Irish nationalists in Northern Ireland. I have a long-standing interest in questions of rights and justice for Indigenous peoples in Australia. As a non-Indigenous Australian, I feel a responsibility to acknowledge the colonial legacy of European settlement, and I am committed to addressing that legacy through promoting the rights of Indigenous peoples in my work. Being of Irish heritage, I have long been aware of the legacies of British colonisation in Ireland. As an undergraduate, I undertook an exchange at Queen’s University in Belfast, and I have since returned several times to live and work in Belfast. I have used my doctoral studies to explore the circumstances and rights claims of these two groups, as part of a broader commitment to the pursuit of the values of justice, liberty and human rights in my life and work.

---

60 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006)
61 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006) Megan Davis is of Cobble Cobble/Waka Waka Aboriginal heritage and South Sea Island descent, and is a legal academic and practitioner. In 2010, Davis was elected as an Expert member of the UN Permanent Forum on Indigenous Issues.
(c) Defining key terms

At this stage, it is important to define my use of key terms appearing throughout the thesis. Language is a site of contest, and my choice of terms has been deliberate.

‘Indigenous peoples in Australia’

James Anaya is one of the most prominent scholars of Indigenous rights under international law. He notes that peoples came to be known as Indigenous during the colonial era:

Such designations have continued to apply to people by virtue of their place and condition within the life-altering human encounter set in motion by colonialism. Today, the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. ... They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.62

There are hundreds of distinct Indigenous groupings in Australia. Most of these groups are Aboriginal peoples, who originate from a variety of locations around the continent. Some Indigenous groups are Torres Strait Islander peoples. Some Indigenous people continue to live on their traditional lands, while others live in regional towns and cities. I have decided to refer to these peoples as ‘Indigenous peoples in Australia’ for several reasons. First, the term Indigenous is frequently used in international legal commentary, and its use here serves to identify this research as a contribution to that body of work. Second, the plural phrase ‘Indigenous peoples’ recognises that there are numerous Indigenous groupings in Australia, with a range of experiences and aspirations for self-determination. Further, they are ‘peoples’ because ‘they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.’63 Third, ‘Indigenous peoples in Australia’ is preferable to ‘Indigenous Australians’, as the former acknowledges the collective nature of self-

---

determination claims, and clearly distinguishes Indigenous peoples from other communities in Australia.

There has been a shift in recent years towards capitalising ‘Indigenous’, particularly on the part of Indigenous advocacy groups, and I have chosen to follow that emerging convention. I also acknowledge that many Indigenous people identify themselves according to their tribal group rather than by the broader label ‘Indigenous’, due to the significant differences between language groups, clans and traditional lands.64

‘Irish nationalists’

The other case study in this thesis relates to Irish nationalists in the North of Ireland. A few terms are important in defining whom I mean in this case. I have relied on definitions from CAIN (Conflict Archive on the Internet),65 to help explain my choice of terminology. Irish nationalists are variously described as nationalist, republican and Catholic. I do not use the term ‘Catholic’, as although a majority of members of the Irish nationalist community are either nominal or practising Catholics, their religion does not define their self-determination claim. Rather, their struggle is political. Also, it is not accurate to use ‘Catholic’ and ‘nationalist’ interchangeably, as it is possible to be one and not the other.

The island of Ireland is currently divided into two political entities; the 26 county ‘Republic of Ireland’ or ‘Éire’ and the 6 county ‘Northern Ireland’, which is a province of the United Kingdom of Great Britain and Northern Ireland.66 The term ‘nationalist’ ‘is used to describe those who hold a long-term wish for the reunification of Ireland’, whether or not they support ‘republican’ groups.67 ‘Republicans’ also aim for the establishment of a united, 32 county Ireland, however, the term implies ‘tacit or actual

64 Robynne Quiggin, ‘Protecting Culture’ in Larissa Behrendt, Chris Cunneen and Terri Libesman (eds), Indigenous Legal Relations in Australia (2009) 207, 209.
65 CAIN is a website based at the University of Ulster and sponsored by ARK (Access Research Knowledge), INCORE (International Conflict Research Institute) and the United Nations University. It provides a range of primary and secondary sources on conflict and politics in Northern Ireland from 1968 to the present: University of Ulster, INCORE and ARK, CAIN (Conflict Archive on the Internet) <http://cain.ulst.ac.uk/> at 1 March 2011
66 The United Kingdom comprises Great Britain, which includes England, Scotland and Wales, and Northern Ireland. Each of the four entities exercise varying degree of autonomy within the United Kingdom unitary state framework.
67 http://cain.ulst.ac.uk/othelem/glossary.htm (at 1 March 2011)
support’ for ‘the use of physical force by paramilitary groups with Republican aims’.68

The largest and most prominent republican group, since the 1960s, has been the Provisional Irish Republican Army (PIRA). I have used ‘nationalist’ rather than ‘republican’ for several reasons. First, all republicans are also nationalists, and so the broader term applies to the greater number of people. Second, it is important to distinguish this work from the platform of any single political group or movement. Third, the distinction between ‘nationalists’ and ‘republicans’ in relation to the physical force tradition in Irish politics is less operative today. The conflict is now largely a political rather than paramilitary one.69

Along with the titles used for the various communities in Ireland, there are also multiple terms used to describe the same territorial entities. The official term for the Northern entity is ‘Northern Ireland’. This is the term used in international legal and political discourse. However, Irish nationalists in Northern Ireland tend to reject the term ‘Northern Ireland’, as was clear in my interviews there. Nationalists variously use terms such as ‘the North of Ireland’ or ‘the Six Counties’, as a means of challenging the legitimacy of the ‘Northern Ireland’ entity. In this thesis, I have decided to variously refer to the entity as ‘Northern Ireland’ and ‘the North of Ireland’. This approach acknowledges the competing nationalist identifications of the two main communities; Irish and British. I have confined my research to the experience of Irish nationalists living in Northern Ireland, because their contemporary colonial experience is distinct from that of Irish nationalists living in the Republic of Ireland.70

‘British unionists’

As I have explained, in this thesis I consider the circumstances of Irish nationalists in the North of Ireland, due to their claim to a contemporary colonial experience. However, it is also important to identify the other major community living in Northern Ireland, as they will be referred to throughout the thesis in relation to the Irish nationalist claim to self-

---

68 http://cain.ulst.ac.uk/othelem/glossary.htm (at 1 March 2011)
69 The most prominent paramilitary group engaged in the Irish political conflict was the Provisional Irish Republican Army (PIRA or IRA). On 28 July 2005, the IRA Council ordered ‘an end to the armed campaign’ and instructed its Volunteers to dump arms and ‘assist the development of purely political and democratic programmes through exclusively peaceful means’. See: Irish Republican Army, Statement on the Ending of the Armed Campaign (25 July 2005) <http://cain.ulst.ac.uk/othelem/organ/ira/ira280705.htm> at 1 April 2011
70 The Republic of Ireland is often referred to as ‘the 26 Counties’ or ‘the Free State’.
determination. The term ‘unionist’ describes people who wish to maintain the union between Northern Ireland and Great Britain.71 Whereas Irish nationalists assert an Irish national identity, unionists identify as British, Northern Irish or Ulstermen.72 The unionist community is often also referred to as the Protestant community, as most of its members were born into Protestant religious denominations. I do not refer to unionists as Protestants, as the terms are not interchangeable.

As there is a distinction between nationalists and republicans, there is also a distinction between unionists and loyalists. ‘Loyalists’ also support continued union with Britain, however, the term implies that these people support the use of force by paramilitary groups to ‘defend the union’.73 I use ‘unionist’ rather than ‘loyalist’ as unionist is the broader category. I also use the broader terms ‘nationalist’ and ‘unionist’ because the terms ‘loyalist’ and ‘republican’ are loaded with meaning relating to the political conflict between state and paramilitary forces. That conflict is largely beyond the scope of this thesis, although I do consider the role of the British state in the conflict in Chapter 6.

British unionist people in Northern Ireland, and in the United Kingdom, are entitled to exercise self-determination. In this thesis, I acknowledge this competing right to self-determination through my promotion of a human rights approach to rights claims. However, I do not explore the right of unionist peoples to self-determination alongside the self-determination claim of Irish nationalists. The right to self-determination of Irish nationalists has been suppressed and undermined through the colonial process, in such a way that it calls for particular attention.

3. Theory

In Chapter 1, on Methodology, I will explain my use of qualitative grounded theory research and doctrinal legal research. Through doctrinal research, I identified the research questions that I have pursued. The theory that I present in this thesis was generated

71 http://cain.ulst.ac.uk/othelem/glossary.htm (at 1 March 2011)
72 Ulster is one of the four provinces of the island of Ireland. Historically, it included the nine counties of Antrim, Armagh, Cavan, Donegal, Down, Derry, Fermanagh, Monaghan and Tyrone. Upon the partition of Ireland, the Northern Ireland boundaries were gerrymandered to include six of these counties. Cavan, Donegal and Monaghan are three of the 26 counties of the Republic of Ireland. It is common for British unionists to refer to Northern Ireland as ‘Ulster’ or ‘the Province’.
73 http://cain.ulst.ac.uk/othelem/glossary.htm (at 1 March 2011)
through doctrinal research and grounded analysis of qualitative research interviews. In this section, I briefly introduce the two central elements of my theory.

(a) Self-determination: The continuing mission of decolonisation

All participants in this research acknowledged continued colonial experiences for the claimant groups I have studied. These experiences do not match the particular type of European colonialism that was addressed through the decolonisation process of the mid to late twentieth century. In order to address contemporary, anti-colonial self-determination claims, a new framework is required. This framework must be capable of addressing the diverse self-determination claims of Indigenous peoples, nationalist groups, secessionists and devolutionists.74

I propose three means by which the law of self-determination may be decolonised. First, evaluations of self-determination claims must acknowledge the variety of means through which the right may be exercised. This will challenge states’ emphasis on the value of territorial integrity, and promote negotiated solutions between states and claimant peoples. Second, I reject the artificial hierarchy between ‘internal’ and ‘external’ self-determination, as it marginalises some claimant groups from international legal dialogue. Third, I argue for the development of a more inclusive international legal system, in order to empower claimant peoples to negotiate with states and international organisations. Such a decolonisation of the law of self-determination would create space for the full and fair evaluation of contemporary claims, on the basis that the right remains an essential element in the international human rights framework.

(b) Self-determination: The human rights approach

Self-determination is often depicted as inherently threatening to state sovereignty, because it has frequently been exercised through independence claims and secession. A human rights approach to self-determination claims would provide a new framework for state interaction with claimant peoples. While it is necessary to deal with colonial experiences, contemporary self-determination claimants inevitably share territory with

other communities, who may assert competing self-determination claims. A ‘human rights approach’\textsuperscript{75} to self-determination provides an alternative to traditional approaches, which emphasise the need to define ‘peoplehood’, or link a self-determination claim to a national right to territory. This more modern and humane approach conceives of self-determination as an ongoing process, rather than a single event. The human rights approach should be ongoing, like self-determination itself, to ensure that competing rights claims continue to be addressed as societies evolve.

\textit{Conclusion}

In their book \textit{Style}, Gregory Colomb and Joseph Williams distinguish between the solutions required for practical and conceptual problems:

We solve practical problems with action: readers (or someone) must \textit{change what they do}. We solve conceptual problems with information: readers (or someone) must \textit{change what they think}.\textsuperscript{76}

Self-determination has a central place in the framework of human rights. Yet, the right continues to pose conceptual problems, particularly for claimant peoples who do not conform to the typical colonial paradigm. Conceptual problems in this context produce practical problems for claimants, who remain stifled in societies still influenced by the detrimental impacts of colonialism.

In this thesis, I argue that some conceptual problems with self-determination may be solved by acknowledging and dealing with the contemporary colonial experience of claimant groups. This would represent a shift in thinking about contemporary, anti-colonial self-determination claims. This shift could lead to the adoption of a human rights approach to self-determination claims. Such an approach would change what states and other relevant actors do in response to contemporary claims, thus empowering contemporary claimants to overcome the practical problems they presently face.


\textsuperscript{76} Joseph M Williams and Gregory G Colomb, \textit{Style: Lessons in Clarity and Grace} (10th ed, 2010), 171.
CHAPTER 1

METHODOLOGY
Introduction

According to Crotty, methodology is

the strategy, plan of action, process or design lying behind the choice and use of particular methods and linking the choice and use of methods to the desired outcomes.¹

Methods are the techniques used to gather data in order to address research questions.² As detailed in the Introduction, the central aim of this thesis is to propose a more just and effective approach to the evaluation of contemporary, anti-colonial self-determination claims. In light of this aim, I chose a methodology that encompasses legal and sociological research methods.

Doctrinal legal research method has enabled me to explore the status of self-determination under international law and identify important questions and gaps in the scholarly understanding of the right. Through qualitative research methods, primarily in-depth interviews, I have gathered data which reflects on the aspirations of contemporary self-determination claimants. Although the legal doctrinal research has provided an important framework for my thesis, this research is principally an interpretivist study based on grounded theory research methods. Interpretivist means that I have sought to understand the concept of self-determination in the context of its specific operation for contemporary claimants.³

This methodology chapter addresses the issues of rigour and validity in relation to my research. Empirical research is typically evaluated in terms of its ‘rigour’; that is, the degree to which the research satisfies conditions of reliability, validity and objectivity.⁴ These conditions are more applicable to quantitative than qualitative research. Rigour in qualitative research requires that researchers provide information on why the chosen methods are appropriate, explain how respondents were selected, use multiple methods,

and present verbatim quotes in the research report. The integration of relevant literature alongside the qualitative data further ensures rigour.

Alongside rigour, validity is a central principle in qualitative research. In qualitative research, the concept of ‘validity’ is concerned with the logic of the connections made between the information gathered and the conclusions drawn. The validity of qualitative research can be judged on the degree of accuracy in reporting data, rather than through any claims of generality. To ensure validity, the qualitative researcher must ensure clarity; that is, the researcher must make explicit the implicit connections between data and analysis. A concept related to validity, namely reliability, requires the researcher to demonstrate a plausible research design. The research design must be based on well-designed analytical constructs.

This chapter explains my methodology and the means by which I have produced the theory of self-determination set out in this thesis. I take a reflexive approach, in line with Norton’s assertion that researchers enhance the rigour of their research reports by acknowledging their involvement in the research and the decisions they made throughout the process. Section A briefly describes ‘traditional’ legal research, explains the use of doctrinal research in this thesis, and introduces the concept of socio-legal research. Section B introduces grounded theory methods, demonstrates the appropriateness of these methods for my research, and explains in detail how I have used grounded theory methods to address my research questions.


A. ‘Traditional’ Legal Research and Socio-Legal Research

Legal research as taught to law students tends to be doctrinal and rule-focused. Doctrinal legal research typically depicts the law as a body of self-sustaining principles able to be ascertained through the study of primary legal sources. Gathering authoritative sources is crucial to this type of research, as is constant updating to ensure currency and accuracy. Standard legal research texts direct researchers to distinguish between, and consult, primary sources (which state the law) and secondary sources (which discuss the law). The state of the law is to be deduced by consulting the primary source, whether legislation or case law.

International legal scholarship is predominantly doctrinal. The Introduction and Chapters 2 and 3 of this thesis present the results of doctrinal research, which I have used to examine self-determination in terms of its status as a legal rule. This aspect of doctrinal research method is particularly evident in Chapter 2, where I trace the evolution of the right of self-determination in international legal texts. These parts of the thesis present analyses of the literature reviews I have conducted throughout the research process.

Review of the relevant literature has been a constant process throughout my research. I have four major collections of literature which I have updated at frequent intervals. The first is a general literature review of international law and commentary in relation to self-determination. Two other, more specific, reviews relate to the Irish and Indigenous Australian case studies. A fourth review contains literature describing various aspects of grounded theory methods and related methodological issues. I also have smaller collections of literature on file for special interest topics, for example self-determination claims from groups other than the subjects of this research. To ensure currency of these reviews I update them each year and make a memo within my notes to show the most

13 Michelle Sanson, David Worswick and Thalia Anthony, Connecting With Law (2009), 98.
recent update. I aim for accuracy in my literature reviews by consulting a wide range of authoritative sources, including books from scholarly writers and refereed journal articles from respected international journals.

In his general international law text, Cassese notes:

While most existing textbooks or treatises take a strictly legal approach, I have attempted not to look at international legal institutions as abstract entities ‘petrified’ in time and space. I believe that it is misleading to consider international law as a piece of reality cut off from its historical, political, and ideological context. To grasp international law in all its ramifications, one ought to look at it as a set of continuously changing elements of a whole. I have therefore tried to combine the strictly legal method with the historical and sociological approach, to expound the dynamic of international law.18

This method of analysing law in its historical and social context is also apparent in the Advisory Opinion of the International Court of Justice (ICJ) in the Israeli Wall case. Following a lengthy discussion of the historical circumstances leading to the Israeli annexation of the Palestinian territories, and a description of the ‘security fence’ presently being constructed by Israel in and around Palestine, the ICJ found that Israel is in violation of several fundamental principles of international law.19 I consider this Opinion in detail at the start of Chapter 4, as it demonstrates the continuing relationship between colonialism and self-determination in international law.

Unlike traditional analyses of international law issues, my research integrates doctrinal legal analysis with sociological methods. This socio-legal approach places the right of self-determination in its social context, to shed light on both the current state of the law, and the means by which the law could more effectively promote the realisation of the right by claimants. Like Cassese, I believe it is crucial to understand international law as it functions in reality. An interdisciplinary approach responds well to this aim, by integrating the knowledge or ‘modes of thinking’ of two disciplines in order to explain

19 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004). See, for example, paragraphs [88], [111], [115] and [119].
the meaning and scope of self-determination more clearly than if a single discipline was used.\textsuperscript{20}

According to Banakar and Travers, traditional legal research has tended to integrate new disciplinary approaches only ‘in so far as they do not question law’s gaze or disciplinary identity’.\textsuperscript{21} Socio-legal research challenges legal researchers to adopt a critical approach by considering the operation of law in its social context. Positivist legal research may appear ‘more systematic’, however, it ‘can be sadly lacking in necessary insight and accuracy as compared to narratives’.\textsuperscript{22} Through this thesis, I aim to demonstrate that a doctrinal legal analysis of self-determination is considerably more enlightening if it is conducted alongside qualitative research that acknowledges the experiences and aspirations of rights claimants. To meet this challenge I have integrated my analysis of the data gathered through interviews with the relevant literature, to ensure that the qualitative data has been rigorously tested and that the meanings derived from it add to the body of literature in the field.

I have taken a purposive approach to my choice of research methods. The research questions outlined in the Introduction defined the appropriate methods. Triangulation, or the use of multiple research methods, achieves a key aim of this research; that is, examining self-determination holistically and in context.\textsuperscript{23} In this thesis, triangulation of methods involves the combination of a doctrinal legal approach and the use of grounded theory methods, namely in-depth interviews and case studies. Denzin and Lincoln acknowledge that the inclusion of multiple methods, perspectives and empirical materials is ‘a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry’.\textsuperscript{24} Both the doctrinal and the qualitative research methods are ‘represented in a significant


\textsuperscript{21} Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), Theory and Method in Socio-Legal Research (2005) 1, 14.

\textsuperscript{22} Miriam Feldblum, 'The Study of Politics: What Does Replicability Have to Do with It?' (1996) 29(1) PS: Political Science and Politics 7, 7.

\textsuperscript{23} Todd J Jick, 'Mixing Qualitative and Quantitative Methods: Triangulation in Action' (1979) 24(4) Administrative Science Quarterly 602, 603.

\textsuperscript{24} Norman K Denzin and Yvonna S Lincoln, 'Introduction: The Discipline and Practice of Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), The Sage Handbook of Qualitative Research (3rd ed, 2005) 1, 5.
way throughout the thesis, however, the qualitative data is given greater emphasis and weight. This thesis presents a new theory of self-determination, in the context of claims referencing the colonial experience. Grounded theory methods, as will be explained in the following section, have theory-generating potential and as such form the centrepiece of this research.

B. Grounded Theory Research

1. What is grounded theory?

Grounded theory has been defined as the ‘discovery of theory from data’. Grounded theory research methods are appropriate where the researcher wishes to ‘make knowledge claims about how individuals interpret reality’. This approach to research relies on a process of constant comparison, whereby data and emerging analysis are constantly compared to generate a theory. In maintaining a constant focus on the data gathered through qualitative research methods, the researcher identifies links between concepts. Using the technique of constant comparison, grounded theory researchers can lift data beyond its basic meanings to develop abstract theoretical conclusions. Grounded theory is not designed to test previously developed hypotheses; rather, theoretical conclusions emerge through deep analysis of data.

As an undergraduate law student, I studied a course in socio-legal research methods and developed an interest in using these tools to explore law in its social context. Prior to seeking ethics approval for this research and conducting the interviews, I consulted

---

several sociological sources and sought advice from supervisors in order to learn how to practise socio-legal research, and grounded theory methods in particular. I continued to update my literature review of methodological material throughout my research, and found that my understanding developed significantly as I began to put grounded theory into practice through the conduct of interviews.

In developing my capacity to use grounded theory methods, I found an article by sociology professor Ralph LaRossa particularly helpful. He sets out key principles of grounded theory methods, including:

a) The ‘microanalysis’ of written data, as undertaken in grounded theory research, is worthwhile because of the centrality of language to social life.

b) Concepts identified in the data gathered through grounded theory research are coded and explained through a process of ‘empirical and conceptual’ comparison.

c) Grounded theory research should produce a ‘central variable’ that ‘will serve as the backbone of a researcher’s “story”’.33

In Section 2 below I will explain how I have applied these principles to my research.

2. How have I applied grounded theory methods in this research?

(a) Data collection

Prior to undertaking data collection, I was required to satisfy the University’s research ethics committee that my research met relevant principles and guidelines. In this part, I describe the ways in which the study was designed, how the research was carried out, and how I ensured that it was ethically sound. Ensuring the ethical rigour of the research process was essential in achieving a data set capable of generating theory.

In both Ireland and Australia I pursued a purposive sampling strategy. I aimed to conduct 10-15 interviews in both sites, and in fact conducted 14 in relation to Ireland and 14 in Australia. Following a non-random, targeted recruitment strategy, participants were selected on the basis of their expertise in relation to self-determination generally, and/or in either the Irish nationalist or Indigenous Australian context. This ensured that all...

participants approached the research project from an informed position and delivered ‘information-rich’ data through the interviews.34

The sample was relatively homogenous, in line with DiCicco-Bloom et al’s recommendation that qualitative interview respondents should ‘share critical similarities related to the research question’.35 All potential participants had professional or practical involvement with human rights issues, specifically relating to self-determination. I identified potential participants through their experiences and expertise as lawyers, academics, politicians, human rights advocates or community workers. All respondents were public figures whose contact details were publicly available. I did not ask any of the respondents to represent a constituency or community; each spoke to me solely on their own behalf. However, many of the respondents hold positions of responsibility to the community, and can claim a high degree of community involvement and awareness.36 In this sense, I used the interviews to gather data capable of translating the ‘wisdom and experience’ of claimant peoples into the dominant narrative of the international law on self-determination.37

In qualitative research, the principle of reliability requires a plausible research design.38 The 14 interviews conducted in each site gathered sufficient data to enable a meaningful comparison between participants’ responses, and ensure reliability and comparability within the research. These numbers also enabled me to interview a sufficiently wide range of people with relevant expertise and varying perspectives. In qualitative research such as this, however, the number of interviewees is not crucial to the validity of the research, as I was not sampling for proportionality. Rather, the depth and quality of the information gathered outweighs the significance of representation and numbers.

36 All 14 interviewees in Australia were Indigenous, and would identify themselves as self-determination claimants. Nine of the 14 respondents in Ireland would identify themselves as Irish nationalist self-determination claimants. Three others originated in the Irish nationalist community, and support the right of self-determination for Irish nationalists, but place greater emphasis on other aspects of their political identity. Two of the 14 interviewees were not Irish nationalists, but had significant academic expertise in relation to their self-determination claim.
37 Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006). Paul Hughes is a former public servant and Aboriginal educationalist and a Yunkunyatjatjara/ Narunnga/Kaurna man.
Potential participants were first approached with a letter explaining who was funding and conducting the research, how they were selected, the aims of the research, its methods, and how the information they might provide would be used. Privacy issues and participant’s rights were also explained in the information letter. I followed up these letters by phone, to ask whether potential participants wished to meet for an interview. At this time I ensured that the potential participants were familiar with the key details of the research, and gave them an opportunity to ask any questions. If an individual wished to participate, we made arrangements over the phone for a face-to-face, in-depth interview. I travelled to conduct all the interviews in the participant’s workplaces, or other sites of their choice.

Research interviews must have a truly voluntary character, as the validity of the data collected depends on how freely it was provided by respondents. Prior to commencing each interview, I gained written consent from all participants. Each participant agreed to the interview being recorded. I recorded each interview with a digital recorder and transcribed each one soon afterwards. I made detailed notes during the interviews which I consulted to ensure accurate transcription. In giving all participants the opportunity to review and revise a transcript of interview, I ensured that informed consent operated throughout the research process, rather than simply at the time of the interview. Importantly, all 28 participants agreed to be personally identified in reports of the research. This demonstrates their degree of confidence in the research design and process, and has been invaluable in strengthening the reliability and verifiability of my research.

I also designed the research to meet the principle of comparability, which is essential to the process of constant comparison required by grounded theory methods. Comparability means that the information gathered from the various interviews conducted will be sufficiently ‘general enough and demonstrable enough to be counted’, prior to a comparison being conducted between the various sets of data. All 28 interviews included a set of standardised questions relating to self-determination. The 14 interviews conducted relating to Ireland, and the 14 conducted in relation to Indigenous peoples in

Australia, contained another set of standardised questions relating to self-determination in the relevant site. This structure, and the digital recording and transcription of the interviews, enabled me to isolate ‘elements of communication in common’ between interviews.\(^{42}\)

I continued the structured interview approach with scripted questions tailored to each respondent. Prior to each interview I researched the specific knowledge and experiences of each interviewee using documentary sources, and this enabled me to bring relevant extant data into the interview. This form of triangulation strengthened the qualitative data gathered through the interviews, by drawing out interviewee-specific material ripe for comparison against other data sets.

I combined the structured approach, which used standardised, open-ended questions, with an informal and conversational tone. Throughout each interview, and particularly at the end, I asked unscripted questions in response to comments made by interviewees. I also provided an opportunity to each respondent to make a final statement, on any issue they regarded as particularly relevant to self-determination. Hiller and DeLuzio have acknowledged that potential respondents are typically disposed to participate in interviews where the interview allows for ‘articulation of personal experience’ and where the potential respondent possesses thoughts and feelings that have few outlets or little legitimacy in current communities of interaction, or that are difficult to express without sanctions or censorship.\(^{43}\)

In adopting an informal, conversational style, particularly at the end of the interviews, I enabled participants to provide an unconstrained, personal view of self-determination. Many respondents expressed views at odds with dominant legal frameworks regulating the exercise of self-determination. The data gained through this style of questioning has strengthened my capacity to ‘make knowledge claims about how individuals interpret [the] reality’ of self-determination.\(^{44}\)


This research was designed to ensure confirmability. According to Lincoln and Guba, this concept relates to
the degree to which findings are determined by the respondents and conditions
of the inquiry and not by the biases, motivations, interests or perspectives of the
inquirer.\(^45\)

I positioned myself carefully in relation to the respondents, by using an interview structure including open-ended questions and questions in response to participants’ comments. I was careful to restrict the degree to which my preconceived ideas about self-determination influenced the questions I asked of participants. I was, however, honest with participants as to my research aims and motivations.

As I will explain further in Part (b) below, I can demonstrate that my research findings are grounded in the meanings expressed by participants. I have achieved this through constant comparison, the coding of frequently raised concepts, and the use of direct quotations from interview transcripts. Johnson describes quotations from transcripts as ‘low inference descriptors’,\(^46\) demonstrating their value in the context of grounded theory methods. Conducting 28 in-depth interviews brought me close to the data, increasing my sensitivity to the meanings conveyed by respondents,\(^47\) and motivating me to ensure that those ‘rich descriptions of phenomena’\(^48\) were reported accurately.

(b) The coding process

Grounded theory methods require three levels of data analysis or coding. In this part I define each stage and describe how I conducted coding in my research. The first level, open coding, involves line-by-line data examination.\(^49\) This stage of coding breaks open the data into discrete parts and examines these for similarities and differences, in order to


\(^{46}\) R Burke Johnson, 'Examining the Validity Structure of Qualitative Research' (1997) 118(2) *Education* 282, 283.

\(^{47}\) Todd J Jick, 'Mixing Qualitative and Quantitative Methods: Triangulation in Action' (1979) 24(4) *Administrative Science Quarterly* 602, 609.

\(^{48}\) Barbara DiCicco-Bloom and Benjamin F Crabtree, 'The Qualitative Research Interview' (2006) 40 *Medical Education* 314, 314.

\(^{49}\) Michelle Byrne, 'Grounded theory as a qualitative research methodology' (2001) 73(6) *Association of Operating Room Nurses Journal* 1155, 1155.
distinguish between the phenomena reflected by the data. I conducted open coding through close reading of each interview transcript. During these readings, I selected passages of text that appeared particularly relevant to the research questions, and wrote summaries of each transcript. Once all the transcripts from each data collection site were complete, I compared the summaries to develop a sense of the common threads and any conflicting ideas. Other grounded theory researchers have also used summaries of key concepts to move towards thematic analysis.

The ‘constant comparison’ technique is used during open coding to identify ‘indicators’ and ‘concepts’. An indicator is a word, phrase or passage that indicates a concept, while a concept is a symbol for an important meaning emerging from the text. Indicators may be identified through the close analysis of written data. The concept is more abstract than the indicator, as it classifies the meaning demonstrated by the indicator. Berg recognises that concepts are the basic constituents of theory. As indicators are coded to concepts, the researcher begins to interpret the meanings expressed in data. For example, I named one of the codes generated by the Australian data ‘Indigenous aspirations undermined’. Several indicators were coded to this concept, each of which expressed the respondent’s sense that Indigenous rights claims are stifled by the dominant legal and social frameworks.

NVivo is a qualitative research software program which facilitates the storage, organisation and analysis of data. I was trained in NVivo early in my candidature and have used the software throughout as a tool for coding and analysis. I entered the 28 interview transcripts into NVivo as Word documents. These were then split into two sets of 14 transcripts, one for each research site. The program has a navigation window which shows several relevant menus at once. This enables speedy shifts between the data sets.

---

55 B L Berg, Qualitative Research Methods for the Social Sciences (2001), 16.
the lists of codes or concepts, and any memos drafted during coding. I annotated the transcripts within NVivo and this provided a quick reference at the early stages of comparison. The transcripts and codes can be searched quickly to find related indicators and concepts. Memos can be linked directly to source documents so as to leave a trail of insights as analysis develops. The software was helpful in my research as it saved time, ensured that I had systematic and accessible procedures in place, and permitted flexibility in my revision of the data.56

NVivo did not do the work of interpretation; rather, it was a tool that assisted in my own interpretation of the data.57 When coding through NVivo, I would identify an initial indicator and code this to a particular concept. In NVivo this is achieved through creating a new ‘free node’. For example, one concept used in relation to the Irish and Australian data sets was named ‘mechanism for achieving self-determination’. When I located a second indicator, I compared this to the first, to determine if the second ought to be coded to the same concept as the first. If not, then the second indicator would be coded to a new concept.58 A concept that was related to, but distinct from, ‘mechanism for achieving self-determination’ was named ‘what self-determination might look like’.

A concept is said to be well-grounded or saturated when sufficient indicators are coded to it, such that the addition of further indicators would not add significantly to the weight of evidence assembled.59 A few concepts were suggested by only a few indicators and did not occur across both research sites. At a later stage of coding, I chose to marginalise these concepts, as they had not reached the saturation stage and therefore could not add significantly to the theory emerging from the data. The table below lists the concepts identified across the two interview sites, through open coding. Concepts are listed in order of degrees of saturation. Those concepts that were marginalised from later stages of coding are marked with an asterisk. It is notable that several concepts reached a similar degree of saturation in both research sites.

**Concepts identified through open coding, and named as free nodes in NVivo**

<table>
<thead>
<tr>
<th>Ireland</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colonialism</td>
<td>Colonialism</td>
</tr>
<tr>
<td>Competing claims to self-determination</td>
<td>ATSIC and governance</td>
</tr>
<tr>
<td>Human rights approach</td>
<td>Human rights approach</td>
</tr>
<tr>
<td>Good Friday Agreement</td>
<td>Meaning of self-determination</td>
</tr>
<tr>
<td>Utility of international law on self-determination</td>
<td>Utility of international law on self-determination</td>
</tr>
<tr>
<td>Meaning of self-determination</td>
<td>Mechanism for achieving self-determination</td>
</tr>
<tr>
<td>Legitimacy of Irish nationalism</td>
<td>Community attitudes towards self-determination</td>
</tr>
<tr>
<td>International opinion on self-determination</td>
<td>State of self-determination</td>
</tr>
<tr>
<td>What might self-determination look like?</td>
<td>What might self-determination look like?</td>
</tr>
<tr>
<td>Sovereignty</td>
<td>Self-determination as event or process</td>
</tr>
<tr>
<td>Self-determination as event or process</td>
<td>Sovereignty</td>
</tr>
<tr>
<td>Role of international law</td>
<td>Legitimacy of Indigenous claim</td>
</tr>
<tr>
<td>Self-determination and minority rights</td>
<td>Indigenous aspirations undermined</td>
</tr>
<tr>
<td>State of self-determination in Ireland</td>
<td>Significance of land</td>
</tr>
<tr>
<td>Internal v external self-determination</td>
<td>Role of international law</td>
</tr>
<tr>
<td>Mechanism for achieving self-determination</td>
<td>Rights issues</td>
</tr>
<tr>
<td>Community attitudes towards self-determination</td>
<td>Internal v external self-determination</td>
</tr>
<tr>
<td>* Self-determination discourse</td>
<td></td>
</tr>
<tr>
<td>* European Union and Ireland</td>
<td></td>
</tr>
<tr>
<td>* Semantic issues</td>
<td></td>
</tr>
</tbody>
</table>

The second level of grounded theory coding is axial coding. At this level, data is compared to develop categories. At this stage, coding ‘consists of “intense analysis done around one category ... at a time”’. These categories define the relationship between the concepts identified at the first stage. Whereas open coding may have resulted in very well-developed concepts, the relationships between them are explored at the axial coding

---

60 Michelle Byrne, 'Grounded theory as a qualitative research methodology' (2001) 73(6) *Association of Operating Room Nurses Journal* 1155, 1155.
stage. Therefore it is at this stage that grounded theory method research ‘begins to fulfil its theoretical promise’.63

I found that there was overlap between the first and second levels of coding. In both stages I employed NVivo as a tool to sort and categorise data. Having developed lists of concepts during the open coding stage, I returned to these concepts during axial coding to explore the relationships between them. NVivo provides options relevant to each stage of grounded theory method. One useful tool within NVivo at the axial coding stage was the reporting function. Once a particular concept had reached the point of saturation, I produced a report which contained all of the indicators coded to that concept. This enabled a range of comparisons, including the extent to which the same indicators were coded to different concepts, suggesting relationships between those concepts. Once I had identified important relationships between the concepts, I modelled these using the relationship nodes within NVivo. Free nodes or individual concepts may be grouped together in tree nodes, which represent the relationships between concepts in a hierarchical pattern.

The relationships identified through axial coding are implicit throughout the thesis in the structure of my argument. For example, section C of Chapter 6 explores ‘the Good Friday Agreement and self-determination in Ireland’. Open coding had generated the following concepts as individual codes, or free nodes:

1. The Good Friday Agreement
2. What might self-determination look like?
3. Sovereignty
4. Mechanism for achieving self-determination

Through axial coding, I established that concepts 2, 3 and 4 were subordinate to the overall concept of ‘the Good Friday Agreement’ and its relevance to self-determination in Ireland. The meanings coded to the Good Friday Agreement formed the tree node, and the subordinate free nodes were arranged within this section in an order suggested by the relevant data gathered through doctrinal research. The tables below show how the free nodes or concepts were grouped together with tree nodes.

As LaRossa recognises, it is also legitimate for a researcher to relate saturated concepts to concepts ‘whose relevance would be suggested from either prior research or an established theoretical framework’.64 At this stage of coding, I returned to and updated my literature review and began to integrate relevant aspects of the literature with the concepts that had emerged through open coding. I acknowledge that some grounded theory practitioners argue that researchers ought to distance themselves from established bodies of literature, in order to avoid contaminating their qualitative data during the

coding phase. My view is that it is impossible to separate myself from the body of literature that I am familiar with, when undertaking qualitative research of my own. I agree with LaRossa that it is possible to ‘mine previous research without stifling our own inventiveness’, so long as prior research does not dictate what I identify within my own data. Although inductive analysis is central to grounded theory method, in that the ‘indicators drive the research’, researchers inevitably bring their own ideas, knowledge of the field and life experiences to the process. Suddaby argues that grounded theory researchers ought to aim for a middle ground between a ‘theory-laden view of the world and an unfettered empiricism’.

Section A of Chapter 4 provides an example of how I have integrated material from relevant literature into a broader discussion that is grounded in participants’ reflections on colonialism. This section is titled ‘A Case Study of Self-Determination in the Twenty-First Century: Legal consequences of the construction of a wall in the Occupied Palestinian Territory’. It presents a discussion of an Advisory Opinion of the International Court of Justice relating to the right to self-determination of the Palestinian people. Although this case did not feature in the qualitative data gathered through interviews, it is related to that data because it reflects on the status of self-determination as a legal right, with specific reference to the colonial experience of Palestinian self-determination claimants.

Throughout the first two stages of coding I used ‘memoing’ as an important tool in the constant comparison process. Moving back and forward between interview transcripts during open coding, I recorded memos to indicate my impressions of the meanings conveyed by the research participants. Later, memos were useful as links between concepts as I categorised them. The memo-taking process has significantly influenced the

---


way in which I have written the substantive chapters of this thesis. These constant reminders of first, and later, impressions of the meanings conveyed by interviewees have ensured that the qualitative data is centralised in the thesis. The theory presented can be clearly traced to its grounding in that data.

The coding process revealed significant convergence in many of the key meanings expressed by respondents, such that my confidence in the results increased as analysis progressed. The constant comparison method eventually resulted in data saturation – the stage of analysis from which no further new themes or categories emerge. At this point no further data collection or coding was necessary, and I moved on to develop my theory through higher-level analysis.

The third level of grounded theory analysis is selective coding. At this stage, theory develops through data filtering and selective sampling. The filtering process is important because the first two stages of coding produce a mass of concepts and relationships. The vast spread of the data must be refined in order to produce a coherent theory. One example of how I filtered material during selective coding relates to the concept named ‘rights issues’. This concept had quite a generic name because it coded indicators relating to a range of rights issues not directly relevant to self-determination. At the selective coding stage, I recognised that this concept encompassed indicators that did not ‘fit’ the more specific concepts and therefore did not add significantly to the emergence of theory. I chose to marginalise this concept at the third stage of coding, as a means of focusing my attention on the more productive concepts.

During selective coding, the researcher chooses the ‘core variable’ or ‘the main story underlying the analysis’. The core variable has ‘analytic power’ because it pulls ‘the other categories together to form an explanatory whole’. During selective coding, I

---

70 Todd J Jick, 'Mixing Qualitative and Quantitative Methods: Triangulation in Action' (1979) 24(4) Administrative Science Quarterly 602, 608.
72 Michelle Byrne, 'Grounded theory as a qualitative research methodology' (2001) 73(6) Association of Operating Room Nurses Journal 1155, 1155.
74 Anselm Strauss and Juliet Corbin, Basics of Qualitative Research: Techniques and procedures for developing grounded theory (1998), 146.
engaged in what Strauss and Corbin term a ‘search for consistency and logic’, 75 in order to generate a theory grounded in the data gathered. In Part (c) below, I introduce the concept of ‘theory’ as it is used in this thesis. Whereas the first and second stages of coding take place prior to ‘writing up’, the third stage of coding is ongoing and informs each draft of the thesis. Therefore, the product of selective coding is the thesis itself.

(c) Analysis of concepts and theory generation

In setting out to understand socio-legal research, and grounded theory methods particularly, I found Berg’s definition of theory instructive:

Theory can be defined as a general and, more or less, comprehensive set of statements or propositions that describe different aspects of some phenomenon… In an applied context, theories can be understood as interrelated ideas about various patterns, concepts, processes, relationships, or events… 76

Through the thesis, I aim to present a comprehensive series of propositions that describe aspects of my theory of self-determination. I will explore the process by which self-determination has taken on legal status, the influence of the colonial experience on contemporary assertions of the right, the concept of a human rights approach to self-determination claims, and the relationships between these key concepts and the chosen case studies.

Throughout the thesis, I make explicit the ways in which the qualitative data, and relevant literature, have generated theoretical concepts. In this way, I ensure that the thesis accurately reflects both the meanings expressed by interviewees, and the ways in which I have interpreted those meanings.77 In part (b) above, I introduced the concept of the ‘core variable’. The core variable tends to recur frequently throughout the data, link various data, become more detailed through constant comparison, and have significance in theory generation.78 Coding of the data collected through my research produced two core variables; namely, the significance of colonialism in relation to contemporary self-

75 Anselm Strauss and Juliet Corbin, Basics of Qualitative Research: Techniques and procedures for developing grounded theory (1998), 156.
76 B L Berg, Qualitative Research Methods for the Social Sciences (2001), 15.
78 Michelle Byrne, ‘Grounded theory as a qualitative research methodology’ (2001) 73(6) Association of Operating Room Nurses Journal 1155, 1155.
determination claims, and the importance of developing a human rights approach to adjudicating those claims.

The concept of colonialism was the most heavily saturated concept following the first stages of coding. During axial coding, it emerged at the top of a hierarchy of concepts relating to the evolution, meaning and scope of self-determination as a human right. The concept of colonialism is heavily emphasised throughout the thesis, to reflect its importance in the characterisation of self-determination by respondents. I do not claim that the concept of colonialism emerged organically from the interview data. Rather, it was a concept that I set out to explore through structured interview questions. However, the degree of convergence throughout the data, as to the significance of the colonial experience for self-determination claimants, was striking.

Concepts relating to the interpretation and exercise of self-determination in the future were also highly significant in the qualitative data, which is unsurprising considering that most respondents would regard themselves as claimants of self-determination. The core variable to emerge from this theme in the data was the need for a new approach to the evaluation of self-determination claims. Again, the focus on a human rights approach to self-determination was suggested not only by the qualitative data, but by targeted interview questions and the integration of relevant literature.

The significance of colonialism and the need for a human rights approach to evaluating self-determination inform the contextual Chapters 2 and 3. These two core variables form the basis of the key theoretical Chapters 4 and 5. They are then explored in the context of case studies in Chapters 6 and 7. The degree to which each part of the thesis is grounded in the qualitative data is made explicit. As I explained in Part 2(b) above, through the example from Chapter 6 of the thesis, the case study chapters are particularly strongly informed by the meanings expressed by respondents. Their structure clearly reflects the relative significance of the various concepts that emerged through coding, and the relationships between these concepts. In contrast, Chapters 2 and 3 are primarily shaped by doctrinal legal research.
(d) The use of case studies

I use the term ‘case study’ in two different contexts in this thesis. I have conducted two case studies of contemporary self-determination claimant groups; namely, nationalists in the North of Ireland and Indigenous peoples in Australia. In the Introduction, I explained the utility of exploring the right in relation to these two distinct groups. Within Chapters 6 and 7, I also use ‘case study’ in a more specific sense. Each chapter, in part, explores the significance of a legislative event and its consequences for the particular claimant group. In Chapter 6, I consider the importance of the Good Friday Agreement in relation to the Irish nationalist claim to self-determination. In Chapter 7, I consider the Aboriginal and Torres Strait Islander Commission (ATSIC), its demise and successors, in relation to the claim to self-determination by Indigenous peoples in Australia.

Case studies require the collection of data on ‘the nature of the case’, its history, political and legal contexts, other relevant cases, and informants able to shed light on the case. These requirements have been met through the triangulation of research methods described in this chapter; that is, through doctrinal legal research and qualitative research interviews. I use the term ‘case study’ in the sense of an instrumental case study, meaning that I have chosen the case studies primarily for the purpose of providing insight into the broader topic of self-determination. The inclusion of two case studies has value as part of the interpretivist model, as each has allowed a deep exploration of self-determination in context. However, the case studies have also served a more ‘positivist’ purpose, in that they have highlighted parallels between two quite diverse cases. As a result, the theory presented in this thesis has potential application in other contexts.

Case study method is compatible with both legal and sociological research models. In the context of doctrinal legal research, case study is one of the most common methods of ascertaining the content of law. This form of doctrinal research is employed in relation to

---

81 ‘Positivist’ is used here in the sociological, rather than legal, sense.
82 Ann Chih Lin, ‘Bridging Positivist and Interpretivist Approaches to Qualitative Methods’ (1998) 26(1) Policy Studies Journal 162, 176. I will reflect on this point in the Conclusion to the thesis.
the Israeli Wall case in Chapter 4, and in relation to the Mabo case⁸³ in Chapter 7. Each of these cases shed light on international and domestic laws in relation to issues of colonisation, the acquisition of territory, and self-determination. The case study method also responds to the requirements of socio-legal research, which is primarily concerned with the social effects of law.

Conclusion

This thesis presents a study of the right of self-determination in context. I have taken an interdisciplinary, socio-legal approach to the choice of research methods and the means of data analysis. This approach has generated a theory of self-determination that sheds light on the meaning and scope of the right for contemporary, anti-colonial claimant groups. As detailed in this chapter, the rigour with which I have coded and analysed my data demonstrates its trustworthiness.⁸⁴ Throughout the following chapters, I will demonstrate the validity of my research, by drawing explicit connections between the data gathered and the theory presented.

⁸³ Mabo v Queensland (No 2) (1992) 175 CLR 1
CHAPTER 2

SELF-DETERMINATION: LEGAL HISTORY
Introduction

The purpose of this chapter is to trace the development of self-determination in international law. This legal history reveals the evolution of the right, from a revolutionary principle to a right of nations, and finally to a central element of the international human rights framework. An exploration of the legal history of self-determination also sheds light on the content of the right, and indicates the wide variety of cases in which the right has been successfully asserted. At each stage of its evolution, self-determination has taken on greater legal power, and has come to offer the hope of emancipation to more and more peoples suffering from oppression. Despite the persistent dominance of states in the international legal framework, self-determination has remained an irrepressible force promoting freedom and the equality of peoples under international law, and has proved its capacity for further evolution in the twenty-first century. I conclude this chapter with a consideration of recent manifestations of the right, which demonstrate that its exercise is not confined to the typical colonial context.

A. Self-determination

Origins and Twentieth Century Development

1. Revolutionary origins: The emergence of the principle of self-determination

The right of self-determination has a revolutionary character, both in the sense that its origins may be traced to revolutionary movements, and in its capacity to revolutionise relationships between peoples and states. The eminent theorist James Anaya describes self-determination as a right which affirms both the human drive to translate aspiration into reality, and the principle of inherent human equality.¹ Anaya’s conception is accurate in that the right of self-determination recognises the necessity and power of individuals coming together in community to pursue their mutual rights, and their capacity to develop just social orders. Just as the ‘rights of man’, so commonly referenced by French and

---

American revolutionaries in the late eighteenth century, were liberating concepts for individuals, so self-determination is a ‘concept of liberation’ for peoples.²

Self-determination emerged as a principle from the demands of the American Declaration of Independence (1776) and the French Revolution (1789) that government be responsible to the people.³ From this time on, in societies committed to democratic governance, governmental rule was to be regarded as legitimate only when it had the consent of the governed.⁴ This revolutionary period fostered a triad of Enlightenment principles – liberalism, nationalism, and independence – to which self-determination was core.⁵ Each of these principles continues to influence assertions and interpretations of, and state reactions to, the right of self-determination in the twenty-first century.

However, having been promoted during the revolutionary era of the late eighteenth century as a notion derived from a ‘profoundly anti-despotic democratic spirit’, self-determination was appropriated by France in ways which effectively limited the freedoms of some peoples, for example through the annexation of lands ruled by other sovereigns.⁶ This adoption of a principle of liberation to serve a purpose of domination has recurred throughout the development of self-determination, in turn promoting competing claims to self-determination. Notable contemporary examples are found in Timor Leste and Palestine. Despite a legacy of misuse of the principle of self-determination, however, it is clear that the revolutionary basis of self-determination has served the development of the right. The infusion of self-determination with the aspirations of liberation, independence and equality has ensured that peoples subject to domination continue to turn to self-determination, in order to translate their aspirations into reality.⁷ Indeed, the examples of early revolutionary assertions of self-determination – for example in France and the United States of America – became so rapidly prominent that, by the mid-nineteenth century, self-determination was well-established as a norm influencing international

⁷ S James Anaya, Indigenous Peoples in International Law (1996), 75.
political action. By this time, national and other liberation groups had gained popular loyalty and begun to assert self-determination as a challenge to the State’s monopoly on legitimate force, for example in then-Tsarist Russia.8

2. Wilsonian self-determination: A right of ‘nations’

Self-determination was born in theory during the Enlightenment, and given voice through revolution. The modern right began to assume its emancipatory potential following the First World War – the first cataclysmic event of international relations in the twentieth century. Self-determination’s evolution from principle to right was ‘one of the most dramatic normative developments’ of that century,9 and the right has since accompanied the birth of nations, the downfall of empires and the emancipation of peoples around the world. The individual commonly credited with elevating self-determination to prominence at the international level was United States President Woodrow Wilson, who argued at the Versailles peace conference for its inclusion as a cornerstone principle guiding the re-drawing of the maps of Europe.10

Prior to the end of the war, President Wilson outlined what he saw as the role of self-determination in the inevitable peace negotiations:

No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property.11 Wilson’s assertion of the importance of democracy in ensuring a lasting and just peace was influential in the drafting of the Versailles peace treaty.12 As Wilson noted, self-determination had become ‘an imperative principle of action, which statesmen will henceforth ignore at their peril’.13 Wilson’s famous assertion retains contemporary relevance as a characterisation of the right, as it encapsulates both the collective nature of

---

10 Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2004), 139.
11 Woodrow Wilson, Address to Senate, 64 Cong. Rec. 1741–42 (1917)
self-determination, and its essential relationship to autonomy and independence. It is arguable that, in many cases since Wilson’s promotion of the principle, peace has been destroyed by the unwillingness of states to honour a people’s right to self-determination.\textsuperscript{14}

However, in its Wilsonian incarnation, self-determination was promoted as a right of peoples only when organised as ‘nations’. Wilson’s pro-self-determination rhetoric reflected Western democratic theory, particularly the ‘right of peoples freely to choose their government’.\textsuperscript{15} In fact, Whelan has argued that Wilson preferred the phrase ‘self-government’ to ‘self-determination’, as self-government more clearly evidenced Wilson’s commitment to the formation of nations governed by democratic principles.\textsuperscript{16} It would be incorrect to understand Wilson as advocating the secession of peoples from nations. Rather, he was concerned to promote liberal democracy, both in the nations already in existence post-World War One, and in the new states which the victorious powers intended to create out of the ruins of the most violent conflict yet witnessed by humankind. The practical implications of the disjunction between the rhetoric of ‘peoples’ and the privileging of nationhood limited the application of self-determination in the Wilsonian period, just as the dominance of nation states in the international community continues to raise barriers to contemporary claimant peoples.

Wilson and others employed self-determination as the driving principle in the development of the state-dominated Mandate system, to be implemented by the League of Nations following the League’s establishment in 1926. As expressed by the League, the Mandate was to recast the role of the imperial powers, in an attempt to put self-determination into practice.\textsuperscript{17} From this point, instead of the traditional colonial relationship, imperial powers were to administer a ‘mandate’ over their colonies, which were given the status of ‘non-self-governing territories’. In theory, the imperial states were made responsible for enabling self-government in their former colonies, and assisting in any way possible until colonial countries and peoples achieved self-determination.\textsuperscript{18} However, the intensely hierarchical nature of this system was bound to

\textsuperscript{14} The most prominent and lasting example of such conflict is the Israeli-Palestinian dispute.
\textsuperscript{17} Oji Umozurike, \textit{Self-Determination in International Law} (1972), 34.
limit the capacity of ‘peoples’ to exercise the right of self-determination, especially as the League did not accept the claims of colonised peoples to self-determination as equal to the rights of existing states.\(^{19}\) As Antonio Cassese recognises:

Wilson somewhat naively believed that under the guidance of the League of Nations the old imperialist system would gradually be replaced by a new liberal order.\(^{20}\)

Wilson expressed his belief in the transformative potential of the new system in his *War Aims of Germany and Austria* of 1918: ‘…peoples may now be dominated and governed only by their own consent’.\(^{21}\)

Wilson’s belief was naïve because the post-Versailles international system remained dominated by the traditional powers – as evidenced by the re-drawing of international borders largely according to the priorities of the key Allied states – thus limiting the capacity of colonial peoples to independently assert self-determination. Furthermore, under the principle of *uti possidetis juris*,\(^{22}\) the boundaries which the imperial powers had drawn around their colonial possessions for the sake of convenience were confirmed as the new ‘national’ boundaries of these territories. Thus, the system developed by Wilson and his colleagues limited the capacity of colonial peoples to self-determine, by entrenching the borders imposed upon them by the powers responsible for their subordination.

The inconsistency with which self-determination was recognised during this period has prompted contemporary scholars from outside Europe to argue that the Western ‘founding fathers’ of self-determination ‘used that right to achieve their own freedom while preventing others from asserting that very same right’.\(^{23}\) It is today widely accepted that President Wilson’s conception of self-determination won support at Versailles because of its utility in terms of statecraft, not because of its capacity to promote justice,


\(^{22}\) A doctrine which fixed the boundaries of newly formed states based on those which existed at the moment independence was asserted. Thus, in effect, the boundaries of the new state became those imposed by the colonial power. I will consider *uti possidetis juris* further in Part 4(a) of this chapter.

notwithstanding that Wilson and many colleagues professed to believe in the justice of their ‘new’ principle.24 This is demonstrated in the selective manner in which state boundaries were re-defined and new states recognised post-war. Only those maps covering the territories of the defeated powers were re-drawn, thus limiting the emancipatory potential of Wilson’s statements for colonised peoples and minorities in other territories. The newly created states legitimised ‘the status of one group that purports to be at the core of the state’, whilst ignoring the existence of others within those states, whose positions were often tenuous.25

Despite strong rhetoric, self-determination was ‘deemed irrelevant where the peoples’ will was certain to run counter to the victors’ geopolitical, economic and strategic interests’.26 This was exemplified in the outcome of the 1920 Aaland Islands Case concerning the claim of those islands to secede from Finland and join Sweden.27 The commission of jurists appointed by the League of Nations to adjudicate on this claim refused to apply self-determination in this context, or legitimate a right to secession.28 Similarly, President Wilson himself demonstrated unequal sympathies for different nations, permitting the demands of Poland and France to dominate over the expressed wishes of peoples in Danzig and Alsace-Lorraine.29

As a consequence of the disjunction between rhetorical promotion and state-centric action in the two decades following the First World War, self-determination in that period was used above all as a means of justifying the methods by which the victorious powers sought to regulate the international community. This period in the evolution of self-determination was incongruous with the theoretical underpinnings of the right. In recognising self-determination only where this was politically expedient, the dominant forces in the international community at this time established a precedent for the

---

26 Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (1995), 25. Cassese offers the examples of Poland, Czechoslovakia and South Tyrol as evidence that territory was re-distributed without reference to the wishes of the populations involved.
dominance of politics over law which continues to impinge upon the right in the twenty-
first century. Self-determination did not become a central principle of international law
until several former colonies came to assert significant influence on the world stage,
following the formation of the United Nations in 1945. By that time, the influence of
self-determination as an international legal principle was beginning to have consequences
which Wilson had not anticipated; non-European peoples in India, Algeria, Vietnam,
Tunisia and elsewhere were asserting that a nation could exist without a state, and were
forming nationalist movements which claimed self-determination in the form of
independence. I will consider this period further in Section 4, below.

Some of the independence movements which became prominent on the world stage post-
World War One turned to socialism, rather than liberal capitalism, as an ideology in tune
with their claims to self-determination. The revolutionary writings of Karl Marx and
Vladimir Lenin were of significance to these movements, because both theorists had
recognised the emancipatory potential of self-determination earlier and more acutely than
Wilson. In Lenin’s conception, self-determination was not a right solely in the power of
the Western liberal democracies to grant to ‘deserving’ peoples. Rather, self-
determination was to become a general criterion in the liberation of the working peoples
around the world. Lenin’s proposals on self-determination were distinctive, as they
promoted the right of self-determination (as independence) for all ethnic groups, not only
colonial peoples.

Yet, as in the case of Wilson’s commitment to liberal democracy, Lenin’s commitment to
socialism limited the practical power of the right which he promoted. Lenin regarded self-
determination as supporting the claims of oppressed nations to political status, although
he did not encourage the use of the right to promote secessionist movements and instead
hoped it would assist in the integration of a universal socialist community. This is
demonstrated in Lenin’s argument that the right of (national) self-determination implied

30 Deborah Z Cass, ‘Re-thinking Self-Determination: A Critical Analysis of Current International Law
31 Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2004), 139.
32 Thesis 4, ‘The Proletarian-Revolutionary Presentation of the Question of the Self-Determination on
Nations, Vladimir I Lenin, Theses on the Socialist Revolution and the Right of Nations to Self-
‘the maximum of democracy and the minimum of nationalism’. That is, Lenin sought more the self-determination of the global working class than the self-determination of distinct peoples within states. Rather than conceiving of self-determination as an absolute right, Marxists promoted self-determination as a stepping stone towards the realisation of universal socialist rights.

In practice, as with the Western liberal conception, the Soviet socialist conception of self-determination was hypocritical, especially given the Soviet Union’s eventual forced annexation of the Baltic States, and later several European and Asian ‘nations’. Lenin’s conception of self-determination also, arguably, underestimated the power of nationalism for oppressed and colonised peoples. Even in those societies where revolutionary movements established socialism as a governing ideology, for example China and Vietnam, a commitment to a unifying nationalistic identity retained either prominence or dominance over commitment to socialist or communist ideology.

Nevertheless, while Wilson and his Western European and North American contemporaries had understated the emancipatory potential of self-determination, Lenin gave early recognition to the capacity of the right to carry out the mission of decolonisation. This clearer understanding of self-determination’s emancipatory power proved a key influence in the subsequent phases of its development. Lenin’s more direct appeals to the peoples of the world had assisted in shifting self-determination from the grasp of ‘statesmen’, and into the popular lexicon.

In the context of one of the two case studies of this thesis, self-determination was first asserted in connection with the emancipation struggles of Indigenous peoples in Australia in the 1920s. As Maynard has revealed, prominent newspaper headlines of this time included: ‘On Aborigines’ aspirations – First Australians to help themselves, self-

---

determination’ and ‘Aborigines in conference – Self-determination is their aim.’39 This stands as early evidence that international legal developments provided peoples with reference points, by which they could judge the degree of recognition given to their rights by the states in which they lived.40 As will be shown in the following sections, popular commitment to self-determination has repeatedly forced the evolution of the right, in the face of statist mistrust. I will explore the ongoing claim to self-determination by Indigenous peoples in Australia in Chapter 7.


Self-determination undoubtedly gained significant political currency post-World War One, however, the potential of the right within global politics was stifled in the subsequent decades by a series of crises, notably the Great Depression and the Second World War. States became more isolationist and protective of their own interests during this period. International legal commentary struggled to reconcile the competing forces of nationalist movements and a desire for a stable legal order.41 It was not until the international community convened following the Second World War, with the aim of devising a system of relations which would prevent a re-occurrence of global conflict, that the true power of self-determination began to be asserted. From the moment self-determination was enshrined in the new Charter of the United Nations, a ‘relentless drive to transform self-determination from an idea into a legally binding principle’ began to take shape.42 It then took on the status of a firm pillar of international law.43

In recognition of Lenin’s early efforts to promote the potential of self-determination, the Soviet Union insisted on the inclusion of the right in the UN Charter.44 Self-determination

40 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006). Aden Ridgeway is a Gumbayyngirr man, a former federal politician and public servant, and is active in a wide range of public policy areas.
43 Ian Brownlie, Principles of Public International Law (6th ed, 2003), 553, 554.
was thus launched on the path to becoming a central element of the international human rights framework.\textsuperscript{45} The relevant provisions of the Charter are Articles 1 and 55:

\textbf{Article 1}

The Purposes of the United Nations are:

\vspace{1em}

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace…

\textbf{Article 55}

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.\textsuperscript{46}

Articles 1 and 55 of the Charter operationalised Wilson’s argument that respect for self-determination was essential for the preservation of peace. However, these two articles did not offer direction on the nature of self-determination, or how and when the principle could be legally asserted. Only Article 73 of the Charter provided some clarification of the content of the right, through its statement of the obligations of UN member states responsible for non-self-governing territories. The holistic nature of self-determination was developed by Article 73, which conferred upon administering states obligations reaching far beyond the purely political context, requiring states:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement…;


\textsuperscript{46} Charter of the United Nations, Articles 1 and 55.
b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions…;

d. to promote constructive measures of development…47

Many of the elements of self-determination which present-day claimant peoples regard as central to the exercise of the right were encapsulated in this provision, notably protection of cultural distinctiveness, advancement and development of disadvantaged peoples, political autonomy and self-government.

The inclusion of self-determination in the UN Charter was a key development in the evolution of the right. The meaning and scope of self-determination had not yet been defined in detail, and many states during this period remained eager to preserve the traditional hierarchy of the international legal order by limiting the circumstances in which self-determination could be asserted. In the early years of the United Nations, many states regarded self-determination as a principle primarily related to the actions of the organisation, rather than to individual member states. Yet, in subsequent years, member states increasingly acknowledged self-determination as a legal standard of behaviour by which they were also directly bound.48 From this point, self-determination was poised to assume a role at odds with multi-national empires and colonial rule.49 Throughout the subsequent six decades, the status of self-determination as a principle of international law has continued to raise peoples’ expectations of the status they are entitled to within the global community.50

4. Freeing colonial peoples and nations: Self-determination in the ‘decolonisation era’

Self-determination retains currency in international law into the twenty-first century. However, it was during what is commonly termed the ‘decolonisation era’, which peaked in the 1960s and 1970s, that the principle of self-determination bore greatest significance in international law and politics. The anti-colonial character of self-determination has come to define assertions and perceptions of the right ever since this period. In the second

47 Charter of the United Nations, Article 73
50 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006). Larissa Behrendt is a Eualeyai and Kamilaroi woman and a legal academic.
half of the twentieth century, colonised peoples around the globe seized upon the right of self-determination as a vehicle by which the mission of decolonisation, which Frantz Fanon and others described, 51 could be achieved. 52 Self-determination was the international legal mechanism best able to facilitate this process, as its origins and development were inspired by the ideals of freedom and emancipation.

In 1945, 51 states joined together, forming the United Nations. By 1960, that membership had increased to 99 states. 53 In 1960, the General Assembly confirmed the relationship between decolonisation and self-determination through the Declaration on the Granting of Independence to Colonial Countries and Peoples, which then became the most frequently cited declaration of international law: 54

*The General Assembly,*

...  
Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

...  
Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

...  
Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

...  
...to this end Declares that:

51 Frantz Fanon, *The Wretched of the Earth* (1965), 41.
1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.\footnote{Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, UN GAOR, 15th session, Supp. No16, UN Doc A/4684 (1960), Articles 1-3.}

This seminal declaration was the first legal statement to employ the words: ‘All peoples have the right of self-determination…’ By stating that an ‘inadequacy’ of ‘preparedness’ was not an excuse for delaying a people’s exercise of independence, the Declaration confirmed that colonial peoples enjoyed separate and distinct legal status from their administering states. Non-dominant or non-Western means of social and political organisation were not to be regarded as valid reasons for the continued suppression of peoples’ claims to autonomy. As is apparent from the text, advocacy on the part of newly independent colonial nations and decolonisation campaigners was essential to the development of this powerful statement of international law. The Declaration quickly came to stand as the first tangible beacon of the legal right of self-determination for colonial claimant peoples.

The Declaration on the Granting of Independence to Colonial Countries and Peoples was followed, the next day, by another General Assembly Resolution, which is now regarded as its ‘sister’ statement of law. Resolution 1541 sought, for the first time, to set down some concrete means by which self-determination might be exercised:

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.\footnote{Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, UN GAOR, 15th session, Supp. No16, UN Doc A/4684 (1960), Articles 1-3.}
The three forms of self-determination presented in this provision formed the basis of what has become a longer and more detailed list over time. The recognition of several legitimate forms of self-determination in Resolution 1541 laid the foundation for claimant peoples to articulate how they sought to exercise self-determination, in their unique circumstances. The peoples’ choice is valid so long as it is freely exercised in accordance with the principles of self-determination.

Although these twin Declarations were developed to progress the mission of decolonisation, they had broader significance for the evolution of self-determination, by confirming the principle as a universal right of all peoples, and recognising that the right could be exercised in a range of ways. The Declarations were also important because they described self-determination ‘as a part of the obligations stemming from the Charter’, and presented themselves as authoritative interpretations of the Charter. In this way the twin Declarations proved that each stage of the evolution of self-determination has built on precedent. In the decolonisation era, self-determination evolved in response to the irressible demands of colonial peoples for liberation from domination.

However, despite the enhanced legal force of self-determination following the passage of the twin Declarations of 1966, powerful states continued to resist the challenges to the foundations of the international order which at that time were gaining momentum around the globe. In presiding over the workings of the decolonisation movement, states re-affirmed their commitment to the ‘salt-water’ test of colonialism, which had been developed during the imperial age. During that period, European powers acquired colonial territories in Africa, Asia, the Americas and the Pacific, which they claimed as evidence of their prestige and superior civilisation. According to the salt-water test, a ‘colony’ could only be defined as such if it was a territory separated from the imperial power by geographical and cultural distance.

---

56 Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Resolution 1541(XV) (1960), Principle VI.
58 Ian Brownlie, Principles of Public International Law (6th ed, 2003), 554.
59 See, for example: Frantz Fanon, A Dying Colonialism (1959), Frantz Fanon, The Wretched of the Earth (1965), Jawaharlal Nehru, The Discovery of India (1946), Tunisia Constitution 1959, preamble.
In the 1960s, the salt-water test was used to ensure normative predictability in the new flood of self-determination claims, however, it was nevertheless manifestly unjust. 

Ethnic and other minority groups living in ‘settler’ colonies, for example Irish nationalists in the North of Ireland and Indigenous peoples in Australia, could not conform to the salt-water test. Persistent commitment to the salt-water test has imposed hardship upon such groups, some of whom continue to experience forms of colonial domination within established nation states. By entrenching the authority of the state over minority groups living within its borders, the salt-water test prevented minority peoples from operating in the international legal forum. As such peoples well recognise, salt-water colonialism is not the only form of domination, and for this reason the salt-water test remains indefensible.

(a) Self-determination and uti possidetis juris

Alongside the affirmation of the salt-water colonial test, the emancipatory potential of self-determination was further constrained by states’ reliance on the principle of respect for the territorial status quo, or uti possidetis juris. In order to maintain colonial borders and avoid the breakdown of colonial ‘nations’ into their (sometimes several) ethnic parts, the international community required colonised peoples to exercise self-determination with regard to this principle of the inviolability of frontiers. The ICJ declared that uti possidetis juris was a necessary constraint on the decolonisation process, to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontier following the withdrawal of the administering power.

The frontiers of newly decolonised states, from South America to Africa and elsewhere, were set according to uti possidetis juris. Indeed, the ICJ has continued to deploy uti

---

62 Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005). Mike Ritchie is a community worker, who represents former Irish republican political prisoners.
65 Frontier Dispute Case (Burkina Faso v Republic of Mali) ICJ Rep 1986 554, Chamber of the International Court of Justice
66 Frontier Dispute Case (Burkina Faso v Republic of Mali) ICJ Rep 1986, 554 at 556, Chamber of the International Court of Justice
possidetis juris for this conflict-avoidance purpose, most recently in 2005 to settle the border between Benin and Niger.68

In fact, the decision of colonial powers to enforce colonial borders on new ‘self-determining’ nation states was a significant causal factor in subsequent conflicts between ethnically distinct peoples, who were required to ‘self-determine’ within those established borders.69 Further, ‘an automatic application of *uti possidetis* can potentially encourage separatist movements, compound historical injustices and deny human rights’.70 The reliance on *uti possidetis juris* during the decolonisation era demonstrated the vulnerability of the legal right of self-determination to the political concerns of dominant states. However, it is important to note that *uti possidetis juris* is not a *jus cogens* norm, and it does not preclude changes to borders made by agreement.71

**Conclusion**

Despite the imposition of significant constraints during the decolonisation period, self-determination continued to function as an emancipatory force. The clearest demonstration of this fact is the vast growth in membership of the United Nations in the second half of the twentieth century. In 1950, the UN was composed of 60 member states – in 2011, this membership stands at 192. A vast number of the more recently formed member states emerged from the decolonisation movement.72 In fact, the modern right of self-determination has been so strongly linked to the phenomenon of colonialism,73 that some commentators have regarded it solely as the right of ‘salt-water’ colonial peoples.74

---

68 Frontier Dispute (Benin/Niger) ICJ Rep 2005, 90, Chamber of the International Court of Justice
71 In Chapter 6, I show how the Good Friday Agreement overrides the operation of *uti possidetis juris* in relation to self-determination in Ireland, by permitting changes to sovereignty through agreement.
However, the universal character of the right has prevented dominant states from limiting its assertion or application solely to salt-water colonial contexts.

5. A central element in the framework of international law: Self-determination in the International Bill of Rights

The immediate post-World War Two period was characterised by mistrust for overt expressions of nationalism and group identity, arguably stemming from the excesses of the Nazi regime and its manipulation of German nationhood for propaganda and expansion purposes. Consequently, self-determination was not at the centre of human rights developments at that time. The Universal Declaration of Human Rights of 1948 (UDHR) focused on individual human rights, and did not include provision for the protection of group rights such as self-determination. Nevertheless, the UDHR did recognise that rebellion could be a legitimate last resort of a people living under tyranny and oppression, if the rule of law was not protecting their human rights.

The most significant legal event in the evolution of self-determination occurred in 1966, during the decolonisation period, with the adoption of the twin human rights covenants. At that time, self-determination assumed a central place in what is unofficially termed the International Bill of Rights, which consists of the three central instruments of international human rights law – the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In enacting self-determination as part of the International Bill of Rights, the international community confirmed that the right belongs to all peoples, not only the peoples of salt-water colonies.

Once expressed in law through the dual human rights treaties of 1966, self-determination was confirmed as a binding principle and legal right. The words which confirmed this

76 Universal Declaration of Human Rights, GA Resolution 217 A (III) (1948)
77 Universal Declaration of Human Rights, GA Resolution 217 A (III) (1948), preamble.
elevated status, set down in common Article 1 of the ICCPR and ICESCR, were not new, but their expression in these most fundamental human rights documents was profoundly important:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.78

Once it was legally confirmed as an essential element in the framework of international human rights law, self-determination came to be accepted as such through state practice.79

Self-determination is the only substantive right protected by both the ICCPR and ICESCR. This, along with the placement of the right in the common first article of the Covenants, proves its heightened status in international law. In 1994, the Human Rights Committee confirmed the importance of the right, and explained why it was given such prominent status in the twin Covenants:

1. …The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in


a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.  

The Human Rights Committee characterised self-determination as an essential element in the framework of international human rights law. In keeping with this position, common Article 1 of the twin Covenants confirmed the universality of self-determination, thus demonstrating that application of the right was not limited to the colonial context. In this way, the concern of the Declaration on the Granting of Independence to Colonial Peoples and Countries to protect peoples from oppression, subjugation, and domination was extended by the twin Covenants, to apply to all peoples. The international community confirmed in a positive and binding statement of law that the domination of one people by another would not be legally tolerated. Claims of subjugation were to be resolved with respect to self-determination, a right unique in its standing as a civil and political right, an economic, social and cultural right, and a collective right. Having made the right of self-determination universal and thus enabling peoples to claim sovereignty and rights of participation, the international community began a process of decolonising international law and legal language which continues – albeit slowly – in the present.

Since the passage of the twin Covenants in 1966, several respected commentators have recognised that self-determination, as framed in the International Bill of Rights, is accorded a constitutive role within the human rights framework. Anaya describes self-determination in this context as a standard of legitimacy against which institutions of government [are] measured. Self-determination is not separate from other human rights norms; rather, self-determination is a configurative principle or framework.

---

complemented by the more specific human rights norms that in their totality
enjoin the governing institutional order…

This description has been supported by the UN Rapporteur on Self-Determination, Héctor
Gros Espiell, and by Kristin Henrard, both of whom have confirmed that the full
realisation of the right of self-determination is essential in order that all people be able to
exercise their full range of human rights. Similarly, in the words of James Crawford,
self-determination is ‘essentially a summary of other rights’, as it both encompasses and
transcends each individual right. The constitutive nature of self-determination has not
been lost on the claimant peoples of the past half-century, who have continually asserted
self-determination as central to the realisation of their full entitlements under the human
rights framework.

(a) Exploring the content of self-determination: The Declaration on Friendly Relations

Although the 1966 twin Covenants stand as the most influential statements of the status of
self-determination in international law, they provide minimal detail regarding the content
of the right. However, in 1970, the UN General Assembly passed a resolution which is
still considered one of the most authoritative expositions of the UN Charter: the
Declaration on Principles of International Law Concerning Friendly Relations and
Cooperation Among States in Accordance with the Charter of the United Nations. This
Declaration provided considerable further guidance on the nature of self-determination:

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

88 See, for example, the Constitution of Timor Leste, which joined the United Nations as an independent state in 2002. The preamble to the Constitution acknowledges the military, diplomatic and clandestine resistance fronts of the independence struggle, and confirms ‘the self-determined will for independence’ of the East Timorese people. The Constitution contains an extensive list of fundamental human rights, which are framed in the context of the Constitution as an assertion of self-determination: *East Timor Constitution 2002*, Preamble and Titles II and III.
social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.89

This Declaration clarified and expanded the scope of self-determination by several means, as was recognised in an important article by Johnson in 1973. Firstly, self-determination is confirmed and entrenched as a right rather than a privilege.90 The right is acknowledged to extend beyond the dismantling of colonialism, an important recognition in light of more recent state-led attempts to stifle contemporary self-determination claims.91 Furthermore, the Declaration makes clear that, in exercising their right of self-determination, a people is entitled to choose whichever political status, for example independence, association, or otherwise, that suits their circumstances and aspirations.92 Again, in an important clarification considering contemporary statist distrust of self-determination advocacy, the Declaration makes clear that peoples are entitled to defend

91 In Chapter 7, I will discuss the lengthy process leading to the adoption of the Declaration on the Rights of Indigenous Peoples (2007). This is one recent example that shows state resistance to the notion of self-determination, even in circumstances where threats to territorial integrity are unlikely.
their right of self-determination and may resist (and seek support for resisting) forceful attempts to deprive them of the right. 93

However, the Declaration on Friendly Relations also imposed significant burdens on self-determination claimants. The Declaration introduced the language of territorial integrity into self-determination discourse, and the notion of states’ rights to territory continues to dominate over the rights of contemporary claimant groups. According to the Declaration, so long as a state is ‘complying’ with self-determination, no action which would threaten that state’s territorial integrity or political unity would be sanctioned by the law. Indeed, one prominent contemporary scholar of self-determination, Hurst Hannum, argues that the language of the Declaration demonstrates its preference for territorial integrity over self-determination: 94

Nothing in the foregoing paragraphs [of the Declaration] shall be 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 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. 95

According to Oloka-Onyango, this formulation is characteristic of the typical UN state-centred perspective on self-determination; acknowledging the existence of the right while significantly limiting its application. 96 There is no doubt that, in juxtaposing the opposing concepts of self-determination and territorial integrity, the Declaration on Friendly Relations caused complications for future interpretations of the right and its applications. Indeed, one critic challenged the sense of presenting the self-determination and territorial integrity provisions together in the Declaration, arguing that this ‘double talk’ primarily

reflected ‘the tremendously powerful impulse towards stable frontiers and the finality of borders’;\(^97\) rather than serving the promotion of self-determination.

However, there is an alternative view. It is possible to characterise the Declaration as a legal means of promoting balance between competing interests within the framework of international law. The Declaration can be interpreted to require the balancing of all assertions of human rights, particularly self-determination, with other competing rights and interests. On this interpretation, territorial integrity need not dominate self-determination; rather, it is an interest which all claims to self-determination must consider and relate to. This interpretation is supported by the language of the Declaration itself, which makes clear that territorial integrity is by no means an unlimited ‘right’ or interest of states.\(^98\) In its Kosovo Advisory Opinion of 2010, the International Court of Justice bolstered this interpretation, through its finding that the obligation to respect a state’s territorial integrity is owed to states only by other states, not by non-state actors (such as self-determination claimants).\(^99\)

I adopt that approach in this thesis, arguing that self-determination claims must be considered on their merits, and balanced against other interests through a human rights approach.\(^100\) This approach complements my focus on the experiences and perspectives of contemporary, anti-colonial self-determination claimants. A state’s interest in territorial integrity is not a trump card against a legitimate claim to self-determination. Rather, territorial integrity is the entitlement of states that protect the right of self-determination for all peoples living within their borders.\(^101\) Even the state which publicly asserts the highest degree of legitimacy and respect for human rights may find its territorial integrity under threat, if it limits or denies the right of peoples within its borders to exercise self-

\(^100\) I consider the human rights approach in detail in Chapter 5.  
determination. Although the ICJ attempted to distinguish the position of Kosovo in its Advisory Opinion on that entity’s unilateral declaration of independence, it is likely that other peoples will be able to make ‘equally compelling legitimacy arguments’ to self-determination, in forms which may affect the territorial integrity of states. The international legal system is obliged to make space for the full and just evaluation of all self-determination claims.

(b) Exploring the content of self-determination: The Helsinki Final Act

A European legal instrument, the Final Act of the Conference on Security and Co-operation in Europe (1975), affirms an essential condition of the Declaration on Friendly Relations, namely that self-determination is not confined to traditional, anti-colonial expressions. Article VIII of the Helsinki Final Act provides:

The participating States will respect the equal rights of peoples and their right of self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with 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.

As I will show in the following section, recent manifestations of self-determination have proved that the right is open to assertion by contemporary claimants, anti-colonial or not.

---

102 In Chapter 6, on self-determination for Irish nationalists, I consider the implicit acceptance of this fact by the British government, through the Good Friday Agreement (Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement)). That Agreement confirms that the British and Irish states will accept a change in sovereignty in Northern Ireland, should that be the will of a majority of the people of Ireland, north and south.


6. Post-colonial? Recent manifestations of self-determination

The final stage in the modern history of self-determination considered here explores more recent manifestations of the right, to demonstrate that self-determination continues to evolve beyond its colonial context, and thus retains potential for further contemporary development. Hurst Hannum argues against this position, asserting that all exercises of the right which have taken the form of independent statehood have been colonial in nature, and thus that the right may only result in an assertion of independence within the colonial context. In promoting this restrictive view, Hannum has relied on the travaux préparatoires of the ICCPR and ICESCR to show that most states supported a restrictive interpretation of self-determination in the early 1960s, and that the United Kingdom argued against its inclusion in the twin Covenants. However, international legal developments since the 1960s and contemporary state practice demonstrate that self-determination retains its universal character. State practice on international law does not remain static, and past interpretations of rights do not prevent those rights from evolving. For example, the expressed attitude of the United Kingdom towards self-determination has developed significantly since the 1960s, and from the 1980s the British government has repeatedly affirmed the universal and inalienable application of the right of self-determination, including to peoples inside its own borders.

Expressions of self-determination – in the form of independent statehood – over the past four decades demonstrate a wide variety of motivating circumstances, many of which were not explicitly colonial. Independence has been achieved by peoples whose struggles were secessionist rather than de-colonialist, for example in Singapore (1965) and Bangladesh (1971). The international community has recognised the validity of the self-determination claims of people in Namibia, East Timor and Palestine, none of which

---

complied with the salt-water colonial test. The reunification of East and West Germany was also defined as an exercise of self-determination by four of five permanent members of the Security Council, via treaty, in 1990. There was no suggestion that the German reunification could be primarily attributed to the decolonisation movement. Therefore, as Robert McCorquodale confirms:

The right of self-determination applies to all situations where peoples are subject to oppression, subjugation, domination and exploitation by others. It is applicable to all territories, colonial or not, and all peoples.

However, the fact that these non-colonial or atypical colonial assertions of self-determination have gained recognition does not prove that self-determination’s mission of decolonisation has been exhausted. I agree with commentators including Gerry Simpson and Arundhati Roy, who recognise that the end of the ‘age of Empire’ has ‘merely revealed most states to be imperial’. Contemporary manifestations of colonialism may be identified throughout the world, particularly if one understands colonialism as relating to the type of administration, rather than to distance from the imperial power. In Australia, for example, neither the constitutional arrangements nor the lived experiences of Indigenous peoples demonstrate a shift into a ‘post-colonial’ relationship between

---


111 *Treaty on the Final Settlement With Respect to Germany*, 29 ILM 1187 (signed 12 September 1990)


114 As I discuss in detail in Chapters 6 and 7, Irish nationalists in the North of Ireland and Indigenous peoples in Australia can prove a contemporary colonial experience, despite the fact that they do not meet the salt-water colonial definition. See: Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006). Robert McCorquodale participated in this research during the process of interviews relating to the self-determination claims of Irish nationalists in Northern Ireland. His academic writings are also cited extensively in this thesis. McCorquodale is not a member of either major community in Ireland, nor is he engaged in a self-determination claim there. He was interviewed on the basis of his expertise in self-determination as a Professor of international law, with particular focus on Britain’s engagement with the right. In this sense, McCorquodale’s participation in this research is similar to that of Professor Christine Bell, another non-claimant interviewee, whose expertise has been considered through both her comments in our interview and her written work.
Indigenous peoples and the state.\textsuperscript{115} The continuing decolonising mission of self-determination is explored in Chapter 4, where I argue that twenty-first century manifestations of colonialism can be more diffuse (or more subtly enforced) than at the height of the imperial age.

The persistence of self-determination claims in recent years, whether colonial or otherwise, has ensured the continued prominence of self-determination in the language of international relations.\textsuperscript{116} For example, during its 1980s conflict with Argentina, Britain relied upon self-determination to support its position that the Falklands/Malvinas Islands were entitled to self-governance.\textsuperscript{117} In a range of other contexts since that time, Britain has accepted that there can be different ‘peoples’ within the same State and, in fact, British practice has helped to dispel any uncertainty as to whether self-determination is applicable in all territories and within State borders.\textsuperscript{118} The establishment of semi-autonomous parliaments and regional governments in Wales, Scotland and Northern Ireland is proof that even Britain, with its imperial history, professes commitment to the right of all peoples to self-determination. Similarly, Australia has in recent years become a prominent supporter of Timor Leste’s assertion of self-determination, despite its earlier failure to respect the distinct rights and identity of the East Timorese.\textsuperscript{119} Lately, Australia’s concern for political and economic expedience in relation to the sovereignty dispute in Timor Leste has, sometimes awkwardly, given way to recognition that the

\begin{footnotesize}
\begin{enumerate}
\item Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
\item Letter from United Kingdom’s representative to the United Nations to the President of the Security Council, 28 April 1982, Security Council Official Record 37 Session Supp for April, May, June, pp. 47-49.
\item Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006). In 1991, Portugal – the former colonial administrator of East Timor – submitted an application to the International Court of Justice (ICJ), claiming that Australia had violated the right to self-determination of the East Timorese people through its completion of the Timor Gap treaty with Indonesia: Portuguese Application, Case Concerning East Timor (Portugal v Australia), ICJ Doc. A/AC.109/1072 (22 February 1991). The ICJ eventually concluded that it did not have jurisdiction to hear the matter: Case Concerning East Timor (Portugal v Australia) ICJ Rep 1995 90, International Court of Justice. However, Australia eventually reversed its position in relation to East Timor, and later led the international military force tasked with supporting East Timor’s emergence to independence, and intervening against Indonesian military and paramilitary attacks: Michael Geoffrey Smith and Moreen Dee, Peacekeeping in East Timor: The path to independence (2003).
\end{enumerate}
\end{footnotesize}
people of that territory bear an equal entitlement to the universal right of self-
determination.\textsuperscript{120}

Self-determination played an important role in the dissolution of the former Yugoslav
federation. International legal adjudications on self-determination which followed the
Balkan wars of the 1990s demonstrated both that the right retained currency, and that its
application remained frequently limited by political circumstances. The Arbitration
Commission of the Conference on Yugoslavia (known as the Badinter Commission)
interpreted self-determination in such a way as to ensure that Yugoslavia’s disintegration
would be confined to its existing federal states, in order to avoid establishing a legal
precedent that could have enabled ethnic claims to statehood elsewhere.\textsuperscript{121} By reasserting
the validity of the old colonial principle of \textit{uti possidetis juris}, the Badinter intervention in
Yugoslavia left a legacy of inequality, in which some peoples of the former federation
enjoyed greater freedom to exercise self-determination than others.\textsuperscript{122}

The Commission’s application of \textit{uti possidetis juris} has since been criticised as
inappropriate, considering the complex policy issues raised by the dissolution of the
federation, the lack of international consensus on how the territory should be divided, and
the increase in awareness of participatory rights since the decolonisation era.\textsuperscript{123} There was
undoubtedly a gulf of difference between the circumstances of emerging African states in
the decolonisation period and Yugoslavia in the 1990s. Although the binding quality of
the Badinter Commission’s decisions is unclear,\textsuperscript{124} its ruling that Serbian people in
Croatia and Bosnia-Herzegovina were not entitled to secession could contribute to an
emerging trend of approaching the claims of ethnic minorities through the framework of
‘minority rights’ rather than through self-determination.\textsuperscript{125}

\textsuperscript{120} Ian Martin, \textit{Self-Determination in East Timor: The United Nations, the ballot, and international
intervention} (2001), 22
\textsuperscript{121} Richard Caplan, \textit{Europe and the Recognition of New States in Yugoslavia} (2005), 69.
\textsuperscript{122} Hurst Hannum, ‘Rethinking Self-Determination’ (1993-1994) 34(1) \textit{Virginia Journal of International
Law} 1, 38.
\textsuperscript{123} Steven R Ratner, ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90
\textit{American Journal of International Law} 590, 614.
\textsuperscript{125} Arbitration Commission of the Peace Conference on Yugoslavia, \textit{Opinion No 2}, 11 January 1992, 31
ILM 1497. In Chapter 3, I consider the relationship between self-determination and minority rights. In
circumstances where a people has a claim to self-determination, minority rights protections may not fully
accommodate that right.
The Badinter rulings did not, however, impose unshakable limits on the contemporary expression of self-determination. Indeed, the international community’s rush to recognise the legitimacy of the secessionist states of the former Yugoslavia was evidence of continuing state support for the exercise of self-determination as independence in certain circumstances, including in cases which are not typically colonial in nature. Further, despite the ruling on Serbian ethnic minorities, the Commission did make significant statements on the importance of ethnic identity, and these have since motivated other ethnic claims to self-determination, including in the newly declared ‘state’ of Kosovo.

In 2007, UN Envoy Martti Ahtisaari issued a proposal for the future status of Kosovo, which acknowledged independent statehood as the only means of ensuring the future viability of Kosovo. Kosovo declared independence from Serbia on 17 February 2008, and in July 2010 the ICJ concluded that this declaration did not violate international law. Many states have since recognised Kosovo as an independent state, although several others remain undecided or opposed. Should Kosovo’s independence be assured in future, it would contradict the inviolability of territorial boundaries as expressed in the principle of *uti possidetis juris*. Further, the Kosovo case demonstrates the continued potential for self-determination to manifest beyond typical colonial contexts. In such cases, approaches to self-determination must ‘move beyond *uti possidetis*’.

However, the Kosovo case also demonstrates the limits of international law in terms of twenty-first century self-determination claims. The ICJ’s decision in relation to Kosovo’s declaration of independence has been criticised as a narrow, positivist approach, which failed to address major contemporary issues. The Court concluded that Kosovo’s declaration of independence was ‘in accordance with’ international law because it was not

---

129 See, for example, the position of Australia as outlined by the Department of Foreign Affairs and Trade: Department of Foreign Affairs and Trade, *Kosovo: Country Brief* (2009) <http://www.dfat.gov.au/geo/kosovo/country_brief.html> at 7 April 2011.
‘in violation of’ any specific prohibition in international law. This approach was ‘highly positivistic’, failing to consider whether Kosovo’s declaration was in accordance with a positive entitlement, such as the right of self-determination. It would have been possible for the court to take a broader approach to the General Assembly’s request for an Advisory Opinion, and so shed light on the wider questions involving self-determination, secession and recognition – not only in Kosovo, but for other groups with similar aspirations. The fact that it did not do so is ‘regrettable’, as an opportunity has been missed for the Court to define its view of the state of the law relevant to self-determination. Importantly, however, the court’s narrow focus has left space for the United Nations to engage in ‘secondary law-making’, and develop the concept of self-determination for the twenty-first century. The critique of the ICJ’s Kosovo Advisory Opinion demonstrates the need for a twenty-first century approach to self-determination, more malleable to the needs of the diverse range of contemporary claimant peoples.

Conclusion

In 1978, Lee Buchheit urged international lawyers to engage with self-determination and ensure its post-colonial currency, partly by opening the right to the claims of those located within independent states but governed without their consent. Buchheit challenged interpretations of self-determination to avoid ‘an uncritical affirmation of the supremacy of the ‘sovereign’ state’. As has been clear throughout the historical development of self-determination, the capacity of the right to unsettle dominance and hierarchy has continued to evolve, and each successive era of its assertion has posed further challenges to traditional conceptions of state sovereignty.

131 Accordance with International Law of the Unilateral Declaration of Independence in Relation to Kosovo (Advisory Opinion) [2010] ICJ Rep 141
In the next chapter, I will argue that Buchheit’s exhortation to international lawyers maintains contemporary relevance. Self-determination continues to face challenges, which may limit its capacity to operate in a state-dominated legal system. Twenty-first century self-determination claims will typically be ‘hard cases’, and the circumstances of contemporary claimants are less ‘clear-cut’ than those of earlier anti-colonial claimants.\(^{137}\) The right of self-determination must be reinterpreted in the twenty-first century, in order to ensure its continued capacity to combat oppression and fulfil its mission of decolonisation.

\(^{137}\) Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006). Bríd Rodgers is a former Irish nationalist politician and founding activist in the civil rights movement.
CHAPTER 3

SELF-DETERMINATION:

CONTEMPORARY CHALLENGES
Introduction

The power of self-determination has been subject to constant challenges, from the earliest stages of its development to the present. This chapter introduces some of the key challenges faced by self-determination in the twenty-first century. First, I consider the status of self-determination as *jus cogens*. Second, I question how self-determination may be validly exercised. This raises the related issue of whether assertions of self-determination ought to be characterised as ‘internal’ or ‘external’. Third, I explore the problem of defining the ‘self’, and examine three different approaches to the question of ‘peoplehood’. Finally, I acknowledge the inherently political nature of self-determination, and consider the challenge of implementing self-determination in that context. These challenges will be explored in the context of contemporary claims in Chapters 6 and 7.

The persistence of these questions demonstrates that the meaning, application and potential of self-determination remain contested. Arguably this is the case because – uniquely within the framework of human rights – self-determination continues to challenge the foundations of state sovereignty in a variety of ways. Whereas many states remain determined to limit the capacity of self-determination to threaten state dominance in the international system, peoples seeking control over their own destinies continue to harness self-determination in their struggles and assert its persistent emancipatory potential. The divergence between statist and popular interpretations of self-determination justifies contemporary exploration of its place in the international system. The range of contemporary challenges faced by self-determination must be explored and overcome, in order that claims may be evaluated on their merits.

In 2006, the people of Montenegro voted for, and achieved, self-determination in the form of independent statehood from Serbia.\(^1\) When self-determination manifests through the assertion of independence, it demonstrates its continued power as a destabilising force. It acts as both ‘a criterion and a moral imperative by which the boundaries of states should be redrawn to reflect the aspirations of national groups’.\(^2\) However, self-determination

---


need not manifest as independent statehood in order to destabilise traditional conceptions of sovereignty. When a people asserts self-determination as a form of autonomy within an existing state, this too challenges the dominance of statist perspectives in international law. Such assertions demonstrate that peoples claim a position alongside states as constituents of the international order. Perhaps because self-determination retains this potential to bring about various forms of destabilisation, those claims to the right which remain in dispute today tend to be regarded as ‘hard cases’. Whilst a high degree of international consensus in favour of decolonisation supported the massive geo-political shifts driven by self-determination in past decades, such consensus does not exist today in relation to the self-determination claims of Indigenous peoples, Irish nationalists, Palestinians, Tamils, and others. Therefore, the essential current challenge for self-determination is to develop a renewed international consensus, in recognition of the fact that many peoples continue to suffer from colonial and other forms of oppression. ‘Only if the international community supports movements for self-determination can it guarantee the protection of the rights of peoples throughout the world.’

The continuing mission of decolonisation is the focus of Chapter 4.

However, the capacity of the international legal system to foster such a consensus is weakened by the diverse nature of contemporary self-determination claims, and the wider variety of potential outcomes. Uncertainty about how to engage with the contemporary potential of self-determination raises a number of challenges which must be confronted. It would be unconscionable for the international community to fail to engage with these challenges, considering that many deserving entities are still unable to secure places within the traditional statist order. Rather than maintaining the status quo and relying on exclusionary past standards, the international legal community is obliged to evaluate self-determination claims according to realistic and humanitarian measures. International law, rather than domestic law, must be the basis for empowering self-determination.

---

claimants, particularly in the divided societies of the twenty-first century. A first step towards such an approach is to engage with the contemporary challenges of self-determination, and positively resolve them in a spirit which recognises the equal rights of peoples as acknowledged in international law.

1. Self-determination as jus cogens

The term *jus cogens* describes peremptory norms of international law; that is, norms recognised by the international community as those from which no derogation is permitted, and which can only be modified by subsequent peremptory norms of the same character. The concept of *jus cogens* itself is almost universally accepted. In 1980, UN Rapporteur on Self-Determination, Héctor Gros Espiell, determined that self-determination was *jus cogens*. Judicial opinions have reached the same conclusion, for example the Italian Court of Cassation in the *Arafat and Salah* case (1985), and the Badinter Commission. The International Court of Justice found, in 1995, that self-determination is *jus cogens* and that it imposes *erga omnes* obligations on states – that is, obligations which are inderogable in all circumstances. The ICJ reached this conclusion on the basis that self-determination ‘is one of the essential principles of contemporary international law…’ This position has been confirmed by a range of commentators.

---

7 Interview with Brid Rodgers, SDLP (Lurgan, 9 March 2006). As the domestic law is an engine of the state, no judge in a domestic court can decide to alter state boundaries or otherwise recognise the validity of a self-determination claim: Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006). Niall Murphy is a member of the Irish nationalist community, and a legal practitioner in Belfast.


13 *Case Concerning East Timor (Portugal v Australia)* ICJ Rep 1995 90, International Court of Justice at [29].

According to Louis Beres, ‘no more valid expectation exists’ than that of self-determination.\(^{15}\)

The question is whether self-determination is a \textit{jus cogens} norm in its full range of applications. Some legal commentators have questioned whether self-determination has \textit{jus cogens} status beyond its decolonisation aspect.\(^{16}\) I argue in this thesis, particularly in Chapter 4, that self-determination ought to be accepted as a \textit{jus cogens} norm in its broadest range of potential applications. This approach recognises the preeminent status of the right in traditional anti-colonial settings, while also empowering contemporary anti-colonial claimants who do not meet the salt-water test, and other ‘hard cases’ whose claims deserve fair evaluation. I am particularly concerned to ensure that the legitimate claims of contemporary anti-colonial claimants, such as Irish nationalists in the North of Ireland and Indigenous peoples in Australia, are not marginalised. Self-determination is a universal human right, which must not be weakened through hidebound application.

The view of Judge Ammoun of the International Court of Justice, extracted from his judgment in the \textit{Namibia case}, is significant in this context:

\begin{quote}
\ldots one is bound to recognize that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity\ldots If any doubts had remained on this matter in the mind of the States Members of the United Nations, they would not have resolved to proclaim the legitimacy of the struggle of peoples \ldots to make good their right of self-determination. If this right is still not recognized as a juridical norm in the practice of a few rare States or the writings of certain even rarer theoreticians, the attitude of the former is explained by their concern for their traditional interests, and that of the latter by a kind of extreme respect for
\end{quote}

\(^{15}\) Louis René Beres, 'Self-Determination, International Law and Survival on Planet Earth' (1994) 11(1) \textit{Arizona Journal of International and Comparative Law} 1, 1.

\(^{16}\) See, for example, David Raič, \textit{Statehood and the Law on Self-Determination} (2002), 444. Scobbie cites the ICJ Advisory Opinion in the \textit{East Timor} case as authority for self-determination as an \textit{erga omnes} right in the colonial context: Iain Scobie, 'Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine' (2005) 16 \textit{European Journal of International Law} 941, 951.
certain long-entrenched postulates of classic international law. Law is a living deed ...  

According to Judge Ammoun, understandings of legal rights can, and must, adapt to changing circumstances. This approach reflects a realistic and humane approach to contemporary issues of self-determination, including the question of whether the right has *jus cogens* status in its full range of applications. I argue in this thesis that understandings of self-determination should adapt in two important senses. First, the right must apply equally to different types of claimants, so long as they advance legitimate claims. Peoples who do not conform to the salt-water colonial paradigm, but who can demonstrate a contemporary experience of colonialism or other oppression, ought to have their claims heard. Second, self-determination must be understood to entail a range of solutions, depending on the circumstances. For Irish nationalists, this involves changes in sovereignty and borders. For Indigenous peoples in Australia, self-determination requires a range of autonomy-related solutions, within the framework of the Australian state.

2. *How can self-determination be validly exercised?*

If the *jus cogens* status of self-determination is fully honoured, rights claimants ought to have freedom to choose the form in which it will be exercised. Proponents of a restrictive approach to self-determination argue that the right remains as vague and imprecise today as it was at Versailles, and that this vagueness results from the variety of means by which peoples seek to exercise the right. Crawford describes self-determination as *lex obscura*, or uncertain law, on the basis that study of the international texts leads inevitably to the conclusion that the right of self-determination is articulated as a right, and that it is of general application. On the other hand…the texts do little to resolve other uncertainties about the meaning and scope of self-determination, at least outside the colonial context.

---

An alternative view is that the right is unique in its flexibility and adaptability. Indeed, the indeterminate nature of self-determination can actually be understood as its greatest asset; that is, its capacity to apply in culturally appropriate and contextually specific ways. Self-determination is better conceived as an ongoing process, rather than a single event, and it is legitimate and just that the right be allowed to manifest in a variety of case-specific ways. As McCorquodale explains, no other human right is restricted to a single valid exercise.20 By analogy, self-determination may evolve as circumstances change.

Frederic Kirgis describes eight possible manifestations of self-determination, emphasising that other manifestations may also be legitimate. Self-determination may mean:

1. Gaining freedom from colonial domination (as in many former African colonies);
2. Remaining dependent on the metropolitan state if that is the will of the people (as is said to be the case in Puerto Rico, although this has been disputed21);
3. Dissolving a state to form new states (as happened in both the former Czechoslovakia and Soviet Union);
4. Seceding from the dominant state and asserting independence (as in Bangladesh);
5. Re-uniting formerly divided states (Germany is the most prominent example);
6. Exercising limited autonomy, short of secession (as is claimed by many Indigenous peoples within metropolitan states);
7. Being respected and protected as a minority group (as the international legal community is currently attempting to ensure for ethnic minorities in the states of the former Yugoslavia);
8. Choosing one’s own form of government or the right to democratic government (as occurred in Haiti).22

As is clear from these illustrations, the capacity of self-determination to manifest in a variety of ways is not purely theoretical; rather, this capacity has been proven by a wide range of claimant peoples over the past century of the development of the right. The long list of diverse means by which peoples have chosen to exercise their right of self-determination supports the contention that the greatest strength of the right is its

20 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
flexibility. The capacity of self-determination to manifest in a range of ways is crucial to facilitate the realisation of the right for contemporary claimant peoples, whose circumstances are diverse and complex. This thesis will focus particularly on the position of Irish nationalists in the North of Ireland, who seek an end to the union with Great Britain and the reunification of Ireland. This proposed self-determination solution, as envisaged by the Good Friday Agreement, includes elements of secession and reunification, and would also require novel solutions to issues of minority rights and representative governance. I will also focus on the circumstances of Indigenous peoples in Australia, which are diverse and unsuited to a catch-all self-determination solution. Instead, a range of self-determination measures, within the framework of the Australian state, is required to address the contemporary colonial experience of Indigenous peoples.

(a) The opposition between ‘external’ v ‘internal’ self-determination

The diverse means by which self-determination has been exercised have led some to suggest that exercises of the right ought to be characterised as either ‘external’ or ‘internal’. In this categorisation, external self-determination describes exercises of the right which result in independence and statehood, and internal self-determination refers to other solutions which do not involve the alteration of existing boundaries. Cassese describes internal self-determination as ‘the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime’. This categorisation may be promoted as a means of proving that almost all the valid external exercises of self-determination have already taken place. For example, Bell argues that the internal exercise of the right will generally be more appropriate in the present day, partly because she finds that external assertions of the right often lead to conflict, whereas internal solutions promote less absolute conceptions of sovereignty. According to Hannum, almost all valid secessionist claims have been dealt with, and the remaining content of self-determination is largely internal.

26 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
In rejecting the claim of Quebec to the right of self-determination through secession from Canada, the Canadian Supreme Court lent judicial support to the internal and external categorisation of self-determination:

The recognized sources of international law establish that the right of self-determination of a people is normally fulfilled through internal self-determination; a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances…”

As was the case in the Reference re Secession of Quebec, the distinction between internal and external categories of self-determination may limit the capacity of claimant peoples to exercise the right. In this thesis, I argue that the categorisation should be rejected, as it enables the state-dominated international legal system to marginalise rights claims, regardless of their legitimacy. All exercises of self-determination are distinctive, and resist categorisation. For example, ‘sovereignty’ is often raised as an important aspect of self-determination for Indigenous peoples in Australia, although it is generally asserted in ways which do not challenge the physical borders of the Australian state. The statist world is being eroded, and self-determination should not be forced into rigid categories which tend to reinforce existing state boundaries, no matter their legitimacy, rather than enhancing the utility of the right. In this thesis, I argue that each self-determination claim should be evaluated on its individual merits.

3. ‘Peoples’ v ‘Territories’ v ‘Human Rights’: Do we have to define the ‘self’?

A persistent challenge for self-determination has been the question of defining the ‘self’. It has been argued that it is necessary to define the self when a group claims self-

---

28 Reference re Secession of Quebec 37 ILM 1340 (1998) at [126] (Canadian Supreme Court)
29 Although Professor Christine Bell argues that the development of self-determination in the present should focus on the ‘internal’ aspect of the right, she nevertheless recognises that the Irish claim to self-determination was stifled in its capacity to attain international recognition by the desire of Britain to internalise the political conflict: Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
30 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
determination, because the right belongs to a community which seeks to have its distinct character ‘reflected in the institutions of government under which it lives’. In this section, I will consider the two more traditional approaches to this question – the ‘territories’ approach and the ‘peoples’ approach. I will also introduce an alternative perspective – a ‘human rights’ approach to self-determination. This approach will be discussed in detail in Chapter 5.

The most restrictive of the two traditional perspectives is the ‘territories’ approach to self-determination. This approach focused historically on colonial boundaries, conceiving of self-determination as a peaceful vehicle for enabling the transfer of colonial territories from an imperial power to a colonial people. Colonial peoples were thus, during the decolonisation era, defined territorially rather than ethnically, according to the principle of *uti possidetis juris*.

In one way the division of the former Yugoslavia may be seen as a contemporary example of the ‘territories’ approach, in that it was divided on the basis of previously-existing federal boundaries, and claims for the further division of territory on ethnic grounds were rejected by the Badinter Commission. However, in subsequent years, the ‘territories’ approach has been proved outdated by the further division of the former Yugoslav federation. In 2006, the people of Montenegro chose to secede from the federation of Serbia and Montenegro, while Kosovo has declared its independence and established legal relations with many other states. Indeed, the ‘territories’ approach is patently and unjustifiably restrictive. According to McCorquodale, the most fundamental failing of this approach is its ignorance of the range of means by which self-determination can be achieved.

---

34 A doctrine which fixed the boundaries of newly formed states based on those which existed at the moment independence was asserted. Thus, in effect, the boundaries of the new state became those imposed by the colonial power.
may be exercised. The ‘territories’ approach ‘is a reminder of the reckless indifference to peoples shown by those who decided on territorial boundaries after the First World War’. 38

In recent decades, the ‘peoples’ approach to self-determination has come to be preferred by commentators over the ‘territories’ approach. In a comment which has often been cited in support of a ‘peoples’ approach, Sir Ivor Jennings famously asserted:

On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people. 39

Jennings’ assertion has been understood as requiring the setting down of criteria which can be used to define which groups constitute a ‘people’ for the purposes of self-determination. In this ‘peoples’ approach, the question of ‘who is the self’ must be conclusively determined before any further evaluation of a self-determination claim may take place. That is, the definition of a people is a threshold question, and a claim to self-determination can falter at this point before being granted a full evaluation.

A 1990 UNESCO report has been cited as the source for the defining criteria of ‘peoplehood’:

A people for the [purposes of the] rights of people in international law, including the right of self-determination, has the following characteristics:
(a) A group of individual human beings who enjoy some or all of the following common features:
   I. A common historical tradition;
   II. Racial or ethnic identity;
   III. Cultural homogeneity;
   IV. Linguistic unity;
   V. Religious or ideological affinity;
   VI. Territorial connection;
   VII. Common economic life.

(b) The group must be of a certain number who need not be large (e.g. the people of micro States) but must be more than a mere association of individuals within a State.

(c) The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.

(d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.\(^40\)

The articulation of such criteria reveals an urge on the part of the international community to delimit and narrow the categories of who may constitute a people.\(^41\) Federal and state governments in Australia seek to fulfil a similar exercise, by setting out criteria by which a person may establish Indigeneity. Australian government agencies require Indigenous people to prove their Indigeneity according to a three part test: Aboriginal or Torres Strait Islander descent, self-identification as Indigenous, and acceptance as Indigenous by an Indigenous community in which the person lives or has lived.\(^42\) Indigenous people in Australia have asserted that the imposition of this artificial test of their identities is unjust and cynical, and aimed at restricting the extent of government obligations to Indigenous people.\(^43\)

I argue that the imposition of a ‘peoples’ approach to self-determination operates to diminish the existence and legitimacy of claimant peoples, until they meet a set of

\(^{40}\) Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, 12 February 1990, SNS-89/CONF. 602/7

\(^{41}\) This urge has been clear in the long history of efforts to protect Indigenous peoples’ rights under international law. Until the adoption of the Declaration on the Rights of Indigenous Peoples in 2007, the term ‘peoples’ had been intentionally avoided in international legal discourse, in favour of ‘Indigenous people’ and ‘Indigenous populations’. The intention behind this approach was to limit the capacity of Indigenous peoples to claim self-determination and other group rights. See: Tom Calma, Indigenous Peoples and the Right to Self-Determination (2004) <www.hreoc.gov.au/speeches/social_justice/sovereignty_seminar.html> at 6 April 2004

\(^{42}\) Centrelink Australia, Are you an Aboriginal or Torres Strait Islander? A guide to your options and our services, 2011.

\(^{43}\) Irene Watson notes that the Working Group on Indigenous Populations emphasises the importance of self-identification by Indigenous peoples as key to self-determination or sovereignty claims: Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006). Irene Watson is a member of the Tanganekald and Meintangk peoples, a legal practitioner and academic, and former member of the UN Working Group on Indigenous Populations. See also: Australian Law Reform Commission, 'Essentially Yours: The Protection of Human Genetic Information in Australia (ALRC Report 96)' (2003), Chapter 36.
externally imposed criteria. This is unfair, because a people claiming self-determination bears the same capacity for dynamism as any people which has already achieved a high level of self-determination. Further, self-determination exists as a right, whether or not a people is free to exercise it effectively. As Berman has acknowledged, ‘the ‘people’ does not simply exist in brute positivity, waiting to be discovered by law.’ Nor is the international community best placed to determine the identity of a people; the people themselves are the only ones who can achieve that, because they have an understanding of their own layered identities. While a sense of group identity is essential for a claimant people to establish entitlement to self-determination, peoplehood should not be imposed as a threshold test.

(a) An alternative approach to ‘peoplehood’: The human rights approach

Both the ‘territories’ and ‘peoples’ approaches to self-determination have been promoted on the basis that they provide criteria by which self-determination claims may be clarified. However, as McCorquodale argues, neither approach succeeds in providing clear rules by which self-determination claims may be adjudicated. Neither do these approaches provide what Pearson might describe as a ‘mature international apparatus for reconciling the place of peoples within nations’. Instead, the traditional approaches merely provide means by which self-determination claims may be rejected at the threshold stage, rather than evaluated within their actual context. The only approach capable of providing rules for the adjudication of self-determination claims is one which balances such claims within the human rights framework as a whole. This ‘human rights’ approach does not provide abstract solutions to self-determination claims, however, it refers to an established and coherent framework to balance all rights and interests brought into contention by a claim to self-determination.

---

45 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
47 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006). Noel Pearson is a member of the Bagaarmugul and Gugu Yalanji peoples, a lawyer and community representative of Cape York Indigenous communities.
In other words, the human rights approach focuses not on ‘who is the self?’, but on how self-determination will be exercised, enabling the concurrent protection of the whole range of human rights to their fullest extent. This approach recognises that respect for the rights of others is the key to the human rights framework itself. Its aim of balancing self-determination claims with other affected rights makes this approach by far the most reflexive and flexible, which is a positive development not only for contemporary claimant peoples, but also for the states which have traditionally feared assertions of self-determination. Even Hannum, who has promoted a restrictive view of self-determination, acknowledges that the inclusion of self-determination in the twin human rights covenants mandates its evaluation within the human rights framework. Further, Hannum finds that such an approach ‘offers a potentially more manageable set of criteria than the conflicting claims of centuries-old historical and territorial exclusivity’.

4. International law v international politics: Problems of implementation and enforcement

As noted in the Introduction, a broader contemporary challenge to the operation of self-determination is the subjectivity of international law to the machinations of international politics. The interests of powerful states have been allowed to dominate over some self-determination claims in the evaluation of those claims’ legitimacy. Indeed, states have often promoted the view that self-determination is poorly defined and confusing, and used this as justification for interpreting the right in a ‘selective, inconsistent and manipulative manner’. In Chapters 6 and 7, I will demonstrate that Irish nationalists in the North of

---

49 In its comments on the rights of minorities in the former Yugoslav states, the Badinter Commission provided an example of how the range of human rights must be balanced when self-determination is asserted: Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No 2, 11 January 1992, 31 ILM 1497 at para. 2. See also: David Wippman, ‘Hearing Voices Within the State: Internal Conflicts and the Claims of Ethno-National Groups’ (1994-1995) 27 New York University Journal of International Law and Politics 585, 592-593.

50 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006). Kieran McEvoy was born into the Irish nationalist community in the North of Ireland. He is a legal academic and criminologist, with particular expertise in relation to political imprisonment. McEvoy is also a long-time Committee member of the Committee for the Administration of Justice, a prominent human rights NGO in Belfast.


Ireland and Indigenous peoples in Australia have suffered as a result of state practice in relation to self-determination. Other contemporary ‘hard cases’ of self-determination receive inconsistent treatment by the international community, depending on the political implications of their claims. For example, the Palestinian people are planning to approach the United Nations in September 2011 and seek its endorsement of a Palestinian state, according to the borders existing in 1967. The United States, a state which has played a crucial role in negotiations relating to Palestine, opposes the Palestinian strategy and argues that Palestine may only achieve statehood through negotiation with the US ally Israel.54

Wilde has argued that the narrow, positivist approach taken by the ICJ to the Kosovo case has entrenched the dominance of international politics over international law, when claimants assert self-determination and seek recognition of their right amongst the international community.55 The reality of secessionist self-determination claims, as seen by the ICJ in the Kosovo case, is largely political rather than legal, as it depends mostly on the capacity of a claimant people to gain support from several established states.56 The Court’s constriction of the question posed in in Kosovo case demonstrates its deference ‘to the will of states’ and sensitivity to ‘the politically charged environment in which it conducts its work’.57 In this thesis, I argue that international law must be restored to a primary position, in order that contemporary self-determination claims receive fair evaluation.

Conclusion

In this chapter, I considered several contemporary challenges to the meaning and scope of self-determination. I argued that the *jus cogens* status of the right ought to extend to its full range of possible applications. I also introduced the range of means by which self-

---

determination may be validly exercised. These various manifestations of the right ought not to be forced into rigid ‘internal’ or ‘external’ characterisations, as this may unfairly limit the capacity of legitimate claimants to exercise the right. I described the two traditional approaches to defining the ‘self’, and introduced an alternative ‘human rights’ approach to self-determination. Finally, I noted the broader challenge of the subjectivity of international law to international politics.

Having set out my methodology, discussed the legal history of self-determination, and introduced the contemporary challenges faced by the right, I will now move to consider the data I have gathered through qualitative research. The following chapters, 4 and 5, explore the two key theoretical positions of this thesis; that self-determination retains a mission of decolonisation, and that the human rights approach is the most appropriate means of addressing contemporary claims to the right. In chapters 6 and 7, I show how a new framework for evaluating self-determination claims may be applied to two contemporary case studies. This thesis, as a whole, engages with the challenges raised in this chapter, and promotes a more humane and just approach to contemporary ‘hard cases’ of self-determination.
CHAPTER 4
TRANSFORMING THE LAW OF
SELF-DETERMINATION:
THE CONTINUING MISSION OF
DECOLONISATION
I sing the song of the colony
How many years and you're still not free?
...
With bible in one hand and a sword in the other
They came to purify my land of my Gaelic Irish mothers
And fathers, and sisters and brothers
With our own ancient customs, laws, music, art
Way of life and culture
...
We suffer with the Native American, the Indian in Asia
Aboriginal Australia
...
You'll never kill our will to be free, to be free
...

1 Damien Dempsey, 'Colony', on the album 'Shots' (2005), Sony/BMG
Introduction

Damien Dempsey is a popular Irish folk singer and songwriter. His song ‘Colony’ (2005) demonstrates the continued significance of the colonial experience for Irish people, for whom folk music has an important cultural place. ‘Colony’ reflects on an experience of dispossession of land and culture, discrimination and subordination by the coloniser. It also expresses a commitment to a continuing struggle for freedom from colonialism, and identifies a shared experience with other colonised peoples, including Indigenous peoples in Australia. For Irish nationalists in the North of Ireland, and Indigenous peoples in Australia, the struggle for self-determination remains intertwined with the experience of colonialism.

This chapter interrogates the contemporary relationship between colonialism and the right of self-determination. In the first section, I consider the Israeli Wall case, which demonstrates that colonialism and self-determination continue to interact in the twenty-first century, in both practical and legal contexts. The second section of the chapter begins with a discussion of some of the seminal characterisations of colonialism which inform my approach to self-determination in this thesis. I then explore perspectives on the colonial experience from interviewees in Ireland and Australia. Having demonstrated that self-determination retains a mission of decolonisation into the twenty-first century, I proceed in the third section to consider how the law of self-determination itself may be decolonised; that is, how the law can adapt to ensure that it continues to battle against colonial domination in an age which some regard as ‘post-colonial’. I argue that self-determination in the twenty-first century has not become so diluted as to mean merely a right to democratic governance, within the existing borders of a state. Rather, the essential meaning of self-determination as independence and freedom from domination is retained, and continues to be asserted by peoples whose contemporary circumstances bear substantial comparison to forms of colonial domination imposed in past centuries.

---

2 As will be discussed, however, independence should not be taken to always mean independent statehood; independence is a value which some claimant people seek to express within existing state borders, through forms of autonomy.
A. A Case Study of Self-Determination in the Twenty-First Century: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

In 2003, an international legal encounter involving Israeli actions in Palestine demonstrated the continued currency of self-determination as an anti-colonial right. Consideration of this encounter sets the stage for an analysis of how colonialism and self-determination interact for Irish nationalists and Indigenous peoples in Australia, a question which is introduced in this chapter and addressed in detail in chapters 6 and 7. In turning its critical gaze to the construction of a wall by Israel across the occupied territories of Palestine, the International Court of Justice (ICJ) has set a precedent of contemporary support for self-determination.

On 8 December 2003, at the motion of several member states and Palestine, the UN General Assembly adopted a resolution requesting that the ICJ deliver an Advisory Opinion on the legal consequences of the construction of a wall by Israel across a significant portion of the Occupied Palestinian Territory, including East Jerusalem. The General Assembly based its request on the Charter principles of the inadmissibility of the acquisition of territory by force, and respect for the equal rights and self-determination of peoples. The General Assembly also recalled its many resolutions to the effect that Israeli settlements in the Occupied Palestinian Territory are illegal, and its commitment to a two-state Israel and Palestine solution, based on the Armistice Line of 1949.

The ICJ has two forms of jurisdiction; contentious and advisory. The Court’s advisory jurisdiction empowers it to

> give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.  

The Court’s advisory views have no binding power, and so are never limited by a state’s refusal of consent. In this case, the ICJ gave its Advisory Opinion, despite Israel’s

---

3. *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, GA Res 10/14, UN GAOR, 10th special session, Supp No.1, UN Doc A/RES/ES-10/14 (2003)*

4. *Statute of the International Court of Justice*, opened for signature 26 June 1945, 33 UNTS 993 (entered into force 24 October 1945), Article 65(1)
protests that it did not consent to the Court’s adjudication. Rather, when the ICJ delivers an advisory opinion to a requesting body, such as the General Assembly, its purpose is to provide that body with the legal elements on which to base subsequent actions.\(^6\)

The Court determined that its first step in carrying out this responsibility was to establish whether the wall in question was being built in violation of international law. The status of Palestine was relevant to this question, and the Court described the recent history of that entity, from the time it was declared a Class A Mandate by the League of Nations and trusteeship was granted to Great Britain following the First World War.

When the Mandate system was established following the First World War, Palestine was regarded as deserving of provisional recognition as an independent nation, and Great Britain was charged with providing support until Palestine could stand alone.\(^7\) However, a second global conflict intervened, and in 1947 the UN General Assembly resolved that all parties, including Britain, should adopt the Plan of Partition which would create an Arab and a Jewish state on Palestinian territory.\(^8\) This plan aimed in part to facilitate the wish of European Jews for a Zionist homeland.

In 1948, Britain began its phased evacuation of Palestine, and on 14 May that year Israel declared itself as an independent Jewish state, on the basis of the General Assembly resolution of 1947. Conflict then broke out between Israel and a number of Arab states, which prevented the implementation of the Plan of Partition. Whilst the United States gave immediate recognition to the new state of Israel, with the recognition of several other states following soon after, an independent Arab state of Palestine was never established. In 1949, armistice agreements were reached between Israel and several surrounding states, setting the demarcation which became known as the Green Line. This was not treated as a settled border, and was expressed as being without prejudice to any future political settlement on territory.

\(^5\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [47]
\(^6\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [60]
\(^7\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [70]
\(^8\) On the future government of Palestine, GA Res 181 (II), UN GAOR, 1st Session, UN Doc A/64 (1947)
During the Six Day War of 1967, Israel attacked the forces of Egypt, Jordan and Syria, and occupied the entire territory which had constituted Palestine under British Mandate. This included the still-contested regions of East Jerusalem, Gaza, the Golan Heights, and the West Bank. From that time, and on several occasions subsequently, the General Assembly and Security Council stated that Israel was in violation of the international legal principle that bars the acquisition of territory by force, and that its attempts to change the status of the border city of Jerusalem were in violation of internationally recognised and established norms.9

Over the following decades, this politically volatile question continued to trouble the international community, and repeated attempts at resolution were made. Finally, on 26 October 1994, a peace treaty between Israel and Jordan confirmed that the boundaries remained as they existed under the Mandate, without prejudice to the territories occupied by Israel in 1967. In the years following the 1994 breakthrough, Israel and the Palestine Liberation Organisation (PLO) have repeatedly reached agreements transferring certain administrative powers to the Palestinian Authority within the occupied territories, however, continued occupation by Israel has significantly limited the capacity of Palestinian authorities to independently exercise governmental functions. Violent conflict between Israeli state forces and Palestinian militants is ongoing. On 1 October 2003, the Israeli cabinet approved plans for the construction of a wall, which Israel terms a ‘security fence’, anticipated to run continuously over 720km in the West Bank region of Palestine.10

At the time the ICJ delivered its advisory opinion, approximately 180km of this complex was complete or under construction, including 8.5km of concrete wall, along with electrified fences, patrol roads, ditches and stacks of barbed wire.11 If completed according to the plans in existence at that time, approximately 975 square kilometres of territory would lie between the wall and the Green Line, and between 237,000 and

---

9 Calling for the withdrawal of Israeli armed forces from the occupied territories, SC Res 242, UN SCOR, 22nd session, 1382nd meeting, UN Doc S/INF/22/Rev.2 (1968)
10 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [80] citing the report of the Secretary-General of the United Nations to the General Assembly, in support of the request for an advisory opinion from the International Court of Justice.
397,000 Palestinians would be encircled within their communities, while 320,000 Israeli settlers would live in the occupied territory delimited by the wall. The most recent UN statistics available date from July 2010, and note that the wall’s length will be more than twice the length of the armistice or Green Line between the West Bank and Israel, with 85% of the wall to be constructed within the West Bank. Israel has also imposed a new administrative system in the region affected by the wall, and Palestinian residents are only permitted to enter or leave the encircled territory with Israeli-issued permits, and then only through heavily guarded and infrequently-opened access gates. Israeli residents do not require any permits for access or return to the region.

The ICJ found that a number of fundamental principles of international law were brought into issue by the Israeli construction of the wall, most importantly the right of self-determination. The Court confirmed that self-determination is owed to all peoples, including those living in occupied territories. The Court rejected Israel’s assertion that the human rights enshrined in the ICCPR and ICESCR do not apply to Palestine, instead finding that human rights law applies both to the acts of states within their own territories, and the exercise of a state’s jurisdiction outside its own territory. The Court agreed implicitly with the PLO’s assertion that Israel was constructing the wall with the aim of annexing Palestinian territory, and reinforcing the numbers of Israeli settlers living illegally on that territory.

In its Advisory Opinion, the ICJ comprehensively condemned Israel’s actions as in violation of international law. Israel has violated the Fourth Geneva Convention by transferring its own civilian population into the occupied territories, with the aim of changing their demographic composition. The construction of the wall severely impedes

---

12 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [84]
13 United Nations Office for the Coordination of Humanitarian Affairs occupied Palestinian territory, West Bank Barrier Route Projections, July 2010
14 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [85]
15 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [88]
17 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [115] and [119]
18 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [120]. This finding is supported by a UN
the right of the Palestinian people to self-determination.\textsuperscript{19} This places Israel in violation of an \textit{erga omnes} norm; that is, a standard of international law from which no state is permitted to derogate.\textsuperscript{20} Thus, all states – not only Israel – are obliged to bring to an end any impediments to the exercise of self-determination by the people of Palestine.\textsuperscript{21} Further, the Court tasked the United Nations with an ‘obligation of result’, namely, bringing the Israeli-Palestinian conflict to an end and facilitating the establishment of a Palestinian state.\textsuperscript{22} Zyberi notes that the ICJ, through its decisions in the \textit{South West Africa} cases,\textsuperscript{23} the \textit{Western Sahara} case,\textsuperscript{24} the \textit{East Timor} case\textsuperscript{25} and the \textit{Wall} case,\textsuperscript{26} has confirmed that self-determination has an \textit{erga omnes} character, and consequently provided much needed guidance to assist in the ongoing process of decolonisation.\textsuperscript{27}

The ICJ’s conclusions confirm Israel’s maintenance of a colonial role in Palestine. This is reflected in the report of the UN Rapporteur on human rights in Palestine, John Dugard, who finds that in moving settlers into the occupied territories and appropriating agricultural land and water, Israel is practising colonialism ‘of the kind declared to be a denial of fundamental human rights and contrary to the Charter of the United Nations’.\textsuperscript{28}

---

\textsuperscript{19} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [122]
\textsuperscript{21} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004) [159]
\textsuperscript{22} Iain Scobbie, 'Unchart(ered)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine' (2005) 16 European Journal of International Law 941, 947.
\textsuperscript{23} South West Africa Cases (Ethiopia v South Africa and Liberia v South Africa), Judgment of 18 July 1966 (Second Phase) ICJ Reports 1966, pp. 10-11.
\textsuperscript{24} Western Sahara Opinion, ICJ Rep 1975 12, International Court of Justice
\textsuperscript{25} Case Concerning East Timor (Portugal v Australia) ICJ Rep 1995 90, International Court of Justice
\textsuperscript{26} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) Advisory Opinion, International Court of Justice, No. 131 (9 July 2004)
Dugard suggests that Israel could be engaged in apartheid. Some civil society groups opposed to the construction of the wall call it an ‘Apartheid Wall’, and argue that it is ‘part of a colonial project that embodies within it the long-term policy of occupation, discrimination and expulsion’.

The conclusions of the ICJ, the principal legal organ of the UN, are significant not only for Palestinians, but for peoples beyond that territory continuing to assert self-determination claims, including Irish nationalists and Indigenous peoples in Australia. Such peoples might, in future, seek to take action under international law for the violation of the peremptory norm of self-determination, just as the UN Rapporteur John Dugard advises Palestine and other states to act against Israel. Alternatively, non-adversarial legal interventions, such as the ICJ’s advisory opinion on the construction of the wall, offer means of legal action which may encourage cooperative solutions to self-determination claims. Such approaches demonstrate the continued force of self-determination in international law in a creative way. They also set a challenge for international legal actors to explore questions of colonialism and self-determination raised by other peoples around the world, with the same critical eye as has been turned to the struggle of the Palestinian people in international legal commentary for several years.

In 1996, James Anaya asserted that international law had learnt its lessons from decolonisation and the human rights movement, and that the law ‘does not much uphold sovereignty principles when they would serve as an accomplice to the subjugation of

---


32 Bekker argues that the ICJ Advisory Opinion may prove a catalyst for the establishment of a Palestinian state, as the Court’s Namibia opinion catalysed that state’s independence from South Africa: Pieter H F Bekker, ‘The World Court's Ruling regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective' (2005) 38(2) Cornell International Law Journal 553, 568.

33 For example, in 1991, Falk and Weston published a strongly worded article which asserted that many legal grounds existed on which the Palestinians could rightly base their intifada, perhaps most important of which was the continued violation of the Palestinians’ right of self-determination by occupying Israel: Richard A Falk and Burns H Weston, ‘The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada’ (1991) 32(1) Harvard International Law Journal 129, 133.
human rights’.

The question today is whether international legal actors, and political leaders, are willing to honour Anaya’s conception of the status of international law in their practice. Renewed political will is required to harness self-determination as the primary legal means of opposing colonialism in the twenty-first century.

B. The Relationship Between Self-Determination and Anti-Colonialism

The ICJ Advisory Opinion on the Israeli construction of a wall in Palestine confirms the contemporary relevance of the decolonising mission of self-determination. In the first part of this section I step back from this contemporary context, to introduce some of the key ideas that have informed my theoretical approach to colonialism in this thesis. There is a vast literature on colonialism, and the process of decolonisation, which I do not present here because it has been thoroughly explored elsewhere. Instead, in discussing the influential views of Fanon, Ammoun, Anghie and others, I aim to ground in theory the contemporary perspectives on the colonial experiences of Irish nationalists and Indigenous peoples in Australia, which I introduce in Part 2 of this section. These perspectives demonstrate that self-determination retains a mission of decolonisation in a variety of contexts which – unlike Palestine – rarely attract international attention in this regard.

1. Key perspectives on the relationship between colonialism and self-determination

Colonialism is a phenomenon with political, social, geographical, cultural and economic dimensions. It defies simple definition, but historically involved the domination of a people by a foreign metropolitan power, often accompanied by the transfer of metropolitan settlers. The term ‘post-colonial’ can be taken to refer to societies established through colonialism. Such societies remain subject to what has been called ‘neo-colonial’ domination, whether through the rise of new elites following the

establishment of an independent state, discrimination based on race, language or religion, or the unequal treatment of minorities, including Indigenous peoples.\textsuperscript{37} Through colonial expansion, European colonial powers spread an international law ‘imbued with European values’.\textsuperscript{38} Essential to the ongoing post-colonial process of resistance and reconstruction\textsuperscript{39} are the perspectives of influential thinkers, including Frantz Fanon, Judge Fouad Ammoun and Antony Anghie.

\textit{(a) Frantz Fanon and the mission of decolonisation}

At the height of the decolonisation era, in the 1960s and 1970s, scores of new nation states were born from the anti-colonial movements of peoples asserting their right to freedom from domination by foreign powers. The membership of the United Nations tripled as sovereignty and nationhood were asserted, or imposed, in a number of territories which – due to their geographical, ethnic and cultural distance from imperial powers – fit the characterisation of salt-water colonies. The birth of these ‘new’ nation states was largely driven by anti-colonial sentiment, as expressed by seminal theorist Frantz Fanon in 1965:

\begin{quote}
The immobility to which the native is condemned can only be called in question if the native decides to put an end to the history of colonisation – the history of pillage – and to bring into existence the history of the nation – the history of decolonisation.\textsuperscript{40}
\end{quote}

In characterising colonialism as ‘the history of pillage’, Fanon acknowledged that imperial domination imposed material and moral violence. He exhorted colonised peoples to join in solidarity with each other and oppose colonialism through revolutionary violence.\textsuperscript{41} Although, generally, contemporary self-determination movements may more appropriately assert themselves through non-violent means, the essence of Fanon’s message remains that colonialism is a force to be struggled against. Self-determination is

\begin{footnotes}
\item[37] Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), \textit{The post-colonial studies reader} (1995), 2.
\item[39] Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), \textit{The post-colonial studies reader} (1995), 2.
\item[40] Frantz Fanon, \textit{The Wretched of the Earth} (1965), 41.
\item[41] Helmi Sharawy, 'Frantz Fanon and the African revolution, revisited at a time of globalization' (Paper presented at the CODESRIA 30th Anniversary Conference, Dakar, 10-12 December 2003).
\end{footnotes}
born from a people’s assertion of its own independence, and it is legitimate under international law for claimant peoples to resist attempts to deny them the right.\footnote{Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625, UN GAOR, 25th session, Supp. No 28, UN Doc A/8028 (1971), C Don Johnson, 'Toward Self-determination - A Reappraisal as Reflected in the Declaration on Friendly Relations' (1973) 3 Georgia Journal of International and Comparative Law 145, 153.}

The most important element of Fanon’s work in the context of this thesis is his exhortation for the colonised to assert themselves as ‘nations’\footnote{As will be discussed in Chapter 7, the notion of asserting ‘nationhood’ may be understood far more broadly than simply the creation of independent nation states. Indigenous peoples in Australia routinely identify themselves as distinct nations, however, they are generally committed to self-determination solutions negotiated within the existing borders of the Australian nation state.} distinct from their imperial rulers, and take on the responsibility of revealing their own domination. As Fanon recognised, self-determination cannot be achieved while a people remains ‘spoken for’ by a dominant power. In his preface to Fanon’s book *The Wretched of the Earth*, Jean-Paul Sartre explained the role of the colonised to speak: ‘Our victims know us by their scars and by their chains, and it is this that makes their evidence irrefutable.’\footnote{Jean-Paul Sartre, preface, in Frantz Fanon, *The Wretched of the Earth* (1965), 12.} Sartre interprets Fanon’s writings to obligate the people of the ‘mother country’ or imperial power to listen to the voices of the colonised, and honour their demands for self-determination, because the people of the mother countries have been enriched through the domination of the colonised.\footnote{Jean-Paul Sartre, preface, in Frantz Fanon, *The Wretched of the Earth* (1965), 12.} When claimants to self-determination take up Fanon’s challenge and speak to their lived experiences of colonialism, international lawyers are obliged to listen to their voices and attend to their assertions of self-determination. Such analyses will reveal cases in which inherited colonial power relations continue to shape political life,\footnote{Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (2000), 1.} thus limiting the capacity of claimant peoples to achieve self-determination.

*(b) Judge Ammoun and the relationship between colonialism and self-determination*

Whereas Fanon has often been cited as expressing the voice of the colonised, Judge Fouad Ammoun of Lebanon may have been the best judicial listener to that colonised voice. This judge of the International Court of Justice delivered separate advisory opinions in the matters of Namibia and Western Sahara, poignantly expressing a legal
understanding of the nature of colonialism for oppressed peoples, and the relationship between colonialism and the assertion of self-determination. In Judge Ammoun’s conception, colonialism is a ‘plague’ delivered upon colonised peoples by imperial powers, causing a jarring and dramatic distortion in history for the societies of the colonised. According to the judge, the international law on self-determination offers the means by which a claimant people may overcome that distortion and reassert their independence. The moment of colonisation marks a turning point, beyond which the law must critically evaluate a people’s history with the aim of determining the consequences of the historical disruption. The role for self-determination then becomes the restoration of a people to its ‘true history’.

Judge Ammoun’s reasoning has had profound significance in directing my analysis of colonialism and its relationship to self-determination in this thesis. While some commentators have proposed that the lens of colonialism sheds little light on contemporary international law, I agree with Judge Ammoun that the fact of the historical disruption imposed by colonialism cannot be ignored. As is revealed in the perspectives of respondents to this research, the colonised remain acutely aware of the influence of colonialism on their capacity to exercise the right of self-determination. Attention to the voices of the colonised does not necessarily lead to a conclusion that all claims to self-determination must result in independent statehood, as will be discussed in relation to the human rights approach in Chapter 5. However, recognition of the legacies of colonialism provides an honest basis from which to explore contemporary self-determination solutions and new ‘true histories’.

(c) Antony Anghie and the influence of colonialism on international law

Underscored by the arguments of liberation put forward by Fanon, Ammoun and others, self-determination movements of the past half century mounted a significant challenge to

---


49 For example, interviewee Professor Christine Bell argues that the colonial analysis is limited in the contemporary context, particularly as the remaining cases of self-determination claims generally arise in multi-cultural societies: Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
the Eurocentric biases of international law. African and Asian decolonisation claims became the key means of alerting international lawyers ‘to the existence of a world which was suddenly discovered to be multicultural’. During this period, international law positioned the right of self-determination as a standard at odds to colonialism and capable of demonstrating the illegitimacy of that form of domination. Decolonisation movements have challenged international law to consider whether its universalism effectively ignored distinct and important cultural traditions.

International legal theorist Antony Anghie has produced an important body of work exploring the significance of colonialism in the development and nature of international law. According to Anghie, international law has not yet adequately engaged with, or overcome, its Euro-centric bias, with the result that even today colonialism features minimally in international law analyses. Instead, having been born from colonialism, international law now reproduces colonialism at every turn. Commentators on international law typically regard colonial encounters merely as events requiring pragmatic solutions, rather than as shifts which reveal matters of theoretical significance for international law. The ‘hard cases’ of contemporary colonialism, such as Ireland, are generally not regarded as such in international legal scholarship. Eurocentric biases of what it means to be a ‘nation’ continue to impinge on the self-determination claims of Indigenous peoples.

Anghie acknowledges that international law regards itself as having achieved decolonisation through recent shifts in its institutions and doctrines. Seen in this light, regardless of the ‘earlier associations between imperialism and international law’, the international legal system can regard imperialism as ‘a thing of the past’. However, the experience of Third World states, formed during the decolonisation era, demonstrates that

---

formal colonialism was replaced by new forms of imperialism, including the economic subordination of the Third World to the West.  

Anghie’s cautionary remarks offer justification for a renewed attention to colonial influence in twenty-first century interpretations of international legal problems, most notably self-determination. This thesis attends to the challenge set down by Anghie, namely that international law be transformed in ways which give space to those who have traditionally been marginalised by its imperial structures. In the following section, I introduce the perspectives of two claimant peoples, who claim a contemporary colonial experience. In Chapter 6, I explore the significance of colonialism for Irish nationalists in Northern Ireland, and, in Chapter 7, I do the same in relation to Indigenous peoples in Australia.

Conclusion

Some respected commentators have, in recent decades, reminded the international legal community that the mission of decolonisation has not come to an end. For example, Gerry Simpson argued that the end of the so-called Age of Empire merely revealed most states to be somehow imperial. This view supports the finding of the UN Rapporteur on self-determination, Héctor Gros-Espiell, that the notion of colonialism is far broader than the typical understanding of colonial domination characterised by the salt-water test. As Kwame Nkrumah famously argued, contemporary forms of colonialism – often termed ‘neo-colonialism’ – can be more difficult to detect and more insidious than past overt forms. International legal analyses must remain conscious of these insightful perspectives, in order to avoid the trap described by Anghie; that is, reproducing colonialism by failing to recognise its continued influence.

60 Kwame Nkrumah, Neo-colonialism: The last stage of imperialism (1965).
The perspectives explored above do, however, raise a difficult question of how to identify contemporary colonialism when its manifestations are so diverse. In this regard, I agree with McCorquodale’s view that colonialism is defined by the type of administration present in a society, rather than distance, as was the case in the antiquated salt-water test. I also follow the assertions of Fanon and Sartre that the people best placed to identify colonial influence are those who experience its effects. In that context, the following section introduces some of the perspectives of respondents to this research regarding their lived experiences of colonialism.

2. Contemporary perspectives from Irish nationalists and Indigenous peoples in Australia on the meaning of colonialism

(a) Contemporary manifestations of colonialism in Ireland

Britain has maintained some presence on the island of Ireland for over eight hundred years. Owing to Britain’s international standing as a military and political power, debate on whether contemporary circumstances in the North of Ireland constitute a form of colonialism has been almost entirely stifled. However, some commentators have continued to recognise that Irish nationalists maintain a struggle against colonialism or neo-colonialism. In 13 of the 14 in-depth interviews conducted in Ireland for this thesis, respondents recognised a continued and explicit colonial British influence in the North. The basis of these perceptions will be examined in more detail in Chapter 6, but at this stage three key elements are introduced; the nature of British administration in Northern Ireland, social imperialism and the colonial mindset, and the suppression of Irish culture.

In arguing that colonialism relates not to distance but to type of administration, McCorquodale asks: ‘Is the type of administration a foreign administration over those

---

61 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
63 Respondent Christine Bell also identified a colonial legacy, but concluded that the colonial analysis was not particularly helpful in the contemporary context: Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
who are different and who don’t share the same approach?’ 64 The use of the term ‘foreign’ is complicated in the Northern Irish context, because over half of the constituents of that jurisdiction identify themselves as British or ‘Northern Irish’ or ‘Ulstermen’, and remain accepting of British governance. For Irish nationalists, however, British rule is both foreign and different in approach from how they imagine governance would take shape were Ireland unified, as was made clear by interviewees in this research.

Like McCorquodale, Bernadette McAliskey rejects the salt-water approach to colonial categorisation, finding that the British presence in Ireland has never been appropriately named as colonial, due to the erroneous perception that colonies must be distant from the imperial power. 65 Further, several respondents to this study identified the unaccountability of the British ruling class as a key signifier of continued colonialism. Anthony Coughlan admits finding colonial terms somewhat simplistic, but nevertheless states: ‘The classic characterisation of colonialism was a subordinate people who had their laws made by others, by foreigners, and Britain does still do that in Northern Ireland.’ 66 Terry Enright is far more explicit in his condemnation of the unaccountable and distant ruling class of British politicians and bureaucrats primarily responsible for the governance of Northern Ireland:

…those people are like a secret society, behind closed doors, who still think of us as the natives and still think that the natives have to be told how to live and what to do. 67

For Irish nationalists, self-determination would require accountable and representative governance, rather than continued dominance by the world’s greatest ever imperial power.

Notwithstanding the recent devolution of some powers to a power-sharing government in Belfast, another vestige of colonialism which some respondents to this study complained

64 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
65 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006). Bernadette McAliskey is an Irish republican and socialist activist and former politician, who continued to contribute to public debate on the Irish national question and directs the South Tyrone Empowerment Program, supporting migrant workers.
66 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006). Anthony Coughlan is an Irish former academic, and a commentator on Irish engagement with Europe.
67 Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006).
of is social imperialism. Northern Ireland as a quasi-state was constructed for the benefit of its British unionist population, who for most of its history have been dominant in a broad range of social fields. Eoin Ó Broin argues that the legacy of unionist dominance in the North of Ireland has been the creation of a class of people who ‘benefited from the dividends of imperialism’, from the most powerful politicians and professionals, to the workers able to gain reliable employment in the shipyards and factories. Meanwhile, Irish nationalists in the North have suffered marginalisation and discrimination in all fields of social life.

Paul O’Connor develops this argument further, finding that anti-Catholic sentiment and sectarian conflict has been used as a justifying ideology for British imperialism in Ireland. O’Connor perceives a legacy of the superiority of one group over another as a continuing symptom of colonialism:

You cannot take people out of their homes, kill them, starve them, treat them like shit, for centuries, unless you had something in your head which told you that they were somehow less than you. You used religion to do it here, and you use race elsewhere.

It is clear from such perspectives of the colonised that, whatever future political settlements might be made, self-determination in Ireland must be asserted on the basis that all the people of the island have equal entitlements to rights and recognition.

A further aspect of continued colonial influence identified by Irish respondents to this study was the dominance of British culture over Irish culture within many areas of social life. An example identified by Paul O’Connor is the use of British points of reference, such as visiting Big Ben, in the textbooks used by children in schools. For O’Connor’s children, the famous sites of London have no cultural relevance, and they would be better served by education which recognises their Irish identities. As was recognised by

69 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
70 Tim Pat Coogan, Ireland in the Twentieth Century (2003), 125, Michael Farrell, Northern Ireland: The Orange State (2nd ed, 1976), 326.
71 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006). Paul O’Connor is an Irish nationalist human rights activist, based at the Pat Finucane Centre in Derry, which represents the families of victims of conflict in their efforts to gain justice and truth.
72 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
Niall Murphy, some of the key areas in which Irish people throughout Ireland assert self-determination lie within the cultural sphere. In promoting the use of the Irish language, and supporting Gaelic sports, people claim their cultural identity. Often, though, the British administration either fails to support or actively discourages the practice of Irish culture. The suppression of Irish culture reflects and reinforces the continued influence of colonialism, and particularly the notion of the superiority of the colonial culture over the culture of the colonised.

Sinn Féin member of the Northern Ireland Assembly, Martina Anderson, explicitly identifies Irish nationalism as a struggle against colonialism. Anderson asserts that this struggle is shared with other peoples experiencing colonialism in the present. This sense of solidarity between the peoples of self-determination movements around the world, which was also expressed by Indigenous research respondents in Australia, echoes the earlier stated views of Fanon and Sartre that the people to turn to for an analysis of colonialism are the colonised themselves. Those peoples identify common experiences despite their unique and contextualised circumstances and hence their voices pose a challenge to restrictive interpretations of self-determination championed by dominant states.

(b) Contemporary manifestations of colonialism for Indigenous peoples in Australia

According to Thornberry, ‘the history of indigenous peoples is a history of colonialism’. All Indigenous respondents to this research identified a continuing colonial relationship between Indigenous peoples and the Australian state. In this regard, they echoed the famous comment on contemporary colonialism made by Yawuru elder and Aboriginal advocate, Patrick Dodson, in his influential Fourth Annual Vincent Lingiari Memorial Lecture of 1999. Dodson titled his lecture: ‘Until the Chains are Broken: Aboriginal

73 Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
74 This is especially apparent currently in relation to the legal protection of the rights of Irish speakers in Northern Ireland, to be discussed in further detail in Chapter 6.
75 Interview with Martina Anderson, Director of Unionist Engagement, Sinn Féin (Belfast, 21 March 2006). Martina Anderson is an Irish nationalist politician, sitting in the Northern Ireland Assembly for Sinn Féin, and a former IRA Volunteer and prisoner.
76 For example: Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006) and Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
Unfinished Business’. The title was a reference to an excerpt from Frank Hardy’s 1972 book *The Unlucky Australians*:

Will I, having written it, be free to turn to other books and obsessions, will you, having read it, be free to turn to the pursuit of happiness, will the lucky country remain free while the unlucky Australians are in chains?

The colonial ‘chains’ which continue to bind Indigenous peoples in Australia, in Dodson’s conception, are diverse and diffuse; in all, he identified 17 elements of ‘Aboriginal unfinished business’ which must be settled before the colonial legacy may be overcome. As was reflected in the responses from Indigenous participants in this research, contemporary colonialism in Australia goes beyond the historical theft of land and resources, to encompass myriad continuing forms of domination and disempowerment. This issue will be canvassed in detail in Chapter 7. Here, I introduce three aspects of continuing colonial influence as identified by Indigenous interviewees; the lack of recognition of Aboriginal sovereignty, the isolation of Indigenous people from governance, and cultural erasure and subjugation.

Even in the post-*Mabo* period, as Irene Watson states, Australian legal and public institutions have failed to recognise or respect continuing Aboriginal sovereignty. The High Court has stated categorically that it has no jurisdiction to enquire into the acquisition of sovereignty by Britain in Australia, and consequently a native title regime has been developed which requires Indigenous claimants to establish an unbroken link between their ‘traditional laws and customs’, as practised at the time of European colonisation, and those laws and customs which they continue to practise today in connection with their traditional lands. Nor has the Australian Constitution developed to

---

80 Patrick Dodson, ‘Until the Chains are Broken: Aboriginal Unfinished Business’ (2000) 45(February-March) *Arena* 29.
81 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
82 *Mabo v Queensland (No 2)* (1992) 175 CLR 1
83 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; *Native Title Act 1993* (Cth), s223.
the point where it would drive, or at least facilitate, a fundamental alteration in the relationship between Indigenous peoples and the Australian state.\textsuperscript{84}

The absence of recognition of Indigenous sovereignty by the Australian legal and constitutional framework is hardly surprising, according to Linda Burney, considering that the prior occupation of Australia by Indigenous people was not legally recognised until the \textit{Mabo} decision of 1992.\textsuperscript{85} The framework of ‘settlement’ and ‘terra nullius’, which justified the colonisation of Australia in Anglo-Australian law, meant that the colonial relationship did not develop to the point reached in other comparable colonial states, such as Aotearoa/New Zealand, Canada or the United States, where prior Indigenous land ownership was acknowledged through treaties.\textsuperscript{86} Although Indigenous peoples in those states share experiences of colonisation and dispossession, the agreement of treaties has provided greater scope for the assertion of rights under domestic law than that afforded Indigenous peoples in Australia.

One of the key practical legacies of this failure to recognise Indigenous sovereignty has been the development of administrative frameworks which isolate and patronise Indigenous people in the present. This is evident in the lack of proportional representation of Indigenous people in important social institutions such as parliaments, the judiciary, and the education system. Irabinna Rigney argues this under-representation demonstrates the ongoing disproportion of power between Indigenous and non-Indigenous in Australia.\textsuperscript{87} Aden Ridgeway, the second Aboriginal person to be elected to the Commonwealth parliament, asserts that a consequence of this lack of representation is a governmental attitude that Indigenous people remain, in a sense, ‘wards of the state’. Ridgeway argues that this attitude results in a colonial governmental approach which emphasises Indigenous disadvantage, and suggests that governments are best placed to

\textsuperscript{84} Indigenous lawyer Larissa Behrendt argues that, even taking into account the 1967 referendum and consequential changes to the Constitution, in terms of the recognition of Indigenous sovereignty and rights, the Constitution has not moved far beyond the arrangements it set out when drafted in 1900: Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).

\textsuperscript{85} Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).

\textsuperscript{86} Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006). Tom Calma is a Kungarakan elder and a member of the Iwaidja tribal group, a long-time public servant and, at the time of our interview, Commissioner of the Human Rights and Equal Opportunity Commission.

\textsuperscript{87} Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
decide for Indigenous peoples how their circumstances might be improved. A parallel concern expressed by Mick Dodson is that the disempowerment of Indigenous people means that governments typically make decisions affecting Indigenous lives without seeking or gaining Indigenous consent. The issue of free and informed consent will be considered in Chapter 7, in relation to the Northern Territory Emergency Response or ‘Intervention’. As is the case for Irish nationalists in the North of Ireland, Indigenous peoples in Australia continue to identify a colonial legacy in the marginalisation of their voices and ignorance of their concerns.

An abiding and unfortunate consequence of the marginalisation of Indigenous people from positions of influence in Australian society is the continued prevalence of racist and discriminatory attitudes towards Indigenous people. Larissa Behrendt asserts that Australia has not changed psychologically as a country, and that while the dominant community appears to resent public debates about racism or Indigenous rights, a key concern for many Indigenous people is bringing an end to the discrimination they routinely suffer. Arguably, one of the key indicators of this abiding discrimination towards Indigenous people is the replacement and erasure of Indigenous cultures, which is maintained in the present, for example through the lack of provision for education in Indigenous languages. The problem of cultural erasure is emphasised as a key colonial barrier to Indigenous self-determination by Noel Pearson, who comments:

There’s never been agreement by the country to say that Indigenous peoples are entitled to maintain their distinct identities, to maintain their languages, to maintain the integrity of their relationship with their traditional lands – we’ve not reached the point where those things have been proclaimed as foundations for moving forward.

Encapsulated in Pearson’s statement is the idea that colonialism abides wherever there is a failure to recognise and respect every people’s equal right of self-determination.

88 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
89 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
90 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
91 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
92 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
C. Decolonising the Law of Self-determination

Interview data collected in this research overwhelmingly points to the continued influence of colonialism on the capacity of Irish nationalists in the North of Ireland and Indigenous peoples in Australia to achieve self-determination. The diversity of these peoples’ situations and experiences is a clear indicator of the variety of means by which colonialism manifests in the twenty-first century. Another persuasive statement on the continued influence of colonialism in international legal terms was offered by the ICJ’s advisory opinion in the Israeli wall case. Such examples offer practical proof of Anghie’s assertion that international law and legal relations remain intertwined with their colonial heritage. These examples also demonstrate the continued role for a mission of decolonisation, such as that promoted by Fanon. As conceived by Judge Ammoun, self-determination is the legal right through which this goal can be achieved.

I argue in this section that, for the law of self-determination to continue its mission of decolonisation into the future, that law itself must be decolonised. In other words, the law must move beyond its almost exclusive association with ending a particular type of European colonialism, to develop a framework which can respond to the diverse self-determination claims of Indigenous peoples, nationalist groups, secessionists and devolutionists, as has been advocated by Gerry Simpson. 93 I present three key ideas for achieving this decolonisation of the law of self-determination. First, analyses of international law should emphasise the various means by which the right of self-determination may manifest, in order to challenge statist assumptions that self-determination claims always threaten territorial integrity, and develop among states a willingness to reach negotiated solutions with claimant peoples. Secondly, and parallel to the first project, I argue that the artificial opposition between ‘internal’ and ‘external’ self-determination must be rejected, as it imposes a hierarchy on self-determination claims which leaves some claimant peoples marginalised from international legal dialogue. Finally, in order to enable claimant peoples to negotiate self-determination on equal terms with states and powerful international organisations, a more inclusive international legal system must be developed.

1. The variety of legitimate contemporary manifestations of self-determination

In this section, I explore the notion that self-determination is a right of many ‘faces’, to demonstrate that statist opposition to self-determination as a threat to territorial integrity is often misconceived. It is crucial to recognise the variety of means by which self-determination may legitimately manifest under international law, as this helps to enable peoples themselves to make the ‘determination’ central to realisation of the right. Even where self-determination claims do challenge existing physical borders, these deserve analysis rather than simple rejection, because the territorial integrity of states cannot be regarded as an automatic trump over self-determination under international law. One such circumstance is considered in Chapter 6, in relation to self-determination in Ireland.

The various means by which self-determination may manifest as a right do not demonstrate its vagueness – as some detractors have asserted – but rather its flexibility and adaptability. That flexibility extends to include assertions of self-determination as diverse as independence from colonial rule, secession, the reuniting of formerly divided states, the exercise of autonomy within existing state borders, and the exercise of the right to democratic governance. It has been suggested that the more ‘extreme’ manifestations of self-determination – for example the establishment of an independent state – will only be given international credence where the existing governance is extremely unrepresentative. Where government is regarded as high on the scale of democracy, less destabilising assertions of the right are said to be preferred by the international community.

This was certainly the legal view taken in Canada with respect to the secession claim of Quebec. In 1998, it was made clear by the Supreme Court of Canada, in its advisory opinion on Quebec’s application to secede, that the universal application of self-

---

98 Reference re Secession of Quebec 37 ILM 1340 (1998)
determination does not mean that every assertion of the right will guarantee a people’s independence. Rather, many contemporary assertions of self-determination are autonomy claims, which do not threaten the territorial integrity of states. Such a claim, as asserted by Indigenous peoples in Australia, will be explored in Chapter 7.

Unfortunately, states tend to equate self-determination with independent statehood, in order to characterise the right as a threat to state sovereignty and territorial integrity. Robert McCorquodale regards this statist tendency as a ‘deliberate misunderstanding’, designed to maintain state control over sovereignty at all costs. Where analyses of international law emphasise independent statehood as the primary goal of all self-determination claims, they continue to serve the interests of dominant states, and so reveal the continued colonial bias within the law of self-determination. A better approach is to recognise that the *jus cogens* status of self-determination applies to the full range of possible manifestations of the right, as discussed in Chapter 3.

A flexible right justifies flexible application, and a broadening of attitudes towards the various means by which self-determination may be realised is important in the decolonisation of international law. If outside judgments on the degree of representativeness of a government – which are bound to be heavily influenced by political and economic considerations – become the determining factors for a particular self-determination claim, the true experiences and entitlements of claimant peoples may be overlooked. Indeed, the very nature of self-determination would be undermined should international law seek to impose precise and restrictive criteria upon its exercise. It is impossible for international legal instruments of general application to state the exact meaning and scope of self-determination, when any manifestation of the right is so dependent on the circumstances of the claim. Any attempt to achieve this would reduce self-determination to some form of ‘arbitrary doctrinal clarity’, within which its exercise would be always contained within existing borders, thus impeding rather than

---

101 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
facilitating the dynamism of the right.\textsuperscript{103} This is not to say that states are unjustified in viewing self-determination claims with caution. All such claims bear potential to challenge borders, whether they are borders of the physical, political or moral kind.

The wariness of states is not a justification for limiting understandings of self-determination because, as with all human rights, self-determination is only capable of meeting the needs of claimants if it is also capable of adaptation to their particular circumstances. Thus a flexible approach to the right is required, where the circumstances of an individual claim will be the basis of judgment, rather than imposed generalisations of how self-determination claims ‘should’ take shape in a given case. Only this contextual application and flexibility will enable self-determination to retain its universal character into the twenty-first century. Furthermore, analyses of international law which promote and explore the flexible potential of self-determination can encourage states to be open to the perspectives of claimant peoples, which in turn may produce more negotiated self-determination outcomes. The resolution of rights claims by agreement is beneficial to all involved.

One means by which commentaries on self-determination may capitalise on the flexibility of the right is through an understanding of the right as process. There is a growing trend in international law scholarship to explore self-determination as a process rather than an event, recognising that a people’s realisation of the right is ongoing, and will adapt to changing circumstances. It rejects outdated, statist interpretations of the right, and responds to a range of influences, including some more recent state practice, advocacy on the part of Indigenous self-determination campaigners, and the ‘moral force’ of peoples’ rights theory.\textsuperscript{104} It also draws on the post-Cold War trend, which has seen the United Nations far more willing and able to intervene in what would previously have been regarded purely as the internal interests of states.\textsuperscript{105}

In characterising self-determination as an ongoing process, rather than a one-off event, this alternative approach capitalises on the special capacity of the right to adapt itself both


to universal application and cultural specificity. In the context of self-determination, the often-discussed opposition between universalism and cultural relativism need not be perceived as particularly harmful. Whilst the right applies universally, it also promotes contextualised understandings of self-determination within the unique circumstances of each claimant group. Self-determination is well-placed to show a universal concern for the other, without negating that other through a ‘one-size-fits-all’ approach.

Self-determination as ‘process’ enables a balancing of the right with other rights and interests such as representative government, protection against discrimination, and minority rights. Further, self-determination as process removes the ‘sting’ from the sovereignty question, enabling creative solutions which will not generally involve the assertion of independent statehood. This position receives support from a somewhat surprising quarter – the British government. Britain lends a powerful voice with its formal recognition of the benefits of conceiving of self-determination in this way:

…self-determination is not a one-off exercise. It cannot be achieved for a people by one revolution or one election. It is a continuous process. It requires that peoples be given continuing opportunities to choose their governments and social systems, and to change them when they so choose.

In Chapter 6, I will consider the extent to which the British state is honouring this characterisation of self-determination, in relation to the position of Irish nationalists in the North of Ireland.

In Chapters 6 and 7, I explore the views of interview respondents on the importance of conceiving of self-determination as a process rather than an event. I proceed here to consider a related means of decolonising the law of self-determination, namely through a rejection of the opposition between ‘internal’ and ‘external’ self-determination.

---

108 Irene Watson argues that dominant perspectives on international law too readily accept the benefits of universalism, without recognising that universalised narratives can marginalise contextualised rights claims: Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).

124
(a) Overcoming the artificial opposition between ‘external’ and ‘internal’ self-determination

In Chapter 3, I introduced the artificial opposition which some analysts have imposed on self-determination, whereby claims are treated as either ‘external’ (involving independent statehood) or ‘internal’ (involving solutions within existing state borders). I agree with James Anaya’s view that the supposed opposition between external and internal self-determination is inapplicable given ‘the reality of multiple human associational patterns in today’s world’. The imposition of rigid categories serves to reinforce state boundaries, no matter their legitimacy, and diminishes the utility of self-determination for claimants. Opposition to this artificial opposition is another means of decolonising the law of self-determination, in that it gives voice to the diverse assertions of the right made by peoples, and encourages fluid understandings of concepts like independence, autonomy and sovereignty.

One crucial justification for opposing the establishment of internal and external self-determination categories is that this categorisation suggests that internal exercises of the right are almost always more legitimate, because they are less likely to lead to major, destabilising political shifts. The corollary of this position is that currently existing state borders are almost undoubtedly legitimate. This reinforces the principle of *uti possidetis juris*, which has justified the maintenance of borders imposed upon colonial peoples by imperial powers. From the perspective of claimant peoples, such a position is unacceptable. It strongly suggests to claimant peoples that the international community only countenances those assertions of group identity made by existing ‘nations’ within existing states. This is an anachronistic approach, which supposes that the world has reached, or is extremely close to, its capacity for new independent states or state arrangements. Potential changes to territorial boundaries should be ‘regulated in terms of an international society that is inclusive of all and allows all to find and use their voices within international society’.

---

Further, promotion of internal self-determination as a preferable form fails to recognise the important role self-determination plays in the legitimate assertion of group identities, especially for those peoples who continue to experience the forced suppression of their identities.\textsuperscript{113} Guyora Binder has drawn a persuasive parallel between this preference for internal over external self-determination, and individual over collective rights:

Critics of the nationalist component of self-determination see political boundaries as justified only to the extent that they protect individual rights. But political boundaries also protect group identities… We can define and advance our moral ends only through joint action, and we are justified in forming political communities for the pursuit of those ends…\textsuperscript{114}

One of the ‘ends’ Binder explores is the assertion of self-determination by nationalist groups seeking to reject the intrinsic injustice of colonial domination.\textsuperscript{115} Binder’s argument on the contemporary legitimacy of assertions of group identity will be taken up in Chapter 6, in relation to the contemporary self-determination claim made by Irish nationalists in the North of Ireland.

Arguably, the artificial internal and external self-determination categories reflect the broader artificial hierarchy which has been suggested in human rights scholarship, namely, between first generation (political and civil), second generation (economic, social and cultural) and third generation (collective) rights.\textsuperscript{116} These categories have been employed to suggest a hierarchy of human rights,\textsuperscript{117} in which civil and political rights are privileged as less challenging and expensive, and economic, social, cultural and collective rights are depicted as impractical or negotiable. Analysis of this hierarchy demonstrates that it is both false and lacking in utility. For example, in some circumstances, facilitating the right to vote (which is characterised as a first generation right) can be extremely expensive and dangerous. Further, as is clear from the position of self-determination within the framework of human rights, without comprehensive recognition and protection of self-determination, many or most of the more individualistic human rights will be

\textsuperscript{113} Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006).
\textsuperscript{116} H Victor Condé, \textit{A Handbook of International Human Rights Terminology} (2004), 90.
\textsuperscript{117} Theodore Meron, ‘On a Hierarchy of International Human Rights’ (1986) 80 American Journal of International Law 1, 2.
threatened. It is futile to distinguish between individual and collective human rights in this way, not only because self-determination has a special constitutive status within the human rights framework, but also because so many social and economic rights are exercised in community.\textsuperscript{118}

Similarly, the opposition between internal and external self-determination is not in keeping with the spirit of international human rights law. To promote internal self-determination as generally preferable to independence is to privilege a statist perspective, and in doing so to reproduce a colonial bias within the international law of self-determination. Further, a preference for internal self-determination fails to recognise that some claimant peoples will never be adequately served by purely integrationist solutions. Megan Davis gives the example of a minority people pressured to express self-determination solely through participation in the internal democratic governance of the state in which they live. The lack of comparative analysis of how international law works for different peoples has typically meant that such proposals are imposed, notwithstanding that the ballot box alone is inherently limited in providing self-determination for a minority group.\textsuperscript{119} An alternative approach is to disregard the question of whether a people’s claim to self-determination can be located in the internal or the external category, and instead evaluate each claim in light of its context, as I advocate through my discussion of the human rights approach in Chapter 5.

2. Developing an inclusive international legal system

The law of self-determination may also be decolonised through the development of an inclusive international legal system. A stumbling block for contemporary claimant peoples is the dominance of powerful states within the international order. This was apparent in recent state-driven attempts to destabilise the progress of the Declaration on the Rights of Indigenous Peoples through the United Nations system, a circumstance which will be discussed in more detail in Chapter 7.\textsuperscript{120} Whilst non-state actors struggle to

\textsuperscript{118} Interview with Aideen Gilmore, Committee for the Administration of Justice (Belfast, 15 December 2005). Aideen Gilmore is a human rights activist with the Committee for the Administration of Justice (CAJ). She chose not to identify a community affiliation. CAJ does not take a position on the constitutional question in Ireland.

\textsuperscript{119} Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)

\textsuperscript{120} Peter Bailey, \textit{The Human Rights Enterprise in Australia and Internationally} (2009), 719.
be heard in the international legal forum, states – the primary actors and subjects in the international legal system – are often unhindered in their efforts to marginalise or ignore their obligations to self-determination claimants. As is expressed in the African Charter of Human and Peoples’ Rights, however, states are obliged to assist peoples in their struggles for liberation from political, economic or cultural domination.¹²¹

Recent proposals to develop a more inclusive international legal system aim to enable peoples to assert their claims from positions of status within the international community, and thus break down the colonial hierarchy which continues to privilege the positions of states. A leading proponent of this approach is Robert McCorquodale. He states an insightful and persuasive case for the development of an inclusive international legal system, in which non-state actors are empowered to negotiate with states in order to resolve rights claims.¹²² Such a system would affirm the UN Charter’s opening expression ‘We the Peoples’, by enabling non-state entities to participate in international legal dialogue.¹²³ McCorquodale promotes ‘participation’ as a key value of this new system, with the aim of overcoming the traditional opposition between ‘subject’ and ‘object’ in international law.¹²⁴ This approach also highlights the key focus of the international legal system; that is, relations between ‘nations’ (and therefore ‘peoples’) rather than relations between ‘states’.¹²⁵ More specifically, this proposal enables self-determination to live up to its promise of participation, by empowering peoples to negotiate with governments.¹²⁶

In proposing this development, McCorquodale demonstrates that an inclusive system is hardly revolutionary, but rather that it is certainly achievable. Indeed, this proposed recasting of the international legal system builds on the precedents already set by the

¹²³ Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 Leiden Journal of International Law 477. According to Mick Dodson, without the inclusion of non-state voices in the international forum, perhaps the UN Charter should read ‘We the States’, instead of ‘We the Peoples’: Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
¹²⁵ Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
¹²⁶ Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
development of the right of self-determination, which was driven by peoples and non-state groups, often in opposition to the wishes of powerful states. Non-state actors have played a range of extremely significant roles in the international community for many decades now, as seen in the law-making achievements of women’s NGOs and civil society groups, the participation of Indigenous peoples in international forums for the development of new law, and the special observer status granted to non-state entities such as Palestine in the UN, and the people of the Western Sahara within the African Union.

An inclusive international legal system could greatly enhance and articulate twenty-first century understandings of self-determination, and contribute to its further development. For example, this more open international forum would provide greater scope for the comparison of various manifestations of the right, and more local and contextualised discussion of the ways in which self-determination can improve peoples’ lived realities. If institutions such as the United Nations Human Rights Council were enabled to examine complaints from peoples, communities would finally be empowered to assert their right of self-determination. Such community empowerment is hugely significant, as is made clear by Eoin Ó Broin, who recognises that Irish nationalists have rarely engaged with

128 For example, women’s activism was crucial in securing the UN Security Council Resolution 1325 (2000) on women, peace-building and security, which has become a cornerstone of security dialogue across a number of post-conflict societies: Felicity Hill, Mikele Aboitiz and Sara Poehlman-Doumbouya, 'Nongovernmental Organizations' Role in the Buildup and Implementation of Security Council Resolution 1325' (2003) 28(4) Signs: Journal of Women in Culture and Society 1255. Margaret Ward confirms that women’s advocacy has had significant influence on international legal developments: Interview with Margaret Ward, Women's Research and Development Agency (Belfast, 19 January 2006). Margaret Ward is an Irish historian and human rights activist, and Director of the Women’s Research and Development Agency, an organisation situated in Belfast and dedicated to the promotion of women’s equality and rights.
129 These forums include the Working Group on Indigenous Populations and the more recent Permanent Forum on Indigenous Issues, which is responsible for providing a permanent voice for Indigenous peoples within the UN, and tracking the progress of the Declaration on the Rights of Indigenous Peoples. Indigenous advocacy on the international stage can be traced back as far as the 1920s, when a group of native Americans unsuccessfully petitioned the League of Nations for inclusion: Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
130 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
131 Interview with Margaret Ward, Women's Research and Development Agency (Belfast, 19 January 2006).
international law, because it was regarded as a waste of time for a small anti-state movement to oppose a superpower on the international legal stage.\textsuperscript{133}

A common view for peoples subject to state domination has been that international law provides assistance in cases of ‘classic’ decolonisation, but that it is unhelpful in terms of challenging existing units and borders.\textsuperscript{134} Restricted understandings of the capacity of self-determination may be recast by a system which combines strategies of accessibility and empowerment, and recognises that legal frameworks can only enhance peoples’ lives if those peoples are empowered to use them.\textsuperscript{135} Such recognition would most certainly contribute to the decolonisation of the law of self-determination, and indeed of international law more broadly. In Chapters 6 and 7, I will consider the development of an inclusive international legal system in relation to the circumstances of Irish nationalists in the North of Ireland and Indigenous peoples in Australia.

\textit{Conclusion}

Vasuki Nesiah describes the Israeli construction of a wall in the occupied Palestinian territory as an example of empire evading the doctrine of self-determination.\textsuperscript{136} Antony Anghie identifies a parallel example of the contemporary influence of colonialism in international law, in his study of the Mandate system and its descendants in the international legal order, which he finds reproduce the ‘civilizing mission’ which has tainted all encounters between colonisers and colonised.\textsuperscript{137} As introduced in Part B of this chapter, Irish nationalists in the North of Ireland and Indigenous peoples in Australia identify a continued colonial experience as a stifling factor in their self-determination claims.

\textsuperscript{133} Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006). This perspective was echoed by many of the Irish respondents to this research: Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006), Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006).
\textsuperscript{134} Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006), Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006).
\textsuperscript{135} Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
My essential argument in this chapter has been that empire cannot be permitted to continue this evasion; instead, colonialism must be confronted, and defeated, by self-determination. The voices of those who can demonstrate a continued colonial experience must be given space within international legal dialogue. Their self-determination claims must be evaluated on the merits, regardless of the form in which they seek to exercise the right. Artificial categories of ‘internal’ and ‘external’ self-determination ought to be abandoned, in favour of context-specific self-determination solutions. Each of these efforts may be facilitated through the development of a more inclusive international legal system.

This need to utilise the right of self-determination to confront colonialism is the first key theoretical proposition to emerge from my qualitative and doctrinal research. The complementary aspect of this theory, to be discussed in the following chapter, explores the human rights approach to self-determination. Once the contemporary influence of colonialism is recognised, self-determination solutions must then be developed which promote the human rights of claimant peoples, and of the peoples with whom they co-exist. In other words, once the colonial context of a self-determination claim is acknowledged, analysis must progress in the knowledge that the rights of others are also brought into question by that claim.
CHAPTER 5
TRANSFORMING THE LAW OF
SELF-DETERMINATION:
THE HUMAN RIGHTS APPROACH
Introduction

Contemporary experiences of colonialism, such as those of Irish nationalists in the North of Ireland and Indigenous peoples in Australia, constitute serious violations of the right of self-determination. When self-determination is violated, presumptions of state sovereignty and territorial integrity ‘may be offset’ in order to reach an appropriate remedy.\(^1\) However, no legal framework currently exists which enables the determination of what might be an appropriate remedy in a particular case where the right is violated. For example, rarely do Indigenous peoples in Australia assert self-determination with the aim of establishing a new sovereign state. In contrast, the central aim of Irish nationalists is the unification of the two Irish jurisdictions. In this case, the territorial integrity of the United Kingdom is brought directly into question.

Arbitrary and standardised ‘solutions’ for self-determination claims will fail claimants and those with whom they share territory. Just and context-specific self-determination solutions may best be developed by situating assertions of the right within the broader human rights framework. In this chapter, I investigate the human rights approach to self-determination developed by Robert McCorquodale, and argue that this alternative strategy is the best means of respecting both that right and the rights with which it typically interacts. I canvassed McCorquodale’s proposal with each respondent to this research, and I include qualitative data throughout this chapter. My conclusions on the human rights approach are grounded in the responses of self-determination claimants from the two research sites.

The first section of this chapter, Part A, critiques the two traditional approaches to evaluating self-determination; the ‘peoples’ approach and the ‘territories’ approach. In Part B, I consider some of the problems identified by research participants in relation to the current place of self-determination within the human rights regime. In Part C, I explore McCorquodale’s proposal for a new way forward for self-determination, within the international legal framework of human rights. I argue that self-determination must be conceived of as an ongoing process rather than as a single event. A human rights approach enables self-determination solutions which balance the right with the range of

---

other related rights and interests, including minority rights. I conclude that the human rights approach has the capacity to alter state practice towards self-determination and the challenges it raises.

**A. Traditional Approaches to the ‘Self’: Territories or Peoples?**

One of the two traditional approaches to the evaluation of self-determination claims has been the ‘territories’ approach. I will not consider it in great detail here, as it lacks contemporary currency. In brief terms, the territories approach focused on historical boundaries and permitted the exercise of self-determination by salt-water colonies within the confines of *uti possidetis juris*. This meant that the ‘peoples’ entitled to self-determination were defined territorially, rather than ethnically.² Elements of this approach were evident in the manipulation of the maps of Europe and the colonial territories, following the First World War. The territories approach was capable of adaptation only to the self-determination claims of colonial peoples whose homeland could be clearly defined in geographical terms, and who wished to separate from an imperial power.

This approach failed to meet Judge Dillard’s famous characterisation of the nature of self-determination, that ‘it is for the people to determine the destiny of the territory and not the territory the destiny of the people’.³ The territories approach served the interests of the dominant powers within the international order, as it guaranteed the stability of borders and limited the number of self-determination claims by minority peoples within states. However, it has fallen from favour in recent decades, and it does not reflect the values inherent in the international human rights framework. The territories approach is not suited to the variety of self-determination claims advanced by peoples in the twenty-first century, who typically share territories and rights entitlements with other peoples, as is the case for both Irish nationalists in the North of Ireland and Indigenous peoples in Australia.

---

The traditional approach which retains significant power within contemporary analyses of self-determination is the ‘peoples’ approach. This strategy requires the identification of the ‘self’ claiming self-determination, according to guidelines which have been discussed in a range of legal commentaries, but which have never been set down as part of a clear legal framework. In this approach, ‘peoplehood’ becomes a threshold question; if a claimant group cannot meet the criteria for peoplehood, their self-determination claim will not gain a full hearing. I introduced some of the proposed criteria in Chapter 3. Because one criterion for defining the ‘self’ is self-identification as a people, a set of fixed criteria is impossible to develop.

The process by which a particular people is recognised is ‘an effect of a particular form of discursive reconstruction’. There is certainly a risk that legitimate self-determination claims will be dismissed because a claimant people cannot meet a set of rigid criteria, even if they are bound by oppressive government or unjust borders, or able to demonstrate a cohesive group identity. For these reasons, the meaning of ‘peoples’ itself is contested, and has been variously argued to identify the whole people of a State, all colonised peoples, all peoples of the world, and even communities which claim membership of a larger ‘people’.

Political considerations invariably dominate when states are faced with a decision whether or not to recognise a group as a people for the purposes of self-determination.

---

4 For example, see Ian Brownlie, ‘The Rights of Peoples in Modern International Law’ in James Crawford (ed), The Rights of Peoples (1988) 1, 5, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Resolution 1541(XV) (1960) and Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, 12 February 1990, SNS-89/CONF. 602/7.
8 Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations (1963), 104.
9 Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Resolution 1541(XV) (1960).
11 As has occasionally been claimed in relation to British unionists living on the island of Ireland, and regarding themselves as members of a British ‘people’.
In 1993, Professor Erica-Irene Daes, a leader of the global movement to develop and bring into effect a Declaration on the Rights of Indigenous Peoples, demonstrated that Indigenous peoples conform to the criteria set down for the determination of ‘peoplehood’. Daes identified Indigenous peoples as distinct in society, language, law, culture and their relationships to their traditional lands, and concluded that the ‘United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist’. Yet around the world, and notably in Australia, states continue to deny Indigenous communities the status of peoples. Earlier rhetorical and legislative commitments to the notion of Indigenous self-determination have been scaled back in recent years in Australia. In Chapter 7, I will demonstrate how this has played out through the abolition of the Aboriginal and Torres Strait Islander Commission and the Northern Territory Intervention. The freedom with which the Australian government denies the status of Indigenous Australians as peoples demonstrates that the ‘peoples’ approach to self-determination is subordinate to political convenience.

McCorquodale has identified a range of further problems with the ‘peoples’ approach, notably that it fails to recognise how peoples may change throughout time, that it may be possible to engineer peoples in order to attain certain political ends, that few individuals can happily state that they are members of one single people, and – perhaps most importantly – that no single definition of peoplehood exists. Furthermore, an individual’s sense of group belonging is an intangible notion, which cannot be easily quantified. The imposition of externally-determined criteria fails to honour an individual’s freedom to choose their community affiliation. The peoples approach also suffers from a degree of hypocrisy, with states proclaiming in international law that peoples ought to decide on their future, even though the question of ‘who is a people?’ continues to be decided by states. Whilst states retain dominance in relation to this test, the question of which peoples are entitled to assert self-determination becomes a political

--

14 Interview with Brid Rodgers, SDLP (Lurgan, 9 March 2006).
rather than a legal one, dependent on the whims of states rather than the circumstances and desires of peoples.16

Attempts to impose rigid criteria upon peoples asserting self-determination ignore ‘the multiple patterns of human association’, and the impossibility of defining all peoples according to ‘existing or perceived sovereign boundaries’.17 For this reason, the ‘peoples’ approach to self-determination is circular and unproductive, especially in the contemporary environment of more fluid sovereignty, multi-national states, and multiple identities.18 There is a need for a new way. In Part C, I will promote the human rights approach as the best strategy for the evolution of self-determination in the twenty-first century. In the following section, I set the scene for that discussion by acknowledging some of the limitations of the present human rights framework.

B. Limitations of the Contemporary Human Rights Framework in Protecting the Right of Self-determination

The development of an alternative strategy, located within the human rights framework, is no easy task, not least because those peoples who might benefit from this alternative approach may mistrust the capacity of human rights discourse to improve their circumstances.19 Indeed, the existing human rights framework is open to criticism that it fails adequately to protect the rights it enshrines. In this section, I discuss some of the problems which participants in this research identified in the existing international human rights framework. Parts A and B of this chapter set the scene for a consideration of the

19 There was almost universal agreement on this point among research participants in Ireland. See particularly: Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006), Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006), Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006), Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006), Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
Indigenous research participants in Australia were generally more positive regarding the capacity of international human rights law. However, this perspective was tempered by the view that this body of law was ‘all we have’ to assert rights not adequately protected under Australian law. See particularly: Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006), Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006), Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006), Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006), Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
potential of the human rights approach to self-determination, and acknowledge that this approach cannot be applied in a vacuum. Rather, the human rights approach is challenged with overcoming the doubts of peoples whose assertions of self-determination have fallen upon deaf ears.

The key weakness of the human rights framework from the perspective of respondents to this study is its lack of enforcement powers. As Eoin Ó Broin recognises, laws which enshrine human rights can set powerful standards, but they do not on their own bring change.\(^{20}\) Implementation of human rights law depends on the degree of subscription to that law,\(^ {21}\) and in the absence of any international ‘law-giver’ beyond the consensus of states,\(^ {22}\) human rights standards can be the first values to give way in favour of political concerns. Indeed, as Mick Dodson comments, the degree to which rights are protected can depend largely on the political agenda of the government of the day.\(^ {23}\) As the souring of relations between Indigenous peoples in Australia and the Howard government of 1996-2007 demonstrated, a conservative government may refuse to accept that the rights agenda has a place.\(^ {24}\) Niall Murphy offers a parallel example from the Irish perspective, noting that any number of domestic Human Rights Acts do not prevent governments from passing severely coercive security legislation which, in effect, trumps human rights.\(^ {25}\)

Problems of enforcement and political will have been persistent in relation to the situation of Palestine. Bernadette McAliskey reflected on Palestine in relation to the self-determination claim of Irish nationalists, arguing that the Palestinian situation demonstrates the dominance of power politics over international law.\(^ {26}\) Paul O’Connor agrees, noting: ‘We know that international law has been on the side of the Palestinians for an entire generation, but it hasn’t done them any good.’\(^ {27}\) The ICJ Advisory Opinion in the *Israeli wall* case, to which I referred in Chapter 4, has no binding effect on Israel. It is understandable that rights claimants will compare their circumstances with those of

---

20 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
21 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
22 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
23 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
24 As is clear from the rejection of the self-determination discourse in Australian political affairs, in favour of the rhetoric of ‘practical reconciliation’ and ‘closing the gap’. I will discuss this in more detail in Chapter 7.
25 Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
26 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
27 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
other groups. Evidence that the international legal system has failed a claimant group may have a stifling effect on other claimants, who might otherwise seek to assert their case for self-determination in the international forum.

Furthermore, while self-determination claimants may find the human rights discourse an appropriate one through which to characterise their key aspirations, the ways in which that discourse takes shape may marginalise some claimants. Irene Watson critiques the universal definition of self-determination in common Article 1 of the ICCPR and ICESCR as problematic. Watson argues that the universal definition of the right makes it more difficult for claimant peoples, particularly Indigenous peoples, to demonstrate their distinctiveness, and thus the validity of their rights claims. 28 This criticism may also reflect one of the key problems with the ‘peoples’ approach to self-determination; namely, that it requires claimants to conform to a set of criteria which cannot properly encompass the range of potentially legitimate self-determination claims.

Another difficulty arises for claimant peoples when the communities with whom they share a territory come to regard the rights discourse as a political tool, wielded by one group to the detriment of another. Both Aideen Gilmore and Christine Bell recognise the problems which have arisen because British unionists in Ireland have typically regarded the rights discourse as part of the Irish nationalist agenda, rather than an empowering discourse for all members of society. 29 This conflict over the utility of human rights is evident in relation to current debates on protecting the Irish language, which I consider in Chapter 6. Even when such difficulties are overcome and a dialogue begins between claimants and governments, the ‘dialogue of the deaf’ which then often takes place demonstrates the incapacity of conflicting parties to understand the other’s point of view. 30

In light of such limitations, it is unsurprising that contemporary ‘hard cases’ of self-determination remain unresolved. Yet, international human rights law remains an important framework through which peoples may characterise their self-determination

---

28 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
29 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005), Interview with Aideen Gilmore, Committee for the Administration of Justice (Belfast, 15 December 2005).
30 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
claims, particularly for Indigenous peoples in Australia, who lack a domestic framework of human rights. The human rights framework may be strengthened, in order to better protect the right of self-determination, particularly for those claimant peoples whose voices remain marginalised in international legal discourse. In the following section, I introduce McCorquodale’s proposal for a human rights approach to self-determination. I explain the positive potential of this approach, particularly as it assists in characterising self-determination as an ongoing process rather than a single event. I show that a human rights approach enables balance between self-determination and the range of other related rights and interests.

C. The Human Rights Approach to Self-determination

In 1994, Robert McCorquodale published an article in the *International and Comparative Law Quarterly* titled ‘Self-Determination: A Human Rights Approach’. This article presented a persuasive case for the implementation of a new approach to self-determination claims, one which would evaluate such claims within the broader framework of international human rights law. McCorquodale argued that a ‘coherent legal framework’ was required to deal with self-determination claims, as the approaches which had held sway until that time were not equipped to address the potential conflicts between rights which may emerge when self-determination is asserted. The international law of human rights is capable of providing the ‘coherent legal framework’ through which self-determination solutions may be negotiated.

The human rights approach to self-determination requires contextualising a self-determination claim in relation to the other rights with which it will interact. As yet, McCorquodale’s proposal has not been generally adopted in international legal dialogue. Instead, self-determination has received progressively less attention within the international arena. Contemporary ‘hard cases’ of self-determination remain marginalised. However, in practical terms, the human rights approach has already assisted in clarifying the meaning and scope of self-determination where it interacts with other

---

31 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
human rights, notably through McCorquodale’s own advisory work in South Africa and Malawi. In light of this, McCorquodale’s proposal deserves renewed evaluation.

In proposing a human rights-centred approach to self-determination, McCorquodale asserts the need for a framework capable of application in a variety of situations, which balances the rights of all people against a concern for preventing threats to peace and security. This distances the human rights approach from the ‘peoples’ and ‘territories’ approaches to self-determination, which favoured the interests of states over the rights of claimant peoples. In contrast to these frameworks, the human rights approach is sufficiently sensitive to balance the competing interests brought into play by self-determination claims. The ‘peoples’ approach to self-determination has facilitated the marginalisation of contemporary self-determination claims, enabling the international legal system to avoid evaluating ‘hard cases’. The human rights approach is capable of facilitating the just evaluation of all self-determination claims, as the guiding framework of international human rights law sets out clear legal rules which aim to balance human rights in light of developments in international society. Until self-determination is evaluated within a framework of human rights, claims to the right will continue to falter at the hurdles identified above, namely the arbitrary threshold question of ‘peoplehood’ and the dominance of politics over law.

McCorquodale explains that self-determination is well-adapted to evaluation within the human rights framework because the two doctrines share fundamentally similar purposes; self-determination protects and empowers communities, and the international law of human rights protects both the rights of individuals and the rights of the communities which those individuals come together to form. Indeed, the central positioning of self-determination in common Article 1 of the ICCPR and ICESCR emphasises the symbiotic relationship between self-determination and the more individual-focused human rights.

---

33 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
Full realisation of the right of self-determination is essential for the adequate protection of all human rights.

In order to explore how the human rights approach to self-determination would work in practice, McCorquodale acknowledges that most human rights are not absolute values, but rather that limitations may sometimes be imposed to enable rights to interact in the real conditions of social life. This is the case with self-determination. It is a general legal rule that any limitations imposed on the exercise of human rights are only imposed to protect other rights and the interests of society, and any limitations imposed are to be interpreted narrowly. While self-determination applies wherever a people is subject to oppression, it is subject to the presumption that exercises of self-determination cannot be permitted to destroy or impair the other human rights also enshrined in the international legal framework. In Chapters 6 and 7, I discuss means by which self-determination might be realised by Irish nationalists and Indigenous peoples in Australia in ways which balance self-determination with other human rights. The human rights approach makes possible self-determination solutions which enable the concurrent protection of the whole range of human rights to their fullest extent.

Self-determination claims not only bring into question the rights of non-claimants, but also the interests of states. A balancing act is also required between the realisation of self-determination and respect for state sovereignty. In this context, self-determination may be subject to limitations imposed to protect the general interests of international society, specifically through the doctrines of territorial integrity and uti possidetis juris. No argument in favour of increased protection for the right of self-determination will find favour in international legal discourse if it fails to recognise that states are the dominant

---

38 Some rights under the international legal framework are absolute, for example the prohibition against genocide (Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 1021 UNTS 78 (entered into force 12 January 1951)), and the right to freedom from torture (Article 7, International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)).
41 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
parties in the international community, and their interests will always remain significant considerations. However, it is already clear in international law that the right of a state to territorial integrity only remains absolute so long as the self-determination of peoples within that territory is fully realised. Only a minority of states could claim fully to respect the right of self-determination of all peoples within their borders. Similarly, *uti possidetis juris* has acted as a constraint on self-determination claims, by ensuring the maintenance of established colonial boundaries. However, state practice in relation to this limitation is inconsistent, and self-determination may sometimes override *uti possidetis juris* to deliver a change in territorial boundaries.

An important justification for abandoning the ‘peoples’ test for self-determination is the injustice imposed by the threshold question of ‘who is the self?’ This question tends to marginalise claims, and prevent their full and fair evaluation. However, the human rights approach to self-determination must acknowledge the significance of the identity of a claimant people. Rather than seeking to establish ‘peoplehood’ according to set criteria, the human rights approach ought to focus on self-identification as a people. As Bernadette McAliskey asserts, ‘you can no longer define a people ... You can recognise a people.’ The benefit of the human rights approach is that it empowers a people to assert self-determination, and then be entitled to respect as a party to a process of international legal dialogue. This approach gives subject communities a voice, and ensures that self-determination claims are treated in a commonsense way. It also contributes to the development of a more inclusive international legal system. Such a system is necessary to assist in the decolonisation of international law, as argued in Chapter 4.

Giving voice to claimant communities can be helpful as a means of diverting some self-determination struggles away from violent conflict and towards negotiation. As the history of the Irish struggle for self-determination demonstrates, armed conflict has been a frequent feature of claims to the right. Lasting, negotiated solutions may be achieved

---


46 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
through a human rights approach, which balances the right with other rights and interests.\footnote{Robert McCorquodale, ‘Self-determination: A Human Rights Approach’ (1994) 43 International and Comparative Law Quarterly 857, 883.} The human rights approach does not impose rigid criteria, but rather enables the contextual evaluation of all self-determination claims. McCorquodale explains the value of such an approach:

> While the human rights approach does not make it possible to say in the abstract which peoples have the right of self-determination and the extent of any exercise of this right, it does provide a framework to enable every situation to be considered and all the relevant rights and interests to be taken into account, balanced and analysed…\footnote{Robert McCorquodale, ‘Self-determination: A Human Rights Approach’ (1994) 43 International and Comparative Law Quarterly 857, 884.}

In the following sections, I consider the human rights approach in further detail, with particular emphasis on self-determination as an ongoing process, and the need to balance self-determination with minority rights protection. In Chapters 6 and 7, I consider means by which the theory could be put into practice in the context of the self-determination claims advanced by Irish nationalists in Northern Ireland and Indigenous peoples in Australia.

1. Positive features of the human rights approach in the contemporary legal context

The human rights approach has the potential to overcome some of the critiques of the human rights framework which respondents to this study raised, as discussed in Part B of this chapter. This more humane approach responds to the lack of enforcement power in international law by proposing a more conciliatory framework of negotiating self-determination. In this context, it is foreseeable that states could be persuaded to sit with claimant peoples ‘at the same table’, on the proviso that a relationship of mutual goodwill could be established. This element of the strategy also responds to the marginalisation of claimant peoples from international legal dialogue, in that the voices of claimants may seem less threatening to states if they are expressed in a framework of negotiation. Further, the difficulty created by the dominance of political considerations in state responses to self-determination claims is addressed by the human rights approach. The evaluation of self-determination according to the ‘coherent legal framework’ of the
international law on human rights may make politics a less decisive factor, and instead promote negotiated agreements.

Each respondent to this research was asked to consider the potential of a human rights approach to self-determination. The approach met with widespread approval from participants. Kieran McEvoy commented: ‘The key in the human rights framework is the recognition of the rights of the other. I think that’s a more mature expression of self-determination.’\(^49\) In this way, McEvoy acknowledges the parallel between the human rights framework as a whole, and the human rights approach to self-determination; namely, the capacity of each to balance rights claims and seek to ensure the greatest degree of realisation of all rights.

In my interview with Robert McCorquodale, he reaffirmed his commitment to the human rights approach. He described the approach as requiring an exercise in understanding, which focuses not on who has self-determination but on how it is to be exercised, and argued that this changes the tone of the debate to one of empowerment and respect.\(^50\) Importantly, the human rights approach promotes respect for all rights-holders, whether they be self-determination claimants or others sharing the same territory. Bernadette McAliskey recognises the value of this aspect of the approach in the Irish context. She argues that it is essential for claimant peoples to realise self-determination in ways which avoid making the claimants – previously the oppressed – violators of the rights of others.\(^51\) This is more of an issue in the Irish context, where constitutional change would see the present British unionist majority in Northern Ireland become a minority in a united Ireland, and will be considered in Chapter 6.

Some respondents gave specific examples of how the human rights approach could apply positively in practice. According to Kieran McEvoy, ‘absolutist’ assertions of self-determination in Northern Ireland have been disaggregated over the past several years of the Irish peace process. Rights issues, for example, claims of British unionists to the ‘right to march’ or parade, are now discussed more frequently in terms of competing rights frameworks, thus developing more practical solutions than were possible in the

\(^{49}\) Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).

\(^{50}\) Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).

\(^{51}\) Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
past.\textsuperscript{52} In Australia, too, the human rights approach lessens the risk of rights claims being rejected solely on the basis that they threaten the already-protected rights of others. Mick Dodson agrees that the cause of reconciliation between Indigenous and non-Indigenous people in Australia can only be achieved through a balancing of all rights and interests, as is advocated by the human rights approach.\textsuperscript{53}

The human rights approach also finds support in international legal commentary. Anaya conceives of self-determination as ‘a configurative principle’ of human rights law, intertwined with individual human rights standards.\textsuperscript{54} When the right is considered in this light, the human rights approach appears both logical and well-adapted to twenty-first century conceptions of the significance of human rights in international relations. Indeed, Simpson argues that the only means of saving self-determination from a ‘descent into incoherence’ is an expansive interpretation of the right which recognises its links with autonomy, democracy, cultural self-expression, and human rights.\textsuperscript{55} A renewal of such links, through the human rights approach, may also allay the fears of some who regard self-determination as divisive or dangerous. For example, Louis Beres has called for the balancing of self-determination with the needs of the entire global community, in order to protect against the more extreme and violent out-workings of separatism, ethnic conflict, and militaristic nationalism.\textsuperscript{56} The human rights approach is the only strategy yet proposed which attends to these concerns with realism regarding the interests of the international community, and a respect for the fundamental entitlements of peoples who assert self-determination.

2. Implementing the human rights approach: self-determination as an ongoing process

A key means of implementing the human rights approach involves framing self-determination as an ongoing process rather than a single event. Nothing in international law mandates that a claimant group’s right of self-determination lapses upon the assertion

\textsuperscript{52} Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
\textsuperscript{53} Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
\textsuperscript{54} S James Anaya, \textit{Indigenous Peoples in International Law} (1996), 77.
\textsuperscript{56} Louis René Beres, 'Self-Determination, International Law and Survival on Planet Earth' (1994) 11(1) \textit{Arizona Journal of International and Comparative Law} 1, 5.
of independence. Indeed, because many self-determination solutions can be developed within existing state arrangements, the right is best expressed as a continuing process without a defined end-point. For example, if an act of self-determination by Irish nationalists were to result in the unification of Ireland, the process of self-determination on the island would continue. Some members of Irish society would not yet be fully empowered to participate in the self-determining whole, and new protections would be required for the new British minority. Once the base level of the right of self-determination is achieved, other related aspirations take prominence, including representative government, and a system which protects all members of the self-determining unit without discrimination. In the Irish case, if eventual self-determination solutions do result in a change of borders, a process of political accommodation will be required, necessitating an extension of the political generosity which the parties are being called upon to demonstrate in the present.

A key advantage of implementing the human rights approach through a process of self-determination is that this conception is more open to the various means by which the right may be achieved. It promotes a less absolutist approach to sovereignty, which is helpful for those peoples who wish to exercise self-determination within existing states, for example Indigenous peoples. Sovereignty remains an essential value for Indigenous self-determination claimants in Australia, who have emphasised that Indigenous sovereignty is capable of coexisting with Australian state sovereignty. Conceiving of self-determination as an ongoing process also addresses the concerns of those who fear that the right can exacerbate rather than resolve conflict. For example, should the two Irish jurisdictions be united, a less absolutist approach to sovereignty might enable arrangements which retain some aspects of the Northern jurisdiction, as a guarantee that all people on the island will be entitled to express their identity as they wish.

57 This group would include the Indigenous Irish ethnic minority – the Travelling Community – and the recent influx of new migrants from various cultural backgrounds: Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
58 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
59 Irene Watson emphasises the status that attaches to the concept of sovereignty, and the importance of Indigenous peoples finding space in both domestic and international arenas to assert themselves, beyond the limitations of colonial legal systems: Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
60 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
61 R V Comerford, Inventing the Nation: Ireland (2003), 46.
The human rights approach to the process of self-determination also emphasises what is a key value of the right; the balance it strikes between universal relevance and contextually specific and culturally appropriate application. The right can manifest in a wide range of forms, from independence through to autonomy within a state, from minority protection through to the entitlement of democracy. The concept of universalism informs the entire human rights framework, however, the exercise of any particular right must always be culturally sensitive. This value of the human rights approach is particularly important for claimants such as Indigenous peoples in Australia, whose cultural values are so distinct from non-Indigenous communities that their claims for self-determination have been misunderstood by non-Indigenous society. There is no doubt that respect for the universal application of self-determination is essential, however, the right must be capable of adaptation to the particular circumstances of each claimant people.

3. Balancing self-determination, minority rights protection and identity through the human rights approach

An area of collective human rights law growing in prominence in recent decades is the field of minority rights. The key statement of this body of law is found in Article 27 of the ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

A further benefit of the human rights approach is its capacity to enhance the balance between self-determination and minority rights. The birth of new political entities through exercises of self-determination can create ‘new minorities’, and raise the question of how such minorities will be protected in terms of rights, anti-discrimination, and identity. The human rights approach addresses such concerns by enabling conflicting rights to be

63 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
64 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 27.
65 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
balanced, with the aim of achieving the highest degree of realisation of all rights in the circumstances.

It is important to balance self-determination and minority rights because the two concepts share a common philosophy; namely, that the protection of individual human rights ‘may not always be sufficient to guarantee legitimate values of group identity or demands for more effective participation in the larger society’. The international community has already demonstrated its commitment to achieving this balance, through the focus which the Badinter Commission gave to minority rights in adjudicating self-determination claims in the former Yugoslavia. Should the assertion of self-determination by Irish nationalists result in the unification of Ireland, affording acceptable minority rights protections to British unionists will be key to ensuring international acceptance of the new entity.

Further, a human rights approach to self-determination is better capable than previous approaches of demonstrating respect for the multiple identities which many people today express. Margaret Ward, speaking from an Irish feminist position, has witnessed people’s identities becoming increasingly fluid over time. She finds that, not only are more people today capable of identifying more than one national identity as significant to them, but that women in particular may find factors other than nationality dominating their identities. Thomas Franck supports the view that it is not ‘natural’, as in Wilsonian terms, ‘for each person to identify exclusively with a single “people”’. Rather, because pluralism is increasingly accepted as a worthwhile goal, the human rights approach enhances self-determination by enabling it to encompass more nuanced expressions of identity. This is important, because self-determination is not only for the claimant group as a whole, but for each of its individual members.

---

67 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006). The rulings of the Badinter Commission are discussed in Part A.6 of Chapter 2, under the heading ‘Post-Colonial? Recent Manifestations of Self-Determination’, and in Part 3 of Chapter 3, under the heading ‘Peoples’ v ‘Territories’ v ‘Human Rights’: Do We Have to Define the ‘Self’?”.
68 Interview with Margaret Ward, Women's Research and Development Agency (Belfast, 19 January 2006).
Conclusion

As I argued in Chapter 4, some contemporary ‘hard cases’ of self-determination can only be fairly evaluated through an acknowledgment of the continued stifling impact of the colonial experience. However, such an acknowledgment need not pose an unmitigated threat to the stability of existing state borders. Rather, it establishes a foundation for historically and legally honest responses to contemporary assertions of self-determination. Some of these assertions do challenge political and territorial boundaries, as with the Irish nationalist claim, while others take the form of claims to autonomy within existing states, as for Indigenous peoples in Australia. The international legal system can itself be decolonised, by opening itself to the variety of legitimate manifestations of self-determination, and becoming more inclusive of non-state actors, including self-determination claimants.

While an acknowledgment of the contemporary colonial experience is a necessary starting point, the human rights approach to self-determination is the best framework for guiding the future of the right. Practical and just self-determination solutions may be crafted by situating the right within the broader human rights framework. By contextualising self-determination claims in this way, the competing rights and interests of other peoples and individuals come into parallel focus. All contemporary assertions of self-determination relate to territories and societies in which non-claimant peoples also live as rights-bearers. Proceeding on the basis of historical truth, solutions must be developed which seek to best protect the rights of all individuals and communities. Such a process reflects both Judge Ammoun’s views on how colonialism effects a distortion in history upon those peoples subject to it, and the guiding spirit of the human rights framework, that rights are universal and indivisible.

The traditional ‘territories’ and ‘peoples’ approaches to self-determination are incapable of serving the development of the right in the twenty-first century. Although the contemporary human rights framework has limitations, as acknowledged by participants in this research, a human rights approach to self-determination can be crafted to advance the circumstances of contemporary rights claimants. This approach has the capacity to

shift relations between states and claimant peoples, encouraging negotiated solutions that balance the range of rights and interests brought into play by self-determination claims. The human rights approach can ensure that self-determination functions as an ongoing process, continually enhancing the rights of individuals and communities in relation to their societies. In the final two chapters of this thesis, I consider how self-determination’s mission of decolonisation, and a human rights approach to the right, can combine to produce just and workable approaches to self-determination in Ireland and Australia.
CHAPTER 6
SELF-DETERMINATION AND IRISH NATIONALISTS:
THE COLONIAL EXPERIENCE,
THE GOOD FRIDAY AGREEMENT AND
THE ROLE OF INTERNATIONAL LAW
Introduction

This chapter is the first of two case study chapters, situating the theoretical findings of my thesis in the practical context of contemporary self-determination claims. In this chapter, I explore the right of self-determination for Irish nationalists in the North of Ireland. I begin with perspectives on the meaning of self-determination from research participants in Ireland. In Part A, I acknowledge the lack of international recognition of the colonial experience of Irish nationalists, and the consequences of this for an Irish nationalist claim to self-determination. In Part B, I focus on the three aspects of their contemporary colonial experience that emerged most strongly in qualitative interviews. Part C examines the Good Friday Agreement as the most significant legal mechanism relating to self-determination in Ireland in the twenty-first century. Finally, in Part D, I identify means by which the international legal system may promote the realisation of self-determination by Irish nationalists in the North of Ireland.

The structure of this chapter, and Chapter 7, reflects the structure of the research interviews conducted in Ireland and Australia. Following a semi-structured schedule, each interview began with an exploration of self-determination under international law, before considering the state of self-determination for the specific claimant group. Each interview concluded with a consideration of the means by which self-determination could be advanced in the future, particularly through international legal means. The concepts central to these two case study chapters were generated through coding of the data gathered through research interviews. In other words, the research findings set out in these chapters are grounded in my deep analysis of qualitative data. Throughout both chapters, I support my conclusions with doctrinal legal research.

Although this chapter is concerned with the right to self-determination of Irish nationalists in the North of Ireland, I do not make any concrete proposals for the future shape of the right, for two reasons. First, although I focus on the colonial experience of Irish nationalists in the North – and how this distinguishes them from others on the island in relation to self-determination – I am not speaking on their behalf. I am concerned with the role of international law in relation to self-determination. Second, fundamental to the
realisation of self-determination is an acknowledgment that its nature and scope in any territory must be determined by the people of that territory.

1. The meaning of self-determination from Irish nationalist perspectives

The starting point for qualitative research interviews conducted with participants in Ireland was the international legal definition of self-determination. There was a universal acceptance of that definition among the 14 respondents, and each then went on to apply the definition in practical terms. In this section, I consider some of their perspectives on the meaning of self-determination. The Irish interview respondents embraced the idea of self-determination as a right operating on a range of levels.

Brid Rodgers reflects on the independence aspect of self-determination, stating that it is ‘the right of a people to decide their own political structures and political destiny, not to have it imposed on them by an outside force…’ Rodgers goes on to note the complicating aspect of this conception of the right in the Irish context:

The issue [in Ireland] is that there are two sets of people on the island who see self-determination differently. The only way to solve that is to get to a context where you accept the legitimacy of both, but you provide a context where they can work together, and eventually heal, and move on to self-determination.1

Here, Rodgers provides an interesting starting point for a contemporary self-determination inquiry, by acknowledging that all peoples on the island of Ireland, nationalist or otherwise, are entitled to be part of any future self-determination solution. Paul O’Connor agrees that the entire people of the island are entitled to decide their destiny together.2

To Eoin Ó Broin, self-determination operates on three levels; the nation, the community and the individual. Along with balancing these three ‘sites’ of self-determination, he argues that the right must also be balanced with social, economic, political and cultural rights.3 Both Paul O’Connor and Terry Enright emphasise the importance of social and

---

1 Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006).
2 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
3 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
cultural freedom as aspects of self-determination. Speaking from an academic perspective, Robert McCorquodale recognises that a number of self-determination matters in recent times have been dealt with at an economic or cultural level, rather than as purely political issues.

Essential to this multi-faceted conception of self-determination is the notion of inclusion in governance. Anthony Coughlan acknowledges that self-determination has been traditionally understood to refer to independent statehood, but it also refers to the state you’re in, and whether it respects your culture and language, and right to a ... standard of living, access to jobs, freedom from discrimination.

This perspective highlights the issue raised by Rodgers, that groups other than Irish nationalists must be included in the development of future self-determination solutions. In this context, Ó Broin notes the disadvantaged status of the small Irish Traveller community. The circumstances of this group tend to be marginalised in the political conflict between Irish nationalists and British unionists, however, Travellers would need to be included in any future Irish self-determination solution.

Another common theme among respondents was that self-determination has to be interpreted on a community level if it is to mean anything to claimants. According to Margaret Ward:

I think it has to start with people’s lived reality – what difference will it make to their lives? If they can’t be convinced on that then that kind of high level of objective [concept of self-determination] wouldn’t move them.

Eoin Ó Broin also emphasises the community aspect of self-determination, arguing that the right must be concerned primarily with community-based activism, empowerment and engagement on issues affecting people in their everyday lives. Niall Murphy provides an

---

4 Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006), Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006).
5 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
6 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
7 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006). Irish Travellers are a nomadic community of Irish ethnic origin.
8 Interview with Margaret Ward, Women’s Research and Development Agency (Belfast, 19 January 2006).
9 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
example of community engagement with self-determination through the Gaelic Athletic
Association, which he regards as a custodian of Irish cultural pursuits.

A. The Absence of International Recognition
of the Colonial Experiences of Irish Nationalists

There was a broad sense among Irish respondents to this research that the visions of self-
determination described above have not yet been realised, due to a continuing, but
inadequately acknowledged, experience of colonialism. A basic obstacle to contemporary
self-determination claims by Irish nationalists is the historical and continuing absence of
international recognition of Ireland as a site of colonialism. British imperial theorists have
given little attention to Ireland, despite it being ‘Britain’s oldest and longest-held colony’,
and consequently minimal recognition has been given to the effects of colonialism on
Irish nationalists.10 Several respondents attributed this circumstance to the relative power
wielded by Britain and Ireland in international relations.11

McVeigh argues that those who have attempted to expose the colonial legacy have been
accused of supporting the tactics, atrocities and mistakes ‘committed in the name of anti-
colonialism’ by the IRA and others. He continues:

This is a remarkable piece of revisionism that leaves most outside observers and
many oppositional voices in Ireland without a paradigm to explain inequality,
injustice and repression within the North of Ireland.12

This interpretation also fails to recognise the deep significance of colonialism in shaping
the identities of the various communities now living in Ireland.13 It may be part of the
reason why the conflict in Ireland is so often viewed through the restrictive lens of
sectarian conflict between Protestants, who are presumed to support union with Britain,
and Catholics, who typically seek a united Ireland. This chapter shows that the colonial
legacy and experience is a complex one, that the roles of communities in the conflict

10 Pamela Clayton, 'Religion, ethnicity and colonialism as explanations of the Northern Ireland conflict' in
11 See, for example, Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006) and Interview with
Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).
12 Robbie McVeigh, ‘The British/Irish ‘Peace Process’ and the Colonial Legacy’ in James Anderson and
13 Robbie McVeigh, ‘The British/Irish ‘Peace Process’ and the Colonial Legacy’ in James Anderson and
cannot be neatly categorised, and that the involved nation states – particularly Britain – are deeply connected to the conflict and its consequences.

Interview respondents in Ireland asserted that Irish self-determination had never been regarded as an international legal issue, and that the power of Britain on the international stage was a key reason for this circumstance. Eoin Ó Broin argues that the application of self-determination is conditioned more by practical power-relations between states than by international law. By this logic,

the EU was never going to raise the issue of the self-determination of Ireland, because the United Kingdom…is a major player…[and in any case] almost no state wants to see an unlimited application of the right to self-determination, because almost every state has existing within it minority communities…

Both Terry Enright and Mike Ritchie concurred in the view that Britain exerts significant power on the world stage, and each used the example of US/UK military intervention in Iraq to support the view that the international community has limited power to prevent what Ritchie describes as flagrant breaches of self-determination. This view is supported by a number of commentators, who have acknowledged the emergence of unilateralism as a powerful contemporary force in international relations. As Anthony Coughlan recognises, other peoples with claims to self-determination confront the same obstacle:

The Russian Federation…encompasses many different nationalities, the Chechens for example, but the international community doesn’t engage with their concerns because they prefer to maintain their relationship with Russia.

Kieran McEvoy asserts that a parallel stumbling block in the path of Irish nationalist assertions of self-determination has been the unwillingness of the Irish state to represent the interests of nationalists in the North. According to McEvoy, the Irish government was

---

14 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
15 Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005); also Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006).
17 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
the natural avenue for advancing a claim for Irish self-determination under international 
law, however, due to political considerations successive governments failed in this task.\textsuperscript{18} 
As Niall Murphy recognises, the Irish government had some limited success in 
international judicial forums in the 1970s,\textsuperscript{19} arguing against the British use of torture in 
Northern Ireland.\textsuperscript{20} However, the Irish state did not go beyond such protests to raise a 
debate on the borders of Northern Ireland in the international community. Consequently, 
according to Christine Bell, 

while there was an international notion that Northern Ireland was in some sense 
an unequal and illegitimate place as a strict matter of international law…that 
notion of territorial integrity went against and de-legitimated, in strict legal 
terms, the rights of Irish nationalists.\textsuperscript{21}

The major political parties in the Republic of Ireland retain a stated commitment to the 
goal of unification,\textsuperscript{22} however, it is clear that action on their part to achieve this goal is 
now tempered by the complexities of a twenty-first century society, including 
multiculturalism, membership of the European Union\textsuperscript{23} and economic concerns. Political 
goals, particularly retaining a strong relationship with Britain, are also influential for the 
Irish government. This is apparent in the fact that the government minister responsible for 
dealing with Northern Ireland issues is the Minister for Foreign Affairs, a designation 
which undermines stated commitments to Irish unity. The party elected to government in 
the Republic of Ireland in 2010, Fine Gael, has opposed efforts to grant speaking rights 
and other limited participation in the Irish Parliament (the Dáil) to representatives of 
political parties from Northern Ireland.\textsuperscript{24}

The consequence of the failure of successive British and Irish governments to 
acknowledge the colonial experience of Irish nationalists has been the lack of

\textsuperscript{18} Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006). 
\textsuperscript{19} Ireland v United Kingdom (1978) 2 EHRR 25 
\textsuperscript{20} Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006). 
\textsuperscript{21} Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 
October 2005). 
\textsuperscript{22} The party that won government in the Republic of Ireland in 2010, Fine Gael, is subtitled ‘the United 
Ireland party’. One of the major opposition parties, and the previous party in government, Fianna Fáil, calls 
itself ‘the republican party’. Its constitution states that it is a national movement, aiming ‘to secure in peace 
and agreement the unity of Ireland and its people’. See: Fianna Fáil, Constitution of Fianna Fáil (2011) 
<www.fiannafail.ie/content/pages/5097/> at 5 May 2011 
\textsuperscript{23} Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006). 
\textsuperscript{24} Ireland, Parliamentary Debates, Dáil Éireann, 2 November 2005, Vol.609 No.69, 125-126 (Deputy 
Bernard Allen, Fine Gael).
international recognition of Ireland as a site of colonialism. This has meant that Irish self-determination advocates have typically avoided the international legal forum as a site for advancing self-determination claims. 25 This is important, because international recognition can be of significant assistance in exercising the right to self-determination. It can, for instance, enable claimants to bolster their claims by reference to comparable situations. 26 It can also develop a broader support base and provide a much wider range of sites for advancing a self-determination claim. Had Ireland been recognised more widely as a site of colonialism, advocates may have been able to build on what Adrian Guelke recognised, in his often-cited article of 1985, as the lack of international legitimacy of Northern Ireland as a political entity. 27 Instead, the issue of Irish self-determination rarely registers on the international stage.

Contemporary evaluations of self-determination claims are without solid foundation if they do not recognise essential historical factors. As Bernadette McAliskey recognises:

… you have to look at that historic usurpation [that occurred in Ireland] …I think that we try to pretend that how we got to where we are doesn’t matter, but it does. We can’t talk about self-determination unless we look at imperialism and colonisation and its effects. 28

The following two sections introduce historical and contemporary factors which currently stifle the capacity of the international legal framework to address colonialism, and its impact on self-determination for Irish nationalists. Later in this chapter, I demonstrate that colonialism remains an influence on Irish self-determination, and explore how international legal responses may be adapted to better deal with that reality.

1. International law and the failure to acknowledge colonialism in Ireland

As a system dependent on the adherence of states for its effectiveness, the international legal system has established a hierarchy of status which privileges states over non-state groups. As Eoin Ó Broin recognises, ‘ethnic minorities and other communal-identified

25 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
26 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
28 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
people aren’t recognised as nations under international law’. They consequently lack capacity to put their right to self-determination into practice against the opposition of a dominant state. Indeed, the low status of groups challenging state authority has meant that they lack capacity to even begin to argue their claim within the international forum. Margaret Ward comments in this context:

How can you be part of international law mechanisms if you’re an insurgent?

As Britain didn’t accept that there was a war, it wouldn’t accept there were insurgents, so they couldn’t be legitimate…There wasn’t any way to plead their case [in the international forum].

It is not only Irish nationalists whose claim to self-determination is stifled by international power relations; Bernadette McAliskey argues that international law has done little to consider the legitimacy of claims put forward by the Palestinians, Iraqis, Quebecois or Indigenous peoples. Antony Anghie and other scholars of the ‘Third World’ have demonstrated that a key context in which international law has both imposed and reinforced hierarchies is the colonial encounter. A central theme consistently emphasised in Third World Approaches to International Law (TWAIL) is history and its influence on contemporary issues. Karin Mickelson shows how TWAIL scholars refuse to consider events and problems – including the colonial experience or self-determination – without reference to their historical context. Instead, Third World voices repeatedly depict the international legal system as Eurocentric and complicit in the colonial enterprise.

The failure of the international legal system to develop a nuanced understanding of the significance of colonialism is clearly demonstrated by the maintenance of the archaic doctrine of uti possidetis juris. Paul O’Connor observes that international law was helpful

---

29 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
30 Interview with Margaret Ward, Women's Research and Development Agency (Belfast, 19 January 2006).
31 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
in ensuring the recognition of self-determination where a clearly established and internationally accepted territorial unit was subject to the claim. However, international law has been resolutely opposed to self-determination claims that challenge the nature of defined units and borders. O’Connor argues: ‘There seems to have been a consensus since World War Two – don’t change borders.’\(^{35}\) This is a harsh reality in Ireland, where the border between North and South was artificially constructed in the 1920s, to ensure a sustainable British unionist majority in the North. As discussed in Chapters 2 and 3, archaic principles which emphasise hard territorial boundaries, particularly *uti possidetis juris*, are inappropriate to the circumstances of contemporary, anti-colonial self-determination claimants.

The international legal system demonstrates a shifting focus in different eras, subject to the contemporary preoccupations of international *realpolitik*. Unfortunately for peoples claiming self-determination in the present day, colonialism has not been a preoccupation of international law for the past three decades.\(^{36}\) Colonialism has come to be often characterised as

> peripheral, an unfortunate episode that has long since been overcome by the heroic initiatives of decolonization that resulted in the emergence of colonial societies as independent, sovereign states.\(^{37}\)

In Ireland, some who believe strongly in the legitimacy of a nationalist claim to self-determination have come, nevertheless, to regard the colonial analysis as futile. Kieran McEvoy believes that the time has passed for Ireland to be considered a colonial case in the international forum.\(^{38}\) Mike Ritchie argues that if the partition of Ireland had been enforced after the twin human rights Covenants were adopted in 1960, partition would have been regarded as illegal. However, according to Ritchie, the colonial experience is today regarded as ‘ancient history’.\(^{39}\)

---

\(^{35}\) Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).

\(^{36}\) Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).


\(^{38}\) Interview with Professor Kieran McEvoy, Queen’s University Belfast (Belfast, 22 June 2006).

\(^{39}\) Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).
2. The role of the ‘internal’ self-determination proposal as a means of stifling contemporary claims

One contemporary consequence of the failure of international law to acknowledge the continuing significance of colonialism is the developing trend to separate self-determination claims into the categories of ‘internal’ and ‘external’. This categorisation was introduced in Chapter 3, and argued against in Chapter 4. In this categorisation, in conditions where a claimant people are severely oppressed, external self-determination is depicted as an extreme manifestation of the right, which will typically result in secession and/or the creation of a new independent state. Internal self-determination encompasses less dramatic manifestations of the right, for example forms of autonomy within an established state, which are typically regarded as appropriate in functioning democracies. For example, the Supreme Court of Canada concluded that the Québécois were entitled to the ‘pursuit of [their] political, economic, social and cultural development within the framework of an existing State’, but not to secession and independence.

Christine Bell regards the law on self-determination as having two strands; external self-determination as an event and internal self-determination as an ongoing process. Bell argues that internal self-determination ought to be expanded and more widely accepted in international law, because, in divided societies, more subtle approaches to the right may support ‘the development of policies of group accommodation such as autonomy regimes, consociationalism, or other minority protections less than secession’. Bell argues that, in relation to Ireland, there are ‘quite a few groups on the island who quite legitimately can [claim self-determination]; the question is … what is the proper answer to who gets what?’ Phrased in this way, competing claims to self-determination are irreconcilable and only ‘internal’ self-determination solutions appear justifiable. Furthermore, Bell, along with Cavanaugh, argues that if self-determination is understood primarily in terms

41 *Reference re Secession of Quebec* 37 ILM 1340 (1998) (Supreme Court of Canada) at 126
42 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
44 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
of secession and statehood, then the right is often in conflict with a state’s right to territorial integrity.45

In the case of Ireland, however, there are at least two fundamental reasons why these categories of self-determination are too restrictive and therefore unhelpful. Firstly, the existence of the Good Friday Agreement means that, were a majority of people in the North to vote in favour of unity with the Southern jurisdiction, this could not be regarded as an assault against the territorial integrity of the United Kingdom. So long as the consent principle is observed, the British state has acknowledged that it would accept a transfer of sovereignty.46 Indeed, Bell and Cavanaugh also recognise that the establishment of cross-border institutions through the Agreement, with the aim of furthering the rights of nationalists and promoting equality, signals a departure from traditional concerns of sovereignty and territorial integrity.47 The Good Friday Agreement will be considered in detail in Part C of this chapter.

Secondly, if a particular claimant community within a divided society bears the legacy of a colonial experience that is not shared with other communities in the society, a restrictive focus only on internal self-determination options is ahistorical. A failure to situate Irish self-determination in the historical context of the nationalist experience of colonialism capitulates to the international legal system’s prejudice against recognising the contemporary colonial experience of some claimant peoples. Such an approach also fails to recognise the legitimacy of the assertion of group identity, such as an Irish nationalist identity, especially for a community whose identity continues to be threatened or suppressed.48 The international legal forum famously opened itself to the voices of colonised peoples during the decolonisation period. That forum is obliged, in the interests of justice, to remain open to contemporary self-determination claimants who share the

---

46 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement), Annex: Agreement Between the Government of The United Kingdom of Great Britain and Northern Ireland and The Government of Ireland, Article 1
experience of colonialism. In the following section, I explore three key aspects of the contemporary colonial experience of Irish nationalists in the North of Ireland.

B. Aspects of the Historical and Contemporary Irish Nationalist Experience of Colonialism

The modern political conflict in Ireland is commonly referred to as ‘The Troubles’. Between July 1969 and 31 December 2001, 3,528 people were killed as a result of the conflict. Countless others suffered in a range of ways. Several peace initiatives failed to bring an end to hostilities, until in late 1994 the main paramilitary groups – including the Provisional Irish Republican Army (PIRA) – declared ceasefires. Despite great hopes for peace talks, there was unfortunately little political progress immediately following these declarations. The transition to political collaboration was extremely challenging for political parties representing polarised sections of society.

In 1996, the PIRA broke its ceasefire and the British government responded by excluding Sinn Féin from peace negotiations. The PIRA did not renew its ceasefire until July 1997, at which time Sinn Féin was readmitted to multi-party talks. Some hard-line unionists left the talks at this point, including Ian Paisley’s Democratic Unionist Party (DUP). The subsequent negotiations were lengthy and fraught with tension, however, on 10 April 1998 – Good Friday – a peace agreement was reached between the British and Irish governments and all participating political parties.

In this thesis, I refer to this Agreement as the Good Friday Agreement. It is also known as the Belfast Agreement and the British-Irish Agreement. The term ‘Good Friday Agreement’ is commonly used in the Irish nationalist community, and I have chosen to

---

49 The most widely cited source for the number of people killed during the conflict is: Malcolm Sutton, Bear in Mind These Dead: An Index of Deaths from the Conflict in Ireland 1969-1993 (3rd ed, 2001), 195. There have been approximately 40 further killings between 2002-2011: Martin Melaugh, Draft List of Deaths Related to the Conflict 2002- (2011) <http://cain.ulst.ac.uk/issues/violence/deaths2002 draft.htm> at 6 May 2011
50 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement)
51 At the time, the political wing of the IRA. In recent years, Sinn Féin has emerged as the largest Irish nationalist party in Northern Ireland, and is independent of the now-disbanded IRA.
52 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement)
adopt it as this chapter is concerned with that community’s right to self-determination. The Agreement was put to referenda in both jurisdictions of Ireland on 22 May 1998. In Northern Ireland, 71.1% of voters answered ‘yes’ to the referendum question: ‘Do you support the Agreement reached at the multi-party talks on Northern Ireland and set out in command paper 3833?’ In the Republic of Ireland, 94.4% of voters agreed to a change to the Irish Constitution, to enable the operation of the Agreement.

The political conflict in Ireland is largely beyond the scope of this thesis, although some aspects of the conflict relevant to the colonial experience are discussed below. However, the Agreement is of profound importance to a discussion of Irish self-determination, because it lays the foundations for peace and enables political progress through negotiation. It is impossible to overstate how great a barrier the conflict was to the achievement of political and legal progress in Ireland. Since 1998, that progress has been slow and difficult, with the Northern Ireland Assembly suspended for several lengthy periods. However, political violence is now relatively rare and the Assembly is beginning to strengthen its capacity to govern within the scope of its devolved powers.

The ‘settlement’ reached through the Agreement was essential in developing peaceful approaches to the political conflict, however, it has not settled Ireland’s colonial history. According to Robbie McVeigh:

Lasting peace would create the proper context within which to begin to excise the violent and debilitating legacy of British colonialism in Ireland. ... If present opportunities are tragically missed, it will be a direct consequence of the

55 For example, the murder of PSNI Constable Stephen Paul Carroll on 9 March 2009 by the Continuity IRA was the first killing of a police officer since 1998: ‘Arrests over NI policeman murder’ (10 March 2009) BBC News <http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7935734.stm> at 11 March 2009. British soldiers Sapper Mark Quinsey and Sapper Patrick Azimkar, killed on 7 March 2009 by the Real IRA, were the first to be killed since 1997: ‘More time in dissident inquiries’ (22 March 2009) BBC News <http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7957650.stm> at 1 May 2009. Both attacks were carried out by so-called dissident republican militants; that is, the attackers are part of a very small group acting outside the mainstream of Irish nationalist struggle.
56 As is evidenced by the increased output from the Assembly in terms of the passage of legislation, see: <http://www.niassembly.gov.uk/legislation/primary/assleg08.htm> (at 3 March 2011)
inability of the British state to come to terms with its own destructive colonial inheritance.\textsuperscript{57}

This view is supported by David Miller, who regards the inequalities created by colonialism as central causes of the conflict in Ireland. Miller argues that a failure to acknowledge the causative role of colonialism risks repetition of the uncritical and often propagandist views that have been promoted as explanations for the conflict, particularly in the British media and unionist ideology.\textsuperscript{58} The following sections of this chapter acknowledge the contemporary colonial experience of Irish nationalists through the perspectives of research participants. Respondents consistently emphasised the continuation of colonialism in three areas; foreign administration by Britain, social imperialism and discrimination, and cultural dominance.

1. \textit{Foreign administration by Britain}

(a) \textit{Partition and governance}

The Normans invaded Ireland from Britain in 1169.\textsuperscript{59} From this first moment of colonisation, until the partition of the island in 1920, Ireland was regarded as a single territory.\textsuperscript{60} The Irish rebelled against British rule numerous times. The most important moment in this colonial period, for present purposes, was the Plantation of Ulster. In the early years of the 17\textsuperscript{th} century, the British state carried out a mass operation to strip Irish landowners of their lands, before transferring these to new small landowners brought in from England and Scotland.\textsuperscript{61} These settler farmers were forbidden from hiring Irish farm workers, and so the settler population expanded as workers migrated from Britain. The dispossession of native Irish people in Ulster during this period set the foundation for the eventual division of the island into a jurisdiction in which Protestant descendants of settlers were in the majority, and another jurisdiction in which Protestants were a small minority.

\textsuperscript{58} David Miller, 'Introduction: Rethinking Northern Ireland' in David Miller (ed), \textit{Rethinking Northern Ireland} (1998) xix, xix, xxiii.
\textsuperscript{59} R Dudley Edwards, \textit{A New History of Ireland} (1972), 32.
\textsuperscript{60} At the moment of partition, British unionists in the new Northern Ireland would have preferred the entire island remain British: Tim Pat Coogan, \textit{Ireland in the Twentieth Century} (2003), 124.
\textsuperscript{61} Peter Somerset Fry and Fiona Somerset Fry, \textit{A History of Ireland} (1988), 114-115.
Pamela Clayton is a theorist of settler colonial societies. She asserts that the dispossession of the Irish, especially in Ulster, during the Plantation ‘was justified in terms familiar in similar actions in East and Southern Africa: the ‘natives’ were pagan, culturally inferior and in need of ‘civilising’’.62 Such attitudes remained evident in the British reaction to the Great Famine of 1845-1850.63 In that period, a potato blight destroyed crops throughout Ireland, thus obliterating the main food source of the rural population. One million people died of famine, and up to two million more emigrated from Ireland.64 During this period, the British press was central in shaping political and public reactions. Lacking a skin colour distinction between the Irish and English, which in other colonies was used to justify colonisation, the British press developed representations of the Irish as simianized, degenerate, barbarous and slothful.65 The emphasis placed on the ‘difference’ of the Irish in British media was characteristic of ‘the power differential between a metropolitan centre and its periphery’.66 As a consequence, the Famine was variously ‘described or ignored, decried or scoffed at, explained with statistics or blamed on the Irish themselves’, and Britain failed to intervene effectively in the catastrophe.67

Consideration of the colonial experience of contemporary nationalists in the North of Ireland must begin with the partition of Ireland in 1920.68 The historical and continuing effects of partition demonstrate the legitimacy of the Irish nationalist claim to self-determination. Kieran McEvoy explicitly links these issues of colonialism and legitimacy:

The illegitimate partition of the island makes it a legitimate claim [to self-determination]. The partition of Ireland along explicitly sectarian grounds was a historical wrong of British imperialism. The British occupation of Ireland has always been wrong. I think it’s the last element of tidying up in terms of the contraction of the British Empire to be done.69

---

65 Anne McClintock, Imperial Leather: Race, Gender and Sexuality in the Colonial Contest (1995), 52-53.
68 At this point, Northern Ireland was established in the north-eastern six counties, while the Republic of Ireland was established in the remaining 26 counties.
69 Interview with Professor Kieran McEvoy, Queen’s University Belfast (Belfast, 22 June 2006).
Colin Harvey has recognised that the ‘border was created in order to ensure unionist hegemony’.\(^{70}\) Partition constituted ‘calculated religion-linked political gerrymandering’,\(^{71}\) designed to ensure that the majority Protestant unionist population would remain loyal to Britain, so maintaining the union, which at that time was politically and economically important to the British state. As Mike Ritchie acknowledges, partition cannot equally serve the interests of a dispossessed Irish minority, ‘particularly when it was an imperial overlord who managed things’.\(^{72}\)

The 1918 Irish general election returned a majority of parliamentarians in favour of Irish unity and independence from Britain.\(^{73}\) The fracture inflicted by partition only two years later was dramatic, and grossly at odds with the democratically expressed wishes of the majority of the island’s population.\(^{74}\) Margaret Ward reflects on the social impact of partition:

...communities were fractured by what was a very arbitrary line drawn around part of Ulster in order to maintain a viable unit. … As an historian I appreciate the sense of great grievance after partition when families were split, when people were suddenly part of another jurisdiction that they didn’t feel part of. … There hadn’t been consent by people to the partition.\(^{75}\)

Families and communities continue to experience the effects of the imposition of an arbitrary border around six counties of Ulster. These include the inconvenience and absurdity of outlying homes in the same town now being governed by different states, and the imposition of global roaming phone and data charges on people who routinely cross the border for personal and business reasons.

Continued partition of the island of Ireland has created an absurd disparity in economic and social welfare terms, particularly for those living in border counties in either


\(^{72}\) Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).

\(^{73}\) Sinn Féin won 73 out of 105 seats; Tim Pat Coogan, Ireland in the Twentieth Century (2003), 72.

\(^{74}\) ‘...this time Nationalist Ireland had not merely voted for Home Rule, which Britain found great difficulty in contemplating; they had voted for an All Ireland Republic, completely independent of England.’: Tim Pat Coogan, Ireland in the Twentieth Century (2003), 72.

\(^{75}\) Interview with Margaret Ward, Women’s Research and Development Agency (Belfast, 19 January 2006).
It has been suggested that economics may prove to be the key imperative for Irish unification. Tom McGurk recently wrote:

Surely the most important realisation that the peace process must bring – as the smoke slowly clears – is that the island of Ireland is an economic and political unit. The economic and social requirements in, say, Monaghan and Armagh are so historically and culturally interlinked, that the idea that they belong to different political jurisdictions and different currency areas makes less and less sense.

A recent controversy in this regard concerned citizens of the Republic of Ireland travelling North to take advantage of the cheaper shopping brought about by a reduced sales tax and the decline in value of the British currency. Then Irish Minister of Finance, Brian Lenihan, responded to this trend by calling these shoppers ‘unpatriotic’. He said: ‘When you shop in Northern Ireland, you’re paying Her Majesty’s taxes; you’re not paying taxes to the state you live in.’ Considering that the major Irish political parties profess commitment to achieving a united Ireland, these comments were criticised as both hypocritical and insensitive to the needs of people struggling with the effects of the financial crisis. They were also, arguably, ignorant of the possibility that economic cooperation between the Irish jurisdictions may become a driving force towards unification.

Opposition to the imposition of partition reflects Judge Ammoun’s argument that colonialism represents an interruption of a people’s true history, thus compromising their capacity to realise self-determination. Bernadette McAliskey’s comments on partition, and the consequential dominance of the settler population, reflect this view:

77 Since Partition, Monaghan is located in the Republic of Ireland, while Armagh is part of Northern Ireland.
80 Quoted in Frances McDonnell, 'Apology sought from Lenihan over 'unpatriotic' shopping in Newry' (9 December 2008) Irish Times <http://www.irishtimes.com/newspaper/finance/2008/1209/1228571686505.html> at 23 February 2009
81 Western Sahara Opinion, ICJ Rep 1975 12, International Court of Justice
…there was a coherent unit here on this island; a workable, viable, economic and cultural unit … And the right of governance on this island had a structure, … and it was by the abuse of authority and by violence that it was not just altered, … but that there was a traumatic imposition of culture. … this is schism in that people from somewhere else came in and by force of law and violence and threat and deprivation … took the culture and language and authority out of this society.82

As is clear in the Israeli-Palestinian conflict, notions of entitlement to self-determination which rely on the time a people has occupied a particular territory are limited in their capacity to promote fair outcomes.83 Yet, the length of time for which Ireland as an island was regarded as a single territory is significant for nationalist claimants of self-determination, and this long-term unified status ought to be acknowledged. This is reflected in the comments of Sinn Féin politician Martina Anderson:

… we had our own culture, identity, economic and social unit, even prior to the Norman invasion. … Many people don’t like you to go back as far as 1169, so we could talk about the United Irishmen, but then others will say that the 1760s are still too far back – so we say ‘let’s propel it on’ – we were a single unit even until the country was partitioned in 1920.84

In contrast, as Niall Murphy notes, ‘the Northern Ireland state is very young, and is not so cemented as to be considered a perpetual state’.85 Indeed, due to the communal divisions which have been exacerbated by conflict, Northern Ireland lacks the identifying features which tend to characterise stable societies.

It must be acknowledged, though, that the British unionist community is firmly established in the North of Ireland and its members share equal entitlement to self-determination in that territory. It would not be sensible to argue that Ireland ought to be unified simply because it is an island, or because it was regarded as a single unit until

82 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
83 The international community has determined that the only solution to the intractable conflict between Palestine and Israel is a ‘two state solution’, considering the bitterness of the ongoing territorial dispute, in which neither contesting party has acknowledged the other’s right to self-determination: Allison Beth Hodgkins, ‘Beyond Two-States: Alternative Visions of Self-Determination for the People of Palestine’ (2004) 28(2) The Fletcher Forum of World Affairs 109.
84 Interview with Martina Anderson, Director of Unionist Engagement, Sinn Féin (Belfast, 21 March 2006).
85 Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
relatively recently. The reality of multiculturalism, and the competing political aspirations of unionists, must be recognised. However, a valid contemporary geographical argument concerns the capacity of politicians on another island to manage the affairs of people in the North of Ireland from a distance. Paul O’Connor argues that a local administration is best able to properly establish the rules of governance, policies on education, social welfare, culture and language and other matters of local significance.\footnote{Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006).} If, as has happened several times in the past decade, the Northern Ireland Assembly is suspended, all such decisions will again be made by British government ministers. Robert McCorquodale recognises that the potential for Britain to suspend the Assembly, rather than requiring the local politicians and community to overcome problems, is a contemporary manifestation of colonialism.\footnote{Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).} This has negative implications for people of all political persuasions.

When the Assembly functions, many powers remain reserved to Westminster. Anthony Coughlan describes these as the powers of greatest importance:

[\textbf{Britain}] ... garrisons the place, it taxes the place, it decides the laws that prevail there…The classic characterisation of colonialism was a subordinate people who had their laws made by others, by foreigners, and Britain does still do that in Northern Ireland.\footnote{Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).} O’Connor resents the distance this situation creates between the governors and the governed:

So decisions which affect me, my family and friends, are determined by a very small group of voters in England, in one of the most profoundly undemocratic systems still existing in Europe – the first past the post system – where you can have under forty per cent of the vote and be in government.\footnote{Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006).}

In one of the many anomalies of governance in the North of Ireland, the British Labour Party and Conservative Party do not stand candidates for election there, thus preventing people in the jurisdiction from voting for or against the party that will govern from Westminster.\footnote{Jenny McCartney, ‘Peter Hain, the last British colonialist’, \textit{Sunday Telegraph} (London), 1 April 2007, 8.}
O’Connor also recognises that the Northern Ireland Office\textsuperscript{91} includes a number of civil servants who have been posted to Northern Ireland from Britain, to make decisions for which they cannot be held accountable.\textsuperscript{92} As women’s rights activist Margaret Ward notes, accountability is also an issue with British ministers who have responsibility for Northern Ireland affairs:

> We have no come-back with direct rule ministers – they’re not elected by us, it’s not as if they’re going to lose a seat because they’ve offended a lot of women. It’s the lack of accountability that’s the frustration.\textsuperscript{93}

When a direct rule administration is in place,\textsuperscript{94} it has no democratic accountability to the people of Northern Ireland, whether unionist or nationalist, nor does it have an interest in encouraging cooperation between different communities.\textsuperscript{95} British ministers who exercise reserved governance powers, while the Northern Ireland Assembly is operating, are similarly unaccountable to the people of the jurisdiction. It is therefore clear that the British state does not exercise adequately representative governance in the North of Ireland, such as would justify a conclusion that the people of the jurisdiction already enjoy the right to self-determination.

(b) Role of the British state in the conflict in Northern Ireland

Central to the contemporary colonial experience of Irish nationalists has been the role of the British state in the conflict in Northern Ireland. This role has not been adequately acknowledged or addressed. In 1969, the British Army was deployed in the North of Ireland, as a response to rioting and swelling sectarian violence against the minority Catholic population.\textsuperscript{96} In 1972, the British government imposed direct rule from Westminster, following the breakdown of the sectarian, unionist-dominated Northern Ireland government. The mission of the British forces quickly shifted in these years from

\textsuperscript{91} The department of the British government in charge of administering Northern Ireland.
\textsuperscript{92} Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
\textsuperscript{93} Interview with Margaret Ward, Women’s Research and Development Agency (Belfast, 19 January 2006).
\textsuperscript{94} At such time as the Northern Ireland Assembly is suspended.
\textsuperscript{96} Kieran McEvoy, Paramilitary imprisonment in Northern Ireland: resistance, management, and release (2001), 207.
inter-communal policing to ‘fighting the IRA’. While some equality provisions were enacted by the Westminster parliament, these were accompanied by:

a set of abrasive military orientated security initiatives...backed by fresh emergency and antiterrorist legislation that entailed multiple human rights violations...

The nationalist population was disproportionately victimised under these ‘special powers’, thus entrenching their colonial experience. Throughout the years of the conflict, the British state administered policies including mass internment without trial, paramilitary policing, constant military intervention in the everyday lives of citizens, torture of detainees, unethical conditions in prisons, and the imposition of non-jury trials for political detainees. Between 1969 and 1993, 357 people were killed by the security forces in Ireland – 300 of these killings were carried out by British soldiers. A litany of rights violations have been extensively documented, however, Britain remains absolutely resistant to acknowledging the violations perpetrated by its forces of state.

There is also considerable and well-documented evidence to show that military agents colluded with loyalist paramilitaries in assassinations and bombings, many of which resulted in the murder of civilians, the majority of whom were nationalists. The issue of state collusion has attracted considerable attention in recent years, and is one context in which the failure of the British state to acknowledge its role in the conflict is most detrimental to efforts to promote peace and reconciliation. It is particularly difficult for victims of collusion and state violence to accept the paucity of truth-telling mechanisms

---

emerging from the Good Friday Agreement, or the British state’s unwillingness to acknowledge its role in the conflict.103

On 17 May 1974, several ‘no-warning’ bombs exploded in Dublin city and Monaghan town, killing 33 civilians, including a pregnant woman. This was the highest number of fatalities on any day during the conflict.104 Several loyalists and members of the British security forces have since been named as suspects, however, no prosecutions have been initiated. In December 2003, Justice Henry Barron presented a report to the Oireachtas105 detailing the results of his inquiries into the Dublin and Monaghan bombings, as well as other incidents resulting in civilian deaths in the Republic of Ireland during the conflict.106 The Inquiry was satisfied that those principally responsible for the Dublin and Monaghan bombings were loyalist paramilitaries from Belfast and nearby towns, acting in response to the prospect of greater Irish government involvement in the administration of Northern Ireland.107 The original terms of reference were then expanded, and Justice Barron inquired into a number of other atrocities carried out in the Republic of Ireland. A Parliamentary Committee was established to investigate the findings of the Barron reports.109

In its final report, the Parliamentary Committee stated that it was:

left in no doubt that collusion between the British security forces and terrorists was behind many if not all of the atrocities that are considered in this report.

We are horrified that persons who were employed by the British administration

103 Bill Rolston, 'Assembling the jigsaw: truth, justice and transition in the North of Ireland' (2002) 44(1) *Race and Class* 87, 94.
105 The Irish Houses of Parliament.
109 These included the Sub-Committee on the Barron Report on the Dublin and Monaghan Bombings of 1974, sub-committee of the Joint Committee on Justice, Equality, Defence and Women’s Rights 2002-2007 (Select Committee of Dáil Éireann and Select Committee of Seanad Éireann), and the Sub-Committee on the Bombing of Kay’s Tavern, Dundalk, sub-committee of the Joint Committee on Justice, Equality, Defence and Women’s Rights 2002-2007 (Select Committee of Dáil Éireann and Select Committee of Seanad Éireann).
to preserve peace and to protect people were engaged in the creation of violence and the butchering of innocent victims.\textsuperscript{110}

On 10 July 2008, all parties in the Dáil passed a motion urging the British government to release files on the Dublin and Monaghan bombings to an international, independent judicial figure. An inquiry was demanded for the purpose of providing a full explanation of the relevant events, and/or enabling the prosecution of the perpetrators.\textsuperscript{111} The Irish Parliamentary Committee found that a full inquiry sanctioned only by the Irish state would not be sufficient, as Britain holds the required information necessary to reach the truth. It thus recommended that Britain authorise an independent inquiry, and provide all information at the disposal of British agencies.\textsuperscript{112} The British government has refused to cooperate.\textsuperscript{113}

Britain’s record on public inquiries into high-profile killings involving British forces is very poor. After 26 years of efforts by victims and victims’ families to achieve justice following the events in Derry of 30 January 1972 – known as Bloody Sunday – a public inquiry was finally announced on 29 January 1998. On Bloody Sunday, 13 civilians attending or passing a peaceful civil rights demonstration were shot and killed by British soldiers. A further 14 were injured, one of whom died of his injuries. Public hearings of the Bloody Sunday Inquiry concluded in 2005, however, the Inquiry did not report until 15 June 2010. All of the British soldiers called as witnesses before the Inquiry were granted anonymity in hearings and the final report.\textsuperscript{114} As of February 2010, the Bloody Sunday Inquiry had cost the British government £190.3 million.\textsuperscript{115}

The Bloody Sunday Inquiry concluded that none of the civilians shot by British soldiers were armed, nor were any of the casualties engaged in attacks against British forces or

\textsuperscript{111} Ireland, \textit{Parliamentary Debates}, Dáil Éireann, 10 July 2008, Vol.660 No.1, 14 (Deputy Pat Carey, Minister of State at the Department of the Taoiseach).
\textsuperscript{112} Ireland, \textit{Parliamentary Debates}, Dáil Éireann, 10 July 2008, Vol.660 No.1, 14 (Deputy Pat Carey, Minister of State at the Department of the Taoiseach).
\textsuperscript{113} Justice for the Forgotten, citing a memo from former British Prime Minister Tony Blair to former Taoiseach Bertie Ahern, dated 10 January 2005, to the effect that the British state would not entertain an inquiry in its jurisdiction: Justice for the Forgotten <http://www.dublinmonaghanbombings.org/index2.html> at 29 January 2009
others. The Inquiry found that several of the soldiers testifying before in hearings made ‘knowingly untrue’ statements to justify the shootings, and that direct responsibility for the civilian casualties lies with the soldiers who shot them. The officer responsible for sending soldiers into the Bogside area of Derry, where the shootings took place, referred to republican paramilitaries as the ‘enemy’, which must reflect on the attitude of the British forces to Irish nationalist communities in the North of Ireland. However, the Inquiry did not accept the range of arguments on behalf of the victims and their families that the British and Northern Ireland governments, and the British army, ought to bear some degree of institutional responsibility for Bloody Sunday.

British Prime Minister David Cameron responded to the Inquiry’s report in the House of Commons, saying:

Some members of our armed forces acted wrongly. The Government are ultimately responsible for the conduct of our armed forces, and for that, on behalf of the Government ... I am deeply sorry.

This apology was undoubtedly significant for the victims of Bloody Sunday and their families, however, Prime Minister Cameron proceeded to defend the British army’s role in Northern Ireland, saying:

...Bloody Sunday is not the defining story of the service that the British Army gave in Northern Ireland from 1969 to 2007. ... Our armed forces displayed

121 United Kingdom of Great Britain and Northern Ireland, Parliamentary Debates, House of Commons, 15 June 2010, 511 15 (David Cameron, Prime Minister), Column 740.
122 The victims’ representatives reacted with jubilation to the publication of the Inquiry’s report, and the accompanying apology from the Prime Minister, on the basis that it vindicated the victims’ innocence. Tony Doherty, whose father Paddy was killed on Bloody Sunday, was quoted as saying: ‘It can now be proclaimed to the world that the dead and the wounded of Bloody Sunday, civil rights marchers, one and all, were innocent, one and all, gunned down on their own streets by soldiers who had been given to believe that they could kill with perfect impunity.’ See: Neil Tweedie and John Bingham, ‘Bloody Sunday: jubilant families hail the innocent victims’ (16 June 2010) The Telegraph <http://www.telegraph.co.uk/news/uk news/northernireland/7831446/Bloody-Sunday-jubilant-families-hail-the-innocent-victims.html> at 10 May 2011.
enormous courage and professionalism in upholding democracy and the rule of law in Northern Ireland. Cameron also vowed that there would be no further open-ended and expensive inquiries ‘into the past’. One year on from the publication of the Inquiry’s report, no prosecutions have been mounted against the soldiers found to have shot civilians on Bloody Sunday.

A public inquiry has long been demanded in relation to the murder of Belfast solicitor Pat Finucane, who was brutally murdered at home, in front of his wife and three children, on 12 February 1989. It is known that his killing was carried out by loyalist paramilitaries. In 2004, Canadian Judge Peter Cory found strong evidence that the British Army, the Royal Ulster Constabulary (Special Branch) and the British Security Service had colluded in the murder, and recommended a public inquiry.

In 2005, the Westminster parliament passed the Inquiries Act, a statute which enables the terms of public inquiries to be significantly limited by the British government. For example, the government may restrict attendance at an inquiry, and ‘the disclosure or publication of any evidence or documents given, produced or provided to an inquiry’, if a Minister concludes that this might cause ‘damage to national security or international relations’. On 14 April 2005, Geraldine Finucane, Patrick’s widow, wrote to all judges in England, Scotland and Wales informing them that the Finucane family could not participate in any inquiry convened under these new statutory guidelines, on account of her belief that such an inquiry would fail to produce an adequate outcome. Mrs Finucane asked all judges to refuse to sit on such an inquiry if requested to do so. Her appeal has been supported by numerous NGOs, international members of parliament and Judge Cory himself. No inquiry has yet been established.

---

123 United Kingdom of Great Britain and Northern Ireland, Parliamentary Debates, House of Commons, 15 June 2010, 511 15 (David Cameron, Prime Minister), Column 741.
124 United Kingdom of Great Britain and Northern Ireland, Parliamentary Debates, House of Commons, 15 June 2010, 511 15 (David Cameron, Prime Minister), Column 741.
126 Cited online at Pat Finucane Centre <http://www.patfinucanecentre.org/pfi/inquibill/inquibill.html> at 24 February 2009
The British state has also failed to acknowledge the rights violations committed by the state-sponsored paramilitary police force in Northern Ireland, known as the Royal Ulster Constabulary (RUC) until 2001. In January 2007, the Police Ombudsman for Northern Ireland reported that collusion certainly occurred between some officers of the RUC Special Branch and an Ulster Volunteer Force (UVF) unit responsible for ten murders and numerous other crimes. In these instances, the Ombudsman found police collusion in several forms, including failure to arrest and charge police informants who confessed to crimes, acting to protect informants from police investigations, failing to act to prevent crimes planned by informants of which the police had knowledge, failing to keep proper records, and destroying or losing forensic evidence. At all relevant times, the RUC was responsible to the British government, as the devolved Northern Ireland Assembly only voted to assume policing and justice powers in 2010.

The peace process in Ireland has not led the British state to address its active involvement in the conflict. As efforts to develop transitional justice processes have advanced since 1998, ‘…the United Kingdom has sought to contain the implications of the Northern Ireland transitional process to the geographical location of the conflict’. Against the recommendation of the Northern Ireland Human Rights Commission, legislation was passed in 2007 at Westminster preventing the Commission from investigating any intelligence services or their members, or inquiring into whether any intelligence services are violating the human rights of individuals in the community. This is characteristic of the British state’s long-term promotion of a ‘community relations’ analysis of the conflict in Ireland, which depicts the state as the neutral arbiter between two ‘warring tribes’. Unfortunately, for those who seek an honest acknowledgment of the contemporary colonial experience of Irish nationalists, Britain’s projection of a self-image as the

130 The police then changed its name to the Police Service of Northern Ireland.
131 One of the most powerful and high-profile loyalist paramilitary organisations.
135 Justice and Security (Northern Ireland) Act 2007 (UK), s69B.
manager of inter-communal tensions and promoter of equality significantly hampers its capacity to transform the social institutions through which colonialism has been perpetuated.

In March 2009, the British state, in conjunction with the Police Service of Northern Ireland (PSNI), again demonstrated its incapacity to recognise the role that British forces have played in exacerbating conflict. On 6 March, it emerged that then Chief Constable of the PSNI, Hugh Orde, had requested the deployment of the Special Reconnaissance Regiment of the British Army to assist police in the management of the threat posed to peace by dissident republican paramilitaries. This is information which Orde had failed to communicate to the meeting of the Policing Board on 5 March, which might have enabled that forum to debate the merits of re-engaging British military forces in security operations in Northern Ireland. Sinn Féin Deputy First Minister Martin McGuinness said that the active presence of British forces in security operations in the North of Ireland was a ‘major threat’ to peace:

The history of the north has shown that many of these forces have been as much a danger to the community as any other group.

Regardless of the merits or dangers of the active deployment of British forces in the North of Ireland, however, the Northern Ireland Assembly is incapable of preventing it from occurring. This demonstrates Britain’s capacity to maintain a military role in local affairs, an inherently colonial power.

2. Social imperialism and discrimination

The contemporary colonial experience of Irish nationalists is also characterised by systemic discrimination and inequality. This can be a difficult topic to discuss post-Good Friday Agreement, since the raft of legal and social measures introduced to promote

equality between members of different communities,\textsuperscript{141} and because many working class British unionist communities continue to suffer from poverty and lack of opportunity. Yet, it must be acknowledged that the discrimination imposed on Irish nationalists had its origins in the partition of Ireland,\textsuperscript{142} and the creation of a unionist-dominated jurisdiction in which the ruling class was responsible for imposing a form of social imperialism.\textsuperscript{143}

Michael Farrell describes how the unionist ruling class won support from the Orange Order\textsuperscript{144} and through sectarianism, and built on that support by discriminating against Irish nationalists in employment and politics:

> Once in power in the new state,\textsuperscript{145} they had ample opportunity to step up discrimination and strengthen their position by gerrymandering and wholesale political repression. ... And Britain allowed an elaborate sectarian police state to be built up without protest, permitting it to be backed in the last resort by British forces.\textsuperscript{146}

The grossly unequal system of governance established following partition enabled the unionist ruling class to entrench their dominance in industry, agriculture, employment, housing and local politics. The degree of discrimination was so extreme that a grassroots civil rights movement – including, most prominently, the Northern Ireland Civil Rights Association\textsuperscript{147} – rose in the late 1960s to campaign for equality, in the face of government intransigence, frequent attacks against marches and even the threat of death at the hands of state security forces or paramilitaries.

Several interview respondents, including O’Connor and Ó Broin, drew a link between the colonial project, accompanying social imperialism and the systemic discrimination

\textsuperscript{141} For example, the Equality Commission and the Northern Ireland Human Rights Commission.
\textsuperscript{142} And, before Partition, the Plantation and dispossession of Irish people.
\textsuperscript{143} See, for example, Christine Bell and Kathleen Cavanaugh, "Constructive Ambiguity" or Internal Self-determination? Self-determination, Group Accommodation, and the Belfast Agreement" (1998-1999) 22 Fordham International Law Journal 1345, 1351.
\textsuperscript{144} A Protestant fraternal order, which defends the union with Britain. The Orange Order is well-known for its controversial parades, which have frequently led to inter-communal conflict between Irish nationalists and British unionists.
\textsuperscript{145} This is a reference to the newly created entity of Northern Ireland, following the partition of Ireland in 1920.
\textsuperscript{146} Michael Farrell, Northern Ireland: The Orange State (2nd ed, 1976), 326. See also: Tim Pat Coogan, Ireland in the Twentieth Century (2003), 125.
suffered by Irish nationalists in the North of Ireland since partition. According to Paul O’Connor:

The discrimination was a direct result of a state that needed to discriminate in order to stay alive. All colonial states depend on using some type of discrimination to maintain their position – here it was religion that was used, in most other places it was racism… Paisley made a speech at a party conference once… He said ‘before we came here, this country was nothing but a bog inhabited by bogtrotters’. The racism oozes out of that…

Eoin Ó Broin argues that the ruling unionist class benefited from the dividends of British imperialism, and maintained this dominance by imposing systemic discrimination against nationalists. This has also been widely acknowledged by academic commentators. While this situation has changed significantly since 1998, the legacies of such discrimination – both social and psychological – continue to be felt by many nationalist individuals and communities. Acknowledging the origins of their inequality is essential in order to promote self-determination in Ireland.

Several elements of a colonial society remain evident in Northern Ireland, including the persistent opposition between the two major communities along political lines, the lack of support for non-sectarian political parties, and the economic gap which persists between British unionists and Irish nationalists. Each of these factors continues to influence the way society is administered, following the implementation of the Good Friday Agreement. Notably, some powerful unionist politicians and activists remain free to express highly prejudicial attitudes which limit the capacity of the society to evolve in terms of equality and self-determination.

---

148 Ian Paisley is the founder of the Free Presbyterian Church in Ireland, a fundamentalist denomination which professes opposition to Catholicism. He also founded the Democratic Unionist Party, a staunchly unionist party, which in recent years has become the largest political party in Northern Ireland.
149 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
150 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
152 This was a common theme throughout interviews conducted with respondents in Ireland.
One manifestation of social imperialism is the hierarchy of victimhood, which some unionists continue to promote in relation to those who were killed during the ‘Troubles’. The Victims’ Commissioner’s report ‘We Will Remember Them’ gives far more attention to those killed by paramilitaries, their relatives, and the police officers who suffered than to the concerns of relatives of those killed by the state. The recently established Consultative Group on the Past has concluded that any hierarchy of victims of the conflict is sectarian, and ought to be rejected to prevent the politicisation of victimhood. One means by which the Consultative Group proposes to overcome the hierarchy of victims is to recommend that the British government pay a ‘recognition payment’ of £12,000 to the nearest family member of every person who died as a result of the conflict. The justification for treating families of the dead equally – regardless of whether their family member was a civilian, soldier, police officer or paramilitary operative – is the Consultative Group’s view that families experience trauma and long-lasting pain as a consequence of the loss of a family member, regardless of that individual’s affiliation.

The recommendations of the Consultative Group are currently under advisement with the British government and the Northern Ireland Assembly. The report received an extremely emotional reaction from some unionist politicians and community activists, especially in respect of the proposed recognition payments. DUP First Minister Peter Robinson described the proposed payments as a ‘betrayal of innocent victims’. According to DUP member Allan Bresland, speaking in the Northern Ireland Assembly, the report’s authors are ‘spitting in the face of the law of a civilised society’ by ‘rewarding the families of murderers’. Through such comments, the families of paramilitaries killed during the conflict are judged according to the ideology and/or actions of their dead relative, thus entrenching the hierarchy of victimhood.

The legacies of social imperialism and systemic discrimination will be difficult to overcome while any political leader opposes the transformation of outdated social attitudes and institutions. Ian Paisley Jnr, then a DUP junior minister of the Northern Ireland Executive and member of the Policing Board, drew attention in 2008 by advocating that police be given ‘shoot-to-kill’ powers as a means of obliterating a threat posed by dissident republican paramilitaries. Demonstrating a lack of awareness of the need to transform the nature of policing in Northern Ireland,\(^\text{161}\) he said:

I believe the community will accept such measures and if dissidents are shot on sight, the community will accept that it is a necessary use of lethal force to prevent dissident republicanism from growing.\(^\text{162}\)

Such a comment demonstrates a disturbing lack of awareness of the extreme social and psychological damage inflicted by such approaches to policing in the recent past.

Other recent comments of prominent unionist politicians suggest that not all share the commitment to the equality agenda which is essential to overcome the history of discrimination in the North of Ireland. For example, Ian Paisley Jnr stated in a 2007 media interview that he was repulsed by homosexuality, that he believed homosexual acts were wrong and that homosexuals harmed society.\(^\text{163}\) Paisley’s DUP colleague Iris Robinson later stated in a Westminster parliamentary Committee hearing: ‘There can be no viler act, apart from homosexuality and sodomy, than sexually abusing innocent children.’\(^\text{164}\) Robinson has also been quoted advising gay people to seek psychiatric assistance to ‘turn around’ and become heterosexual.\(^\text{165}\) That these political leaders, the successors of the earlier unionist ruling class, continue freely to express such prejudicial

---

\(^\text{161}\) As was acknowledged by the Patten report into policing in Northern Ireland, commissioned as one of the outcomes of the Good Friday Agreement: Independent Commission on Policing for Northern Ireland, ‘A New Beginning: Policing in Northern Ireland’ (1999), 2.

\(^\text{162}\) ‘Paisley defends lethal force call’ (20 August 2008) \(BBC\) News \(<http://news.bbc.co.uk/g/pr/fr/-/2/hi/uk_news/northern_ireland/7571688.stm>\) at 1 September 2008

\(^\text{163}\) ‘Row over “repulsive gays” comment’ (30 May 2007) \(BBC\) News \(<http://news.bbc.co.uk/1/hi/northern_ireland/6705637.stm>\) at 3 February 2009


\(^\text{165}\) ‘Gay counselling’ call rejected (6 June 2008) \(BBC\) News \(<http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7439661.stm>\) at 3 February 2009
attitudes, demonstrates that the legacy of social imperialism remains strong in Northern Irish political life.\textsuperscript{166}

3. Cultural dominance

A third element of the contemporary colonial experience of Irish nationalists, repeatedly emphasised by interview respondents, is the suppression of cultural self-determination. In 1998, then Taoiseach\textsuperscript{167} Bertie Ahern wrote that the Good Friday Agreement ‘guarantees institutional expression of the Irish identity of Northern Nationalists’, through its equality provisions and the North-South cooperative institutions it establishes.\textsuperscript{168} The Agreement undoubtedly contains provisions essential to building cultural equality in the North of Ireland. However, in the key area of language rights, political intransigence continues to dominate over formal legal equality measures.

The capacity freely and fully to express and practise Irish culture – in all its forms – is crucial for nationalist claimants of self-determination. For example, Paul O’Connor believes that his children are entitled to be taught through a culturally-relevant curriculum.\textsuperscript{169} Community activist Terry Enright has devoted himself to the promotion of Irish language and tradition in the belief that strong cultural expressions strengthen progress towards self-determination.\textsuperscript{170} On the same note, Niall Murphy identifies the renewed vitality of the Irish language, particularly in the North, and the continued success of the Gaelic Athletic Association as evidence that Irish nationalists are moving confidently – particularly in cultural terms – towards self-determination.\textsuperscript{171}

Great strides have been made by Irish-speaking communities in the regeneration of the Irish language in recent years, particularly in the North of Ireland. A key area of progress is in the provision of Irish-medium education. There are now 81 Irish medium schools in

\textsuperscript{166} The DUP, the party of Paisley and Robinson, is currently the largest political party in Northern Ireland. Its members hold seats at Westminster, and its leader is the First Minister of the Northern Ireland Assembly.

\textsuperscript{167} The leader of the Irish government, equivalent to Australia’s Prime Minister.


\textsuperscript{169} Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).

\textsuperscript{170} Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006).

\textsuperscript{171} Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
the North of Ireland, educating over 4000 children.\(^{172}\) This number grew by 1000 between 2003 and 2009, due to the concerted efforts of communities to establish Irish-medium schools.\(^{173}\) The Irish language community have, since 2003, campaigned for an Irish Language Act to provide rights-based protection for Irish speakers.\(^{174}\) They argue that it is the right of Irish speakers to be treated equally in all areas of social life, including in their interactions with government and the civil service.\(^{175}\)

The demand for an Irish Language Act accords with a range of international and regional legal mechanisms supporting the protection and promotion of minority languages. The British government is bound by the European Charter on Regional and Minority Languages to promote and safeguard the Irish language, to ensure that Irish speakers do not suffer discrimination on the basis of their language, and to promote the use of the Irish language in public life.\(^{176}\) The British government also committed itself, in the Good Friday Agreement, to the promotion of the Irish language in private and public life, the removal of obstacles to the use of the language, the facilitation of Irish medium education, and the support of Irish language broadcasting.\(^{177}\) In 2006, when an agreement was reached at St Andrews in Scotland enabling the re-establishment of the Northern Ireland Assembly following suspension, the British government committed itself to:

...introduce an Irish Language Act reflecting on the experience of Wales and Ireland and work with the incoming [Northern Ireland] Executive to enhance and protect the development of the Irish language.\(^{178}\)

The Westminster Parliament did not meet its commitment to introduce or pass an Irish Language Act. The majority party in the Northern Ireland Assembly, the Democratic Unionist Party, regards the matter as an issue for the Assembly rather than for the British government, and is opposed to the passage of rights-based legislation.

---


\(^{175}\) As is guaranteed under the Good Friday Agreement: Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement), 6. Rights, Safeguards and Equality of Opportunity, Articles 3 and 4.

\(^{176}\) *European Charter for Regional or Minority Languages*, Strasbourg, opened for signature 5 November 1992, ETS No.148 (entered into force 1 March 1998), Parts II and III

\(^{177}\) Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement), 6. Rights, Safeguards and Equality of Opportunity, Economic and Social Issues, Art.4

\(^{178}\) Agreement of the British and Irish Governments at St Andrews, Scotland, 19 October 2006, Annex B. Human Rights, Equality, Victims and Other Issues
Irish language activists subsequently proposed that an Irish Language Act be passed by the Northern Ireland Assembly. However, the proposal was not put to a vote by the full Assembly. Then Minister for Culture, Arts and Leisure, DUP member Edwin Poots, rejected rights-based legislation promoting the language. On 16 October 2007, Poots made a Ministerial Statement to the Assembly, rejecting the proposed legislation on the following basis:

There is insufficient community consensus, and there are potentially significant costs. Moreover, there is a real possibility that legislation could undermine good relations. In so doing, it could prove counterproductive to those who wish to see the language developed in a non-politicised and inclusive manner.\textsuperscript{179}

This decision was made despite the first public consultation on an Irish Language Act having attracted over 5000 names on petitions and 668 written submissions, with 93% of these strongly supporting an Irish Language Act.\textsuperscript{180} Minister Poots called a second consultation, which attracted 11,000 responses, 65% of which supported an Irish Language Act.\textsuperscript{181}

The fact that a second consultation was called, after an initial and thorough consultation attracted overwhelming support, strongly suggests that there was entrenched political opposition to a clear statement of the rights of Irish speakers. Minister Poots’ concern that the language develop ‘in a non-politicised and inclusive manner' reflects one of the constant themes of unionist political responses to the protection and promotion of the Irish language.

The Good Friday Agreement requires ministers of the Northern Ireland Assembly to take a Pledge of Office. As O’Leary recognises, ministers’ ‘duties of office include a requirement to serve all the people equally, to promote equality, and to prevent discrimination’.\textsuperscript{182} Since the restoration of the Assembly on 8 May 2007, following a suspension of almost five years, it is clear that unionist ministers have failed to promote

\textsuperscript{182} Brendan O'Leary, 'The Nature of the Agreement' (1998-1999) 22 \textit{Fordham International Law Journal} 1628, 1635. See: Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement), Annex A
equality and prevent discrimination in relation to the rights of Irish language speakers to use and promote the Irish language. This is apparent not only in Minister Poots’ rejection of the proposed legislation, but also in the following extracts from Assembly debates.

Some unionist politicians have argued that protecting the rights of Irish speakers through legislation is harmful to others in the community. Ulster Unionist David McNarry expressed this view in an Assembly debate on the proposed Act:

What did the myth makers behind the consultation process try to get away with? They told us that an Irish Language Act would have no adverse impact on those who did not speak Irish. However, in this place, even without an Act, unionists are constantly experiencing the effects of an adverse impact, and today we are plainly saying to you that we are having no more of it.

The scribes of scribble and deceit also suggest dangerously that the proposed Act would help build support for, and understanding of, the benefits of promoting and protecting the Irish language. Even those on the opposite side of the House do not believe such nonsense. It completely ignores the political, social and cultural reality that the Irish language is not – I repeat not – viewed as a neutral form of cultural expression.183

It is apparent in this emotive speech that political opposition to the protection and promotion of the Irish language stems from the fact that nationalist politicians are the advocates of Irish language rights in the Assembly. That is, opponents of an Irish Language Act attribute a political character to the language itself, and to its speakers. This is entirely at odds with the legal obligations on all Northern Ireland politicians to respect the rights and equality of all members of the community. It also ignores the reality that the vast majority of Irish speakers are not politicians or activists, but ordinary members of the community, choosing to express themselves and their culture through the Irish language.

In the same debate, McNarry suggested that unionist members of the Assembly suffer from the Irish language because some nationalist members of the house use Irish alongside English during debates. This is despite the fact that members speaking Irish translate everything they say into English and are simply exercising their rights under the

183 Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007, Private Members’ Business: Irish Language, David McNarry MLA
Good Friday Agreement. McNarry consequently proposed that members not be allowed to use the Irish language in the Assembly or in other official business. He said:

Since 1998, unionists have been subjected to having the Irish language forced down their throats in an uncompromising and adversarial way. How disappointing it is, therefore, in our country — blessed over a short but unique period of history in the United Kingdom, in which we have contributed to the society of a Union that flows with a rich diversity of cultural traditions and where, in recent times, we have embraced a growing range of ethnic minority traditions — to find conflict manufactured by an Irish-speaking minority, as represented in the House by Sinn Féin, which is forcing an obscene aggression of deliberate defiance right smack into our unionist faces. 184

This strongly-worded suggestion that the Irish language itself is political begs the question of how Irish speakers ought to advocate for their cultural rights while avoiding the accusation that their practise of culture is offensive to others in the community.

Numerous prominent unionist politicians support the strident opinions expressed by McNarry. DUP MLA 185 Nelson McCausland also opposed the proposed Irish Language Act, saying: ‘The difficulty for many of us is that what should be cultural wealth has been turned by Sinn Féin and others — they are not alone — into a cultural weapon.’ 186

George Robinson of the DUP added that the Irish language ‘became closely identified with IRA terrorism’. 187 According to Ulster Unionist David Kennedy, ‘Sinn Féin uses the Irish language as a kind of warped ideological jihad’. 188 When nationalist members and Ministers of the Assembly spoke in support of the Act, speaking first in Irish followed by direct translations in English, David McNarry left the chamber several times. He explained that he did so because he was ‘heartily sickened to hear a Minister of this institution speaking in Irish’. 189 Gregory Campbell of the DUP asked: ‘If not to make a

---

184 Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007, Private Members’ Business: Irish Language, David McNarry MLA
185 Member of the Legislative Assembly of the Northern Ireland Assembly.
187 Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007, Private Members’ Business: Irish Language, George Robinson MLA
188 Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007, Private Members’ Business: Irish Language, David Kennedy MLA
189 Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007, Private Members’ Business: Irish Language, David McNarry MLA
political point, what is the point of speaking Irish [in the Assembly]? Such a position demonstrates ignorance of the significance of asserting human rights, including language rights, as a means of striving for self-determination.

The political climate created by the tone of these comments, made under parliamentary privilege, stifles the capacity of Irish nationalists to realise self-determination. In their opposition to the promotion and protection of the Irish language, these unionist political leaders express a contemporary colonial attitude. They occasionally make allowances for the formal equality which modern law now protects, for example in McCausland’s phrase ‘what should be cultural wealth’. However, the speakers’ begrudging acceptance of the need to acknowledge formal equality standards is undermined by their resistance to what substantive equality requires in reality, namely the capacity of Irish people to freely express their culture in private and public life.

C. The Good Friday Agreement and Self-determination in Ireland

It is essential to expose the contemporary colonial experience of nationalists in the North of Ireland, in order to begin an examination of Irish self-determination with an honest acknowledgment of context. The other essential contextual factor in relation to contemporary self-determination in Ireland is the Good Friday Agreement. In this section, I explore the significance of the Agreement to self-determination, with emphasis on the key provisions of the Agreement and its status as a transitional instrument. I argue that the full implementation of the Agreement requires a deeper focus on the notion of transitional justice. In the years ahead, the Agreement must be continually analysed in terms of its capacity to promote self-determination. It is particularly important to consider the meaning of the ‘consent principle’, the abandonment of territorial integrity as a barrier to constitutional change, the potential for an all-island settlement of the self-determination issue, and the need for an inclusive approach to the implementation of the Agreement.

190 Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007, Private Members’ Business: Irish Language, Gregory Campbell MLA
1. The value of the Good Friday Agreement in building self-determination

During the recent conflict in the North of Ireland, several attempts at securing a lasting peace were thwarted or abandoned. The Good Friday Agreement of 1998 received mass public support throughout Ireland. In the challenging years since its acceptance at referenda, the Agreement has not been abandoned by any of the mainstream political parties. In fact, the Democratic Unionist Party, which rejected the Agreement at the time of negotiations, is now the largest party in the consociational Parliament established under the Agreement. The Agreement is generally accepted as the foundation of political progress in Northern Ireland, and between the Irish jurisdictions and the Irish and British states. The Agreement can also function as the foundation for a human rights approach to self-determination in Ireland.

General agreement on the significance of the Agreement was demonstrated in March 2009, when dissident republicans claimed responsibility for the shooting deaths of two British soldiers in Antrim and a policeman in Craigavon, two towns outside Belfast. These events raised fears of a severe threat to the peace process. Unionist and nationalist political leaders united in their condemnation of the threat. British Secretary of State for Northern Ireland, Shaun Woodward, called the peace process ‘unstoppable’. Deputy Chief Minister of the Northern Ireland Assembly, Martin McGuinness of Sinn Féin, made a particularly strong statement. McGuinness was previously an IRA commander and supporter of the political war against the British occupation of the North of Ireland, however, he said:

These people [the gunmen] are traitors to the island of Ireland, they have betrayed the political desires, hopes and aspirations of all of the people who live on this island. They don’t deserve to be supported by anyone.

The desperation of political leaders to preserve the peace at this time proves their acceptance that the Good Friday Agreement is an instrument too essential to peaceful progress to be abandoned. Indeed, according to journalist John Ware, the fact that unionist politicians declined an opportunity to use the killings for political mileage

against their nationalist opponents ‘suggests the peace process is going from strength to strength’.193

Commentators from a wide range of perspectives have repeatedly described the Good Friday Agreement as of immense significance. According to Colin Harvey, the Agreement is ‘constitutive’ and must underpin all future constitutional developments in Northern Ireland.194 Former Taoiseach Bertie Ahern regarded the Agreement as ‘truly historic’ because it was the first time since 1918 that ‘the people of Ireland voted on the same day to determine the future of the entire island’.195 Bell and Cavanaugh assert that, while the Agreement is filled with ‘constructive ambiguities’ designed to facilitate the settlement, the vote of the people of the island in favour of it could be argued to be an exercise in self-determination, in that the people expressed their desire for the Agreement to form the foundation for devolved government and political progress.196 Bríd Rodgers agrees that the Agreement ‘is self-determination’, because of its wide public acceptance as demonstrated through referenda.197 The involvement of all the people of Ireland signalled that the future of self-determination is necessarily an ongoing question, to be jointly addressed by the people of both jurisdictions. Indeed, ‘the Agreement’s institutions are being created by the will of the people of Ireland, North and South, and not just by the people of Northern Ireland’.198 Mike Ritchie expresses a nationalist perspective on this aspect of the Agreement: ‘…a reading of the Good Friday Agreement shows that the unit of self-determination is quite clearly the Irish people’.199

197 Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006).
199 Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).
2. Key provisions of the Good Friday Agreement and ‘constructive ambiguity’

The Good Friday Agreement begins with a declaration by all the negotiating parties of their support for the negotiated provisions, as a basis on which to build reconciliation and a new, shared future. The negotiating parties then endorse the decision of the British and Irish governments to:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland...

The effect of these provisions is that the two governments withdraw their stake in the future constitutional status of Northern Ireland, and agree that any change is entirely subject to the will of the people. In this sense, the Agreement represents a modern approach to sovereignty.

The Agreement makes provision for constitutional change by requiring the British Secretary of State for Northern Ireland to trigger a poll

if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

---

200 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 1. Declaration of Support
201 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 2. Constitutional Issues [1]
202 The Agreement effectively nullifies the effect of the uti possidetis juris principle, enabling a change in political borders on the basis of popular agreement.
203 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 2. Constitutional Issues, Schedule 1 [2]
Should a poll be held and fail, at least seven years must pass before another poll could be held. As yet, no poll has been held and there has been no demand made for such a poll, because Irish nationalists remain in the minority of voters in the North of Ireland. Therefore this element of the Agreement remains a largely unexplored – but very important – provision.

This part of the Agreement also acknowledges the right of the people of the North of Ireland to identify and be recognised as British or Irish or both, regardless of any potential future change in the territory’s constitutional status. This provision is important for Irish nationalists now, considering their experience of systemic discrimination on the basis of their communal identity. It may be of great significance to British unionists in a potential future united Ireland. In that case, the protection for self-identification set out in the Agreement would require sensitive and creative methods of state-building and governance, to ensure that a British minority in Ireland would not suffer systemic discrimination.

Strand One of the Agreement provides for the establishment of a consociational Northern Ireland Assembly. The Assembly exercises devolved powers in the areas of agriculture, culture, education, employment, trade, environment, finance, health, social services and, since 2010, has power over policing and justice. Powers in other areas are reserved by the British government in Westminster. The rules of the Assembly are designed to ensure cross-community participation and support for legislation and executive decisions. Certain key decisions may only be taken with either a majority of all members voting, including a majority of members of both unionist and nationalist designation, or a 60% majority of all members voting, including at least 40% of members from both unionist and nationalist designations. A First Minister and Deputy First Minister, elected from the two largest parties in the Assembly, are jointly responsible for overseeing the exercise...
of executive powers by Ministers, who are in turn elected by proportional representation.\(^{208}\)

Strand Two of the Agreement aims to strengthen cooperation between the northern and southern Irish jurisdictions through a North-South Ministerial Council. This Council comprises members of the Executive governments of Northern Ireland and the Republic of Ireland, who meet together regularly to cooperate on matters of mutual concern and cross-border issues.\(^{209}\) The six areas of cooperation currently include agriculture, education, environment, health, tourism and transport.\(^{210}\) There have been several periods since the Assembly’s establishment when it has been suspended, due to disagreements between parties, and during these periods the Ministerial Council has not functioned according to its remit.

Strand Three of the Agreement establishes a British-Irish Council, which aims to further relationships and cooperation between the British and Irish governments, as well as the devolved governments in Northern Ireland, Scotland and Wales.\(^{211}\) Strand Three also establishes a British-Irish Intergovernmental Conference, which brings together Ministers of each government. Meetings are sometimes convened to enable the Irish government to put forward views and proposals on matters which are not devolved to the Northern Ireland Assembly, but are of special interest to the Irish state.\(^{212}\) These measures have been recognised as distinctive and significant in relation to self-determination under international law. According to Warbrick and McGoldrick, ‘the level of participation for the minority group and especially the kin-State is more than is required by any international instrument.’\(^{213}\)

\(^{208}\) Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 3. Strand One [14] – [25]

\(^{209}\) Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 4. Strand Two

\(^{210}\) See <http://www.northsouthministerialcouncil.org/index/areas-of-co-operation.htm> at 2 February 2009

\(^{211}\) Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 5. Strand Three

\(^{212}\) Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 5. Strand Three, British-Irish Intergovernmental Conference [5]

Essential to the Good Friday Agreement are the provisions concerning protection of human rights. These particularly emphasise values of equality, non-sectarianism, freedom of religious and political expression, and non-discrimination.\textsuperscript{214} The British government pledged to incorporate into Northern Ireland law the European Convention on Human Rights, and to establish the Northern Ireland Human Rights Commission and an Equality Commission.\textsuperscript{215} The Irish government committed to establishing an equivalent Human Rights Commission.\textsuperscript{216} The Agreement emphasises the importance of reconciliation and of acknowledging the experiences of victims of conflict.\textsuperscript{217}

The Agreement has been described as an exercise in ‘constructive ambiguity’. This is a political device used to gain agreement on a disputed text, and while in this case it produced extremely positive results in terms of the peace process, it also results in some uncertainty in relation to key terms.\textsuperscript{218} The central ambiguity in the Good Friday Agreement relates to the ‘unit’ of self-determination which it is said to create. First, the Agreement vests a decision on future constitutional change in ‘the majority of the people of Northern Ireland’.\textsuperscript{219} However, in the next paragraph, the Agreement identifies self-determination as a right to be exercised by ‘the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment’.\textsuperscript{220}

The use of these two different categories need not, however, be interpreted as a source of confusion. Bell and Cavanaugh argue that reference to the two competing groups boosts the legitimacy of the Agreement, and confirms the right of all the people of the island to involvement in future self-determination solutions.\textsuperscript{221} In giving both the people of the

\textsuperscript{214} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 6. Rights, Safeguards and Equality of Opportunity \[1\]
\textsuperscript{215} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 6. Rights, Safeguards and Equality of Opportunity \[2\], \[5\] and \[6\]
\textsuperscript{216} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 6. Rights, Safeguards and Equality of Opportunity \[9\]
\textsuperscript{217} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 6. Rights, Safeguards and Equality of Opportunity \[11\]-\[13\]
\textsuperscript{219} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 2. Constitutional Issues \[2\] (i)
\textsuperscript{220} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 2. Constitutional Issues \[2\] (ii)
North of Ireland and the people of the island of Ireland a place within this central provision, the Agreement acknowledges that each jurisdiction has unique features, and that the two must collaborate if constitutional change is to occur. The constructive ambiguity of these essential provisions also enables either of the two potential future outcomes – continued union with Britain or the creation of a united Ireland – to be achieved in the context of the legal protections offered by the Agreement.

3. The Good Friday Agreement as a transitional document – how will it develop?

The Good Friday Agreement makes no assumptions about future constitutional settlements, but instead offers either the continuation of the union with Britain or the establishment of a united Ireland as alternative future outcomes. This flexibility is bolstered by the commitments made by the two governments that they have no vested interest in either outcome, and that they are bound to facilitate whichever outcome expresses the will of the majority of the people. Therefore, the Agreement is a transitional rather than a final settlement. It was intended to bring an end to violent political conflict, while enabling the different communities to continue to debate their future status through democratic means.

The openness of the Agreement necessitates an ongoing conversation regarding the constitutional arrangements on the island of Ireland, and how potential change might affect its people. Discussion regarding whether and how change might occur in Ireland is essential, in order to avoid inflicting on future generations the suffering imposed on Irish nationalists through partition and colonial domination. This proposed conversation requires contributions influenced by international legal considerations – particularly the right of self-determination. Indeed, it has been argued that international law explains the Good Friday Agreement more effectively than other legal approaches.

222 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 2. Constitutional Issues [1]
(a) The need to acknowledge colonialism and provide for transitional justice

In this chapter, I have already sought to make one contribution to this conversation on Ireland’s constitutional future, by arguing that the colonial experience of Irish nationalists must be acknowledged in order to move forward with honesty. While the Good Friday Agreement appears to respect the legitimacy of two competing political aspirations – British unionism and Irish nationalism – it does not name colonialism as a fundamental contextual experience for both traditions, and particularly for nationalists. It is arguable that the absence of this acknowledgement, or a recognition of the British state’s active role in the conflict, is the most troubling gap in the Agreement.

In Bernadette McAliskey’s conception, the negotiations leading to the Agreement were concerned with how the conflict ‘could be managed out of existence’, rather than with conflict resolution. This assertion is supported by the findings of Campbell, Ní Aoláin and Harvey that the Agreement deals little with the past and the legacies of the conflict, but rather aims to transform a violent conflict into a political conflict. Although the Agreement contains a number of provisions which are helpful in developing transitional justice, for example, those which require reform of policing, criminal justice, victims’ rights, human rights and the release of paramilitary prisoners, understandings of the origins of conflict and nationalist political aspirations cannot be transformed without acknowledgment of colonialism.

(b) Recognising the full significance of the consent principle

The ‘consent’ principle essential to the Good Friday Agreement means that the constitutional status of Northern Ireland should no longer be subject to the will of the British state; instead it is said to depend on the will of a majority of its people, and

225 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
requires Britain to give effect to any change which they may, in future, wish to make.\textsuperscript{229} Campbell, Ní Aoláin and Harvey argue that this principle demonstrates that the Agreement makes a creative contribution to the development of the international law on the transfer of sovereignty:

No longer is territorial cession about the transfer of sovereignty by means of an agreement between ceding and acquiring state, but rather the ceding of the decisive power to citizenry itself, with the prior consent of the implicated states.\textsuperscript{230}

The British state’s acceptance of this shift, to enable control of constitutional and territorial status to be exercised by the citizenry through elections, ‘is a radical reconfiguration of both the theory and practice of state formation’.\textsuperscript{231} It is an official acknowledgment that Northern Ireland has a right to secede, and join a union with the Republic of Ireland, if that is the wish of the people.\textsuperscript{232}

It is important that the consent principle be understood in this sense, rather than confined by an interpretation which emphasises the protection it offers to the political preferences of the current British unionist majority. It is certainly true that the consent principle operates to ensure that unionists cannot be forced into a united Ireland while they remain a majority in Northern Ireland. Some Irish nationalists would regard the consent principle as the equivalent of the unionist ‘veto’,\textsuperscript{233} which was a concept always resisted by militant nationalism during the political conflict. Prior to the development of consociational mechanisms through the Good Friday Agreement, unionists were seen to be exercising a veto over claims for Irish unification, and were supported in this through the force of the British state.\textsuperscript{234} Indeed, those Irish nationalists opposed to the Agreement

\textsuperscript{233} Although, as Tim Pat Coogan recognises, the Agreement effectively gives both sides of the divide a veto through the ‘parallel consent’ requirement: Tim Pat Coogan, \textit{Ireland in the Twentieth Century} (2003), 683.
continue to argue that their former comrades, now Sinn Féin politicians, have accepted a unionist veto despite claiming they would never do so during the conflict.235

However, the consent principle may be interpreted in a more positive light from the nationalist perspective. For example, Bríd Rodgers believes the significance of the Good Friday Agreement is that it recognises the legitimacy of both nationalist and unionist perspectives, and by providing the consent principle the Agreement enables both nationalists and unionists to advocate peacefully for their desired ends.236 The consent principle undoubtedly represents a compromise on the part of nationalists, some of whom previously did not accept the need to secure majority support for constitutional change, instead arguing that British rule in the North of Ireland is inherently wrong and ought to be immediately ended.237 However, alongside the majority protection offered to the British unionist community by the consent principle, complementary and novel protection is now offered to Irish nationalists in the Agreement, through the hugely significant commitment by Britain to respect whatever choice is made by the people. Of course this commitment is yet to be tested, but Britain has committed itself in formal legal terms, and this represents a massive shift in the British position, considering both its historical reluctance to accept the weakening of its empire, and its vehement and long-term opposition to militant Irish republicanism. Also, and importantly, the notion that future constitutional change will only come through political rather than violent means was a key factor in securing majority support for the popular referenda that confirmed the Agreement.

(c) The potential for an inclusive, all-island self-determination settlement

The Good Friday Agreement provides legal and political confirmation that Irish unification is a potential future outcome. According to Bertie Ahern, the Agreement makes the people truly sovereign for the first time, and establishes a mechanism of consent by which the people of the island may choose to exercise the right of self-

---

236 Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006). Rodgers was one of the first Ministers in the devolved Northern Ireland Executive, elected for the Social Democratic and Labor Party (SDLP), a centrist Irish nationalist party.
237 It is clear, particularly in light of renewed violent political actions in 2009-2011, that some nationalists continue to subscribe to this view.
determination by uniting in one sovereign Irish state.\textsuperscript{238} Both the Irish and British governments accept, through the Agreement, the right of the people to change their constitutional circumstances, and the governments commit themselves to facilitate whatever change may come.\textsuperscript{239} Therefore, the Agreement has the capacity to enable an eventual all-island self-determination settlement in two senses. First, any future change will be required to consider the interests of all communities on the island. Second, and crucially for Irish nationalists, the unification of the two jurisdictions is now accepted as a legitimate political goal and the Agreement confirms that nationalists are equally entitled to advance their political aspirations through peaceful means.\textsuperscript{240}

The island status of Ireland is significant in terms of international opinion regarding the success of the settlement contained in the Good Friday Agreement. Guelke’s argument that the current borders and status of Northern Ireland lack international legitimacy\textsuperscript{241} has often been cited.\textsuperscript{242} He notes that the all-Ireland dimensions of the Agreement, for example the North-South Ministerial Council and cross-border implementation bodies, were accepted internationally as guarantees that the Agreement was not partitionist and would not stand as an obstacle to ‘the eventual outcome of a united Ireland’.\textsuperscript{243} Guelke’s view demonstrates why the cross-border dimensions of the Agreement were so fundamental to securing nationalist agreement; that is, because these dimensions confirm that the Agreement is concerned with the self-determination of all the people of the island. In responding to the 1995 Forum for Peace and Reconciliation, an important consultation process conducted three years before the Agreement was reached, Sinn Féin stated:

\begin{footnotesize}
\textsuperscript{239} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 2. Constitutional Issues [1] (iv)
\textsuperscript{240} Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement) 1. Declaration of Support [5]
\textsuperscript{243} Adrian Guelke, 'Northern Ireland and Island Status' in John McGarry (ed), Northern Ireland and the Divided World: Post-Agreement Northern Ireland in Comparative Perspective (2001) 228, 250.
\end{footnotesize}
What is required is a new and imaginative approach which tilts the balance away from the prohibitive and negative power of veto towards the positive power of consent, of considering consent, of negotiating consent.244

The mass support for the peaceful political process set out in the Good Friday Agreement demonstrates popular acceptance of the importance of inclusivity in relation to self-determination in contemporary Ireland. An inclusive approach does not require a particular community to abandon its own history or aspirations, as I have argued in this chapter in relation to Irish nationalists. However, as Paul O’Connor explains, inclusiveness does require a more plural conception of self-determination:

…you put everything that’s important to you in your life into bags, and that’s your history and you shouldn’t leave that behind. We need to come at it as who we are [as Irish nationalists] and recognise that it’s important who we are, but also make space. So someone will suggest that in a new structure [for example a united Ireland] unionists can maintain a British passport – sure, why not? That doesn’t take away my right. I almost find self-determination a more useful phrase in describing what I want than a united Ireland – a united Ireland seems to be saying ‘I want a unit, that we control’, which could seem exclusive. Self-determination means that Protestants, Catholics, working class, middle class … self-determine their lives. …245

This approach would necessitate the preservation of the minority rights protections incorporated in the Agreement in any new constitutional arrangement. The aim would be to ensure that Irish self-determination means the highest possible level of self-determination and rights protections for everyone on the island, including those who do not express an Irish national identity.

Following the Good Friday Agreement, and as a demonstration of its willingness to respect the choice of a majority in Northern Ireland, the UK parliament repealed the Government of Ireland Act 1920 (UK). This statute had enabled the partition of Ireland. In turn, the electorate of the Republic of Ireland agreed through referendum to change Articles 2 and 3 of the Irish Constitution, as a condition of their acceptance of the

245 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006).
Agreement. Article 2 of the Constitution had previously asserted a territorial claim over the whole of the island of Ireland. Following the post-Agreement amendment, Article 2 now affirms ‘the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation’. The earlier form of Article 3 had anticipated ‘the re-integration of the national territory’ and affirmed ‘the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory’. Article 3 no longer claims the right of the Irish Parliament to govern the whole island. Instead it recognises:

the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.

Arguably, these changes were essential to facilitate an inclusive future self-determination solution for Ireland. According to Kieran McEvoy, the changes encouraged nationalists to ‘think more deeply about accommodating unionist tradition within the island of Ireland’ and to recognise ‘that self-determination is not simply about the expression of one’s own rights, but is about the accommodation of the rights of the other’. Anthony Coughlan agrees that the Agreement and consequent amendments to the Irish Constitution ensure the extension of minority rights to British unionist people, should the Irish jurisdictions be united. These developments might, for example, enable unionists ‘to retain British citizenship as a complex of legal rights’ within an Irish state.

Conclusion

Aspects of the Good Friday Agreement, considered above, reflect concepts central to the human rights approach to self-determination. The Agreement confirms that the people of

---

246 Bunreacht na hÉireann: Constitution of Ireland (1937) Article 2, prior to nineteenth amendment (1998)
247 Bunreacht na hÉireann: Constitution of Ireland (1937) Article 2
249 Bunreacht na hÉireann: Constitution of Ireland (1937) Article 3
250 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
251 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
the Irish territory, North and South, will determine the future of the territory. It emphasises the need for balance between self-determination and minority rights protections. The Agreement is a living document, capable of facilitating flexible solutions to a potential constitutional change in Ireland. Like the human rights approach to self-determination, the Agreement avoids dealing in absolutes, but instead uses ‘constructive ambiguity’ to enable divided communities to work together. It has encouraged sections of the Irish nationalist community to shift from political violence towards negotiation as a means of furthering their self-determination claim. Representatives of the Irish and British communities now sit at the same table, a circumstance that would have been unthinkable twenty years ago.

The Good Friday Agreement is a hybrid agreement, being both a bilateral treaty between the British and Irish states, and a settlement to violent conflict negotiated by a wide range of political parties in the north of Ireland. The influence of the international law on self-determination is clear throughout the Agreement, notably in its flexible approach to state sovereignty, its emphasis on the importance of popular will, its inclusiveness of the people of both Irish jurisdictions, and the human rights protections it provides. Having established the significance of the Agreement in the context of Irish self-determination, it is important to explore how the Agreement’s progress – and through it the progress of self-determination in Ireland – may be promoted through international law. The international legal system must play a role in promoting a human rights approach to self-determination in Ireland, through the Good Friday Agreement itself, and by other means.

D. The Necessary Role of the International Legal System

1. The need for an active role for international law

International law has not been seen to take an active role in the self-determination issue in Ireland. During the period of the Troubles, there was minimal international legal intervention in Irish politics, on the basis that Northern Ireland and the conflict were

---

highly sensitive internal political issues to be dealt with by the British state. Britain’s status in the international community was influential in this context. The government of the Republic of Ireland, despite its stated commitment to the unification of Ireland, turned only occasionally to the international legal forum with complaints regarding the role of the British state in the North of Ireland.

The most prominent of these was the action taken by Ireland in 1978 in the European Court of Human Rights, complaining of British treatment of detainees under special ‘emergency powers’ legislation. In 1971, 14 people were arrested as part of a mass internment campaign led by British forces and the Royal Ulster Constabulary. They were subjected to sensory deprivation techniques during lengthy interrogations, in experiments later described by John McGuffin in *The Guineapigs*. The experimental techniques included hooding, wall-standing, subjection to noise, deprivation of sleep and deprivation of food and drink. Medical evidence and testimony from the victims has demonstrated that the combination of these techniques, and their constant use on the detainees for eight days, produced long-lasting and devastating physical and psychological effects.

In *Ireland v United Kingdom*, the Irish government argued that Britain had violated several of the detainees’ rights under the European Convention on Human Rights, including the freedom from torture and inhuman treatment, the prohibition against slavery, servitude and forced labour, the right to liberty and security of person, the right to due process, and the right to freedom from discrimination on the basis of political opinion. The European Court found against Britain on only one count, concluding that the detainees had been subjected to cruel, inhuman and degrading

---

254 Ireland v United Kingdom (1978) 2 EHRR 25
257 Ireland v United Kingdom (1978) 2 EHRR 25
treatment in contravention of Article 3. Jackson has argued, ‘the Court gratuitously distinguished between torture on the one hand and cruel, inhuman, or degrading treatment on the other’.

The distinction drawn by the majority judges was between degrees of cruelty and intensity of suffering experienced by the detainees, although the court did not explain how this was assessed. Indeed, some judges of the Court complained that the Court’s reasoning for distinguishing between the two forms was arbitrary or confusing. The Court dismissed the other complaints on the basis that the subject of the complaints did not exceed the powers the British state had given itself through emergency powers legislation. The Republic of Ireland did not take further legal action against Britain in relation to subsequent allegations of human rights violations committed during the conflict.

Several Irish respondents to this research were, unsurprisingly, doubtful of the capacity of international law to promote Irish self-determination. According to both Paul O’Connor and Mike Ritchie, international law was effective in promoting self-determination for the peoples of salt-water colonies during the decolonisation period. However, they argue that some peoples, including Irish nationalists, Palestinians and Basques, have been left behind in international legal terms as decolonisation has come to be seen as – in Ritchie’s terms – ‘ancient history’. Bernadette McAliskey believes the international law on self-determination has been ‘as useful as a snowball in a furnace’, because international law is dominated by power politics rather than a concern for rights. Eoin Ó Broin agrees that the international law on self-determination has not been an effective instrument for claimant peoples like the Irish, because the theory appears to be much stronger than the state practice. He believes that Irish independence movements have not looked to public international law to support their demands, for fear it would be a waste of resources.

267 Interview with Paul O’Connor, Pat Finucane Centre (Derry, 2 March 2006), Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).
268 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
269 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
It is desirable that the international legal approach to self-determination be developed in order to shift such perceptions, so that international law may be actively engaged in the development of self-determination solutions. Opening up alternative pathways towards self-determination may be particularly valuable at this time, considering the risk of fragmentation among Irish nationalists in the North of Ireland who are frustrated by a perceived lack of political progress. The engagement of the international legal system may be able to boost the hopes of some disillusioned nationalists in the utility of the peace process and democratic methods of advocating for constitutional change, and discourage them from returning to or advocating violent opposition to British rule in the North of Ireland.

Some respondents to this research argued that international law should have a greater role in developing self-determination solutions, because it bears extremely valuable – and unfortunately under-utilised – capacities. In Robert McCorquodale’s view:

…the role of law is crucial in that it clarifies a lot of the parameters of the exercise: law clarifies that there is a right here, it clarifies the content, it clarifies what possible exercises there are…

Bernadette McAliskey argues that the law ‘is the most important part of the mechanism’ for realising self-determination,

because it is the law that gives us a process for resolving … any degree of conflict without resort to abuse of authority, abuse of power or violence.

Christine Bell also sees international law as having a conflict-prevention role, and argues that international law can provide ‘objective guidelines or objective standards by which people can measure their claims’. Beyond this point, international law also offers a range of conflict resolution processes which may be of use in Ireland.

As discussed above in relation to the ‘constructive ambiguity’ of the Good Friday Agreement, the Agreement is clearly a transitional, rather than a permanent, resolution. It is important to consider what form future progress beyond that transitional settlement

---

270 For an example of this sentiment, see: Anthony McIntyre, 'Who is McGuinness to talk of treachery?' (13-19 March 2009) Irish Republican News <http://republican-news.org> at 25 March 2009
271 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
272 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
273 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
may take, particularly if progress comes to mean constitutional changes and the
unification of the two Irish jurisdictions. International law can assist in this context, to
help to ensure that any developments will follow legal guidelines, and to promote
conflict-avoidance and peaceful political progress. Indeed, the design of the Good Friday
Agreement invites continual international legal analysis. It is a bilateral treaty between
Britain and Ireland, inspired and explicitly informed by principles of international human
rights law, with the special added element of the involvement and endorsement of the
people of both Irish jurisdictions. As an example of contemporary state practice on self-
determination, the Agreement has been argued to be constitutive of newly formed
interpretations of international law, particularly in terms of the role the Agreement
reserves for the people of the whole island. A corollary of this role for the population of
the whole island must be some guidance at the international legal level as to how and
when the ‘people of the island of Ireland alone’ might be given the opportunity to voice
their will.

One means by which further interaction between the Agreement and international law
may occur is by encouraging information exchange between claimants of self-
determination from different territories, and interested states. Anthony Coughlan
recognises that ‘issues of self-determination and decolonisation were debated regularly in
the United Nations’ in the 1960s, and argues that similar moments will arise again,
perhaps to be raised by national and ethnic minorities in the Russian Federation,
Indonesia or Pakistan. If self-determination were to receive renewed international
attention, the international forum could become a more fruitful site for the discussion and
promotion of self-determination claims by claimant peoples. This would be positive for
claimants such as Irish nationalists, whose claim raises a range of issues – including
colonialism, human rights and sovereignty – of interest to international law. Further, as
Robert McCrorquodale recognises, the comparisons between cases afforded by the airing
of self-determination claims in the international forum identifies areas of commonality

274 Rosemary Byrne, 'Changing Modalities: Implementing Human Rights Obligations in Ireland after the
Good Friday Agreement' (2001) 70 Nordic Journal of International Law 1, 1.
275 Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing
276 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or
Belfast Agreement) 2. Constitutional Issues [1] (ii)
277 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
and enables novel self-determination solutions.\textsuperscript{278} Irish nationalist communities have links with other peoples claiming self-determination, notably the Palestinians\textsuperscript{279} and Basques, however, these links could be made more fruitful should they be developed in the context of an increased international legal focus on contemporary self-determination.

International law also has the capacity to promote constructive approaches to the ongoing political conflict in Ireland. Campbell, Ni Aoláin and Harvey recognise that, rather than ending the constitutional conflict in Ireland, the Good Friday Agreement transformed the conflict from a violent to a non-violent one.\textsuperscript{280} While the Agreement has facilitated considerable progress towards peace, its capacity to assist in promoting a resolution to the constitutional conflict is limited. Guidance from the human rights principles central to the notion of self-determination under international law could assist divided communities in moving beyond the current accommodation towards a long-term solution. An increase in oversight at the international law level would not risk unjustified interference with the domestic affairs of Britain. This is because, as Robert McCorquodale has recognised, the recognition of the right of the people of Northern Ireland to exercise self-determination necessarily confers ‘legal justification for international scrutiny’.\textsuperscript{281}

One important issue which must be addressed in this context is how and when a referendum might be triggered to gauge whether the people of Ireland wish to unite the two jurisdictions. As Hooper and Williams recognise:

The agreement requires the British Secretary of State to call for a referendum on independence every seven years if it is “likely” that the majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland. If the resulting vote favours uniting

\textsuperscript{278} Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
\textsuperscript{279} Richard Falk and Burns Weston draw an interesting parallel between the self-determination struggles of Palestinians and Irish nationalists, suggesting that the 1987 intifada echoed the 1916 Easter Rising, in that both events signalled the beginning of a struggle, which would last for many years, regarding the final status of the territory: Richard A Falk and Burns H Weston, 'The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada' (1991) 32(1) Harvard International Law Journal 129, 129.
with Ireland, the Secretary of State is obligated to take such proposals as are necessary to the British Parliament to give effect to the referendum’s result.282

There are a range of unanswered questions raised by this provision, including how a referendum would be phrased, when one might be held, and how the Secretary of State is to define the term ‘likely’. Should a referendum be called, it would then be crucial to determine whether a majority means a simple fifty per cent plus one, and how this would be measured.

Recourse to international law is an essential means by which answers to these questions may be found. The international legal forum will provide case examples of various forms of international intervention and oversight, some of which may be desirable in the Irish case, depending on the future directions of the political conflict.283 International legal specialists may also prove helpful as arbitrators or mediators between contesting parties should these questions be raised.284 Whereas the international legal system has been frequently called upon to assist in the resolution of territorial questions, no domestic court has the capacity to rule on issues concerning the sovereign territory or boundaries of a state.285

The political power of the international community could also be employed as a powerful tool in promoting a self-determination solution in Ireland. Alongside the questions raised above, there is also the problem of the seemingly contradictory position of the British

283 The United Nations may serve as a forum for dispute resolution, perhaps by extending special status to the disputing parties, as it has done for the Palestinian Authority. The UN created a Permanent Observer Mission of Palestine to the United Nations by General Assembly resolution in 1974: GA Res. 3237, UN GAOR, 29th Sess, Supp. No. 31 at 4, UN Doc A/9631 (1974). The UN and its agencies may also play important observation roles, for example in the administration of referenda. For example, the United Nations Mission in East Timor was responsible for registering voters, organising the ballot and ensuring that the referendum on independence was free and fair. The UN succeeded in organising the ballot in exceptionally difficult and dangerous circumstances, and it was a crucial step on East Timor’s path to independence: Ian Martin, Self-Determination in East Timor: The United Nations, the Ballot and International Intervention (2001), 11-12. Should the continued political conflict in Ireland result in a renewed outbreak of violence, it is possible that the international community might intervene by means it has not previously used in that jurisdiction, for example by posting a peacekeeping force to the territory. See, for example: Mari Katayanagi, Human Rights Functions of United Nations Peacekeeping Operations (2002), John Norton Moore, 'Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance' (1996-1997) 37 Virginia Journal of International Law 811.
285 Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
government in relation to the Good Friday Agreement. On the one hand, Britain is explicitly committed to the principle of consent and the notion that it is now completely up to ‘the people’ to decide the future constitutional arrangements of Ireland. Britain has taken the unusual step of declaring – through the Good Friday Agreement – that it has no strategic interest in staying in Northern Ireland. However, as Robert McCorquodale recognises,

and this is where you come back to colonialism … Britain is still able to come in and decide whether to suspend the Assembly or not, rather than just leaving the situation to the people to work it out. … At the moment, it’s terribly patronising that the British government comes in to solve it or just toss it aside. I think that’s extremely unhealthy and contrary to self-determination.

Margaret Ward agrees that the capacity of Britain to suspend the Northern Ireland Assembly, which has been exercised several times since its establishment, represents a continuation of the colonial relationship. Ward would prefer the reinforcement of the collective responsibility of the people of Northern Ireland to implement the Agreement, as any reimposition of direct rule reinforces ‘a dependency on Britain’.

In light of this contradictory position, it is not possible to rely solely on Britain to call a referendum under the terms of the Good Friday Agreement, should such a vote appear likely to result in constitutional change. Therefore it is legitimate for greater international pressure to be imposed on the British government. McCorquodale proposes that this could be achieved by strengthening the powers of human rights treaty bodies to require prompt and thorough reports from states. Britain is obliged to address its efforts to honour and promote self-determination in Ireland in its reports to the Human Rights Committee under the International Covenant on Civil and Political Rights, and the treaty body should require this by making direct inquiries. The following sections explore the ways in which international law might take a more active role in relation to self-determination in Ireland.

286 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
287 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
288 The Assembly was suspended between 11 February and 30 May 2000, on 10 August and 22 September 2001, and between 14 October 2002 and 7 May 2007.
289 Interview with Margaret Ward, Women’s Research and Development Agency (Belfast, 19 January 2006).
290 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
2. Proposals for decolonising international law

In Chapter 4, I argued that the international law on self-determination must itself be decolonised if it is to be of assistance to contemporary claimant peoples. The suggestions put forward in that chapter may be usefully adapted to the Irish context. These include enabling the variety of legitimate manifestations of self-determination, rejecting the artificial opposition between internal and external self-determination, developing an inclusive international legal system, and abandoning the ‘peoples’ approach to the right.

There may be a contradiction at work between the international law on self-determination and the practice of the international community in relation to the right in recent times. Whereas the right is defined in broad terms, and various instruments confirm that it may take a range of forms subject to the will of the self-determining people, in practice there is resistance to changing borders. However, the Good Friday Agreement relieves international law of its usual concern for territorial integrity in the face of a self-determination claim. For this reason, Ireland is one site in which the range of potentially legitimate manifestations of self-determination may be freely explored. International legal specialists may promote this exploration by drawing comparisons with the self-determination solutions developed elsewhere, by opening the international legal forum to the voices of Irish self-determination claimants, and by promoting self-determination as a process rather than an event. In turn, by challenging the continuing reluctance within the international legal system to accept changes to borders as a consequence of the exercise of self-determination, the Irish case may assist the international legal system to develop more nuanced and sensitive approaches to the right. If it is effectively implemented, the Good Friday Agreement has the potential to become an example for the international community. Not only has the Agreement facilitated transition from violent conflict to negotiation, but it may in future enable a constitutional and territorial shift unfettered by the colonial doctrine of *uti possidetis juris*.


293 Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006).

294 As is evidenced by the maintenance of the doctrine of *uti possidetis juris*. 
The international legal community ought also to discourage overly state-centred proposals in relation to self-determination. As McCorquodale recognises, states have typically opposed solutions which enable people to express multiple identities, or to be governed in more fluid ways which would preserve the involvement of two interested states – for example both Britain and Ireland in relation to Northern Ireland.\(^295\) In order to develop a people-focused and flexible self-determination solution in Ireland, all interested people must have an opportunity to contribute to an ongoing legal and political conversation. Indeed, several respondents proposed that it is now time for such a discussion to begin, enabling all the people of the island to explore the range of possible options for their future.\(^296\) International law has a role in this discussion, as the framework capable of explaining and exploring the variety of legitimate manifestations of self-determination, and ensuring that any future solution reflects human rights principles.

To facilitate a discussion of the various means by which self-determination might be achieved in Ireland, it would be helpful to abandon the artificial distinction between internal and external self-determination. This distinction is irrelevant in Ireland as a consequence of the Good Friday Agreement provisions, which expressly permit a range of solutions, including the dissolution of the union with Britain and the unification of the Irish jurisdictions. Were the international legal framework to confirm that this distinction is unhelpful, through state practice and international legal commentary, this would be an important step in acknowledging the legitimacy of Irish nationalist experiences of colonialism and aspirations for self-determination.

Robert McCorquodale has found that some claims of self-determination have been stymied by the view that a people is not entitled to exercise the right unless they have received international recognition.\(^297\) However, as is the case with all universal human rights, people are entitled to them regardless of whether or not they are adequately recognised or exercised in a particular context. The Irish case ought to be recognised as

\(^{295}\) Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).

\(^{296}\) Interview with Martina Anderson, Director of Unionist Engagement, Sinn Féin (Belfast, 21 March 2006), Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006), Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).

\(^{297}\) Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
an expression of this fact. Through the Good Friday Agreement, the right of all people on
the island to self-determination is both acknowledged and protected, both by popular
approval and by the two interested states.

Ireland could become an important site in the development of a more inclusive
international legal system, in light of the Good Friday Agreement provisions that
envisage novel self-determination solutions. As proposed by Robert McCorquodale,298 a
system based on popular participation in international legal processes is an important step
in decolonising international law. The international legal forum could promote the
implementation of the Good Friday Agreement by providing opportunities for the people
of the island of Ireland to engage in their discussion of self-determination at the
international level. This approach would accord with the formal legal recognition by
Britain and Ireland that self-determination is an entitlement of the people of the island,
rather than a privilege to be granted or withheld according to the whim of states. By
opening this forum for such a discussion, the status of claimant peoples in relation to
states could be enhanced. This would enable claimants to seek support for their proposals
from other states and international organisations, and thereby to challenge the colonial
hierarchy which still influences international power relations. Therefore, a more inclusive
international legal system could assist Irish self-determination claimants to overcome the
history of British intransigence.

A further means by which the international legal approach to Irish self-determination may
be decolonised is through the abandonment of the outdated ‘peoples’ approach to the
right. As this chapter has shown, it is essential to acknowledge the distinctive experiences
of communities claiming self-determination. In the North of Ireland, it is particularly
crucial to recognise the contemporary colonial experience of Irish nationalists, and the
stifling effect this experience has on their capacity to realise self-determination. However,
recognising this experience cannot be the endpoint of an analysis of self-determination, as
such an approach would negate the legitimate and important aspirations and experiences
of other communities on the island. Rather, it is a beginning, which opens a path of
inquiry into how a range of perspectives can be understood within a human rights-based
self-determination framework.

International Law 477.
The Good Friday Agreement itself demonstrates the inapplicability of the peoples approach to self-determination in Ireland. As Hayward recognises, the Agreement was enabled through the ‘politics of nuance’, which emphasised individual freedom to choose community affiliation over exclusive forms of collective identity. 299 Indeed, the Agreement shows the ultimate futility of attempting to define a “minority”, a “nation” or a “people”, or of trying to classify them as either ethnic, national, religious or linguistic. 300 Rather, the Agreement depicts self-determination as a collaborative process, involving the people of the whole island. This is important not only as a means of considering the needs and aspirations of Irish nationalists and British unionists, but in including the perspectives of other smaller communities, including Irish Travellers and recently established migrant communities, and in acknowledging the differing experiences and aspirations of nationalists in the Northern and Southern jurisdictions.

3. Using the human rights approach to self-determination in Ireland

These proposals support the case for a human rights approach to self-determination in Ireland. Conceiving of the right as an ongoing process is an important element in this approach. According to Eoin Ó Broin, self-determination is necessarily a process, because there will always be a higher level of human well-being and social cohesion to aspire to. 301 Indeed, considering that self-determination is necessarily subject to an ongoing discussion among all the people of the island of Ireland, the right may only be realised on a progressive basis. If self-determination in Ireland is recognised as an ongoing process, dialogue between people of opposing views will be central to its success. A first step in that process may be to develop a stronger human rights framework and culture in the North of Ireland and the island as a whole. This is especially crucial considering the legacy of human rights abuse during and following the decades of conflict.

301 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
Kieran McEvoy argues that Charter of Rights processes in both Irish jurisdictions are the most important means of developing a human rights culture on the island. Aideen Gilmore supports this view, arguing that human rights abuses have exacerbated conflict in Northern Ireland, and consequently that protecting human rights is essential to building peace. The Good Friday Agreement required the Northern Ireland Human Rights Commission (NIHRC), established under the Agreement’s provisions, to submit to the British government a list of rights supplementary to those contained in the European Convention on Human Rights. These two sources were then to be combined into a legislative Bill of Rights for Northern Ireland, to be passed by the Westminster parliament. After an extensive public consultation process and lengthy delays, the NIHRC submitted its advice on the Bill of Rights to the government in December 2008. The British government has yet to take action to enact such a Bill. Self-determination is notably absent from the list of rights the NIHRC advised ought to be incorporated into the Bill of Rights. Aideen Gilmore suggests that this may be because the constitutional issue is regarded as inherently divisive, and the approach taken appears to favour rights which are likely to find support among both unionists and nationalists.

This perception of self-determination as a divisive concept, and one which has relevance only for Irish nationalists, poses an obstacle to the realisation of self-determination by the people of Ireland. The international legal system can promote a human rights approach to self-determination in Ireland by emphasising that it is a universal entitlement, and that the exercise of the right must be balanced with the range of other human rights brought into play by its assertion. The absence of self-determination in the NIHRC advice on a Bill of Rights is troubling in the context of relevant international legal standards, because it fails to acknowledge the significance of self-determination within the human rights framework, and perpetuates the myth that the right is either exclusive or necessarily divisive. These factors provide further justification for the intervention of international

302 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
303 Interview with Aideen Gilmore, Committee for the Administration of Justice (Belfast, 15 December 2005).
306 Interview with Aideen Gilmore, Committee for the Administration of Justice (Belfast, 15 December 2005).
307 Interview with Aideen Gilmore, Committee for the Administration of Justice (Belfast, 15 December 2005).
law, via the means proposed in Section 2 above, to promote human rights understanding at a community level and to require commitment to human rights implementation at the level of government.

In other areas, however, some positive signs are emerging to suggest that a human rights approach to self-determination, infused with international legal principles, is gradually developing in the North of Ireland. For example, Kieran McEvoy regards the contentious issue of loyalist marches as one context in which a human rights approach to self-determination is developing. Under the new framework established by the Good Friday Agreement, McEvoy asserts that a process of dialogue has begun over when and where marches may be held, and it is coming to be understood that there will be winners and losers from each negotiation, but at least participants are reaching ‘some sort of acknowledgement of the rights of the other in that framework’.308 McEvoy regards this as a significant departure from the past, when ‘unionist self-determination would have meant “an Ulsterman’s right to walk wherever the hell he wants”’.309 Bryan agrees that recent years have seen the Parades Commission begin to make decisions within a human rights framework, however, he argues that the Commission has not yet used the Human Rights Act 1998 (UK) to define the rights of marchers and residents.310 Reference to international legal standards promoting human rights can facilitate this process, particularly by developing awareness that human rights are not absolute, and that their complementary exercise often requires negotiation and compromise.

Another example of the growing human rights culture is the increased frequency with which the NIHRC is asserting its responsibility to assess whether government actions are meeting human rights standards. For instance, in March 2009, NIHRC Chief Commissioner Monica McWilliams demanded and was allowed to attend Antrim police station to investigate the conditions under which suspects were being detained without charge under extended powers conferred by the Terrorism Act 2000 (UK).

---

308 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
309 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
McWilliams stated firmly and publicly that the NIHRC opposes lengthy detention periods, and stated that those detained should be either charged or released.311

Alongside efforts to develop a human rights culture, the human rights approach to self-determination in Ireland could be promoted through sensitive efforts to deal with the past. Again, this is an area in which international law can provide assistance, particularly in terms of comparative examples of truth-telling and reconciliation processes conducted in other places. Indeed, the importance of international oversight of truth and justice processes was made patently obvious in the aftermath of the release of the report of the Consultative Group on the Past in 2009. Public and political reaction to this report has been volatile and in some cases counter-productive.312 Some nationalist politicians have put forward convincing arguments that the Group’s proposals were inherently flawed, because the Group’s members were appointed by the British government, its report failed to implicate the British state as a participant in the conflict, and the report appeared to rule out the possibility of independent internationally-convened inquiries into controversial incidents.313 Transitional justice processes are particularly complicated in the North of Ireland, due to the continuation of a ‘meta-conflict’ or a conflict about the nature of the conflict itself.314 International participation in a truth and reconciliation process in Ireland may assist in developing forums in which all who wish to discuss their experience of the conflict have an opportunity to be heard and respected.

International law also has an essential role to play in promoting balance between any future self-determination solution in Ireland and the protection of minority rights. This is important in the Irish context because of the significant divergence between the political aspirations and identities of the two largest communities. As Brid Rodgers recognises, if the two Irish jurisdictions were united, it would be crucial to ensure that British unionists

had no reason to fear being ‘swallowed up into an Irish Ireland where their Britishness would be totally disregarded’. Minority rights protections are also of increasing importance in Ireland due to the growing recognition of the distinct experiences and aspirations of the Travelling community and the many growing migrant communities. The ‘two communities’ approach to the dispute, as well as being insufficiently nuanced, fails to recognise the position of non-aligned people on the island. Further, minority rights protection would be an essential element in ensuring that any Irish self-determination solution avoids inflicting systemic discrimination on any other group, in light of the discrimination historically perpetrated against nationalists in the North. The human rights approach to self-determination has great potential in this context, as it places self-determination within the broader human rights framework, and requires that its exercise not result in the unnecessary diminution of other rights.

This aspect of the human rights approach was widely supported by respondents in Ireland. For example, Niall Murphy argues: ‘You can’t argue for human rights, but only ‘our’ human rights – it has to be for all shades of society’. Bernadette McAliskey expresses concern that if a nationalist expression of self-determination is forced through, without efforts to accommodate the rights of unionists, nationalists will become the violators of rights. In exploring how constitutional change might manifest in Ireland, Eoin Ó Broin asserts that the ‘most important question to ask will be what types of institutions guarantee [all peoples’] social, economic, political and cultural rights? The Good Friday Agreement bolsters the potential for a human rights approach to self-determination in Ireland, by ensuring ongoing minority rights protection regardless of potential future change. As Bríd Rodgers says, the Good Friday Agreement ‘which now protects nationalists in the North, will still be there to protect [unionist] identity in a united Ireland’. The rights protection provisions of the Agreement have been described

315 Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006).
317 Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006).
318 Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006).
319 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
320 Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006).
by O’Leary as reflecting a ‘double protection model’.321 Under this model the Agreement is able to withstand dramatic change, by guaranteeing the equal protection of rights for communities regardless of whether they are majorities or minorities, and regardless of potential changes in constitutional status.322 The international legal framework provides precedents for the possible future adaptation of the Agreement’s rights protections to a new constitutional model in Ireland. For example, Robert McCorquodale cites the strong emphasis placed on minority rights protection by the Badinter Commission’s rulings on the legal outcomes of the dissolution of the former Yugoslavia.323

Minority rights protection is clearly one area in which the Good Friday Agreement and international law may combine to promote flexible and sensitive self-determination solutions. Christine Bell acknowledges:

…if everybody feels they’re going to be treated fairly and equally, whether a majority or a minority, in whatever political arrangement, to some extent you’ve pulled some of the sting from the constitutional question, which should make it easier to deal with that question or to live with a compromise on it – whether you’re a nationalist in the North…or a unionist in a united Ireland.324

Bell’s view suggests that the human rights approach to self-determination is well-suited to facilitating an ongoing discussion of the right, and promoting a solution which sensitively balances all rights brought into play when self-determination is exercised.

A human rights approach to self-determination in Ireland also has the potential to address the complex intersections between community membership, political aspirations and other aspects of identity, notably gender. Feminist historian Margaret Ward raises an example in this context of the new challenges faced by women in the post-conflict environment. Ward recognises that many women who gained positions of political influence during the conflict and throughout peace negotiations have since found that this

324 Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005).
emancipation has not translated into ‘fulsome new roles for women generally’. Ward cites then DUP MLA Iris Robinson’s comment that feminism is part of a ‘pan-nationalist front’, to demonstrate ‘that gender equity sits far down the political agenda’ and that women may face social exclusion and discrimination in relation to multiple layers of their identities.

4. How might self-determination manifest in Ireland in the future?

There is, among some commentators, a sense of inevitability about constitutional change and the unification of Ireland. Kieran McEvoy believes the people of the island are in the middle of a process which basically involves learning how to accommodate the unionist tradition within a united Ireland. Brid Rodgers adds that the work of cooperation between the Irish jurisdictions and the different political traditions will enable Irish unity to evolve. As a member of the European Parliament and former Agriculture Minister in the Northern Ireland Assembly, Rodgers observed that the two Irish jurisdictions have ‘so much in common that we would be better served at the European table by an Irish minister, rather than an English minister.’ Eoin Ó Broin sees potential for unionists to form voting blocs or electoral coalitions with the conservative southern Irish political parties. Regardless of whether unionists were to form political alliances with other groupings, they would constitute around a fifth of the total Irish population – a very significant minority. Martina Anderson expresses a contemporary nationalist perspective by arguing that it would be

328 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
329 Interview with Brid Rodgers, SDLP (Lurgan, 9 March 2006).
330 Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006).
331 Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006).
to the social and economic benefit of unionists to be twenty per cent of a structure that actually listens to their voice, and gives them a voice, as opposed to five per cent within the UK context, and so peripheral.332

The potential for unification of the Irish jurisdictions is clearly acknowledged by both interested states through the Good Friday Agreement. Therefore, the ongoing conversation in relation to self-determination proposed by this chapter ought to explore potential constitutional models for a future self-determination solution. One option which was raised by respondents to this research was a federal or quasi-federal united Irish state. For example, the Social Democratic and Labour Party (SDLP), a small nationalist party in the North, have suggested retaining the Northern jurisdiction as a distinct entity within a unified Irish state, as a means of protecting the rights of a potential unionist minority.333 Former SDLP Minister Bríd Rodgers proposes that a federal Ireland would provide rights protections to facilitate the maintenance of British identities by those who identify as British.334 Mike Ritchie regards this proposal as an interesting alternative to the single unitary state view traditionally advanced by Irish republicans, including Sinn Féin, and one worthy of discussion.335

Comerford goes so far as to argue that the people of the Republic of Ireland have accepted that Northern Ireland has a distinct identity, and that a future united Ireland will not be a unitary Ireland.336 It is, however, far too soon to judge the will of the people of the island in this context. A more prudent argument is that the mass support for the Good Friday Agreement demonstrates a capacity on the part of the people of the island to engage in an ongoing discussion as to how self-determination might be most fully realised by all people in both jurisdictions. The constructive ambiguity of the Agreement sets the tone for such a discussion, by confirming that a future self-determination solution is up to the people to determine. It need not consist of a simple transfer of sovereignty over the North from Britain to Ireland, but may be much more creative.337 According to

332 Interview with Martina Anderson, Director of Unionist Engagement, Sinn Féin (Belfast, 21 March 2006).
334 Interview with Bríd Rodgers, SDLP (Lurgan, 9 March 2006).
335 Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).
336 R V Comerford, Inventing the Nation: Ireland (2003), 46.
337 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006).
Kieran McEvoy, the notion of self-determination will be enriched through a process of disaggregation and reconstruction, and by

…making [self-determination] more sophisticated than simply the old traditional anti-colonial notion that I would have grown up with.338

Conclusion

This chapter has demonstrated that recognition of the contemporary colonial experience of Irish nationalists in the North of Ireland is an essential starting point in any honest evaluation of self-determination in Ireland. It has also shown how a process of self-determination may be facilitated through the twin forces of the Good Friday Agreement and the international law on self-determination. Confronting the experience of colonialism need not stand in the way of developing a self-determination solution in Ireland. This is particularly so if the international legal system is prepared to acknowledge its own colonial biases, and move towards the promotion of a human rights approach to self-determination for the twenty-first century.

I have not made any concrete proposals for the future shape of self-determination in Ireland. The future is up to the people of the island to determine. The Good Friday Agreement is an important foundation for the ongoing conversation regarding the constitutional status of the Irish jurisdictions and their peoples. The Agreement has secured a peace process, which must be maintained in order to protect the peoples of the island from further violent conflict. However, the Agreement can also be an important element in a self-determination process. That process is important to enable the society to progress in justice. In this chapter, I have shown that the potential of the Agreement to promote the realisation of self-determination by the people of Ireland has not yet been fully harnessed. With an acknowledgment of the contemporary colonial experience of Irish nationalists, and guidance from the international human rights framework, the Agreement can be a starting point for developing a range of creative self-determination solutions on the island of Ireland.

338 Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006).
CHAPTER 7
SELF-DETERMINATION AND
INDIGENOUS PEOPLES IN AUSTRALIA:
THE COLONIAL EXPERIENCE,
EXPERIMENTS IN SELF-DETERMINATION
AND THE ROLE OF INTERNATIONAL LAW
Introduction

My research in Australia explored the meaning and importance of self-determination from the perspective of 14 Indigenous respondents. Each respondent reflected upon self-determination in the context of the colonial experience of Indigenous peoples in Australia. This chapter begins with an examination of the meaning of self-determination from the perspective of research participants. In Part A, I explore the capacity of international law to address the colonial experience of Indigenous peoples. Part B, on ‘Aspects of the Colonial Experience’, proves that colonialism continues to influence all interactions between the Australian state and Indigenous peoples, such that developments up to the present have led to ‘the re-engagement of assimilationist-style policies’. In Part C, I consider the range of ‘experiments’ in self-determination of recent years, with particular focus on the Aboriginal and Torres Strait Islander Commission (ATSIC) and its successors. I conclude, in Part D, by setting out the necessary engagements of the international legal system, in facilitating the realisation of self-determination by Indigenous peoples in Australia.

Although I do not make concrete proposals for the future shape of self-determination for Indigenous peoples in Australia, I proceed on the basis that any self-determination solution will evolve within the framework of the Australian state. As in Chapter 6, the findings presented in this chapter are grounded in the data gathered through qualitative research interviews. None of the research respondents proposed any form of secession or independent Indigenous statehood, and it remains rare for other commentators to recommend such a path. Any future self-determination process must be generated and directed by Indigenous peoples themselves.

---

2 An exception is Michael Mansell, National Secretary of the Aboriginal Provisional Government. This association has claimed over 1,000 members around Australia, however, it is not a prominent movement and there is little evidence of recent activity. It advocates the establishment of a sovereign state for Aborigines, located on Crown land throughout Australia, and the right of communities to determine the laws applying to them on their country. See: Aboriginal Provisional Government, 'Towards Aboriginal Sovereignty' (1990) <http://www.apg.org.au/files/towards.pdf> at 18 May 2011. Mansell argues that Australia could recognise an Aboriginal nation, in a manner similar to the special status of Norfolk Island: Michael Mansell, 'Why Norfolk Island but not Aborigines?' in Barbara A Hocking (ed), Unfinished Constitutional Business? Rethinking Indigenous Self-Determination (2005) 82.
1. The meaning of self-determination from the perspectives of Indigenous peoples in Australia

Research interviews with Indigenous respondents in Australia began with a discussion of the international legal definition of self-determination. All 14 respondents engaged with the basic concept of self-determination, and each proceeded to apply the right in his or her particular context. Notions of independence, autonomy and equality were stressed by respondents in their engagement with the right of self-determination.

In exploring the meaning of self-determination, Irabinna Rigney asserts that the right ‘is for the members of a group to determine’.3 Mick Dodson agrees that the form that self-determination might take in a particular case is secondary to the consideration of whether claimant people are empowered to express the right as they wish.4 Irene Watson also emphasises the importance of translating the universal definition of self-determination into Indigenous-specific contexts. Watson regards the international legal definition of the right as ‘a useful tool to assert a place from which such groups can begin in asserting their different identities’.5

One unifying factor Rigney identifies in terms of self-determination, for groups of Indigenous peoples in Australia, is the importance attached to ‘the right for Indigenous peoples to be Indigenous’:

The right to be Indigenous is the right to practise, uphold, maintain, revive, reaffirm the rights of Indigenous cultures and languages to exist in Indigenous peoples into the future.6

Allied to this concept is Linda Burney’s argument that self-determination must entail recognition of the status of Indigenous peoples as First Peoples, and recognition of their survival in the face of dispossession and colonial domination.7

---

3 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
4 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
5 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
6 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
7 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
While respondents emphasised the importance of equality for Indigenous and non-Indigenous peoples in Australia, some distinguished equality from ‘sameness’. Self-determination for Indigenous peoples in Australia ought not to be seen as the entitlement to the same sorts of lives and cultural practices as other peoples in Australia; that is, ‘formal’ equality. Rather, Indigenous self-determination requires an ongoing commitment to ensuring that Indigenous communities may protect their distinctiveness, and so move towards the achievement of substantive equality.

Irabinna Rigney proposes a range of means by which self-determination and substantive equality might be achieved, including the rights of Indigenous people

...to be educated in their own languages in their schools, to have access to their own laws, to have access and rights to their own land and freedom of movement without restriction, to have the freedom to be represented by a voting representative of their people in an elected body, they should be attached and inserted into the dominant Australian economy...

Other factors central to self-determination proposed by respondents include the need to provide a space in which Aboriginal law might function, the right to be consulted and to give or withhold free, prior and informed consent to decisions that will affect Indigenous people, the requirement for a settlement – whether through a treaty or other agreement – between Indigenous peoples and the Australian government, and recognition of the fundamental significance of the connection between Indigenous self-determination and land.

One key aspect of Indigenous self-determination, emphasised by Irabinna Rigney and Paul Hughes, is the importance of education that reflects Indigenous cultures and

---

8 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
9 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
10 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006); Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006); Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
11 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
12 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
languages. This was also significant for Irish nationalist interview respondents. Hughes argues that the identity of Indigenous children can be destroyed by education that fails to teach them ‘who they are’. In this context, John Maynard reflects on his own experience of schooling during the 1960s. Maynard remembers being taught post-contact ‘British history’, within which there was nothing for an Aboriginal student to identify with; Indigenous people were represented either as ‘wild savages’ or ‘good’ blackfellas, like Jacky Jacky.

Some Indigenous respondents also reflected on the more individualistic aspect of self-determination. For example, Mick Mundine comments: ‘...self-determination is within yourself – being proud of who you are. Aboriginal people find that really hard because you have all these people knocking you down all the time.’ This reflection relates to the comments of Hughes and Rigney regarding culturally-sensitive education, in that each respondent emphasises the significance of self-awareness, self-esteem and pride – all values that have been undermined by Indigenous peoples’ experience of paternalism and colonialism.

**A. The Capacity of International Law to Promote Indigenous Self-determination**

Respondents in this research were united in the view that the visions of self-determination described above have not been achieved. In this section, I examine the historical and current capacity of international law to respond to the colonial experience of Indigenous
peoples. Although some positive developments have occurred in recent years, it must be acknowledged that international law has both authorised and perpetuated the colonial domination of Indigenous peoples, and failed to do enough to address the extent to which the contemporary experience of colonialism stifles Indigenous claims to self-determination.

1. The status of Indigenous peoples in international law

This section begins with a brief overview of the historical position of Indigenous peoples under early international law. I then consider the role of international law in authorising the mass dispossession of Indigenous peoples through colonialism. The third part of this section describes the position of Indigenous peoples within the contemporary human rights framework, with particular focus on the new Declaration on the Rights of Indigenous Peoples. In the final part, I discuss the stifling impact of the external and internal categorisation of self-determination. I conclude that the international legal system could do more, based on the text of the new Declaration, to empower Indigenous peoples in Australia and elsewhere to realise fully their rights to self-determination.

(a) The historical position of Indigenous peoples under international law

In the late fifteenth century, Indigenous peoples in various parts of the globe began to encounter Europeans for the first time. These explorers, and later missionaries and settlers, fundamentally changed the ways of life, relationships with land, and degrees of autonomy of Indigenous communities wherever they encountered them. As colonial expansion became a key focus of the emerging European powers, a law of nations or international law developed, and from its origins that law has reflected a concern with the relations between states and Indigenous peoples and their lands.

In the sixteenth century, early influential commentators on modern international law gave some acknowledgment to the distinct status of Indigenous communities. Dominican priests and legal theorists Bartolomé de las Casas and Francisco de Vitoria acknowledged the humanity of the Indigenous peoples of the Western hemisphere and challenged, to

some extent, the brutality of the Spanish colonisation. Conceiving of the Indigenous peoples of the Americas as capable of reason, early international legal theorists like Vitoria and Hugo Grotius rejected the claims of Spain and the Vatican that land could be acquired through discovery alone. Rather, discovery only gave a colonial power the option to acquire territory if the land was \textit{terra nullius}.21

Early international law explored the relations between colonial states and Indigenous peoples in relation to the acquisition of territory, and was concerned to ensure that territory occupied by Indigenous peoples was acquired according to principles justified by natural law. Colonial powers were able to gain title to territory that was \textit{terra nullius} through occupation. This involved a demonstration of possession, for example by planting a flag on a given territory, along with the establishment of some form of administration over the territory. Importantly, as was recognised by the International Court of Justice in the \textit{Western Sahara} case, the State practice of the relevant period [1884] indicates that territories inhabited by tribes or people having a social and political organisation were not regarded as \textit{terrae nullius}. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of \textit{terra nullius} by original title but through agreements concluded with local rulers.

In strict legal terms, then, the doctrine of cession was established as the more appropriate means of acquiring territory occupied by Indigenous peoples. Cession involves the transfer of sovereignty over territory from one sovereign to another, usually through a treaty. British colonists represented the Treaty of Waitangi (1840), an agreement between British representatives and Maori of Aotearoa/New Zealand, as an expression of

\begin{footnotesize}
\begin{enumerate}
\item S James Anaya, \textit{Indigenous Peoples in International Law} (1996), 10. For example, Vitoria noted that the Indigenous peoples of the Americas ‘possessed true public and private dominion’, such that the Spanish could not claim the territories ‘by right of discovery’: Francisco de Vitoria, ‘On the American Indians (De Indis), Question 2, Articles 3-5’ in \textit{Francisco de Vitoria: Political Writings} (1991)
\item S James Anaya, \textit{Indigenous Peoples in International Law} (1996), 12.
\item That is, land belonging to no one. See: \textit{Western Sahara Opinion}, ICJ Rep 1975 12, International Court of Justice
\item \textit{Netherlands v United States (Island of Palmas case)} (1928) 2 RIAA 829
\item \textit{Western Sahara Opinion}, ICJ Rep 1975 12, International Court of Justice
\item Donald K Anton, Penelope Mathew and Wayne Morgan, \textit{International Law: Cases and Materials} (2005), 98.
\end{enumerate}
\end{footnotesize}
this more ‘enlightened’ approach.26 Maori signed a Maori-language text of this treaty, which yielded governance, while retaining full Maori chieftainship over lands and other treasured possessions.27 In contrast, the British relied on and enforced an English-language text of the treaty, which regarded Maori as having ceded full sovereignty to the Crown and a right of pre-emption to purchase land for sale, while retaining possession of traditional lands and gaining status as British subjects.28 In the earlier colonisation of Australia, the First Fleet commanded by Captain James Cook claimed title on the basis of ‘discovery’ of terra nullius. Although Cook’s orders had been to acquire the territory with ‘the consent of the natives’, he did not regard the Aboriginal people he encountered at Botany Bay as capable of giving consent to effect cession.29

As the colonial era progressed, the concept of the nation state developed and became essential to the modern international legal system. The Peace of Westphalia, of 1648, brought an end to the Thirty Years War in Europe, and is typically described as the point of origin of the modern nation state.30 The parties to this treaty gained sovereignty within their own territorial boundaries, and from this point the independent sovereign state became the primary and dominant legal person in the international legal framework.31 Anaya recognises that the development of international legal theory in the sixteenth and seventeenth centuries emphasised the natural law rights of states and of individuals, whilst marginalising ‘the rich variety of intermediate or alternative associational groupings actually found in human cultures’, including Indigenous peoples.32

The notion of a state, as developed by the early theorists of the international legal system, is Eurocentric and based on forms of organisation which emphasise exclusive territorial

30 Donald K Anton, Penelope Mathew and Wayne Morgan, International Law: Cases and Materials (2005), 43-44.
31 Donald K Anton, Penelope Mathew and Wayne Morgan, International Law: Cases and Materials (2005), 44.
integrity and a hierarchical authority structure. In contrast, traditional Indigenous societies have tended to organise themselves according to kinship and tribal connections, and have maintained an attitude to land which emphasises custodianship and spiritual connection rather than ownership and exploitation.

(b) International law, colonialism and the authorisation of dispossession

The development of international law in the late nineteenth and early twentieth century was characterised by a shift from natural law theory to positivism. In this period, international law was recast as the law between nations, deriving its authority from their consent, rather than a law above nations based on some source of ‘natural’ values. The earlier acknowledgment of Indigenous peoples as rights-holders gave way to a positivist focus on the sovereignty of the state, and international law came to legitimise colonisation and the dispossession of Indigenous peoples. By this time, powerful states had come to harness international law as a tool to justify their colonial enterprises and entrench European values in the international legal system. As sovereign equals in the international legal system, states had the power to make positive law confirming the validity of their dispossession of Indigenous peoples.

The international legal community came to regard itself as an association of ‘civilized humanity’, a category which included states possessing European modes of governance and sedentary lifestyles. Indeed, according to Thornberry:

Indigenous groups entered the twentieth century with hardly a remnant of any former ‘subject’ status in international law. Their treatment reflects, in a striking manner, the racist and hierarchical assumptions about the lack of value in

---

35 Fred Tanner, ‘Land rights, Native Title and Indigenous land use agreements’ in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), Indigenous Australians and the Law (2nd ed, 2008) 147, 149.
39 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009), 297.
particular ‘undeveloped’ or ‘primitive’ cultures and the attempt to extinguish or ‘modernize’ them.\textsuperscript{41}

In Part B of this chapter, I consider how this attitude was reflected in the ‘protection’ and ‘assimilation’ laws and policies in Australia.

International judicial decisions of this period did not countenance the possibility that Indigenous sovereignty continued in territories that had been colonised; instead, sovereignty achieved by states through colonial processes was accepted as self-evident.\textsuperscript{42} In this context, Anghie has argued that it was through colonialism that international law became universal; colonial powers exported what they had determined to be the universal law of nations to those territories which they occupied and exploited, regardless of whether they had been already occupied by non-European peoples.\textsuperscript{43} The acquisition of territory by conquest, or through treaties formed with Indigenous peoples in unconscionable terms, was legitimised by a system of law that regarded Europeans as civilised and Indigenous peoples as backward and inferior.\textsuperscript{44}

Having shifted its focus wholly to the relations between states, international law came to regard the position of Indigenous peoples as a matter within the exclusive jurisdiction of the state in which they resided. The ‘interior realm of Western states (and of course their colonies)’ became ‘immune from international scrutiny’.\textsuperscript{45} In Part B of this chapter, I consider the devastating effects of the abandonment by international law of Indigenous peoples to the jurisdiction of the Australian state.

\textit{(c) Indigenous peoples and the contemporary human rights framework}

The period following the Second World War was critical in the development of modern international law. The horrors of that conflict prompted a reflection on the capacity of international law to respond adequately to potential future conflicts. Indeed, Europe’s

\textsuperscript{41} Patrick Thornberry, \textit{Indigenous Peoples and Human Rights} (2002), 332-333.
\textsuperscript{42} \textit{Island of Palmas (United States v Netherlands)}, II R. Int'l. Arb. Awards 831 (1928), \textit{Legal Status of Eastern Greenland (Denmark v Norway)}, 1933 PCIJ (ser. A/B) No. 53.
\textsuperscript{44} Antony Anghie, \textit{The Evolution of International Law: colonial and postcolonial realities} (2006) 27(5) \textit{Third World Quarterly} 739, 745.
claim to being ‘civilised’ and morally superior was brought into question. As a result, a renewed focus on the value of humanity became evident, as expressed in the Preamble to the UN Charter:

We the peoples of the United Nations determined
... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ...

have resolved to combine our efforts to accomplish these aims.

Following the establishment of the United Nations, international law has progressively given greater acknowledgment, through treaties, non-binding international agreements, and international and domestic judicial decisions, to the rights and interests of Indigenous peoples.

The first instrument of international law specific to Indigenous peoples was adopted by the International Labour Organisation (ILO) in 1957. Convention 107, the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, responded to concern over the disadvantaged social and political position of Indigenous peoples and their marginalisation from their national communities. This Convention promoted equality and non-discrimination and warned against assimilation. It also called for the recognition of Indigenous rights over traditional lands.

47 Charter of the United Nations preamble
49 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959)
50 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959), Preamble.
51 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959), Article 2.
52 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959), Article 11.
While Convention 107 was important as a first step towards international legal recognition of the rights of Indigenous peoples, it was also limited in its capacity to promote equality. The Convention was expressed in sometimes paternalistic language, reflective of the limited participation of Indigenous peoples in its drafting. For example, under Article 2:

 Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries. 53

This focus on the value of integration into an overall national community, and the use of the term ‘populations’ rather than ‘peoples’, fails to recognise the permanency or the unique and distinct status of Indigenous peoples.

In 1989, Convention 107 was replaced with ILO Convention 169, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, which emphasised the importance of the participation of Indigenous peoples in policies and programs designed to promote their human rights. 54 Increasingly powerful Indigenous advocacy at the international level forced the international community to begin to adapt its attitude concerning the position of Indigenous peoples in relation to states. 55 This Convention has been ratified by 20 states. 56 Convention 169 permits the use of special measures, or positive discrimination, to safeguard the property, environment and cultures of Indigenous peoples. 57 It is the only binding treaty in force applying specifically to Indigenous peoples, and as such makes a significant contribution to international law. Although it is only binding on the states parties, it has had some influence on policy development in other states and judicial decisions of international and domestic courts. 58

---

53 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959), Article 2, emphasis added.
55 S James Anaya, Indigenous Peoples in International Law (1996), 47.
56 See <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> at 1 October 2010
57 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959), Article 4
58 Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and others v. the Attorney General of Belize and others, Judgment of October 18, 2007, Supreme Court of Belize; Yakye Axa Indigenous Community vs. Paraguay, Judgment of June 17, 2005, Merits, Reparations and Costs, Inter-American Court of Human Rights; No. 020-2000-TC, Ernesto López Freiré et al. v. President of the
Article 1 of the ICCPR and ICESCR, confirming the right of all peoples to self-determination, applies to Indigenous peoples. The right to self-determination is expressed in universal language in this provision. However, over time, it has been acknowledged that universal expression does not necessarily produce universal realisation; Indigenous peoples do not enjoy the right to self-determination equally with other peoples. It took the international community over two decades to draft and accept, through a resolution of the General Assembly, an Indigenous-specific rights statement. This document, the Declaration on the Rights of Indigenous Peoples (2007), serves as an acknowledgement that the rights of Indigenous peoples require specific protection in international law.

(i) The United Nations Declaration on the Rights of Indigenous Peoples

In Chapter 6, I discussed the position of Irish nationalists in relation to the international legal system, and noted that Irish self-determination activists have typically avoided the international forum in the belief that it provides minimal scope for the assertion of their claim. In contrast, Indigenous peoples have frequently turned to the international forum as a site for asserting self-determination, due to their minimal power within their administering states, the tendency of states to refuse to recognise Indigenous rights to self-determination, and because cooperative action at the international level strengthens Indigenous claims to self-determination.

Perhaps the most significant achievement to date of Indigenous international advocacy has been the adoption of the Declaration on the Rights of Indigenous Peoples. This non-binding resolution of the General Assembly is important because it acknowledges that individualistic human rights protection has failed to protect the rights of Indigenous peoples and communities. The Declaration was compiled largely from rights statements already existing in general human rights law, however, it places emphasis on the barriers faced by Indigenous peoples in seeking the full realisation of those rights.

Republic and President of the National Congress, Judgment of November 21, 2000, Constitutional Court of Ecuador.


60 Peter Bailey, The Human Rights Enterprise in Australia and Internationally (2009), 713.

The evolution of the Declaration is testament to the long-term and deep commitment of Indigenous peoples around the world to promote the special recognition of Indigenous rights under international law. In 1982, the United Nations Economic and Social Council (ECOSOC) established the Working Group on Indigenous Populations. From 1985 to 1993, the Working Group, in consultation with Indigenous peoples from around the globe, developed the draft Declaration on the Rights of Indigenous Peoples. Following the announcement of the first ‘International Decade of the World’s Indigenous People’ (1995-2004), the Working Group’s draft was taken up by the United Nations Human Rights Committee, which established its own Working Group on the Draft Declaration. This Group met 11 times and made slow progress, due to the resistance of some states to the explicit protection of Indigenous self-determination in the Draft Declaration.62

The development of the Declaration was given much greater impetus following the establishment in 2000 of the UN Permanent Forum on Indigenous Issues.63 This resulted from a recommendation of the 1993 World Conference on Human Rights, which concluded that states and the international community were responsible for ensuring respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.64

The Permanent Forum is an advisory body of ECOSOC, responsible for making recommendations on Indigenous issues, including social, cultural, environmental and human rights issues. The 16 member Forum, comprising independent experts from a range of states, is responsible for ensuring the coordination of various UN programs relating to Indigenous peoples.

In 2006, the UN Human Rights Council finally voted by majority to adopt the UN Declaration on the Rights of Indigenous Peoples and recommend its adoption by the General Assembly.65 On 13 September 2007, the General Assembly adopted the

---

Declaration, with 143 votes in favour, four against, and 11 abstentions.\footnote{United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007)} The Chair of the UN Permanent Forum on Indigenous Issues welcomed the Declaration as the first UN resolution drafted by the rights-holders themselves, and as a new foundation for the advocacy, advisory and monitoring work of the Permanent Forum.\footnote{Victoria Tauli-Corpuz, Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples, 13 September 2007, 61st session of the UN General Assembly

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007), Articles 1 to 5.} The initial provisions of the Declaration confirm that Indigenous peoples are equally entitled to all rights contained in universal human rights law, that they are entitled to be free from discrimination in the exercise of their rights, that Indigenous communities have the right to self-determination, that self-determination includes a right to autonomy and self-government, and that Indigenous communities may maintain distinct identities while also participating fully in the wider society.\footnote{United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007), Article 8.\footnotemark[3] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007), Article 19. United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007), Article 26.} Subsequent articles elaborate on these provisions, for example, by prohibiting assimilation and the destruction of Indigenous culture,\footnote{Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006) ; Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).} and by giving special protection to rights to practise and revitalise Indigenous cultures,\footnote{To own, use and develop traditional Indigenous lands and resources, among other rights.} to be consulted and given the opportunity to give free, prior and informed consent to government decisions affecting Indigenous rights,\footnote{Peter Bailey, The Human Rights Enterprise in Australia and Internationally (2009), 719. See also: Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006) ; Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).} and to own, use and develop traditional Indigenous lands and resources,\footnote{Among other rights.} other rights.

Only four states voted against the adoption of the Declaration by the General Assembly in 2007. These were Australia, Aotearoa/New Zealand, Canada and the United States. The protection of the right of Indigenous peoples to self-determination in the Declaration was the key ‘sticking point’ for these states.\footnote{Triggs notes that the applicability of self-determination to Indigenous peoples has been controversial, ‘because historically it has
been equated with the decolonisation process and with an absolute right to form an independent state’. 74 The conservative Howard government in Australia rejected the Declaration, with Indigenous Affairs Minister Mal Brough arguing: ‘What it does is it provides rights to one group of Australians over all else.’ 75 In the Senate debate prior to the government’s decision to reject the Declaration, Liberal party Senator Mathias Cormann said:

...we are quite appropriately concerned that references to [self-determination] in the current text could be misconstrued as conferring the right of secession upon indigenous peoples.76

On 3 April 2009, the subsequent Labor government gave its support to the Declaration.

Although it is a newly-adopted instrument, the Declaration has already produced some positive effects. McCorquodale calls the drafting process of the Declaration ‘revolutionary’ in that it enabled Indigenous representatives to participate at an almost-equal extent with UN member states.77 Before its adoption, the Draft Declaration was cited to support the recognition of Indigenous rights and status in domestic courts. 78 In 2010, the Queensland Court of Appeal cited the Declaration as part of the body of international law on human rights to which Australia is a party, and which ought to influence domestic interpretations of the human rights obligations of the Australian state to Indigenous peoples.79

The Declaration is of symbolic significance to Indigenous peoples because it gives them the title of ‘peoples’. Earlier legal statements and various Indigenous UN bodies have used terms such as ‘populations’, ‘people’ and ‘Indigenous issues’ to avoid the term ‘peoples’ and its connection to the right of self-determination. As Tom Calma recognised,

76 Commonwealth, Parliamentary Debates, Senate, 10 September 2007, 62 (Mathias Cormann, Senator for Western Australia)
78 Cal v Attorney-General (Claim 121/2007), Supreme Court of Belize, 18 October 2007, Inter-American Court of Human Rights, Case of the Saramanka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2007, Ser C no 173.
Indigenous peoples ‘have been fighting for the letter ‘S’ in the United Nations for at least thirty years’. The recognition of self-determination in the Declaration thus represented a significant shift on the part of states, which as recently as 1989 had insisted on the inclusion of a limiting clause in ILO Convention 169 to avoid the application of self-determination to Indigenous peoples.

It is clear, however, that the Declaration is limited in its capacity to promote Indigenous rights, including self-determination. Although Indigenous peoples are one of the most prominent ‘minority’ groups within the international legal system, having recently gained greater powers of participation, their capacity to influence international law remains limited. It took over 20 years of advocacy to achieve a non-binding Declaration of Indigenous rights. Some Indigenous commentators regard the non-binding status of the Declaration as a failure. According to Irene Watson, the Declaration was ‘watered down to nothing more than a statement of good intentions’. Binding multilateral treaties have been adopted to offer specific rights protection to other groups, including women, children and people with disabilities, however, the protection of Indigenous rights is not enforceable.

Notably, when Australia agreed to adopt the Declaration, Indigenous Affairs Minister Jenny Macklin emphasised the non-binding nature of the Declaration: ‘While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to.’ The federal government does not have any plans to amend existing laws or draft new laws to bring the provisions of the Declaration into effect in Australian law. This position demonstrates that the Australian state, regardless of its agreement to the Declaration, considers itself free to act in contravention of its provisions if this is considered necessary for domestic political reasons.

---

83 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
2. The role of the ‘internal’ self-determination proposal as a means of stifling contemporary claims

In Chapter 6, I raised the opposition between the categories of internal and external self-determination as an unjustifiable limiting factor in relation to the claim of Irish nationalists. In that context, the opposition is unwarranted because a change in sovereignty over the North of Ireland is permitted through the Good Friday Agreement, and because the particular colonial experience of the nationalist community warrants special attention in the context of its self-determination claim. In contrast, the opposition of internal and external self-determination does not appear to be as significant an issue for Indigenous Australian claimants. This is because, aside from marginal and minority views, claims for self-determination from Indigenous peoples in Australia are not claims to independent statehood.

However, the categorisation of self-determination as either external or internal is rejected by Indigenous claimant peoples. To assert that Indigenous peoples are entitled only to a defined and limited category of self-determination denies their equal entitlement to the right. It is a patronising position which appears designed to assuage the concerns of states to protect their sovereignty and territorial integrity. Mick Dodson explains the context in which this problem arises:

...there’s an assumption by states that the right can only be exercised in a particular way, namely that self-determination means nation-statehood…I think that the problem with some nation states about agreeing to recognise the right for Indigenous people assumes that there is only one expression, whereas overwhelmingly Indigenous people are saying ‘we don’t think it’s very wise in our situation to choose sovereignty in the sense of statehood’.

This categorisation also reflects the incorrect notion that the ‘peoples’ of the world are limited to those groups that have organised themselves as sovereign, independent states. There are 500 or more Indigenous peoples in Australia, and each has the right to exercise...

---

86 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
self-determination in appropriate ways.  

Flexible and context-specific self-determination solutions are required to account for the varying needs and aspirations of different Indigenous peoples in Australia.

Further, Indigenous peoples have argued ‘that it would be racist to deny them the right to self-determination on the basis that they were no longer “blue-” or “salt-water” colonies...’  

Although Indigenous claimants generally do not seek independent statehood, they often call for recognition of continuing Indigenous sovereignty.  

For example, in explaining why she prefers the term ‘sovereignty’ to the term ‘self-determination’, Irene Watson comments:

> I suppose sovereignty is the term that’s used by states, and it invokes the external as well as the internal capacity to be politically autonomous ... By internalising the character of self-determination the concept is turned on its head and negates the real possibility of autonomy. It keeps people as players within colonial paradigms, subjects of a colonial political framework, with the illusion of this recognition of self-determination...  

If exercises of self-determination are constrained by an internal categorisation, this may authorise states to continue to reject the notion that sovereignties of different kinds may co-exist.

**Conclusion**

The Declaration on the Rights of Indigenous Peoples is important, because the ‘[r]ecognition of self-determination is a vital step in a legal process of decolonising the relationship of Indigenous peoples and states’.  

However, the capacity of the Declaration to promote the realisation of self-determination by Indigenous peoples is dependent on the will of the international community and its member states, as the Declaration is non-

---

88 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).

89 Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (2005), 121.

90 Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009), 18-19, Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006), Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).

91 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).

binding. In order to avoid the ‘recolonisation’ of Indigenous peoples, international law must now build on the foundations set by the Declaration on the Rights of Indigenous Peoples. Indigenous peoples must be empowered to develop self-determination solutions not limited by externally-imposed categories of ‘internal’ or ‘external’ self-determination.

B. Aspects of the Historical and Contemporary Indigenous Experience of Colonialism in Australia

If Indigenous peoples are to be empowered to realise self-determination, their colonial experiences must first be addressed. This section focuses on those aspects of the colonial experience cited by interviewees in support of Indigenous claims to self-determination. It is not a comprehensive analysis of the colonial experiences of Indigenous peoples since European settlement; such an analysis is beyond the scope of this thesis, and has been the subject of numerous other commentaries.93 In Part 1, I consider aspects of the relationship between Indigenous peoples and the Australian state, with focus on settlement, dispossession, and legal encounters over land. Part 2 explores the challenges of racism and discrimination. In Part 3, I demonstrate that the cultural rights of Indigenous peoples in Australia are not yet adequately protected, particularly in relation to Indigenous languages.

1. Indigenous peoples and the Australian state

(a) ‘Settlement’ and subsequent dominance

The colonial nature of the relationship between the Australian state and Indigenous peoples is evident in the fundamental disagreement about the nature of the acquisition of Australian territory by Britain. Australia has been described as having been ‘settled’ by Europeans, following its ‘discovery’ by Captain James Cook and the crew of the Endeavour in 1770.94 ‘Settlement’ is a term that has been challenged by Indigenous peoples, some of whom have referred to the acquisition of sovereignty in Australia by the

---

Crown as an ‘invasion’. The reliance on the doctrine of *terra nullius* in the colonisation of Australia ‘was part of a colonial world view which classified peoples in terms of a hierarchy of races with Indigenous peoples at the bottom of the hierarchy’. The Australian courts continued to endorse the notion of a hierarchy of races for a lengthy period beyond colonisation. The courts also rejected the notion that Indigenous peoples retained sovereignty following European occupation, as was made clear in the 1836 judgment in *R v Murrell*:

...the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilisation, and to such a form of Government and laws, as to be entitled to be recognised as so many sovereign states governed by law of their own.

In more recent years, some Indigenous claimants have asserted that there is room for the recognition of continuing Indigenous sovereignty in Australia, however, the courts have not accepted this as a possibility. In *Coe v Commonwealth*, Gibbs J found: ‘The contention that there is in Australia an Aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.’ According to this judgment, due to the absence of Western-style legal institutions among Indigenous peoples at the time of colonisation, Indigenous peoples may not now be regarded as bearing sovereignty or the capacity to relate to the Australian state as anything but citizens.

In arguably the most significant judicial encounter between Indigenous peoples and the Australian state, *Mabo (No 2)*, the High Court acknowledged that Australia had not been *terra nullius* prior to European occupation. However, the High Court found that the acquisition of territory and sovereignty over Australia was an act of state, not open to

---


97 See, for example, the decision in *Cooper v Stuart* (1889) 14 App Cas 286

98 *R v Murrell* Supreme Court of NSW (Forbes CJ, Dowling and Burton JJ) 11 April 1836, AILR 3(3) 1998 per Burton J at 416

99 *Coe v Commonwealth* (1979) 53 ALJR 403 per Gibbs J at 409


101 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at 41
question in a domestic court. An opportunity for recasting Australia as a legally pluralist state, comprising distinct nations of people, was rejected.

Following *Mabo*, in a summons heard in chambers and dismissed, Chief Justice Mason confirmed that the High Court does not consider Australian sovereignty to be justiciable:

*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a ‘domestic dependant nation’ entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.

Respondents in this research identified the dispute over sovereignty in Australia as an essential element of their continuing colonial experience. Tom Calma recognises that

…there was no offering up of the land by Aboriginal people, there were battles, and there are ongoing battles in relation to recognition of sovereign ownership of the land.

In the absence of a treaty or treaties between the colonisers and the Indigenous peoples, European settlement in Australia created a ‘totally misconstrued framework’ in which ‘mutually respectful relationships’ were impossible. As a consequence, states Irene Watson, Indigenous peoples remain

... dispossessed, disempowered and displaced within dominant states such as we are in Australia ... we are still in my view colonial subjects, even though we are not even recognised as that [at the domestic or international level].

---

102 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 32 and 79 per Brennan J and 78 and 95 per Deane and Gaudron JJ


104 *Walker v NSW* (1994) 182 CLR 45 per Mason CJ at 48

105 Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006).

106 Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006).

107 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
Respondents focused particularly on three subsequent eras in relations between Indigenous peoples and the Australian state, to demonstrate the continued experience of colonialism; the ‘protection’ era, the ‘assimilation’ era, and the ‘experiment’ with Indigenous representative governance.

(i) The protection era

By the late nineteenth century, the Australian colonies began to pass statutes which would empower what has come to be known as the protection era. Protection legislation was especially significant in terms of the relationship between Indigenous peoples and the emerging Australian state, as it created a comprehensive system of segregation and racial discrimination,\(^{108}\) the legacies of which continue to be felt by Indigenous communities throughout the country. The first protection statute was the *Aborigines Protection Act 1869* (Victoria), which created the post of Protector of Aborigines, and empowered the Protector to take custody of Aboriginal children and control where Aboriginal people lived and worked. It was followed by more comprehensive legislation in other states, including the *Aboriginal Protection and Restriction on the Sale of Opium Act 1897* (Queensland), which enabled the forced removal of Aboriginal people from their traditional lands onto reserves, the placement of Aboriginal children into service for non-Aboriginal masters and the prohibition of the practice of certain Aboriginal customs. The *Northern Territory Aborigines Act 1910* (South Australia) enabled the Protector to prohibit inter-racial marriage.

Such statutes were attempts to control the lives of Indigenous people, and deny them the freedoms owed to citizens of the state.\(^{109}\) The forced movement of Indigenous people onto reserves enabled the dispossession of their lands by European settlers, and perpetuated the myth of occupation according to *terra nullius*.\(^{110}\) Those required to live on reserves were categorised as ‘controlled wards’ of the state, and could only gain an exemption from reserve life by proving that they could ‘live like the white man’.\(^{111}\) Paul Hughes cites these exemption certificates as evidence of the colonial mindset pervasive in the protection era, which depicted Indigenous people as less than human and in need of

---


Larissa Behrendt states that, in seeking to control the lives of Indigenous people, the protection era stripped those people of their capacity to decide their own destinies about fundamental things, including where they could live, whom they could marry, what family life they could establish, their land and property entitlements, and where they could work.

The protection laws have long since been repealed, however, in some cases Australian governments continue to seek considerable degrees of control over the lives of Indigenous people. Irabinna Rigney regards the test for Indigeneity as an indicator of a contemporary colonial attitude, reminiscent of the protection era. Rigney notes that the test, which requires a person to identify as, be a descendant of, and be recognised by an Aboriginal community, fails to relate identity to language or country. This approach to defining Indigeneity violates the international legal principle that self-identification as Indigenous ought to be the key criterion, and again seeks to impose governmental control over a question that ought to be within the purview of Indigenous peoples themselves.

(ii) The assimilation era

The protection era was followed by a process of forced ‘assimilation’, a period which has left deep scars in the relationship between Indigenous peoples and the Australian state. Assimilation aimed first at biological or genetic absorption of Indigenous people into the dominant white society. Between 1910 and 1970, through the project of assimilation, between ten and thirty per cent of Aboriginal children were forcibly removed from their families, a phenomenon which has come to be known as the Stolen Generations. The laws which enabled the removal of these children operated on the assumptions that ‘full-
blood’ Indigenous people would die out, and that the future of ‘half-caste’ Indigenous people would be their ‘ultimate absorption’ into Australian society.121 Later, assimilation policies were expressed as targeting the cultural absorption of Indigenous people into mainstream white society, in order that they be accepted as part of a single nation.122

E P Mullighan, a barrister experienced in dealing with those affected by the removal of Aboriginal children from their families, recounts a story of the children of a European father and an Aboriginal mother. One day, many years ago, an officer of the Aborigines Protection Board in South Australia inspected the hands of the children and declared: ‘This one is white enough to learn.’ As a result of this decision, the children were removed from their mother, separated, and fostered to non-Aboriginal families in the city.123

In 1997, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families published its report ‘Bringing Them Home’. This was a highly significant moment for Indigenous peoples in Australia, in that it constituted belated acknowledgment of the severity and harmfulness of the long-term policy of forced child removal. Indeed, the Inquiry was persuaded that the assimilation process was genocidal. In a controversial finding, the Inquiry stated:

When a child was forcibly removed that child’s entire community lost, often permanently, its chance to perpetuate itself in that child. The Inquiry has concluded that this was a primary objective of forcible removals and is the reason they amount to genocide.124

---

124 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, ‘Bringing Them Home’ (1997), 190. The main author of this report, Sir Ronald Wilson, later regretted the use of the term ‘genocide’, on the basis that it created a distraction from the report’s significance. Wilson stated that, while it was accurate, the genocide label ‘gave the government an out because the first thing they could do was to reject the report on its finding of ‘genocide’’, and ‘come out fighting’: Wilson cited in Patrick Carlyon, ‘White Lies’, *The Bulletin* (Sydney), 12 June 2001, 26.
Irene Watson raises the experience of inter-generational trauma as an inhibiting factor preventing the recasting of the colonial relationship between Indigenous peoples and the Australian state. Central to this trauma is the experience of the Stolen Generations, their families and communities, and subsequent generations who have lost their kinship ties. Aden Ridgeway recognises that this trauma, fundamental to the colonial experience of Indigenous people, has left many individuals and communities ‘broken in some way’. For Irabinna Rigney, the legacy of the Stolen Generations is proof that Australia has not transcended its colonial past. Peter Yu states that this legacy is poorly understood by governments and the wider Australian community, evidenced by a lack of engagement with Indigenous peoples and their aspirations for self-determination.

(iii) Indigenous representative governance

Yu’s concern for the state of the relationship between Indigenous peoples and the Australian state is reflected in the issue of Indigenous representative governance. One fundamental characteristic of the continuing colonial experience is the way in which experiments in Indigenous governance have been abandoned or otherwise limited in recent years. Irene Watson cites the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), the ‘mainstreaming’ of Indigenous affairs within Commonwealth government departments, and the replacement of the discourse of self-determination with the discourse of self-management as evidence of the continuing colonial relationship between Indigenous peoples and the Australian state. Megan Davis argues that the ‘mainstreaming’ of Indigenous affairs renders Indigenous peoples ‘invisible’.

The democratic model of governance in Australia has also failed to challenge the colonial nature of the state’s relationship with Indigenous peoples. Indigenous peoples are disproportionately underrepresented in powerful positions in politics, the judiciary, and government administration, and Australian parliaments have done little to address this.

As Megan Davis comments:

125 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
126 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
127 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
128 Interview with Peter Yu (Sydney, 29 September 2006). Peter Yu is a Yawuru man and prominent Indigenous community activist, particularly in the area of land rights.
129 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
130 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006).
131 Marian Sawer, Norman Abjorensen and Philip Larkin, Australia: The State of Democracy (2009), 125.
When they announced the abolition of ATSIC, it drove me nuts when Amanda Vanstone responded to a question about representation by saying that Aboriginal people have got their local members to represent them…

Peter Yu argues that the dual-governance model required by the federal system – through which the Commonwealth and States/Territories share governmental responsibility for Indigenous affairs – can cause conflicts between tiers of government and result in minimal benefit being received by Indigenous communities from government funding arrangements. Tom Calma states that Aboriginal people in the Northern Territory believed that they were entitled to use the royalties from mining deposited into the Aboriginal Benefits Account at their own discretion, however, in recent years Territory government ministers have used funds from that trust for political programs, and Aboriginal people have no power to prevent this. Yu and Dodson also argue that governments exhibit a ‘controlling’ attitude towards Indigenous communities, and John Maynard finds that the ‘we know what’s best for you attitude’ prevents governments from listening to Indigenous voices. Aden Ridgeway describes such governmental attitudes as continuing to identify Indigenous people as ‘wards of the state’.

Several respondents found that this relationship plays out through government programs, some of which seek to make funding for social services contingent on certain behaviours or choices by Indigenous people. Peter Valilis, of the Aboriginal Housing Company in Redfern, found that ‘government uses funding like a bone, to keep people in line’. Mick Dodson gives the example of Indigenous land holders being encouraged to individualise title to that land, in return for funding. Linda Burney, formerly Minister

---

132 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)
133 Interview with Peter Yu (Sydney, 29 September 2006).
134 Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006).
135 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006); Interview with Peter Yu (Sydney, 29 September 2006).
136 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
137 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
138 Interview with Mick Mundine and Peter Vallis, Aboriginal Housing Company (Redfern, 8 August 2006).
139 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006). Sullivan confirms that the federal government is in a strong position to make funding contingent on its policy objectives: Patrick Sullivan, 'Reciprocal
for Community Services in the NSW government, regards the ‘practical reconciliation’ agenda as consisting only ‘of what governments are obliged to provide to all of their citizens anyway’.\textsuperscript{140} Aden Ridgeway criticises what he sees as a ‘bully attitude’, used ‘to force Indigenous people to comply with what the government wants, rather than working with communities to work out what they want’.\textsuperscript{141} I will discuss the issues of Indigenous representation and governance further in Parts C and D of this chapter.

(b) Legal encounters over land

Land is not a commodity for Indigenous peoples. Rather, they regard the land as the home of the ancestors, and the source of the stories and laws that have been passed down through the generations.\textsuperscript{142} Prior to the interruption of colonialism, Indigenous peoples practised systems of sustainable development on the land, to which they had physical and spiritual connections.\textsuperscript{143} Indigenous peoples regard themselves as custodians of their traditional lands, and they have consistently struggled against the dispossession of their lands and their capacity to exercise traditional obligations in relation to the land.\textsuperscript{144} It is because land bears spiritual significance for Indigenous peoples that the dispossession inflicted upon them through the colonial enterprise has been particularly devastating.

There have been multiple legal encounters over land between the Australian state and Indigenous peoples, particularly in more recent decades. This section does not attempt a survey of the body of law and commentary in this area, as this is beyond the scope of the thesis and has been covered comprehensively elsewhere.\textsuperscript{145} I focus on aspects of these legal encounters which were of particular significance to interview respondents. These include the barriers constructed by contemporary judicial and statutory interpretations of accountability: Assessing the accountability environment in Australian aboriginal affairs policy' (2009) 22(1) International Journal of Public Sector Management 57, 61.


140 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).

141 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).

142 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009), 172.

143 Elspeth Young, Aborigines, Land and Society (1992), 19.

144 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009), 171.

the meaning of land rights and native title, and the associated challenges for Indigenous people in interacting with the state through its legal system.

In *Mabo (No 2)*, the High Court rejected the notion of *terra nullius* as a legitimate basis for the acquisition of sovereignty in Australia. The consequence of this finding was the court’s conclusion that a type of ‘radical title’, which they termed ‘native title’, had survived the Crown’s acquisition of sovereignty. The High Court’s decision exposed some Crown land to native title claims by Indigenous peoples. It also made native title the most vulnerable of titles, inferior to all other titles since acquired through colonisation. Noel Pearson critiqued the High Court’s judgments on native title in *Mabo* and the subsequent *Wik* case as follows:

> The whitefellas keep all that is now theirs, the blackfellas get whatever is left over and there are some categories of land where there is co-existence and in the co-existence the Crown Title always prevails over the Native Title.

As Pearson notes, post-*Mabo* decisions of the High Court have established a notion of the coexistence of Indigenous and other land titles which places Indigenous title at the bottom of a hierarchy and leaves it vulnerable to extinguishment. This notion is ‘inconsistent with notions of equal, coexisting peoples’.

It is arguable that the High Court has become increasingly conservative in its interpretation of native title, and the promise of *Mabo* has been further diminished. One case that demonstrates this clearly is the *Yorta Yorta* case. This case concerned the requirement that proof of native title rests on continuing connection to the land through traditional laws and customs. At each stage of proceedings, the Yorta Yorta claimants’ assertion of native title failed, as their experience of colonialism had altered their ties to their traditional lands. The High Court required that the claimants show a substantially uninterrupted continuation of ‘the body of law and customs acknowledged and observed

---

146 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57 per Brennan J
147 Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009), 5.
148 *Wik Peoples v State of Queensland and Others* (1996) 187 CLR 1
152 *Native Title Act 1993* (Cth), s223(1).
by the ancestors of the claimants at the time of sovereignty’, in order that the Yorta Yorta’s contemporary laws and customs could be regarded as ‘traditional’. This finding was justified on the basis that the acquisition of sovereignty in Australia is not justiciable, and any rights and interests to be recognised by law must either stem from a sovereignty pre-existing colonisation, or emerge from the new sovereignty itself. Having suffered forced removal to reserves and ‘the suppression of indigenous languages and traditional practices’, the High Court found that the Yorta Yorta people ‘had ceased to occupy their lands in accordance with traditional laws and customs’.

A prominent subsequent native title claim was lodged by the Noongar people, who claimed native title over much of South-West Western Australia, including Perth. In a preliminary decision, in the Federal Court, Justice Wilcox concluded that the Noongar people met the test for establishing an ongoing connection to land including the Perth metropolitan area. The Full Federal Court later reversed this finding. Darryl Pearce, a respondent in this research and a lawyer representing Noongar claimants, notes the perverse argument of the Western Australian government in response to the Noongar claim:

The state’s contention in the Noongar claim was that, at the time of colonisation and not long after, we massacred you, we took your children away, we brought diseases to kill you – how can you possibly exist? They attempted to argue successfully that there were no Aboriginal people with traditional connection to Perth – that they had been successful at genocide.

Indeed, the Full Federal Court found that Noongar people had been forced from their traditional lands, thus requiring the alteration of their traditional laws and customs, but

---

153 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at 554 per Gleeson CJ, Gummow and Hayne JJ
155 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at 569 per Gaudron and Kirby JJ
156 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538 at 553 per Gleeson CJ, Gummow and Hayne JJ. In June 2011, former Prime Minister Paul Keating publicly supported an overhaul of native title legislation, commenting that the ‘onerous burden of proof has placed an unjust burden on those native title claimants who have suffered the most severe dispossession and social disruption’: Josephine Tovey, ‘Native title onus unjust: Keating’, Sydney Morning Herald (Sydney), 1 June 2011, 3.
157 Bennell v Western Australia (2006) 230 ALR 603
158 Bodney v Bennell (2008) 167 FCR 84
159 Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006). Darryl Pearce is a member of the Central Arrente people and a native title activist.
that the reason for this alteration (that is, the experience of colonialism) was irrelevant.\(^{160}\)

In effect, native title jurisprudence requires Indigenous peoples to prove that colonisation was not a calamity for them, because ‘the greater the injury, the smaller the bundle of surviving rights’.\(^{161}\)

An outcome of the continuing colonial experience is that Indigenous peoples must frame their legal claims in terms recognisable to the dominant legal system. As Irabinna Rigney recognises, the total dominance of Anglo-Australian law requires Indigenous peoples to assert self-determination:

...in the court system that has been fundamental in their own oppression... the same system that has dislocated them from their languages, their educations and their lands and knowledges. In some instances it was the Western law that actually took children from their mothers.\(^{162}\)

Rights assertions in such a forum carry a high level of risk for Indigenous claimants. For example, traditional owners may fail to meet the stringent test for proving native title, and consequently lose their claim to country,\(^{163}\) as occurred for the Yorta Yorta people. Whether Indigenous claimants are engaged in adversarial or conciliation processes with the state and its agencies, a significant power differential is inevitable.\(^{164}\)

Indigenous legal claimants are also required, particularly following the decision in *Yorta Yorta*, to translate their claims into the dominant language of Australian legal processes. Claims are heard in Western-style courtrooms, and may not be expressed in Indigenous languages. The adversarial style of proceedings may be culturally inappropriate for Indigenous claimants.\(^{165}\) According to Pearson, claimants must ‘surmount the most unreasonable and unyielding barriers of proof’ and ‘prove that they meet white

\(^{160}\) *Bodney v Bennell* (2008) 167 FCR 84 at [186] per Finn, Sundberg and Mansfield JJ

\(^{161}\) Joe Williams, Chief Judge of the Maori Land Court, ‘Confessions of a native judge - reflections on the role of transitional justice in the transformation of indigeneity’ (Speech delivered at the Native Title Conference, Perth, 5 June 2008).

\(^{162}\) Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).

\(^{163}\) Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).


\(^{165}\) Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
Australia’s cultural and legal prejudices about what constitutes “real Aborigines”. The system is ethnocentric, and has not demonstrated a shift ‘from a colonial to a post-colonial situation’.

2. Social inequality, racism and discrimination

The contemporary colonial experience of Indigenous peoples in Australia is also characterised by social inequality, racism and discrimination. These experiences have their roots in the wrongful acquisition of territory by Britain and subsequent settlers. As was particularly apparent in the assimilation era, the Western imperative to ‘civilise’ resulted ‘in widespread racism, violence, disease, dispossession, exclusion and disenfranchisement of Indigenous peoples across the country’.

In Australia today, Indigenous peoples rank at the bottom of multiple measures of disadvantage. For 2005-2007, the life expectancy for Indigenous men was 11.5 years below that of non-Indigenous men, and the gap for women was 9.7 years. Whereas five percent of non-Indigenous Australians were unemployed in 2008, 17 percent of Indigenous Australians were unemployed. In 2008, 30 percent of Indigenous people aged between 25 and 34 had completed school to Year 12, compared to over 70 per cent of non-Indigenous people of the same age. Also in 2008, 28 percent of Indigenous...
people lived in a household that had run out of money for basic living costs in the previous year.\textsuperscript{173} Indigenous children are seven times more likely than non-Indigenous children to be in out-of-home care.\textsuperscript{174} Indigenous people were, in 2008, 17.2 times more likely to be imprisoned than non-Indigenous people. While the imprisonment rate for non-Indigenous people reduced slightly between 2000 and 2008, the rate for Indigenous people increased by 34.5 percent in the same period.\textsuperscript{175}

It is also clear that the colonial experience is a fundamental cause of the massive disparities between the socio-economic positions of Indigenous peoples and the general Australian population. Larissa Behrendt cites the examples of extremely poor health outcomes, low literacy rates and inadequate housing to demonstrate that Indigenous peoples have not ‘been given the same opportunities as members of the dominant culture’.\textsuperscript{176} Irabinna Rigney agrees that the colonial experience is obvious in the high rates of incarceration and poor education outcomes.\textsuperscript{177} Linda Burney, a former minister of the NSW government, relates experiences of visiting rural communities which have almost entirely Aboriginal populations, ‘yet not one Aboriginal person owns a store, not one Aboriginal person is on local council, the employment rates are shocking’.\textsuperscript{178}

One outcome of colonisation has been the disempowerment of Indigenous communities, and consequently the diminished capacity of those communities to participate in decision-making processes that affect Indigenous people in ways which ‘other Australians take for granted’.\textsuperscript{179} This is entrenched as a result of the fact that ‘Indigenous peoples in Australia enjoy less formal political autonomy than in any comparable settler society in the world’.\textsuperscript{180} The disempowerment of Indigenous communities has arguably been

\textsuperscript{173} Australian Bureau of Statistics, 'The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples' (2010)
\textsuperscript{174} Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 69.
\textsuperscript{176} Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
\textsuperscript{177} Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
\textsuperscript{178} Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
\textsuperscript{179} Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
\textsuperscript{180} Stuart Bradfield, 'Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) \textit{Australian Journal of Politics and History} 80.
exacerbated by the Northern Territory Emergency Response, which I will discuss in Part C 4(a) of this chapter.

Australian governments have not properly acknowledged or addressed the contemporary colonial experience of Indigenous peoples. Few recommendations of the Royal Commission into Aboriginal Deaths in Custody, which reported in 1991, have been implemented.\(^{181}\) Self-determination was formally abandoned in Australian government policy in 1996,\(^{182}\) and has not returned to the political lexicon, despite the subsequent adoption of the Declaration on the Rights of Indigenous Peoples. The Aboriginal and Torres Strait Islander Commission – despite its faults, the only structure which has yet attempted representation of Indigenous voices at governance level – was abolished in 2005, with then Senator and Minister for Indigenous Affairs Amanda Vanstone likening the existence of parallel governance structures to a system of apartheid.\(^{183}\) Pearson cites such examples as evidence that Australia has not come to terms with its legacy of colonialism and dispossession:

There’s never been agreement by the country to say Indigenous peoples are entitled to maintain their distinct identities, to have their languages protected, to maintain the integrity of their relationship with their traditional lands…We’ve not reached that point where those things have been proclaimed as foundations for moving forward.\(^{184}\)

Australia is a settler society, situated on territory appropriated from the original inhabitants through colonialism. As I have discussed above, the colonial project in Australia was authorised by racist assumptions of the inferiority of Indigenous people. Racism is still ‘entrenched in the psyche of the Australian public’,\(^{185}\) however, the racist

---


182 John Herron, Senator and Minister for Aboriginal and Torres Strait Islander Affairs, '9th Annual Joe and Enid Lyons Memorial Lecture' (Australian National University, Canberra, 15 November 1996).


184 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).

origins of the contemporary society have not been acknowledged as part of the ‘national story’. Larissa Behrendt finds that the general Australian community has not adequately acknowledged the continuing experience of racism for Indigenous people, and argues that the necessary attitudinal change has not been promoted through symbolic national acts, for example a change of date for Australia Day, or constitutional acknowledgment of Indigenous peoples.

Mick Mundine expresses concern that the general Australian community takes human rights for granted, and is resistant to the idea that the rights of Indigenous people are so grossly abused. Larissa Behrendt regards this as evidence that Australia has not changed ‘psychologically’, but rather that the discussion of Indigenous rights claims tends to raise resentments in the wider community and the repetition of stereotypes like those which represent Indigenous people as lazy and disproportionately supported by government funding. John Maynard asserts that these stereotypes are promoted through the media, and manifest in ‘backyard gossip in this country about all the supposed extra entitlements of blackfellas…’ These perspectives from research participants demonstrate their continued experience of colonialism, and the degree to which they see racism as stifling their capacity to achieve self-determination.

Other respondents raised concerns regarding the ways in which mainstream Australian society selects aspects of Indigenous culture to promote, while marginalising or demonising other aspects. Paul Hughes gives the example of the teaching of ‘Aboriginal

186 Reena Bhavnani, Heidi Sofia Mirza and Veena Meetoo, Tackling the roots of racism: Lessons for success (2005), 143. See also Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
187 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
190 Interview with Mick Mundine and Peter Vallilis, Aboriginal Housing Company (Redfern, 8 August 2006).
191 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
192 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
spirituality’ in schools, noting with concern that this can be done in a non-reflective way, by people lacking the cultural capacity to determine which elements of culture ought to be incorporated and to what extent. Peter Yu argues that: ‘The general populace view of what an Aboriginal person should be is someone like Cathy Freeman or Adam Goodes’. In contrast, according to Darryl Pearce, governments only want to:

…talk to us about why we’re not getting our kids through school, why we’re all women-bashers or paedophiles, without talking to us about their lack of respect for our identity within Australia. They have no feelings for us in relation to how we fit in this country. What you really focus on is our art, maybe our dance, maybe where we’re getting places in relation to mining and native title, but you don’t celebrate us. It’s probably like Britain in relation to the Irish, the Scots, maybe the Welsh – that Celtic identity is acknowledged sometimes, but not celebrated at all.

For John Maynard, it is essential that the diversity of Indigenous peoples in Australia be recognised, and that each be empowered to express self-determination in their own way.

3. Cultural dominance

Indigenous peoples in Australia emphasise the essential relationship between self-determination and cultural rights. However, government approaches to Indigenous affairs tend to focus on social disadvantage, thus failing ‘to recognise the legitimacy and importance of culture and cultural identity’. Consequently, according to former Senator Aden Ridgeway, the state ignores cultural rights,

---

193 Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006).
194 Interview with Peter Yu (Sydney, 29 September 2006). Cathy Freeman is a famous Indigenous athlete and philanthropist, who won the Gold Medal in the 400m at the Sydney Olympic Games. Adam Goodes is a Premiership player with the Sydney Swans Australian Rules football club and a former member of the National Indigenous Council.
195 Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006).
196 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
198 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).

258
whether it’s about issues of land rights, native title, natural resources, protection of cultural identity through sacred sites, the way in which we deal with education within our school systems … nor do we do much to support languages… 199

One cultural issue that has not been adequately addressed by the Australian state is the significance of Indigenous languages, and the detrimental effect language loss and erasure has had on Indigenous peoples’ autonomy. At the time of contact between European colonisers and Indigenous peoples in Australia, there were at least 250 Indigenous languages spoken, with many more dialects.200 Language is so significant because it ‘embodies ways of thinking, words for place-specific things, culturally distinct concepts and knowledge’.201 Irene Watson regards the erasure of Indigenous languages through the colonial process as a form of ‘cultural genocide’. 202

Irabinna Rigney argues that the right of self-determination entails a right to exist as Indigenous, and that the true significance of Indigenous languages can only be acknowledged if they are recognised as official languages of Australia, along with English.203 Noel Pearson shares this concern that language erosion is characteristic of continuing colonial experience:

We do not have a commitment that Aboriginal languages in Australia should be preserved, maintained or revived. We are still heading down a colonial path of destruction of Aboriginal culture and languages. There are only very minimal gestures towards language maintenance, but it’s not the subject of national commitment, and Indigenous people are entitled to their languages – we should be doing everything in our power to preserve Australia’s Indigenous languages.204

199 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
202 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
203 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
204 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
Some respondents commented on this issue in relation to Indigenous children. The only international human rights treaty article which Australia has ratified is Article 30 of the Convention on the Rights of the Child. Article 30 states:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.\(^\text{205}\)

Irabinna Rigney notes that most Indigenous children in Australia cannot exercise this right, as they are taught exclusively through English.\(^\text{206}\) Paul Hughes raises the concern that the Australian education system generally is not culturally equipped to educate Indigenous children in their own cultures.\(^\text{207}\) In Peter Yu’s experience, Yawuru children of earlier generations were removed from their communities, losing their language as a consequence. Yu seeks self-determination for his people, in order that they may reinvigorate their language, cultural practices, and awareness of their obligations to their traditional lands.\(^\text{208}\)

Another area of significance to cultural rights is Indigenous cultural heritage. In order to maintain their cultures, Indigenous peoples need to own and control their cultural heritage, to protect their cultural expression from exploitation, to be recognised as guardians of cultural heritage, to be acknowledged as holders of intellectual property rights, to control the commercial use of Indigenous cultural property, and to be enabled to benefit commercially from the authorised use of Indigenous cultural property.\(^\text{209}\)

According to Linda Burney:

In the Aboriginal world, self-determination is so much a part of cultural expression, recognition of our status as first peoples, recognition of survival ...
Your essence comes from your Aboriginality, and that’s very much tied up with the notion of being able to make our decisions ourselves.\(^\text{210}\)

\(^{205}\) *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

\(^{206}\) Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).

\(^{207}\) Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006).

\(^{208}\) Interview with Peter Yu (Sydney, 29 September 2006).


\(^{210}\) Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
Darryl Pearce raises the concern that Indigenous cultural heritage is subject to exploitation, particularly where it may have economic benefit.\textsuperscript{211} Indigenous people have raised concerns that their arts and cultural expressions are particularly subject to appropriation, to be ‘marketed as an integral part of Australian identity’, in ways which may be culturally inappropriate, derogatory or offensive.\textsuperscript{212} It is also of concern that secret/sacred knowledge is subject to appropriation, and unauthorised use.\textsuperscript{213} As was demonstrated by the famous Hindmarsh Island Bridge case, the Australian legal system is poorly equipped to respond to the needs of Indigenous communities seeking to protect their secret/sacred knowledge from exposure.\textsuperscript{214}

\textit{Conclusion}

Irene Watson argues that there is a myth of decolonisation pervasive in Australian culture, and that this stands as an obstacle to an honest engagement with Australia’s colonial heritage and the ways in which the colonial experience is current for Indigenous peoples.\textsuperscript{215} I have explored respondents’ perspectives on the colonial experience of Indigenous peoples, with particular focus on European settlement, dispossession, legal encounters over land, racism and social inequality, and cultural dominance. In Part C, I critique the approach of the Australian state to Indigenous self-determination, particularly in relation to its experiments with representative governance for Indigenous peoples.

\textbf{C. Experiments in Self-determination for Indigenous Peoples in Australia}

In our interview, Wiradjuri woman and NSW MP Linda Burney explained her view of self-determination, and her perspective on the state’s attitude to the right:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{211} Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006).
\item \textsuperscript{214} \textit{Kartinyeri v The Commonwealth} (1998) 195 CLR 337. See also: Joanna Bourke, 'Women's Business: Sex, Secrets and the Hindmarsh Island Affair' (1997) 20(2) \textit{University of New South Wales Law Journal} 333 and Mark Harris, 'The Narrative of Law in the Hindmarsh Island Royal Commission' in Martin Chanock and Cheryl Simpson (eds), \textit{Law and Cultural Heritage} (1996) 115. In this case, a group of Ngarrindjeri women were unable to secure protection from the courts for the secrecy of their cultural heritage. Their interests were subordinated to the interests of non-Indigenous property developers.
\item \textsuperscript{215} Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
\end{itemize}
\end{footnotesize}
Self-determination is a way of being, it’s a principle that should inform everything. Now our federal government uses it to inform nothing, and I think there’s been a real roll-back in terms of the notion and practice of self-determination in Australia.\(^{216}\)

In this section, I demonstrate that, in the view of respondents, the Australian state has failed to approach the right of self-determination in good faith, or with an honest acknowledgment of the significance of the colonial experience for Indigenous peoples. The right has been referred to selectively in past government policy, however, it does not inform twenty-first century government approaches to Indigenous affairs.

In Part 1, I introduce respondents’ views on the legitimacy of Indigenous claims to self-determination. These are contrasted, in Part 2, with respondents’ perceptions of the degree to which Indigenous peoples currently enjoy the right in Australia. In Part 3, I consider ATSIC as the most prominent ‘experiment’ in self-determination to date. Finally, in Part 4, I consider post-ATSIC developments relevant to Indigenous self-determination in Australia. The way in which the Australian state has represented the right of self-determination for Indigenous peoples has been flawed and divorced from the true meaning of the right.

1. The legitimacy of Indigenous claims to self-determination

Respondents argued strongly that Indigenous claims to self-determination are legitimate. For example, Mick Mundine said:

> We should be treated like human beings, the colour of our skin shouldn’t matter…The sad thing is that we are the original people in this land, and we get treated like second class citizens…\(^{217}\)

The injustice of the fact that Indigenous peoples have not benefited from the wealth of Australia is heightened, according to Irabinna Rigney, by the fact that their contributions to the country’s development have been undervalued.\(^{218}\) Peter Yu believes that self-

---

\(^{216}\) Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).

\(^{217}\) Interview with Mick Mundine and Peter Valilis, Aboriginal Housing Company (Redfern, 8 August 2006).

\(^{218}\) Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
determination for Indigenous peoples would encourage a broader recognition of the value of Indigenous contributions to the country.\textsuperscript{219}

Irabinna Rigney expresses the legitimacy of the claim in assertive terms:

...no Indigenous nation in what is now called Australia has ever ceded sovereignty. So it’s a historical, indisputable fact, that Indigenous peoples are the sovereign communities or nations of this country called Australia. The other indisputable fact is the recognition by the High Court that Indigenous peoples were here prior to colonisation...\textsuperscript{220}

Peter Yu agrees that the status of Indigenous peoples as First Peoples in Australia supports their claims to self-determination,\textsuperscript{221} and Linda Burney regards realisation of the right as an essential means by which the survival of Indigenous peoples may be acknowledged and celebrated.\textsuperscript{222}

Mick Dodson draws an explicit link between the legitimacy of Indigenous claims to self-determination and Indigenous connection to the land:

...the country was forcibly taken from us. We didn’t agree to people coming here and taking our country from us. It was wrenched from us by violence, through the colonial process...\textsuperscript{223}

As Peter Yu recognises, the ‘distinct nature of our relationship to the land and its environment, and our inter-connectedness with that’, are fundamental justifications for Indigenous claims to self-determination.\textsuperscript{224} Self-determination, according to Darryl Pearce, would be an expression of the awareness of Indigenous peoples that they are ‘the right ones for country’ and that the land is essential to their identity.\textsuperscript{225}

The claims of Indigenous peoples in Australia to self-determination are legitimate, due to the historical and contemporary experience of colonialism. They are also legitimate

\textsuperscript{219} Interview with Peter Yu (Sydney, 29 September 2006).
\textsuperscript{220} Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
\textsuperscript{221} Interview with Peter Yu (Sydney, 29 September 2006).
\textsuperscript{222} Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
\textsuperscript{223} Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
\textsuperscript{224} Interview with Peter Yu (Sydney, 29 September 2006).
\textsuperscript{225} Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006).
because the right applies universally. The right does not simply apply to the general Australian community, to the exclusion of the distinctive and strong claims of Indigenous peoples. John Maynard argues that self-determination is ‘fundamental to belonging to this country’. This is because self-determination requires substantively equal treatment for all groups in Australian society, as proposed by the human rights approach discussed in Chapter 5.

2. The state of Indigenous self-determination in Australia

There was a stark contrast between respondents’ arguments in favour of Indigenous claims to self-determination, and their assessment of the degree to which the right is presently enjoyed. Irabinna Rigney reflects on the context in which many Indigenous Australians are asserting self-determination:

Indigenous peoples are in extreme poverty… Indigenous peoples are worried about their law, legal systems, and struggles for their right to self-determination, but the struggle can only come after the struggle for survival.

In other words, the substantively equal treatment required by self-determination is denied for Indigenous peoples in Australia, whose capacity to claim the right is diminished by their experience of inequality and dispossession.

Speaking as an historian, John Maynard expresses frustration at the lack of progress in terms of Indigenous self-determination. His research has revealed that ‘Indigenous voices have been discussing the issues, problems and possible solutions for all these years, but they’re always ignored…’ Indeed, Irene Watson argues that Indigenous people in Australia have been presented with a series of illusory forms of recognition of their right to self-determination, culminating in the establishment and then abolition of ATSIC. Aden Ridgeway reflects in similar terms on the degree to which self-determination has been realised in Australia:

---

226 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006); Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006).
227 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
228 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
230 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
231 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
I think at best it’s been a compromised form and it hasn’t really lived up to a full expression of Indigenous peoples’ right to make decisions about their cultural identity or their opportunities to sustain and maintain culture and identity.232

Linda Burney believes that self-determination will remain on the Indigenous agenda, ‘because it’s so much a part of what Aboriginal Australia is about’, however, she finds that the degree of practical application of the right – especially in terms of federal government policy – is ‘very grim’.233 Mick Dodson reflects on the parallel frustration of Indigenous legal claimants, when they are successful before the courts but then find that the government either appeals against a judgment in their favour, or changes legislation to weaken Indigenous rights.234

One of the most significant investigations of the circumstances of Indigenous peoples in contemporary Australia was conducted by the 1987-1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The RCIADIC established that disproportionate numbers of Indigenous people die whilst in custody. The key factor in this circumstance is the overrepresentation of Indigenous people in custody, which the RCIADIC concluded was primarily a result of ‘the disadvantaged and unequal position in which Aboriginal people find themselves in the society – socially, economically and culturally’.235 The RCIADIC made 339 recommendations to address the disadvantage experienced by Indigenous people in Australia.

But running through all the proposals that are made for the elimination of these disadvantages is the proposition that Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.236

232 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
233 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
234 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
In terms of the capacity of Indigenous peoples to claim self-determination, Paul Hughes notes that ‘…for the first time, now, in the history of our people, we have a collection of wisdom and experience across the generations which translates to the dominant society’. Peter Yu adds that high levels of Aboriginal land ownership, and the fact that the high birth rate among Indigenous people has led to a growing Indigenous youth, are capacities to be used in order to achieve practical expressions of self-determination:

Hopefully…[we can establish a] culture-based type of economy – which is having people back on their country, using it, and maintaining important cultural standards while using Western science and contact – then we can grow wealth, generate capital, and give ourselves the opportunity to put in place…a greater impetus to manage the land better and make decisions about cultural management.

Such capacities are essential for Indigenous peoples to exercise self-determination in Australia. However, as I discuss in the following sections, the Australian state remains resistant to the empowerment and self-determination of Indigenous peoples, despite the recommendations of the RCIADIC.

3. The Aboriginal and Torres Strait Islander Commission and governance

The most wide-ranging experiment with self-determination for Indigenous Australians, in the form of representative governance, was the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC was established by the Hawke Labor government in 1989. Its functions included policy and program development, advice to government on Indigenous affairs and the protection of Indigenous cultural heritage. ATSIC comprised a Board of Commissioners, who were appointed by the Minister for Aboriginal and Torres Strait Islander Affairs, and elected regional councils. The ATSIC Act divided Australia into 35 regions plus the Torres Strait. Regional councils were empowered to formulate regional plans for the advancement of their local Indigenous populations, cooperate in the implementation of these plans, to receive and pass on the views of Indigenous peoples in each region and to represent their interests to the Commission and

---

237 Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006).
238 Interview with Peter Yu (Sydney, 29 September 2006).
239 Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) s7.
240 Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) s27
241 Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) s91
to governments.\textsuperscript{242} The Australian Electoral Commission was responsible for conducting elections to the Regional Councils,\textsuperscript{243} in which the Aboriginal or Torres Strait Islander persons residing in each region were entitled to vote.\textsuperscript{244} Public service employees acted as bureaucratic support staff for ATSIC.\textsuperscript{245}

For many Indigenous people, ATSIC represented a significant development in terms of their capacity to exercise autonomy. For the first time, Indigenous communities had the opportunity directly to elect regional representatives to a national body. ATSIC had powers to liaise with all levels of government in the development of policy and the implementation of programs. The Commission also gained significant capacity to put forward Indigenous perspectives across a range of relevant policy areas through its strong links to government bureaucracy.\textsuperscript{246}

For a range of reasons, however, ATSIC was a seriously flawed experiment in Indigenous self-determination. It was a creation of government, and thus subject to political whim and ultimately abolition in 2004. The \textit{ATSIC Act} required ATSIC to serve two masters with divergent priorities; on the one hand it was responsible to government in its delivery of services and allocation of public funds, yet on the other hand it was responsible to the Indigenous voters who elected its Regional Councils. Some Indigenous critics were concerned that the voting process was flawed, causing detachment between the national board and regional communities.\textsuperscript{247}

A 2003 government review of ATSIC found that the national board was detached from the Regional Councils, such that the representative nature of the Commission was compromised.\textsuperscript{248} ATSIC also suffered from the public perception that it was its responsibility – and therefore its failure – to achieve significant improvement in

\textsuperscript{242} \textit{Aboriginal and Torres Strait Islander Commission Act 1989} (Cth) s94
\textsuperscript{243} \textit{Aboriginal and Torres Strait Islander Commission Act 1989} (Cth) s100
\textsuperscript{244} \textit{Aboriginal and Torres Strait Islander Commission Act 1989} (Cth) s101
\textsuperscript{245} \textit{Aboriginal and Torres Strait Islander Commission Act 1989} (Cth) s55
\textsuperscript{246} Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 282.
\textsuperscript{247} Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 281.
Indigenous social and economic circumstances. In reality, 85 percent of ATSIC’s budget was dedicated to two key programs in employment and housing and it never had responsibility for Indigenous health, nor did it have the capacity to develop or implement programs beyond the priorities determined for it by government. Despite these problems, however, the ATSIC Review did not advocate the abolition of the body; rather, it recommended changes to the representative structure and the strengthening of regional processes. The Review noted overwhelming support amongst Indigenous communities for the maintenance of a representative governance structure.252

However, in 2005, the conservative Howard government abolished ATSIC, on the basis that it represented a ‘failed experiment’ in self-determination: ‘We believe very strongly that the experiment of separate representation, elected representation, for Indigenous people has been a failure.’ In abandoning self-determination as a government policy in dealing with Indigenous affairs, the Howard government denied the existence of ‘an Indigenous polity’. In more recent times, supporters of a return to assimilationist-style policies have also labelled self-determination as a failure:

Self-determination created a wicked problem for Aborigines. Their lives were confined to the insular world of Aboriginal politics and public-sector provision.255

Indeed, the perception that self-determination itself was a ‘failure’ has been absorbed as an orthodox view within the mainstream Australian media. For example, writing in 2010 regarding the establishment of a new representative body for Indigenous peoples, The Australian declared:

---

249 Angela Pratt and Scott Bennett, ‘The end of ATSIC and the future administration of Indigenous affairs’ (Department of Parliamentary Services, 2004), 9-10.
250 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009), 280-3.
Aboriginal interests have not had a national representative body since ATSIC was scrapped in 2005, ending a failed 14-year experiment in indigenous self-determination.\footnote{256} According to Irene Watson, the colonial relationship between the Australian state and Indigenous peoples was evident ‘…in the abolition of ATSIC and the immense political mileage that was made in the process, by demonising the body and Aboriginal people’.\footnote{257}

As Behrendt, Cunneen and Libesman recognise, however, the Howard government sought to confuse government policies which had been labelled as ‘self-determination’ with self-determination as it exists as a right under international law.\footnote{258} Self-determination, in the international legal sense, ‘has never really been put into practice in Australia post-colonial contact’.\footnote{259} As it was expressed through the ATSIC ‘experiment’, self-determination was a policy involving the establishment of an elected Indigenous governance body – ATSIC – and direct funding to Indigenous communities and programs.\footnote{260} It did not entail recognition of Indigenous peoples as ‘separate nations or peoples’.\footnote{261} Indeed, ATSIC merely ‘flirted’ with self-determination, ‘without embracing principles of inherent Indigenous rights’.\footnote{262} Commentators have argued that the abolition of ATSIC was ideologically driven; the Howard government wished to eliminate ‘Indigenous representation from effective participation in government policy and program delivery’.\footnote{263}

The abolition of ATSIC reflected John Howard’s opposition to its establishment, which he justified with the argument that separate representation for Indigenous peoples in Australia was divisive:

\footnote{257 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).}
\footnote{258 Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 295.}
\footnote{260 Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 295.}
\footnote{261 Stuart Bradfield, 'Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) \textit{Australian Journal of Politics and History} 80, 88.}
\footnote{262 Stuart Bradfield, 'Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) \textit{Australian Journal of Politics and History} 80, 95.}
\footnote{263 Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 284.}
...if the Government wants to divide Australian against Australian, if it wants to create a black nation within the Australian nation, it should go ahead with its Aboriginal and Torres Strait Islander Commission (ATSIC) legislation ... Many commentators have pointed to the dangers of legislation which takes the principle of self-determination for Aborigines to the point of creating completely separate representative structures. ... The ATSIC legislation strikes at the heart of the unity of the Australian people.264

Following the abolition of ATSIC, the Howard government ‘mainstreamed’ Indigenous policy and programming services across a range of government departments. In 2011, Indigenous affairs are mostly subsumed within the broadly focused Department of Families, Housing, Community Services and Indigenous Affairs.

All interview respondents commented on the establishment and later abolition of ATSIC in the context of self-determination, however, opinions varied considerably in this context. Mick Mundine regarded ATSIC as ‘one big con-job’:

It was meant to be the voice of Aboriginal people at the government level but it never was. Every time they spoke out they got slapped down – that’s not independence. What Aboriginal people need is a very powerful independent body that speaks for them, not government.265

Noel Pearson similarly regarded ATSIC as an institution operating on the fringe; ‘an Indigenous affairs ghetto away from the main game’.266

Irabinna Rigney states that, while the government abolished ATSIC to minimise Indigenous self-determination, the dissolution of the body was driven by ‘an outcry among Indigenous peoples that their self-determination wasn’t being carried out by the leaders inside ATSIC’.267 Rigney complains that ATSIC was too centralised, and so failed to engage effectively at the local level or distinguish between the needs of geographically and culturally distinct Indigenous communities around Australia.268 Megan Davis finds

264 Commonwealth, Parliamentary Debates, House of Representatives, 11 April 1989, 1328 (John Howard, Leader of the Opposition)
265 Interview with Mick Mundine and Peter Valilis, Aboriginal Housing Company (Redfern, 8 August 2006).
266 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
267 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
268 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
that one of the problems with ATSIC was that it entrenched the patriarchal structure that dominates in politics generally, not only in the sense that fewer women were elected to the body than men, but also that programs benefiting men were favoured in funding terms. 269

However, Megan Davis mediates criticisms of ATSIC itself, to the extent that she recognises that ATSIC was a new and evolving structure, and that it had the potential to further promote self-determination if it had been reformed rather than abolished. 270 ATSIC was the most powerful collective voice for Indigenous peoples in Australia and, with its abolition, ‘that voice has been quieted and a focal point for the national identity of the Aboriginal people lost’. 271

Several respondents recognised that the ATSIC structure, as designed by the federal government, limited the capacity of the body to promote self-determination. Irene Watson argues that the government marketed ATSIC as a vehicle for self-determination, however, it replaced the term self-determination with ‘self-management’ in the Aboriginal and Torres Strait Islander Commission Act,272 demonstrating its concern to limit the body’s capacities. 273 Mick Dodson never identified ATSIC as an expression of self-determination, because the body and its structures were ‘thrust upon us by the government’. 274 Peter Yu agrees that ATSIC’s structure was ‘externally imposed’ and a ‘foreign construct’. 275

At the time of ATSIC’s abolition, the federal government promoted the view that its officers were corrupt and that it had misspent its resources. Then Prime Minister Howard said: ‘I don’t think the money has been wisely spent. ... The culture of favouritism and

269 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)
270 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)
272 Section 3(b) Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)
273 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
274 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
275 Interview with Peter Yu (Sydney, 29 September 2006).
nepotism that has surrounded that body has become notorious.\textsuperscript{276} Irabinna Rigney argues that this was a ‘smear campaign’, at odds with the fact that ATSIC was ‘fundamentally under-resourced’.\textsuperscript{277} John Maynard blames many of the failings of ATSIC on the degree to which the body was ‘constrained and controlled by government’.\textsuperscript{278}

Some respondents commented on the gaps left following ATSIC’s abolition. For example, Paul Hughes believes that activity on areas of concern, like education, has become fragmented without national structures to support it.\textsuperscript{279} Larissa Behrendt comments that, while ATSIC had problems, having no representative governance structure at all is hardly an improvement.\textsuperscript{280} Behrendt argues that the abolition of ATSIC has left Indigenous communities without regional, context-specific governance, and without a unified national voice.\textsuperscript{281} Aden Ridgeway characterises this as a ‘deafening silence’.\textsuperscript{282} Linda Burney expresses concern that there is now no advocacy structure, which prevents Indigenous people from connecting with government.\textsuperscript{283}

John Maynard notes that ATSIC, despite its failings, had ‘some great successes at community level’ which were overlooked when the federal government decided to abolish the body.\textsuperscript{284} ATSIC also, according to Linda Burney, had great symbolic value for Indigenous self-determination.\textsuperscript{285} Regardless of the weaknesses of ATSIC, its abolition created a gap in Indigenous representation which was left entirely empty for several years. It has been argued that the absence of an Indigenous representative structure assisted the Howard government in implementing the Northern Territory Emergency

\textsuperscript{276} Quoted in ‘End for ATSIC’, \textit{Koori Mail} (Lismore), 21 April 2004, 3.
\textsuperscript{277} Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
\textsuperscript{278} Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
\textsuperscript{279} Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006).
\textsuperscript{280} Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
\textsuperscript{281} Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
\textsuperscript{282} Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
\textsuperscript{283} Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
\textsuperscript{284} Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
\textsuperscript{285} Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
Response in 2007, a scheme which is demonstrably flawed in terms of its capacity to promote self-determination.\textsuperscript{286}

ATSIC was established as an element of the then Labor government’s policy of self-determination.\textsuperscript{287} As is clear from the critique of ATSIC by respondents in this research, the organisation did not bring about self-determination for Indigenous peoples. However, as the ATSIC Review suggested, reform was possible and this may have resulted in a better understanding of self-determination on the part of government. Instead, through the abolition of ATSIC, the Australian government rejected the rights agenda. The government also successfully promoted ‘a growing orthodoxy ... which assumes that what can be broadly described as a “rights based agenda” has failed Indigenous Australians’.\textsuperscript{288}

The abolition of ATSIC marked the final shift in government discourse from ‘self-determination’ to ‘practical reconciliation’. Then Prime Minister Howard stated that practical reconciliation entailed focus on improving living standards for all, acknowledging inter-related histories of Australian communities, while avoiding the apportionment of blame for past wrongs, and a mutual acknowledgment of the need to work together.\textsuperscript{289} Since the election of a Labor government in 2007, government discourse has again shifted, from ‘practical reconciliation’ to ‘closing the gap’. Again, this policy approach focuses on disadvantage, to the exclusion of the rights agenda.\textsuperscript{290} In the absence of a representative body, Indigenous peoples in Australia have reduced capacity to claim their rights domestically, or advocate for them in the international forum.\textsuperscript{291}


\textsuperscript{287} Tim Rowse, Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs (2000), 107.


\textsuperscript{289} John Howard, 'Practical Reconciliation' in Michelle Grattan (ed), Reconciliation: Essays on Australian Reconciliation (2000), 89-96.


\textsuperscript{291} Megan Davis, 'Self-determination and the demise of the Aboriginal and Torres Strait Islander Commission' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), Indigenous Australians and the Law (2nd ed, 2008) 217, 230.
Following the completion of interviews for this research, there have been several further developments relating to Indigenous affairs, and particularly to the issues of representation, governance and self-determination. In this section, I consider four recent developments which demonstrate persistent confusion at the level of government regarding the right of Indigenous peoples to self-determination, and how that right ought to be respected. In Part (a), I explore aspects of the Northern Territory ‘Intervention’. In Part (b), I briefly describe the short-lived experiment of the National Indigenous Council. Part (c) concerns the national apology to the Stolen Generations, and its relationship to Indigenous self-determination. Finally, in Part (d), I consider the National Congress of Australia’s First Peoples, established by Indigenous people in 2010.

(a) The Northern Territory ‘Intervention’

One of the most significant recent developments in relation to Indigenous self-determination in Australia is the Northern Territory Emergency Response (NTER), otherwise known as the Northern Territory ‘Intervention’. In 2006, the Northern Territory government established a Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. This was a response to widespread media reporting and public concern that there was a significant child sexual abuse problem in remote Aboriginal communities.292 The resulting 2007 report, ‘Ampe Akelyernemane Meke Mekarle: Little Children are Sacred’, attributed the problem of child sexual abuse to ‘social dysfunction’ in Northern Territory Aboriginal communities, and made 97 recommendations to government to tackle problems in the areas of government leadership, family services, health, police and prosecution dealings with victims, bail, offender rehabilitation, education, alcohol, community justice, employment, housing, pornography, gambling and cross-cultural practice.293 The report called for the empowerment of local communities to

lead themselves out of cycles of abuse, and emphasised the values of consultation, partnership and engagement between government and Indigenous communities and respect for human rights in the making and implementation of policy.

The conservative Howard government argued that remote Northern Territory communities are ‘sites of organised and endemic child abuse’, and this representation came to be seen as orthodox by mainstream Australia. Then Indigenous Affairs Minister, Mal Brough, justified the NTER legislation in his Second Reading speech by declaring that the Parliament was ‘confronted with a failed society where basic standards of law and order and behaviour have broken down’. The government relied on such depictions to declare a state of emergency, and consequently the ‘Intervention’ into Northern Territory Aboriginal communities. In ten days, 480 pages of legislation authorising the NTER was drafted and passed into law, with no consultation taking place between government and those subject to the new laws.

NTER measures included linking school attendance rates to parental welfare payments and children’s health checks, bans on alcohol in certain communities, obligatory internet filters on publicly owned computers, and compulsory five year government leases over some Aboriginal lands. Barrister Raelene Webb relates the story of an Aboriginal invalid grandmother who has devoted her life to supporting her family, and who has never drunk alcohol, yet who had her pension quarantined under the NTER because she lived on Aboriginal land subject to the NTER. This type of income management scheme removes agency from Indigenous people and echoes the era in which Indigenous living and working conditions were controlled by the state.

297 Commonwealth, Parliamentary Debates, House of Representatives, 7 August 2007, 10 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs)
299 Northern Territory National Emergency Response Act 2007 (Cth), ss 11, 26, 31 and 125
The NTER was based on race, applying only to prescribed Aboriginal communities in the Northern Territory. The *Racial Discrimination Act 1975* (Cth) (*RDA*) and Northern Territory anti-discrimination legislation were suspended to enable the government to implement these measures without legal challenge. This approach to the rights of Indigenous peoples was emblematic of a general willingness on the part of the former Howard federal government to use its constitutional ‘race’ power as the basis for laws detrimental to the interests of Indigenous people. Former High Court Justice Michael Kirby warned of the dangers of heightening disadvantage among Indigenous people resulting from the passage of special laws targeting people on the basis of race. At the outset of the intervention, the authors of the ‘Little Children Are Sacred’ report, Pat Anderson and Rex Wild, concluded that the federal government was not responding to any of the Report’s 97 recommendations through its NTER measures.

In keeping with the positioning of the NTER as an ‘emergency response’, the government mobilised army and police personnel to assist in the early implementation of its new measures. The mobilisation of the army, which is hard to imagine in relation to any other group of people in Australia, ‘conveyed the appearance of communities living under martial law’, and caused fear and panic among some remote Aboriginal communities that children were about to be removed by the government.

A 2008 NTER Review Board Report to the new federal Labor government found that the NTER remained justified, however, it also recommended that government work to recast its relationship with Indigenous peoples, following the damage done in the early months of the NTER. Notably, the suspension of the *RDA* was found to engender disadvantage among Indigenous people.

---


a deep sense of humiliation and shame and perception of second-class citizenship for people treated differently to other Australians.307

In mid-2010, the federal Labor government stated that it is working towards amending the NTER laws to enable the total reinstatement of the *RDA* from 31 December 2010.308 The income management provisions of the NTER were broadened from 1 July 2010 to apply to Northern Territory welfare recipients generally, rather than only Indigenous people, and so this aspect of the NTER now complies with the *RDA*.309 In its report on consultations with Indigenous communities between June and August 2009, the federal Labor government proposed several changes to NTER measures. Most of the NTER measures have been retained in an altered form. For example, the government has retained currently imposed alcohol restrictions in communities affected by the NTER, but sought to change the focus of these measures ‘from a universally imposed measure to a measure designed to meet the individual needs of specific communities’.310

The government argues that these alterations will enable the measures to be properly classified as ‘special measures’ for the purposes of the *RDA*.311 The 2010 amendments potentially open the NTER to challenge under the *RDA*. Even considering the amendments, it is arguable that the NTER measures fail to meet the test for special measures, because they cannot be shown to be for the advancement of Aboriginal people,

---

309 Macklin, Jenny and Snowdon, Warren, 'Major welfare reforms to protect children and strengthen families' (Press release, 25 November 2009)
311 According to Article 1(4), *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969): ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’ This definition is adopted in Section 8 *Racial Discrimination Act 1975* (Cth).
advancement does not appear to be their sole purpose, and there has been insufficient consultation with the people meant to be beneficiaries.312

There has been considerable criticism of the NTER from commentators, and protests from some Indigenous communities. Former Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma found that the most significant problem with the NTER was the absence of opportunities for Indigenous people to engage or participate in policy making and implementation:

Indigenous peoples are treated as problems to be solved, not as partners and active participants in creating a positive life vision for the generations of Indigenous peoples still to come.313

Pounder supports this criticism, arguing that the NTER was paternalistic, portraying Indigenous children as ‘passive victims in need of salvation, rather than rights-holders with agency’.314 She cites as evidence of this outlook the comment of Indigenous Affairs Minister Mal Brough that the government was obliged to stand up to ‘save Indigenous children’.315

In January 2009, a group of Aboriginal people from communities affected by the NTER, the Prescribed Areas People Alliance (PAPA), sent a request for urgent action to the Committee on the Elimination of Racial Discrimination (CERD) on the basis that the NTER is racially discriminatory316 and in violation of self-determination.317 Vivian and Schokman supported this perspective, labelling the NTER ‘unjustifiable racism’.318 CERD responded by issuing an Urgent Action letter to Australia, requesting further

---

312 George Newhouse and Daniel Ghezelbash, 'Calling the Northern Territory Intervention Laws to Account: Complaint to the UN Committee on the Elimination of All Forms of Racial Discrimination' (2009) 47(October) Law Society Journal 56, 58.
information on the progress of redesigning NTER measures and the lifting of the suspension of the RDA. 319

PAPA subsequently updated its urgent action request to CERD, arguing that the new Labor government’s consultations with NTER-affected communities were inadequate and that the RDA remains suspended. 320 In a further Urgent Action letter to Australia, CERD notes that the new government was in the process of redesigning NTER measures, however, it also directs the government to the findings of the UN Special Rapporteur on the human rights of Indigenous peoples that the NTER remains in violation of CERD. 321 CERD has previously upheld complaints against states such as Nicaragua, Brazil and Ethiopia. 322 In 2011, the UN Human Rights Rapporteur, Navi Pillay, repeated this critique of the Intervention, noting that Aboriginal people had expressed to her hurt and pain resulting from ‘government policies that are imposed on them’. 323

Billings argues that the NTER echoes earlier detrimental government approaches of protectionism and assimilation, particularly in the lack of concern demonstrated for seeking or gaining Indigenous peoples’ informed consent or partnership in policy development. 324 This ‘top-down’ approach to the implementation of the NTER is inconsistent with the right of self-determination. 325 It is also characteristic of the history of Australian government policies which have refused or been incapable of accommodating Indigenous people’s difference. 326 Further, the government has failed to acknowledge the degree to which social problems in remote Aboriginal communities

have resulted from the colonisation process, which denied Aboriginal laws, and altered or banned the practice of traditional customs, languages and culture. Indeed, as Irene Watson has recognised following the Intervention, ‘[t]here is almost no space in which Aboriginal culture remains unaffected by the inroads of colonialism’.

Of course, it is crucial that governments respond strongly and effectively to child sexual abuse wherever it occurs, including in remote and disadvantaged Aboriginal communities. Indeed, the NTER measures of providing increased police and child protection workers to remote communities were essential, however, they were not accompanied by principles of self-determination or capacity building, such that Indigenous communities are empowered to respond effectively to child sexual abuse or other symptoms of social dysfunction.

(b) Post-ATSIC – the National Indigenous Council

In 2004, following its announcement that ATSIC would be abolished, the Howard federal government appointed a National Indigenous Council (NIC). This Council was designed as a purely advisory body, which the government identified as a potential source of ideas on Indigenous policy. It had no independent powers and was constituted by 14 government-appointed members from areas such as business, sport and the arts.

Mick Dodson described this body as:

a body of people ... chosen by the Prime Minister. There’s no representative nature to it…they’re not a political body, they’re an advisory body that it seems to me the government generally ignores. They’re very secretive.

Peter Yu added that the NIC was not established by legislation, and that its advisory status meant that the government was under no obligation to take its proposals into

---

327 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009), 67.
328 Irene Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) Borderlands 5.
331 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
account. John Maynard argued that the NIC had no support among Indigenous people, but rather that it was seen as unrepresentative and futile. Linda Burney said that the NIC was imposed without consultation, and that it was ‘completely ineffective’.

The NIC was never accepted as legitimate by Indigenous peoples. The appointed members were not representatives of Indigenous communities, nor were they accountable to an Indigenous constituency. They therefore lacked ‘political or cultural authority’. Indeed, the fact that sportspeople with no policy-making or political expertise were appointed, indicated that the government was prepared to ignore established Indigenous authority structures and the need for a public appearance of legitimacy on the part of NIC members. The dependence of members on government for their appointment shifted the nature of advice to government from that provided by ATSIC. This short-lived body was abolished in 2008 by the Rudd Labor government, with Minister Jenny Macklin committing the government to consultations with Indigenous peoples with the aim of developing a new representative body.

(c) Post-ATSIC – the National Apology

On 13 February 2008, then Prime Minister Kevin Rudd apologised to the Stolen Generations of Indigenous peoples on behalf of the Australian parliament and government:

> We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

---

332 Interview with Peter Yu (Sydney, 29 September 2006).
333 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
334 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
The ‘national apology’ was a significant moment in the relationship between Indigenous and non-Indigenous Australians.

In his apology speech, Kevin Rudd commented:

...there comes a time in the history of nations when their peoples must become fully reconciled to their past if they are to go forward with confidence to embrace their future.\(^{339}\)

This statement supports the conclusion reached in Chapter 4 of this thesis, namely that the colonial experience of Indigenous peoples in Australia must be acknowledged in order to promote their realisation of self-determination. However, it is questionable whether the national apology made a sufficient contribution to this process. The Human Rights and Equal Opportunity Commission, in its report on the Stolen Generations, recommended reparation in five forms; apology, a guarantee against repetition, restitution where possible, rehabilitation, and monetary compensation.\(^{340}\) Despite this, the Labor federal government has refused to provide monetary compensation to the Stolen Generations. This has left the apology open to accusation that it is merely a symbolic gesture, incapable of securing real justice.\(^{341}\)

\[(d) \textit{Post-ATSIC – the National Congress of Australia’s First Peoples}\]

Following consultations after its election in 2007, the federal Labor government appointed a Steering Committee to develop a model for a new national representative body for Indigenous peoples. The outcome of this process demonstrates that Indigenous peoples in Australia are committed to developing representation structures independent from government, and from government powers of abolition.\(^{342}\) On 22 November 2009, then Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma announced the establishment of the National Congress of Australia’s First Peoples.

---


\(^{340}\) National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, \textit{Bringing Them Home} (1997), 282.


\(^{342}\) Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 294.
The Steering Committee took its lead from Article 18 of the Declaration on the Rights of Indigenous Peoples:

Indigenous peoples have the right to participate in decision-making in matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision making institutions.343

The Steering Committee conducted consultations which revealed that Indigenous peoples want a national representative body, and feel that their voice had been stifled since the abolition of ATSIC.344 The Committee also concluded that such a body is necessary to recast the relationship between Indigenous peoples and Australian governments, and hold governments to account in their efforts to address Indigenous marginalisation and disadvantage.345

The National Congress has been established as a private company limited by guarantee, rather than a statutory authority, in order to preserve its independence from government. After the initial development phase, which is ongoing in 2010-2011, the National Congress envisages itself as undertaking three key roles; the formulation of policy and advice, advocacy and the lobbying of government and industry bodies, and the monitoring and evaluation of government performance on its commitments to Indigenous peoples.346 In future, the National Congress may also take on roles in building links between Indigenous bodies, development partnerships with government and other actors, law reform, international representation of Indigenous peoples, monitoring the long-term achievement of government commitments, including to ‘closing the gap’ of opportunity between Indigenous and non-Indigenous Australians, facilitating the sharing of information between relevant Indigenous bodies, and providing mediation services.347

344 Australian Human Rights Commission Steering Committee for the creation of a new National Representative Body, ‘Our future in our hands - creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples’ (2009), 5.
345 Australian Human Rights Commission Steering Committee for the creation of a new National Representative Body, ‘Our future in our hands - creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples’ (2009), 7.
346 Australian Human Rights Commission Steering Committee for the creation of a new National Representative Body, ‘Our future in our hands - creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples’ (2009), 23.
347 Australian Human Rights Commission Steering Committee for the creation of a new National Representative Body, ‘Our future in our hands - creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples’ (2009), 23.
According to Commissioner Calma, the establishment of the National Congress provides a rare opportunity for Aboriginal and Torres Strait Islander peoples to work together with governments, industry and the Australian community to secure the economic and cultural independence of our peoples, and to enable us to truly experience self-determination, for the first time in this country.  

The National Congress is still in its establishment phase, having appointed a Board of Directors and CEO in May-June 2010. The establishment of the National Congress has been welcomed, for example by Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda, who described it as ‘ground-breaking’ due to its emergence from a process driven by Indigenous peoples, its commitment to gender equity, and its inclusion of an Ethics Council to ensure high standards of professionalism and accountability. The distinctions between the National Congress and ATSIC have also received favourable comment. The Sydney Morning Herald noted that the National Congress does not have responsibility for legislation or programs, so that it can maintain independence from government and avoid blame for continuing Indigenous disadvantage.

The first Executive of the National Congress has appointed the first Congress of 120 members. The Executive aims to build membership of the organisation, with any Indigenous person eligible to join as a member. The first National Congress will be responsible for setting the initial political agenda for the organisation. A National Congress will be held annually, following the inaugural conference in Sydney in June 2011. The first public initiative of the National Congress was to support the campaign for Indigenous recognition in the Australian Constitution.

---

348 Australian Human Rights Commission Steering Committee for the creation of a new National Representative Body, 'Our future in our hands - creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples' (2009), 3.
349 Australian Human Rights Commission, 'First National Executive is a Milestone Moment for Indigenous Australians' (Press release, 2 May 2010)
It has been suggested that the structure of the National Congress will produce a lobbying organisation with similar aims as a peak body like the National Farmers’ Federation. On this basis it has attracted criticism from prominent Indigenous commentator Noel Pearson, who was quoted as comparing the National Congress to ‘a blackfellas’ wailing wall’. It is not yet possible to evaluate the potential of the National Congress, however, the stated aims and structure of the body appear to limit its capacity to promote Indigenous self-determination. There is undoubtedly a place for organised lobbying on behalf of Indigenous peoples. The National Congress is not subject to abolition at government whim, yet its distance from government significantly limits its capacity to influence government policy and programs. It is not clear whether the National Congress will achieve significant membership amongst Indigenous peoples, and it is not structured in accordance with traditional or regional Indigenous authority structures. For these reasons, its capacity to function as a representative governance structure is limited.

Conclusion

The circumstances surrounding the abolition of ATSIC demonstrated that the Australian state has rejected the notion of a separate Indigenous governance structure ‘before it has been seriously investigated’. The short-lived National Indigenous Council was incapable of promoting self-determination. The National Congress of Australia’s First Peoples may prove to be a more useful venture, considering that it has been generated by Indigenous peoples, however, it remains to be seen who this body will come to represent or how well its voice will be heard. The Northern Territory Intervention proved the willingness of government to claim control over the lives of Indigenous peoples, and the lack of understanding on the part of the Australian state of the right to self-determination for Indigenous peoples.

354 In commenting on the abolition of ATSIC, NSW MP and former ATSIC councillor Linda Burney stated that a new representative body ought to have a wide range of capacities, including influence on government decisions, advocacy for Indigenous interests, and focus on policy, politics and programs: Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
356 The National Congress is reliant on individual Indigenous people choosing to join as members.
D. The Necessary Role of the International Legal System

In Part A of this chapter, I showed that international law has had a mixed history in relation to promoting self-determination for Indigenous peoples. In Part B, I explored the contemporary colonial experiences of Indigenous peoples in Australia, and in Part C demonstrated that the Australian state had failed to respond appropriately to these experience. In this section, I consider the necessary engagements of the international legal system, in addressing the historical and contemporary colonial experiences of Indigenous peoples, and encouraging the Australian state to promote their realisation of self-determination. First, I explore the need for an active role for international law, through the perspectives of interviewees. Second, I discuss proposals for decolonising international law, specifically in relation to Indigenous self-determination claims in Australia. Third, I consider how the human rights approach to self-determination may be implemented in Australia. Finally, I introduce a range of means by which self-determination might manifest for Indigenous peoples in Australia.

1. The need for an active role for international law

Unlike Irish nationalists in the North of Ireland, Indigenous peoples around the world have a long history of appealing to the international legal forum for support in their self-determination claims. Indeed, Indigenous respondents in this research express hope for what may be achieved through international legal mechanisms. Irabinna Rigney argues that, despite its lack of enforcement mechanisms and avenues for engagement by non-state actors, the international legal system provides another option for advocacy.\(^{357}\) Irene Watson concludes that international law is ‘a useful tool in that it provides a framework to work from, it provides a framework in terms of setting at least minimum standards…’ or guiding principles.\(^{358}\) Larissa Behrendt similarly characterises the international human rights framework as a ‘benchmark’, setting a ‘baseline of human rights’, particularly significant to rights-claimants in jurisdictions like Australia, where human rights protection is minimal.\(^{359}\) One means of promoting change at the domestic level is to

\(^{357}\) Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).

\(^{358}\) Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).

\(^{359}\) Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
engage with international jurisprudence and the language of rights as expressed in international law.  

The Declaration on the Rights of Indigenous Peoples is a non-binding instrument. Nevertheless, Mick Dodson regards the Declaration as a tool that may be used as a weapon to remind states that the United Nations have accepted these as the aspirations and standards, and we can use it to argue with governments about our rights, including the right to self-determination. Megan Davis is also hopeful that the Declaration might be cited by judges in Australian courts, in support of Indigenous legal rights. There is some early evidence that this may occur, although at least one recent judgment has noted that the Declaration has not been incorporated into domestic law, thus limiting its influence on Indigenous legal rights in Australia.

Indigenous peoples have made inroads in the international legal system in recent decades. Mick Dodson notes the value of the Working Group on Indigenous Populations and its successor, the Permanent Forum on Indigenous Issues, in enabling Indigenous peoples to communicate with the United Nations. However, these mechanisms have a subordinate status and it is difficult for Indigenous peoples to communicate directly with the General Assembly and states. Access remains a significant problem in terms of the utility of international law. Indigenous peoples have advocated for changes to the state-dominated international legal system, but little has changed in terms of its structure. In comparison with other non-state parties, Indigenous peoples face added obstacles due to their minority status and the diversity of their interests in different parts of the world. Irabinna

360 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
361 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
362 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)
364 Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690 (2 July 2010) per McKerracher J at [98]
365 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
366 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
Rigney identifies poverty, distance, language, cultural barriers and cost as inhibiting factors that may often prevent Indigenous peoples from engaging with international law as a means of promoting self-determination.367

Rigney also notes that the lack of enforcement mechanisms available under international law limit the system’s capacity to influence domestic developments.368 In this context, Valilis raises the anti-discrimination case concerning the name of the grandstand at the Toowoomba Athletic Oval in Queensland, the ‘ES Nigger Brown Stand’. An Aboriginal academic and local resident, Stephen Hagan, sued the Toowoomba Council for racial discrimination over its refusal to remove the sign, however, his action was defeated at each stage, concluding before the Full Court of the Federal Court.369 Hagan pursued his claim to the Committee on the Elimination of Racial Discrimination, which agreed that the name of the stand was offensive, and recommended that the Australian government take action to secure its removal.370 The rare opportunity for individual Indigenous people to take action against the state for human rights violations may have symbolic power, however, the Committee had no capacity to enforce its decision in Hagan’s case. As Valilis recognises, the decision had no effect on the local council, nor did the Australian government take enforcement action.371 This type of outcome can lead some people to conclude, as Paul Hughes says, that the decisions of international rights tribunals do not ‘mean a damn thing in practice’, and therefore that there is no point appealing to such tribunals.372

Another means by which the international legal system seeks to hold states to account is through the periodic reporting obligations under various human rights treaties. In its fifth periodic report under the International Covenant on Civil and Political Rights, the Australian government met its obligation to comment on the right of self-determination in relation to Indigenous peoples in the following terms:

The Australian Government believes that individuals and groups should be consulted about decisions likely to impact on them in particular, including by

367 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
368 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
371 Interview with Mick Mundine and Peter Valilis, Aboriginal Housing Company (Redfern, 8 August 2006).
372 Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006).
giving them the opportunity to participate in the making of such decisions through the formal and informal processes of democratic government, and exercise meaningful control over their affairs. However, the Australian Government does not support an interpretation of self-determination that has the potential to undermine Australia’s territorial integrity or political sovereignty.\footnote{Commonwealth of Australia, ‘Common Core Document forming part of the Reports of States Parties - Australia - incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights’ (2006), 55. As at the time of submission of this thesis, this report is the most recent statement of the Australian government position on self-determination.}

In this comment, the Australian government shows its willingness to disregard the actual nature of Indigenous self-determination claims, and the obligations these claims impose on the state. This public rejection of self-determination for Indigenous peoples brings into question the capacity of the periodic reporting process, as a means of keeping states to their treaty obligations. More broadly, it is indicative of the freedom of states to choose, at least to some extent, the degree to which they are bound by international legal norms. Irene Watson regards Australia and the United States as key proponents of this worldview:

> These are states that have founded themselves on the dispossession of Aboriginal people…So we’re up against that kind of thinking, in terms of ‘we will not listen’, or alternatively ‘we will determine what will happen and what rights will be recognised’.\footnote{Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).}

In Chapter 6, I noted that it is not possible to rely on the British state to pursue self-determination solutions in Ireland. Similarly, as demonstrated by its own statements in the international legal forum, Australia is not fully committed to the realisation of self-determination for Indigenous peoples. Indigenous respondents in this research acknowledged the need for an active role for international law in the pursuit of self-determination for Indigenous peoples in Australia. Ridgeway argues that member states of the UN ought to be critical of other states that fail to respect Indigenous self-determination.\footnote{Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).} This is especially true following the adoption of the Declaration on the Rights of Indigenous Peoples. The following sections explore means by which
international law might take a more active role in relation to self-determination for Indigenous peoples in Australia.

2. Proposals for decolonising international law

In Chapter 4, I argued that the international legal system must itself be decolonised, in order to support the realisation of self-determination for contemporary claimants. The proposals I made in Chapter 4 may be adapted to the circumstances of Indigenous peoples in Australia, particularly in terms of enabling the variety of legitimate manifestations of the right, developing a more inclusive international legal system, and abandoning the outdated peoples approach to self-determination.

In Chapter 6, I noted that the Good Friday Agreement nullified the consideration of territorial integrity in relation to a potential change of borders in Ireland. For that reason, the international legal system is obliged to consider the range of legitimate self-determination solutions available to the people of Ireland. In Australia, Indigenous self-determination claims will not result in changes to the state’s territorial integrity. This fact removes the sting from Indigenous claims, and obliges international legal specialists to assist in the development of nuanced self-determination solutions. The Australian state has repeatedly demonstrated its unwillingness to understand self-determination as a right with a variety of legitimate manifestations, thus necessitating the deeper engagement of the international legal system to perform an educative and promotional role in relation to the right for Indigenous peoples.

A key means by which international law could engage in this process is through the development of a more inclusive international legal system. Megan Davis notes that the non-binding Declaration on the Rights of Indigenous Peoples took more than twenty years to reach the adoption stage, and indicts the UN structure as insufficiently inclusive of non-state parties. The rights claims of Indigenous peoples raise the paradox of international law’s incapacity to adequately realise a right accruing to an entity which is

---

376 Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)
not recognised as having legal existence. In order to promote the value of participation, the international legal system could countenance a greater degree of status and standing for Indigenous peoples. As Noel Pearson states, the development of ‘an international apparatus for coexistence and reconciliation’ between Indigenous peoples and states would facilitate creative self-determination solutions.

A more inclusive system could be developed through increased acknowledgment of distinct Indigenous systems of law and custom. Irene Watson questions why Aboriginal laws should be generally regarded as subordinate to the dominant Australian legal system. The international legal system could provide an example of the incorporation of Indigenous laws and ways of approaching problems, which could translate to more effective incorporation of Indigenous legal perspectives in domestic systems. Watson gives the examples of Aboriginal laws on environmental protection, land management and ecological sustainability as potentially valuable counterpoints to Western laws, some of which have enabled environmentally unsustainable development.

It may also be necessary for the international community to develop its capacity to intervene constructively in the affairs of states, in order to overcome the paradox that the international community ‘upholds the right to self-determination but can do so little to provide for its consistent or effective implementation’. As current conflicts in Iraq and Palestine bear out, states can often choose whether, or at least to what extent, they will comply with international law. If international law is decolonised through the development of an inclusive legal system, Indigenous peoples and other minority groups will have a voice where they have previously struggled to be heard. They may be more successful in attracting advocates for their rights among the international community, who are capable of applying political pressure to recalcitrant states. Mick Dodson argues

---

379 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
380 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
381 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
383 Interview with Martina Anderson, Director of Unionist Engagement, Sinn Féin (Belfast, 21 March 2006); Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005).
384 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
in favour of such an approach, noting the disregard for international legal standards demonstrated by recent government approaches to Indigenous affairs, and stating that Australia must accept that the international community is meant to protect the interests of peoples as well as dominant states.385

An inclusive international legal system would also assist Indigenous peoples in achieving self-determination through developing connections between distant Indigenous representatives and enabling communication between communities. John Maynard suggests that if Indigenous peoples were better enabled to ‘present a united front internationally’, this would enhance their capacity to overcome domestic divisions caused by colonisation.386

I have argued that, in settler societies, it is crucial to both acknowledge the distinctive colonial experience of particular groups, and to approach self-determination as a collaborative process, involving all communities in a society. International law could be further decolonised by the abandonment of the outdated peoples approach to self-determination, which imposes an arbitrary threshold question on a claimant group. As I will discuss further in the following section, a human rights approach is preferable to a peoples approach, as it is capable of acknowledging the colonial experiences of claimants, while requiring the balancing of their rights with those of other communities. In Australia, it would be useful to abandon the peoples approach by retreating from the three-part, state-imposed test of Indigeneity387 and instead emphasising self-identification as the key criterion.388

---

385 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
386 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
387 This test requires a person to identify as, be a descendant of, and be recognised by an Aboriginal community in order to be acknowledged by the state as Indigenous: Centrelink Australia, *Are you an Aboriginal or Torres Strait Islander? A guide to your options and our services*, 2011.
388 In line with the requirements of Article 278, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)*, opened for signature 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991)
A decolonised international legal system would be well-equipped to implement a human rights approach to self-determination. For Indigenous peoples in Australia, this approach would depict self-determination as a process rather than an event, and promote the development of a human rights culture. A human rights approach in Australia also requires focus on substantive rather than formal equality, and awareness of intersections between race, gender and other factors.

Respondents in this research supported a conception of self-determination as requiring an ongoing process of realisation, rather than a single event. Irabinna Rigney perceived the right as an ongoing process, ‘linked to the cultural wellbeing of Indigenous peoples’, and related to ‘land, language, culture, education’ and other values. Larissa Behrendt regards process as central to the realisation of self-determination, in the sense of active and continual involvement in decision-making and the development of structures and institutions, ensuring that visions of self-determination may evolve over time. Self-determination is not a stagnant idea and, as Mick Dodson argues, claimants ‘ought to have the opportunity to question the way in which things are arranged, constitutionally and legally, from time to time…’ Indeed, according to Linda Burney, self-determination is necessarily an ongoing process because it is ‘a way of being; it’s a principle that should inform everything’. In similar terms, Darryl Pearce describes self-determination as ‘like Aboriginality – it’s a state of heart and mind’.

Irene Watson notes that, ‘especially considering the diversity of Aboriginal Australia, one act can never bring self-determination to all’. Furthermore, future generations should not be bound to exercise self-determination under terms set by their forebears. Rather, within the process of self-determination, claimants should have ongoing choice ‘in

---

389 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
390 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
391 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
392 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
393 Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006).
394 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).
395 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
relation to issues like culture, language and lifestyle'. Noel Pearson notes the significance of ‘moments’ when settlements are reached or laws are changed, but believes that self-determination is not realised at any single moment because legal change is only an aspect of the whole.

In international law, self-determination has often been signified by an event, for example the secession of a territory and formation of an independent state. As is clear from the above perspectives from respondents, this perception of self-determination does not accord with the nature of Indigenous claims to the right. Therefore, the international legal system could promote a human rights approach to self-determination by emphasising the importance of process to the realisation of the right.

To paraphrase comments made by von Doussa and Calma in the context of reconciliation in Australia, a human rights approach to self-determination requires ‘acknowledgment of the impact of historically-derived disadvantage on Indigenous peoples’, culturally responsive measures to address inequality, and a sustained commitment to the full and equal realisation of all human rights by Indigenous peoples in Australia. This mandates the further development of a human rights culture in Australia. The international legal system could play an oversight role in this context, especially as the Australian state has recently demonstrated its unwillingness to entrench human rights protection in legislation.

A human rights approach to self-determination should also be promoted through the recognition that Indigenous peoples seek substantive, rather than formal, equality. Irabinna Rigney notes government resistance to differential treatment of different groups,
but argues that treating all people in the same way ‘means assimilation for Indigenous peoples’. Aden Ridgeway notes that

One [aspect of self-determination] is the achievement of formal equality, in the sense of having a government talking about their policy of self-determination... But you’ve also got to have substantive equality at the other end, which means you have to work away at all the small building blocks that define and give expression to real equality being achieved – otherwise you end up with situations where the letter of the law says something, and it’s warm and feels good, but life within a community stays exactly the same. You’re still disadvantaged, there’s poor health, there’s people unemployed, your culture’s not being support or recognised...

A human rights approach to self-determination for Indigenous peoples in Australia also has the potential to address complex intersections between race and gender. Irene Watson argues that the patriarchal colonial legal system imposed on Indigenous peoples in Australia has influenced ‘the way Aboriginal law can express itself’. Consequently, critiques of Aboriginal law and custom, in relation to Indigenous women’s experiences of violence within family relationships, may be overly simplistic. Larissa Behrendt also believes that patriarchal influences in the dominant colonising culture have detrimentally affected Indigenous women’s traditional cultural roles. Megan Davis raises the intersection between race and sex when seeking informed consent from Indigenous communities in relation to government initiatives. She questions whether women are in an equal position to men to be able to give informed consent, particularly in the context of measures relating to the NTER.

---

400 Interview with Associate Professor Iarbinna Rigney, Flinders University (Adelaide, 29 August 2006).
401 Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006).
402 Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006). See: Irene Watson, ‘Sex, Race and Questions of Aboriginality’ in Margaret Thornton (ed), Sex Discrimination in Uncertain Times (2010) 347.
403 Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006).
4. How might Indigenous self-determination manifest in Australia in the future?

I do not propose any concrete self-determination solution for Indigenous peoples in Australia; the very nature of the right requires that its manifestations be determined by claimant peoples themselves. However, my research supports Pat Dodson’s view that many elements of ‘unfinished business’ must be resolved before self-determination will be realised by Indigenous peoples around Australia.\(^{405}\) The Australian state is obliged, and the international legal system must require, the open and continual evaluation of potential self-determination solutions for Indigenous peoples. In this section, I discuss aspects of ‘unfinished business’ highlighted by respondents in this research.

\((a)\) The significance of land

Any self-determination solutions in Australia must be cognizant of the significance of land to Indigenous peoples, both traditional owners and urban Aborigines. One of the reasons for the persistent refusal by the Australian state to recognise the connection between Indigenous rights to land and self-determination is the paranoia that self-determination claims threaten Australia’s sovereignty and territorial integrity.\(^{406}\) Of course, it appears ‘almost inconceivable that [isolated instances of] Indigenous separatism would translate into the creation of a “black state”’.\(^{407}\)

As seen in their continuing struggle to gain recognition of land rights and native title, Indigenous peoples regard land as fundamentally intertwined with self-determination. Noel Pearson notes:

...the ancestral connection with land for Indigenous peoples is not just a question of multicultural coexistence. The relationship with home land is

\(^{405}\) Patrick Dodson, ‘Until the Chains are Broken: Aboriginal Unfinished Business’ (2000) 45(February-March) Arena 29.

\(^{406}\) See, for example, the Australian government’s comment that it ‘does not support an interpretation of self-determination that has the potential to undermine Australia’s territorial integrity or political sovereignty’: Commonwealth of Australia, ‘Common Core Document forming part of the Reports of States Parties - Australia - incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights’ (2006), 55.

something that is distinct to those people for whom a particular land is their native land. 408

Some urban Indigenous communities also regard connection to land as essential to self-determination. For example, although the Aboriginal community in Redfern is ‘like the United Nations’, the community’s land has great political, historic and cultural significance. 409 The Australian state is obliged to engage with the range of distinctive Indigenous perceptions of land and its relationship to self-determination. The international legal system could support this by becoming more inclusive of the voices of non-state actors, thus reducing the emphasis placed on territory in international legal discourse.

(b) Sovereignty

Statist understandings of sovereignty tend to emphasise geographical and political boundaries. Respondents in this research contended that Indigenous sovereignty continues in Australia, and the state is obliged to broaden its understanding of what sovereignty entails. 410 In this context, Australia may look to the example of the international legal system. State sovereignty within the international forum is becoming increasingly limited by the existence of global and regional governance bodies such as the United Nations and European Community, the increasingly powerful human rights framework and the establishment of international courts such as the International Criminal Court. Indeed, the idea of nation states as islands of sovereignty no longer holds sway in a globalised and interdependent world. With some flexibility and imagination, Indigenous peoples’ prior sovereignty could be recognised in a manner which enhances rather than fractures Australia’s democratic system of governance. 411

408 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
409 Interview with Mick Mundine and Peter Valilis, Aboriginal Housing Company (Redfern, 8 August 2006).
410 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006), Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006), Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006), Interview with Peter Yu (Sydney, 29 September 2006).
411 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009), 19.
In an historical context, a new understanding of Indigenous sovereignty ought to acknowledge that ‘no Indigenous nation is what is now called Australia has ever ceded sovereignty’. Recognition of continued Indigenous sovereignty is regarded by some Indigenous self-determination claimants as conferring status, thus enhancing the capacity of claimants to achieve external acknowledgment of their distinctiveness. The key is not to regard Indigenous sovereignty as translatable to a hard, statist understanding of the concept. Instead, contemporary approaches to self-determination ought to encompass the perspectives of Indigenous claimants on sovereignty as a corollary of self-determination. Indigenous sovereignty may be exercised within the Australian nation state. As Peter Yu states, ‘the context is that of nations within a nation’. Indigenous self-determination and sovereignty may both be expressed, in part, through the concepts discussed in the following three sections; representative governance, constitutional recognition, and treaty.

(c) Representative governance

Irabinna Rigney regards representative governance, ‘put in place by, for and in the interests of Indigenous peoples’, as central to achieving improvement in socio-economic outcomes for Indigenous people, and enabling Indigenous communities to ‘negotiate with the…nation state to solve some of the conflicts around self-determination, around land’. Mick Dodson argues that this should be an independent, Indigenous-designed body, ‘free of government influence or interference’. However, as Peter Yu recognises, it would be crucial to establish what relationship such a body would have to government, and its degree of authority and independence.

Re-establishing representative governance, and making it effective, is also important as a means of enabling Indigenous communities to communicate, strategise and work together towards self-determination within the Australian nation state. Linda Burney argues that any model should have the capacity to:

---

412 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
413 Interview with Peter Yu (Sydney, 29 September 2006).
414 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
415 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
416 Interview with Peter Yu (Sydney, 29 September 2006).
417 Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006).
…influence Cabinet decisions, function as an advocacy body for Aboriginal aspirations, have a political focus, have a policy focus, and probably be responsible for some programs.418

In this context, Noel Pearson advocates for ‘a mechanism for levelling the playing field’ between Indigenous peoples and the Australian state, noting that majority-elected democratic governments will never reflect an Indigenous agenda.419 Pearson describes this as a ‘power equalisation mechanism’, capable of requiring government to negotiate with Indigenous people on equal terms rather than as a dominant party.420

Mick Dodson comments that no option for Indigenous representative governance within the Australian state should be regarded as unavailable. For example, he suggests that particular regions such as the Torres Strait or the Kimberleys could establish autonomous regional governing entities within the nation state.421 Peter Yu raises the example of the Saami parliament in Norway, which functions as a house of review,422 and suggests that such a body in Australia might be able to both provide advice to government and have an oversight role in relation to laws affecting Indigenous interests.423 Darryl Pearce suggests that it may be possible to develop a political framework for Indigenous peoples through an ‘assembly of First Nations’, which would bring together self-identifying and self-organising communities, perhaps in their context of their native title claims.424

The key element in establishing an effective governance structure is the free choice of Indigenous people and communities. John Maynard argues that any new structure should arise from an ‘all-Aboriginal directive’ to be legitimate.425 Whatever is established should be sufficiently flexible to ensure that communities with different needs may self-determine according to their circumstances. For example, Mick Dodson suggests that

418 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006).
419 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
420 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006).
421 Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
423 Interview with Peter Yu (Sydney, 29 September 2006).
424 Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006).
425 Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006).
some communities may prefer for their elders to choose representatives, while others will favour a secret ballot or a public vote.\textsuperscript{426} A new structure should also be enabled to deal with intersectional rights challenges. As Tom Calma recognises, Indigenous Australia is incredibly diverse, and an effective representative structure must be capable of taking into account the needs of ‘women, youth, older people’,\textsuperscript{427} as well as geographically and culturally distinct communities. In this context, I note the establishment of the National Congress of Australia’s First Peoples in 2010. This body must meet high expectations if it is to function as a driving force of self-determination.

\textit{(d) Constitutional recognition}

Bradfield argues that Indigenous peoples increasingly seek recognition of a form of unique identity and status, which brings together elements of Australian citizenship alongside ‘a measure of political independence’.\textsuperscript{428} One means of acknowledging the distinct status of Indigenous peoples is constitutional recognition, for example through a new Preamble to the Australian Constitution.\textsuperscript{429} In 2011, the federal government launched a consultation process about amending the Constitution ‘to reflect a modern Australia by recognising our first peoples and culture for the benefit of all Australians’.\textsuperscript{430} As I noted above, in relation to the Northern Territory Emergency Response, the constitutional ‘race power’ has been employed to authorise laws detrimental to the rights of Indigenous peoples. Constitutional recognition of the distinct status of Indigenous peoples could enhance their capacity to exercise self-determination, by obliging the state to honour that status when passing laws affecting Indigenous communities.

\textit{(e) Treaty}

The existence of treaties between colonisers and colonised in other settler states, such as Aotearoa/New Zealand and Canada, have been credited with enhancing the degree of

\textsuperscript{426} Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006).
\textsuperscript{427} Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006).
\textsuperscript{428} Stuart Bradfield, ‘Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC’ (2006) 52(1) \textit{Australian Journal of Politics and History} 80, 83.
\textsuperscript{429} Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009), 272-273.

300
self-determination available to contemporary Indigenous claimants. In recent times, Indigenous peoples in Australia have advocated for a treaty or treaties with the state, as a means of establishing a new framework for relations. Governments have opposed such proposals, on the basis that a treaty is an agreement between two sovereign entities. Respondents to this research argued in favour of a treaty or similar agreement, noting that the absence of such has diminished the status of Indigenous peoples since colonisation.

**Conclusion**

According to Thornberry,

the history of indigenous peoples is a history of colonialism. The general issue of colonialism has been largely transformed through the emergence of a legal doctrine of self-determination, questioning its legitimacy and reducing its scope, though its long-term effects are likely to be profound.

This chapter has demonstrated the need to acknowledge the historical and contemporary colonial experiences of Indigenous peoples in Australia, in order to establish a foundation for self-determination. I have also shown that, as yet, the Australian state has failed to come to terms with the true meaning of self-determination, and consequently failed to...

---


433 See, for example, a statement of former Prime Minister John Howard: 'A nation, an undivided united nation does not make a treaty with itself. I mean, to talk about one part of Australia making a treaty with another part is to accept that we are in effect two nations.' See Tony Wright and Kerry Taylor, 'PM Rules Out Divisive Treaty', The Age (Melbourne), 30 May 2000 cited in Stuart Bradfield, 'Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) Australian Journal of Politics and History 80, 94.

434 Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006), Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006), Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006).

empower Indigenous peoples to realise the right. The international legal system provides a powerful set of standards, and Indigenous peoples continue to rely on these when asserting their rights. However, the system could do more to enhance the status of Indigenous peoples and improve their capacity to relate to dominant states.

I have not proposed a single self-determination solution for Indigenous peoples in Australia. This would be futile, considering that the right must manifest differently according to the diverse circumstances of Indigenous peoples. It would also be presumptuous, as the claimants themselves must determine how to exercise the right. Bradfield recognises that, between the extremes of secession and assimilation, the right of self-determination contains ‘a multitude of possibilities for realising aspirations to both retain rights as citizens and a unique status as Indigenous peoples recognised by the state’.436 By acknowledging the significance of the colonial experience, and adopting a human rights approach, the Australian state can recast its relationship with Indigenous peoples.

CONCLUSION
The human rights framework serves an essential function in international law. It offers protection to individuals and communities in their relations with powerful states. Human rights should be interpreted expansively, to enable the international legal system to recast the balance of relations between legal actors for the twenty-first century. An expansive definition of self-determination will ensure that the right retains its emancipatory potential, and continues to operate in opposition to the dominance of state interests over human and peoples’ rights.

In this thesis, I have shown that a key site for adaptation is the international law of self-determination. The meaning and scope of self-determination remain contested, proving the need for continual re-evaluation.1 A twenty-first century approach to the right must address conceptual problems, including the perception that the right is incapable of proper definition, the opposition between ‘internal’ and ‘external’ exercises of the right, the persistence of the outdated ‘peoples’ test, and the subjectivity of international law to politics.2

These conceptual problems have produced a practical problem for some contemporary ‘hard cases’ in self-determination. Some claimant groups, including Irish nationalists in the North of Ireland, and Indigenous peoples in Australia, assert a continuing experience of colonialism.3 Their experiences demonstrate that the right retains a role in decolonisation, yet they do not conform to the archaic salt-water test of colonialism.4 The international legal system risks failure on human rights grounds if it fails to acknowledge and address these contemporary, anti-colonial claims to self-determination. International law must serve justice and legitimacy for contemporary self-determination claimants, as it has sought to do for earlier claimants to the right.5

---

1 The question of defining self-determination was considered in Part A.1 of the Introduction.
2 These conceptual problems were explored in Chapter 3 Self-determination: Contemporary Challenges.
3 Aspects of these experiences were introduced in Chapter 4 Transforming the Law of Self-determination: The Continuing Mission of Decolonisation, and discussed further in Chapters 6 and 7.
4 The salt-water test, and the allied constraint of *uti possidetis juris*, were discussed in Part A.4 of Chapter 2 Self-determination: Legal History.
5 While international law aims to create a degree of predictability through the promotion of norms, it must always strive to serve the interests of justice and legitimacy, particularly in relation to human rights: Steven R Ratner, ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90 American Journal of International Law 590, 623.
In this research, I have taken a non-traditional approach to a perpetual problem in modern international law. Through analysing the perceptions of self-determination claimants, and others qualified to reflect on the status of the right, I have demonstrated the value of exposing international law to the critical gaze of non-state actors. Respondents in this research have called for the ‘peoples’ of the world to be heard, and for each claimant group to receive a full and fair evaluation of their unique self-determination claim.

The continuing colonial experiences of some contemporary self-determination claimants must be acknowledged, in order to honour the equal entitlement of these claimants to self-determination. However, these peoples will only be empowered to realise self-determination when the international law regulating the right is itself decolonised. This mandates the recognition that self-determination may legitimately be exercised in a variety of ways, the rejection of the opposition between internal and external self-determination, and the development of an inclusive international legal system.

A decolonised international law on self-determination will enable the adoption of a human rights approach to the exercise of the right. This approach can shift state perceptions of the implications of self-determination claims, avoiding the sterile debate about polarising approaches to state sovereignty, and enabling the emergence of a new framework to shape relations between states, international organisations and claimant peoples. The human rights approach may be implemented by abandoning attempts to define a claimant group’s ‘peoplehood’, by conceiving of the right as a process rather than an event, and – most importantly – by seeking to balance the rights of groups and individuals sharing the same territory. In settler societies such as Australia and Northern Ireland, the interests of the majority continue to dominate the rights of minorities. A human rights approach seeks to shift that imbalance, and promote the best possible outcomes for all.

As discussed in Chapter 1, qualitative research is primarily concerned with credibility. Transferability is a principle more commonly associated with quantitative research. Yet,

6 The ways in which I conducted both doctrinal and qualitative, grounded theory research were explained in Chapter 1 Methodology.
7 These strategies were set out in Part C of Chapter 4 Transforming the Law of Self-determination: The Continuing Mission of Decolonisation.
8 The means by which a human rights approach may be implemented were explored in Chapter 5 Transforming the Law of Self-determination: The Human Rights Approach.
it is possible for qualitative research to have transferable outcomes, and shed light on cases other than those under investigation. 9 I have confined this research to the circumstances of two contemporary, anti-colonial claimant groups. However, my findings on the decolonisation of international law and the human rights approach to self-determination can improve the way in which all contemporary assertions of the right are evaluated. This is because the developments I have proposed would empower claimants to take on greater status within the international legal system, and require states to evaluate self-determination claims, rather than denying them a full hearing on the basis that they may pose a risk to a state’s perception of its sovereignty or territorial integrity.

Although I have not made concrete proposals for how self-determination might manifest for Indigenous peoples in Australia, or Irish nationalists in the North of Ireland, it is clear that this research has broader practical implications in both research sites. For example, the contributions of self-determination claimants to this research highlight the value of government consultation with rights claimants. Effective consultation ought to produce policies informed by the perspectives of the people who will be affected by the implementation of government programs. By bringing domestic policy and governance into accordance with international human rights standards, states can enhance their international standing, and their capacity to influence positively the behaviour of their neighbours. By this means, states may also enhance community wellbeing within their societies and promote the development of an open and productive human rights discourse.

The contemporary experience of colonialism revealed by the Irish interview respondents necessitates a new approach to the nationalist self-determination claim by the British and Irish governments. The two states are obliged to acknowledge the contemporary colonial experience of Irish nationalists, and respond more effectively to some of its most destructive impacts. One recent proposal in this context is for the two governments to establish an independent, international truth commission. 10 Should such a body be established, it would need to ensure an entirely transparent and independent profile, in order that the interests of truth, reconciliation and justice could be seen to be served for

---


all communities affected by the political conflict in Ireland. If established according to human rights principles, a reconciliation process in Ireland could promote the achievement of self-determination for all peoples of the island.

Alongside some form of truth and reconciliation process, a forward-looking approach to self-determination in Ireland is also required. A census was conducted in Northern Ireland in March 2011. The results of this census will provide an ideal opportunity for the British government, through its Secretary of State for Northern Ireland, to engage with the provision of the Good Friday Agreement which calls for a referendum on constitutional change, should community demographics suggest that change may be supported by a majority. Despite the ongoing nature of the political conflict in Ireland, constitutional change and the unification of the two Irish jurisdictions remain a possibility. For the benefit of all communities on the island, the British state is obliged to facilitate an ongoing discussion of whether change may occur, when, and in what forms. A human rights approach to self-determination mandates the balancing of competing rights and interests, and the adoption of a more consultative approach.

In Australia, one of the most pressing current domestic policy issues is the ongoing ‘Intervention’ in Northern Territory Aboriginal communities. In June 2011, the federal Labor government announced a new round of consultations with Indigenous people, acknowledging that the manner in which the Intervention was implemented from 2007 caused ‘hurt and feelings of shame’ amongst Indigenous people. Stating that ‘[a] stronger future can only be built in partnership with Aboriginal people and communities’, Prime Minister Gillard identified education, employment and alcohol abuse as the three key areas for the government’s continued focus. While the government’s stated commitment to a more consultative approach is positive, the findings of this research suggest other means by which government policy could be transformed to promote the

---

11 The previous census was conducted 10 years before, in April 2001. The results of the census are not yet available, but general information is available from: Northern Ireland Statistics and Research Agency, ‘2011 Census’, <http://www.nisranew.nisra.gov.uk/census/2011_census.html> at 23 June 2011
12 Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement), 2. Constitutional Issues, Schedule 1 [2]
realisation of self-determination by Indigenous peoples. For example, consultations with Indigenous peoples should embrace the principle of informed consent. Further, government approaches to Indigenous affairs should acknowledge the significance of human rights values, in order that efforts to address disadvantage may be empowering of Indigenous peoples and their aspirations for self-determination. It is crucial that the value of rights not be lost in a focus on Indigenous ‘victimhood’.

It is also clear in the findings of this thesis that law has variously authorised, permitted or failed to address the colonial experiences of Indigenous peoples in Australia. Therefore, the recently-announced campaign for constitutional recognition of Indigenous peoples is welcome. Constitutional change provides an opportunity to reshape the Australian legal system in line with Indigenous self-determination. For this to occur, however, the recognition provided in the Constitution must not be mere window dressing. Rather, it must acknowledge the colonial experience and guarantee that Indigenous legal issues will, in future, be dealt with through the human rights framework. Should constitutional recognition for Indigenous peoples be achieved, it could inform the system as a whole, by encouraging parliaments to take Indigenous rights, particularly self-determination, into account in law- and policy-making, and law reform processes.

Since its origins in modern international law, the right of self-determination has been contested. In 1956, Jennings decried self-determination as impractical and poorly defined:

> On the surface it seemed reasonable: *let the people decide*. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.¹⁵

Jennings’ assertion bolsters an overly statist perspective in international law, and is outdated. Claimant peoples do not exist only when they are ‘discovered’ by the international legal system. They may claim their human rights on the basis that they are human beings. Contemporary, anti-colonial claimants bear colonial experiences which must be acknowledged. They share territories with other groups, whose rights must be balanced against new self-determination claims. It is up to the international legal system to create space for contemporary claimants, and evaluate their claims within the context of universal human rights.

---

BIBLIOGRAPHY
1. Articles/Books/Reports


Anaya, S James, 'A Contemporary Definition of the International Norm of Self-determination' (1993) 3 *Transnational Law and Contemporary Problems* 131


Asmal, Kader, *If law is the enemy - Britain's responsibilities: Human rights in Northern Ireland* (1990)


Banakar, Reza and Travers, Max, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), Theory and Method in Socio-Legal Research (2005) 1


Bassiouni, M Cherif, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 63


Baxter, Jamie and Eyles, John, 'Evaluating Qualitative Research in Social Geography: Establishing 'Rigour' in Interview Analysis' (1997) 22(4) Transactions of the Institute of British Geographers 505


Behrendt, Larissa, Cunneen, Chris and Libesman, Terri, Indigenous Legal Relations in Australia (2009)


Bell, Christine, Peace Agreements and Human Rights (2000)


Bell, Christine, Campbell, Colm and Ni Aoláin, Fionnuala, 'Justice Discourses in Transition' (2004) 13(3) Social and Legal Studies 305


Bott, Bruce, Cowley, Jill and Falconer, Lynette, *Nemes and Coss' Effective Legal Research* (2007)


Byrne, Michelle, 'Grounded theory as a qualitative research methodology' (2001) 73(6) Association of Operating Room Nurses Journal 1155

Byrne, Rosemary, 'Changing Modalities: Implementing Human Rights Obligations in Ireland after the Good Friday Agreement' (2001) 70 Nordic Journal of International Law 1


Cassese, Antonio, International Law in a Divided World (1986)


Cassese, Antonio, International Law (2nd ed, 2005)


Clayton, Pamela, 'Religion, ethnicity and colonialism as explanations of the Northern Ireland conflict' in David Miller (ed), Rethinking Northern Ireland (1998) 40

Cohen, Stanley, States of Denial (2001)


Connor, Michael, The Invention of Terra Nullius: Historical and legal fictions on the foundation of Australia (2005)


Coogan, Tim Pat, 1916: The Easter Rising (2001)

Coogan, Tim Pat, Ireland in the Twentieth Century (2003)

Coombes, Annie E (ed), Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand and South Africa (2006)


Coughlan, Anthony, 'The Way to Peace in Ireland: the necessity for a British commitment to end the Union' (Irish Sovereignty Movement, 1974)

Crang, Mike, 'Qualitative methods: there is nothing outside the text?' (2005) 29(2) Progress in Human Geography 225

Crawford, James, 'Some Conclusions' in James Crawford (ed), The Rights of Peoples (1988) 159


Curthoys, Ann, 'Indigenous Subjects' in Deryck M Schreuder and Stuart Ward (eds), Australia's Empire (2008) 78


Davis, Megan, 'Self-determination and the demise of the Aboriginal and Torres Strait Islander Commission' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), Indigenous Australians and the Law (2nd ed, 2008) 217


de Vitoria, Francisco, 'On the American Indians (De Indis), Question 2, Articles 3-5' in Francisco de Vitoria: Political Writings (1991)

Denzin, Norman K and Lincoln, Yvonna S, 'Introduction: The Discipline and Practice of Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), The Sage Handbook of Qualitative Research (3rd ed, 2005) 1

DiCicco-Bloom, Barbara and Crabtree, Benjamin F, 'The Qualitative Research Interview' (2006) 40 Medical Education 314

Dodson, Patrick, 'Until the Chains are Broken: Aboriginal Unfinished Business' (2000) 45(February-March) *Arena* 29


Edwards, R Dudley, *A New History of Ireland* (1972)

Elliott, Naomi and Lazenblatt, Anne, 'How to Recognise a 'Quality' Grounded Theory Research Study' (2005) 22(3) *Australian Journal of Advanced Nursing* 48

Emerson, Rupert, 'Self-Determination' (1971) 65 *American Journal of International Law* 459

'End for ATSIC', *Koori Mail* (Lismore), 21 April 2004, 3

Erickson, Frederick, 'Demystifying Data Construction and Analysis' (2004) 35(4) *Anthropology and Education Quarterly* 486


Fanon, Frantz, *A Dying Colonialism* (1959)

Fanon, Frantz, *The Wretched of the Earth* (1965)

Farrell, Michael *Northern Ireland: The Orange State* (2nd ed, 1976)


Fearon, Kate and McWilliams, Monica, 'The Good Friday Agreement: A Triumph of Substance Over Style' (1998-1999) 22 *Fordham International Law Journal* 1250


Feldblum, Miriam, 'The Study of Politics: What Does Replicability Have to Do with It?' (1996) 29(1) *PS: Political Science and Politics* 7


Franck, Thomas M, 'Postmodern Tribalism and the Right to Secession' in Catherine Bröllmann, René Lefeber and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (1993) 3

Franklin, Cynthia, 'Learning to Teach Qualitative Research: Reflections of a Quantitative Researcher' (1996) 24 Marriage & Family Review 241


Glaser, Barney, Theoretical Sensitivity (1978)

Glaser, Barney and Strauss, Anselm, The Discovery of Grounded Theory: Strategies for Qualitative Research (1967)


Grey, David L, 'Interviewing at the Court' (1967) 31(2) The Public Opinion Quarterly 285


Grossi, Renata, 'The Northern Territory Intervention and the Racial Discrimination Act' (2009) 31(3) Legal Date 11

Guelke, Adrian, 'Northern Ireland and Island Status' in John McGarry (ed), Northern Ireland and the Divided World: Post-Agreement Northern Ireland in Comparative Perspective (2001) 228

Hadfield, Brigid, 'Constitutions and Majorities' (1996) 47(3) Northern Ireland Legal Quarterly 227


Hannum, Hurst, 'Rethinking Self-Determination' (1993-1994) 34(1) Virginia Journal of International Law 1

Hannum, Hurst, 'Minorities, Indigenous Peoples, and Self-Determination' in Louis Henkin and John Lawrence Hargrove (eds), Human Rights: An Agenda for the Next Century (1994) 7


Harris, Mark, 'The Narrative of Law in the Hindmarsh Island Royal Commission' in Martin Chanock and Cheryl Simpson (eds), Law and Cultural Heritage (1996) 115

Harrison, Faye Venetia, Resisting Racism and Xenophobia: Global Perspectives on Race, Gender, and Human Rights (2005)


Healey, Justin (ed), *Native Title and Land Rights* (2007)


Higgins, Rosalyn, *The Development of International Law through the Political Organs of the United Nations* (1963)


Jick, Todd J, 'Mixing Qualitative and Quantitative Methods: Triangulation in Action' (1979) 24(4) *Administrative Science Quarterly* 602

Johns, Gary 'The Northern Territory Intervention in Aboriginal Affairs: Wicked Problem or Wicked Policy?' (2008) 15(2) *Agenda* 65

Johnson, C Don, 'Toward Self-determination - A Reappraisal as Reflected in the Declaration on Friendly Relations' (1973) 3 *Georgia Journal of International and Comparative Law* 145

Johnson, R Burke, 'Examining the Validity Structure of Qualitative Research' (1997) 118(2) *Education* 282


Kirk, Jerome and Miller, Marc L, *Reliability and Validity in Qualitative Research* (1986)


Kracauer, Siegfried, 'The Challenge of Qualitative Content Analysis' (1952-1953) 16(4) *Public Opinion Quarterly* 631

Kuzmarov, Betina, 'Unilateral Acts in International Relations: Accepting the Limits of International Law' (2005) 8(1) *Yearbook of New Zealand Jurisprudence* 77


Langton, Marcia et al (eds), Settling With Indigenous People (2006)

Larkin, Paul, A very British jihad: Collusion, conspiracy and cover-up in Northern Ireland (2004)

LaRossa, Ralph, 'Grounded Theory Methods and Qualitative Family Research' (2006) 67 Journal of Marriage and Family 837


Lenin, Vladimir I, The Right of Nations to Self-Determination (English ed, 1947)


Lenin, Vladimir I, Selected Works (1969)


Loomba, Ania, Colonialism/Postcolonialism (2005)


326


Martin, Ian, Self-Determination in East Timor: The United Nations, the Ballot and International Intervention (2001)

Maynard, John, "Be the change that you want to see": The awakening of cultural nationalism - Gandhi, Garvey and the AAPA' (2005) 4(3) Borderlands e-journal


McCall, Cathal, Identity in Northern Ireland: Communities, Politics and Change (1999)

McCartney, Jenny, 'Peter Hain, the last British colonialist', Sunday Telegraph (London), 1 April 2007, 8.

McClintock, Anne, Imperial Leather: Race, Gender and Sexuality in the Colonial Contest (1995)


McCorquodale, Robert, 'The Right of Self-Determination' in David Harris and Sarah Joseph (eds), The International Covenant on Civil and Political Rights and United Kingdom Law (1995) 91


McCorquodale, Robert, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1996) 66 The British Year Book of International Law 1995 283


328

McGurk, Tom, 'Breaking down the border is in the North's own interest', *Sunday Business Post* 11 May 2008,


Meron, Theodore, 'On a Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 1


Moore, Margaret, 'Introduction: The Self-Determination Principle and the Ethics of Secession' in Margaret Moore (ed), National Self-Determination and Secession (1998) 1

Moore, Margaret, 'The Territorial Dimension of Self-Determination' in Margaret Moore (ed), National Self-Determination and Secession (1998) 134

Moore, Margaret, The Ethics of Nationalism (2001)

Moore, Margaret, 'Conclusion and Overview' in Allen E Buchanan and Margaret Moore (eds), States, Nations and Borders: The Ethics of Making Boundaries (2003) 317


Morison, John, 'How to Change Things with Rules' in Stephen Livingstone and John Morison (eds), Law, Society and Change (1990) 5


National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 'Bringing Them Home' (1997)

Nehru, Jawaharlal, *The Discovery of India* (1946)


Newhouse, George and Ghezelbash, Daniel, 'Calling the Northern Territory Intervention Laws to Account: Complaint to the UN Committee on the Elimination of All Forms of Racial Discrimination' (2009) 47(October) *Law Society Journal* 56


Ni Aoláin, Fionnuala and Campbell, Colm, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 *Human Rights Quarterly* 127

Nic Shuibhne, Niamh, 'Ascertaining a Minority Linguistic Group: Ireland as a Case-Study' in Deirdre Fottrell and Bill Bowring (eds), *Minority and Group Rights in the New Millennium* (1999) 87

Nkrumah, Kwame, *Neo-colonialism: The last stage of imperialism* (1965)


O'Loan, Nuala, 'Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters' (2007)


Ostrower, Francie, 'Nonparticipant Observation as an Introduction to Qualitative Research' (1998) 26(1) *Teaching Sociology* 57


Peabody, Robert L et al, 'Interviewing Political Elites' (1990) 23(3) *Political Science and Politics* 451

Pearson, Noel, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta' (2003) 7(1) *Newcastle Law Review* 1

Pearson, Noel, 'Uses of layered identities', *Weekend Australian* 18-19 November 2006, 28


Philpott, Daniel, 'In Defense of Self-Determination' (1995) 105 *Ethics* 352


Pratt, Angela and Bennett, Scott, 'The end of ATSIC and the future administration of Indigenous affairs' (Department of Parliamentary Services, 2004)

Punch, Maurice, 'Politics and Ethics in Qualitative Research' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (1st ed, 1994) 83

Quiggin, Robynne, 'Protecting Culture' in Larissa Behrendt, Chris Cunneen and Terri Libesman (eds), *Indigenous Legal Relations in Australia* (2009) 207


Reconciliation, Forum for Peace and, 'Paths to a Political Settlement in Northern Ireland: Policy Papers Submitted to the Forum for Peace and Reconciliation' (The Blackstaff Press, 1995)

Reilly, Alexander, 'How sorry are we? The limits of the apology to the Stolen Generation' (2009) 34(2) *Alternative Law Journal* 97


Rolston, Bill, 'Assembling the jigsaw: truth, justice and transition in the North of Ireland' (2002) 44(1) *Race and Class* 87

Rolston, Bill and Scraton, Phil, 'In the Full Glare of English Politics: Ireland, Inquiries and the British State' (2005) 45 *British Journal of Criminology* 547
Rosenblum, Karen E, 'The In-Depth Interview: Between Science and Sociability' (1987) 2(2) Sociological Forum 388

'Row over 'repulsive gays' comment' (30 May 2007) BBC News <http://news.bbc.co.uk/1/hi/northern_ireland/6705637.stm> at 3 February 2009

Rowse, Tim, Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs (2000)


Sanson, Michelle, Worswick, David and Anthony, Thalia, Connecting With Law (2009)

Sartre, Jean-Paul, Colonialism and Neocolonialism (1964)


Scobbie, Iain, ‘Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine’ (2005) 16 European Journal of International Law 941


Sharawy, Helmi, 'Frantz Fanon and the African revolution, revisited at a time of globalization' (Paper presented at the CODESRIA 30th Anniversary Conference, Dakar, 10-12 December 2003)


Shirlow, Peter and McGovern, Mark, 'Introduction: Who Are 'the People'? Unionism, Protestantism and Loyalism in Northern Ireland' in Peter Shirlow and Mark McGovern (eds), Who Are 'The People'? Unionism, Protestantism and Loyalism in Northern Ireland (1997) 1

Shirlow, Peter and McGovern, Mark (eds), Who Are 'The People'? Unionism, Protestantism and Loyalism in Northern Ireland (1997)


Smith, Michael Geoffrey and Dee, Moreen, Peacekeeping in East Timor: The path to independence (2003)

Social Democratic and Labour Party, 'A United Ireland and The Agreement' (21 March 2005)

Somerset Fry, Peter and Somerset Fry, Fiona, A History of Ireland (1988)

Stake, Robert E, 'Qualitative Case Studies' in Norman K Denzin and Yvonna S Lincoln (eds), The Sage Handbook of Qualitative Research (3rd ed, 2005) 443

Statement by UK Representative to 3rd Committee of the General Assembly on 12 October 1984: UKMIL (1984) 55 British Yearbook of International Law 432

Steering Committee for the creation of a new National Representative Body, Australian Human Rights Commission, 'Our future in our hands - creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples' (2009)


Strauss, Anselm, Qualitative Analysis for Social Scientists (1987)

Strauss, Anselm and Corbin, Juliet, Basics of Qualitative Research: Techniques and procedures for developing grounded theory (1998)

Strelein, Lisa, Compromised Jurisprudence: Native title cases since Mabo (2006)


Sutton, Malcolm, Bear in Mind These Dead: An Index of Deaths from the Conflict in Ireland 1969-1993 (3rd ed, 2001)

Sutton, Peter, 'Mediating Conflict in the Age of Native Title' (2010) 1 Australian Aboriginal Studies 4

Tanner, Fred, 'Land rights, Native Title and Indigenous land use agreements' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), Indigenous Australians and the Law (2nd ed, 2008) 147

Taylor, Peter, Provos: The IRA and Sinn Fein (1997)


Thornberry, Patrick, International Law and the Rights of Minorities (1991)


Tovey, Josephine, ‘Native title onus unjust: Keating’, Sydney Morning Herald (Sydney), 1 June 2011, 3

Tomlinson, Mike, 'Walking backwards into the sunset: British policy and the insecurity of Northern Ireland' in David Miller (ed), Rethinking Northern Ireland (1998) 94


Tricot, Roland and Sander, Barrie, ‘Recent Developments: The Broader Consequences of the International Court of Justice’s Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo’ (2011) 49 Columbia Journal of Transnational Law 321


Umozurike, Oji, Self-Determination in International Law (1972)

'UN rights chief slams 'racist' Australia', Sydney Morning Herald (Sydney), 26 May 2011, online edition

United Nations Office for the Coordination of Humanitarian Affairs occupied Palestinian territory, West Bank Barrier Route Projections, July 2010


Vashakmadze, Mindia and Lippold, Matthias, “‘Nothing but a road towards secession’? The International Court of Justice’s Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo’ (2010) 2(2) Goettingen Journal of International Law 619


Wallace, Kathleen A, 'Anonymity' (1999) 1 Ethics and Information Technology 23

Ward, Margaret, 'Times of transition: republican women, feminism and political representation' in Louise Ryan and Margaret Ward (eds), Irish Women and Nationalism: Soldiers, New Women and Wicked Hags (2004) 184


Watson, Irene, 'Internationalising, Humanising and Diversifying: The One Nation State' in Elisabeth Porter and Baden Offord (eds), Activating Human Rights (2006) 257

Watson, Irene, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) Borderlands e-journal

Watson, Irene, 'Sex, Race and Questions of Aboriginality' in Margaret Thornton (ed), Sex Discrimination in Uncertain Times (2010) 347


Young, Iris Marion, *Inclusion and Democracy* (2000)


2. Case Law


*Accordance with International Law of the Unilateral Declaration of Independence in Relation to Kosovo (Advisory Opinion)* [2010] ICJ Rep 141

Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and others v. the Attorney General of Belize and others, Judgment of October 18, 2007, Supreme Court of Belize


Bennell v Western Australia (2006) 230 ALR 603

Bodney v Bennell (2008) 167 FCR 84

Case Concerning East Timor (Portugal v Australia) ICJ Rep 1995 90, International Court of Justice

Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690 (2 July 2010)

Coe v Commonwealth (1979) 53 ALJR 403

Cooper v Stuart (1889) 14 App Cas 286

No. 020-2000-TC, Ernesto López Freiré et al. v. President of the Republic and President of the National Congress, Judgment of November 21, 2000, Constitutional Court of Ecuador

Frontier Dispute Case (Burkina Faso v Republic of Mali) ICJ Rep 1986 554, Chamber of the International Court of Justice

Frontier Dispute (Benin/Niger) ICJ Rep 2005, 90, Chamber of the International Court of Justice


In Re Duffy (FC) (Appellant) (Northern Ireland) [2008] UKHL 4

Inter-American Court of Human Rights, Case of the Saramanka People v Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2007, Ser C no 173

Ireland v United Kingdom (1978) 2 EHRR 25

Island of Palmas (United States v Netherlands), II R. Int'l. Arb. Awards 831 (1928)

Kartinyeri v The Commonwealth (1998) 195 CLR 337

Legal Status of Eastern Greenland (Denmark v Norway), 1933 PCIJ (ser. A/B) No. 53

Mabo v Queensland (No 2) (1992) 175 CLR 1

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538


Namibia Opinion, ICJ Rep 1971 16, International Court of Justice

Netherlands v United States (Island of Palmas case) (1928) 2 RIAA 829

R v Murrell Supreme Court of NSW (Forbes CJ, Dowling and Burton JJ) 11 April 1836, AILR 3(3) 1998

Reference re Secession of Quebec 37 ILM 1340 (1998) (Supreme Court of Canada)

South West Africa Cases (Ethiopia v South Africa and Liberia v South Africa), Judgment of 18 July 1966 (Second Phase) ICJ Reports 1966

Walker v NSW (1994) 182 CLR 45

Western Sahara Opinion, ICJ Rep 1975 12, International Court of Justice

Wik Peoples v State of Queensland and Others (1996) 187 CLR 1


Yakye Axa Indigenous Community vs. Paraguay, Judgment of June 17, 2005, Merits, Reparations and Costs, Inter-American Court of Human Rights

3. Legislation

Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)

Aboriginal Protection and Restriction on the Sale of Opium Act 1897 (Qld)

Aborigines Protection Act 1869 (Vic)

Bunreacht na hÉireann: Constitution of Ireland (1937)
East Timor Constitution (2002)

Government of Ireland Act 1920 (UK)

Human Rights Act 1998 (UK)

Inquiries Act 2005 (UK)

Justice and Security (Northern Ireland) Act 2007 (UK)

Native Title Act 1993 (Cth)


Northern Territory Aborigines Act 1910 (SA)

Northern Territory National Emergency Response Act 2007 (Cth)

Prevention of Terrorism (Temporary Provisions) Act 1974 (UK)

Racial Discrimination Act 1975 (Cth)

Terrorism Act 2000 (UK)

Tunisia Constitution (1959)

4. Treaties


Agreement of the British and Irish Governments at St Andrews, Scotland, 19 October 2006

Agreement reached at multi-party negotiations, Belfast, 10 April 1998 (aka Good Friday Agreement or Belfast Agreement)

Charter of the United Nations (1945)

Conference on Security and Co-operation in Europe, Final Act of the 1st Summit of Heads of State or Government, Helsinki, 1 August 1975
Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959)


European Charter for Regional or Minority Languages, Strasbourg, opened for signature 5 November 1992, ETS No.148 (entered into force 1 March 1998)


International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)


Statute of the International Court of Justice, opened for signature 26 June 1945, 33 UNTS 993 (entered into force 24 October 1945)

Treaty on the Final Settlement With Respect to Germany, 29 ILM 1187 (signed 12 September 1990)


5. Other Sources


Interview with Martina Anderson, Director of Unionist Engagement, Sinn Féin (Belfast, 21 March 2006)

Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No 1, 29 November 1991, 31 ILM 1394

Arbitration Commission of the Peace Conference on Yugoslavia, Opinion No 2, 11 January 1992, 31 ILM 1497


Australian Human Rights Commission, 'First National Executive is a Milestone Moment for Indigenous Australians' (Press release, 2 May 2010)


Interview with Professor Larissa Behrendt, University of Technology Sydney (Sydney, 8 September 2006)

Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster (Derry, 27 October 2005)


Boraine, Alex, 'Transitional Justice as an Emerging Field' (Paper presented at the Repairing the Past: Reparations and Transitions to Democracy, Ottawa, Canada, 11 March 2004)
Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (Sydney, 15 November 2006)

Calling for the withdrawal of Israeli armed forces from the occupied territories, SC Res 242, UN SCOR, 22nd session, 1382nd meeting, UN Doc S/INF/22/Rev.2 (1968)


Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (Sydney, 11 December 2006)

Centrelink Australia, *Are you an Aboriginal or Torres Strait Islander? A guide to your options and our services*, 2011


Committee on the Elimination of Racial Discrimination, 'Urgent Action letter to Australia' (28 September 2009) <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf> at 10 June 2010

Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 10 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs)


Commonwealth, *Parliamentary Debates*, Senate, 10 September 2007, 62 (Mathias Cormann, Senator for Western Australia)


Interview with Anthony Coughlan, Trinity College (Dublin, 3 March 2006)
Craig, Sir James, *Parliamentary Debates, Northern Ireland House of Commons, 24 April 1934, Vol. XVI, Cols. 1091-95* (1934)

Interview with Megan Davis, Director, Indigenous Law Centre, University of New South Wales (Sydney, 5 December 2006)


*Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514, UN GAOR, 15th session, Supp. No16, UN Doc A/4684 (1960)

Dempsey, Damien, 'Colony', on the album 'Shots' (2005), Sony/BMG


Interview with Professor Mick Dodson, Director, National Centre for Indigenous Studies, Australian National University (Canberra, 22 September 2006)


Interview with Terry Enright, Human Rights Consortium (Belfast, 2 February 2006)


Interview with Aideen Gilmore, Committee for the Administration of Justice (Belfast, 15 December 2005)


Herron, John, Senator and Minister for Aboriginal and Torres Strait Islander Affairs, '9th Annual Joe and Enid Lyons Memorial Lecture' (Australian National University, Canberra, 15 November 1996)

Hillyard, Paddy, 'Lessons from Ireland' (Paper presented at Suspect Communities: The Real 'War on Terror' in Europe, London Metropolitan University, 21 May 2005)

Interview with Professor Paul Hughes, University of South Australia (Adelaide, 29 August 2006)


_Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory_, GA Res 10/14, UN GAOR, 10th special session, Supp No.1, UN Doc A/RES/ES-10/14 (2003)

_Importance of the Universal Realisation of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights_, GA Resolution 3382 (XXX) (1975)

_Independence of Namibia_, SC Res 435, 33 UN SCOR, 2087th mtg, UN Doc S/12865 (1978)

Ireland, _Parliamentary Debates_, Dáil Éireann, 2 November 2005, Vol.609 No.69, 125-126 (Deputy Bernard Allen, Fine Gael)

Ireland, _Parliamentary Debates_, Dáil Éireann, 10 July 2008, Vol.660 No.1, 14 (Deputy Pat Carey, Minister of State at the Department of the Taoiseach)


_Justice for the Forgotten_ <http://www.dublinmonaghanbombings.org/index2.html> at 29 January 2009

Knight, Deborah, Interview with Prime Minister John Howard (_Landline_, 18 May 1997)
Kosovo Declaration of Independence, 17 February 2008

Letter from United Kingdom's representative to the United Nations to the President of the Security Council, 28 April 1982, SCOR 37, Session Supp for April, May, June, pp. 47-49


Macklin, Jenny and Snowdon, Warren, 'Major welfare reforms to protect children and strengthen families' (Press release, 25 November 2009)


Interview with Professor John Maynard, Head of Wollotuka School of Aboriginal Studies, University of Newcastle (Newcastle, 9 November 2006)

Interview with Bernadette McAliskey, South Tyrone Empowerment Program (Dungannon, 7 June 2006)

Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (Nottingham, 27 March 2006)

Interview with Professor Kieran McEvoy, Queen's University Belfast (Belfast, 22 June 2006)


Interview with Mick Mundine and Peter Valilis, Aboriginal Housing Company (Redfern, 8 August 2006)

Interview with Niall Murphy, Kevin R Winters and Co Solicitors (Belfast, 15 March 2006)

Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007 (Gregory Campbell MLA)

Northern Ireland, Parliamentary Debates, Northern Ireland Assembly, 9 October 2007 (David Kennedy MLA)
Northern Ireland, *Parliamentary Debates*, Northern Ireland Assembly, 9 October 2007 (Nelson McCausland MLA)

Northern Ireland, *Parliamentary Debates*, Northern Ireland Assembly, 9 October 2007 (David McNarry MLA)

Northern Ireland, *Parliamentary Debates*, Northern Ireland Assembly, 9 October 2007 (George Robinson MLA)

Northern Ireland, *Parliamentary Debates*, Northern Ireland Assembly, 16 October 2007 (Edwin Poots MLA, Minister for Culture)

Northern Ireland, *Parliamentary Debates*, Northern Ireland Assembly, 2 February 2009 (Allan Bresland MLA)


Interview with Eoin Ó Broin, Sinn Féin (Belfast, 24 January 2006)

Interview with Paul O'Connor, Pat Finucane Centre (Derry, 2 March 2006)


*On the future government of Palestine*, GA Res 181 (II), UN GAOR, 1st Session, UN Doc A/64 (1947)

*Pat Finucane Centre* <http://www.patfinucanecentre.org/pf/inquibill/inquibill.html> at 24 February 2009

Interview with Darryl Pearce, Lingiari Policy Centre (Sydney, 15 November 2006)

Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006)

*Permanent Observer Mission of Palestine to the United Nations* <http://www.un.int/wcm/content/site/palestine/> at 6 April 2011


*Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Resolution 1541(XV) (1960)*


*Resolution on East Timorese Self-Determination, SC Res 384, 1869th mtg (1975)*

Interview with Aden Ridgeway, Tourism Australia (Sydney, 28 November 2006)

Interview with Associate Professor Irabinna Rigney, Flinders University (Adelaide, 29 August 2006)

Interview with Mike Ritchie, Coiste na n-Iarchimí (Belfast, 7 December 2005)

Interview with Brid Rodgers, SDLP (Lurgan, 9 March 2006)


Tauli-Corpuz, Victoria, *Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61st session of the UN General Assembly


United Kingdom of Great Britain and Northern Ireland, *Parliamentary Debates*, House of Commons, 15 June 2010, 511 15 (David Cameron, Prime Minister)


Universal Declaration of Human Rights, GA Resolution 217 A (III) (1948)

University of Ulster, INCORE and ARK, CAIN (Conflict Archive on the Internet) <http://cain.ulst.ac.uk/> at 1 March 2011


Interview with Margaret Ward, Women's Research and Development Agency (Belfast, 19 January 2006)

Interview with Dr Irene Watson, University of South Australia (Adelaide, 30 August 2006)


Williams, Joe, Chief Judge of the Maori Land Court, 'Confessions of a native judge - reflections on the role of transitional justice in the transformation of indigeneity' (Speech delivered at the Native Title Conference, Perth, 5 June 2008)

Wilson, Woodrow, Address to Senate, 64 Cong. Rec. 1741-42 (1917)


Interview with Peter Yu (Sydney, 29 September 2006)