Statism's Catch-22: An Austro-Libertarian Analysis of "Self-Determination of Peoples" under International Law

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Abstract

"Self-determination of peoples" is a relatively new international law principle which has gone through numerous changes in its history, making it an elusive concept. The principle has received interest the last 30 years, prompted at first by the Soviet breakup, more recently by growing nationalist movements, and most recently by states' totalitarian measures enforced in the name of combating Covid-19. Important issues concerning the future of self-determination's status in and impact on the international system remain. This paper outlines and analyzes the history of self-determination using a three-phase framework. In Phase One, the principle was a non-legally binding political principle. In Phase Two, the principle became legally binding but was limited to the decolonization context. In Phase Three, the principle becomes a universally accepted human right that some judges and jurists argue has become a peremptory norm of international law (jus cogens), which no state can violate under any circumstances. This historical inquiry reveals that the principle has always been asserted and argued against by states with the goal of maintaining or gaining power for themselves. This paper then summarizes the principle's modern incarnation as a human right under international law, whereby "peoples" – i.e., the entire population of a state's territory – have the right to both "external" and "internal" self-determination. "External" self-determination is the right of a people to have a state with independent international status. "Internal" self-determination means that the people in the state must be free to pursue their economic, social, and cultural development, while having adequate ability to participate in government. Self-determination and secession are often paired together, but current international law does not directly allow or disallow secession. This paper then delineates theoretical issues the modern incarnation of the self-determination principle poses for statism[1] and the international system, including: how to define "peoples" under the principle; what the relationship of the principle to states' sovereign territorial integrity should be; how to redraw state boundaries after a successful secession; whether radical self-determination leads to violent conflict; and what is the relationship of unfettered secession to liberal-democratic theory that much of the international system is based upon. Then, this paper applies Austro-libertarian theory to these issues, arguing that: the principle relies on an unfounded collectivist conception of rights; the international system slavishly adheres to the incoherent concept of states' sovereign territorial integrity; the principle, when its inconsistencies are removed, must theoretically justify unfettered secession; and the conflation of democracy with both liberalism and government by consent keeps properly understood self-determination from being achievable in fact. This paper concludes that the modern self-determination principle's theoretical deficiencies and inconsistencies present a catch-22

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[1] I.e., the view that the modern nation-state is desirable. "[I]n determining what constitutes a state [under international law], four factors are considered: the existence of (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states." Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28(2) Stan. J. Int'l L. 451, 456 (citing J.D. van der Vyver, *Statehood in International Law*, 5 Emory Int'l L. Rev. 9 (1991)).

dilemma for the international system. Either self-determination must be extended to take supremacy over state territorial integrity, or it must be rejected explicitly and entirely. Either choice, or trying to split the difference between them, incentivizes delegitimization of statism and the international system.

Introduction

"Self-determination of peoples" is a relatively new principle of international law that has undergone numerous changes through its history, making it an elusive concept. It is asserted both by states to legitimize their rule, and separatists attempting to secede.

Classical liberals and libertarians have taken interest in the ideas of self-determination and secession,[2] due to their long-time opposition to colonialism[3] and their advocacy of individual self-ownership and private property rights.[4] After the Soviet breakup,[5] and "under the rather realistic assumption that the . . . states of the West in general are bound for economic bankruptcy (much like the socialist peoples' democracies of the East collapsed economically . . .)",[6] Austro-libertarians have held that "present tendencies toward political disintegration will likely be strengthened in the future. Accordingly, the number of potential secessionist regions will continue to rise[.]"[7] This claim has been vindicated by modern decentralist and nationalist movements, such as the United Kingdom's referendum to leave the European Union.[8] Given Austro-libertarianism's prescience as to this trend, which is progressing within an international law context that faces persistent issues concerning the substance, status, scope and application of self-determination, especially in light of many states' movements towards totalitarianism in the name of combating Covid-19,[9] Austro-libertarian theory can provide meaningful analysis here.

This paper applies Austro-libertarian theory to the self-determination principle and its international law issues, making the case that the principle's contradictions place the statist international law paradigm in a catch-22 dilemma. Either self-determination must be taken to its logical conclusion, meaning a full, unqualified legal right for individuals and voluntarily-formed

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[2] Llewellyn H. Rockwell Jr., *The Libertarian Principle of Secession*, 1(1) The Austrian 4, 5 (2015); *see also* Murray N. Rothbard, The Irrepressible Rothbard: The Rockwell-Rothbard Report Essays of Murray Rothbard 234 (Center for Libertarian Stud. 2000) (stating that "national self-determination is a vitally important matter in which libertarians should properly take sides." From the August 1990 essay entitled "*The Nationalities Question*").

[3] *See, e.g.*, Ludwig von Mises, Liberalism: In the Classical Tradition 124-130 (The Found. for Econ. Educ. and Cobden Press, 3d ed. 1985) (1927).

[4] *See e.g.* Hans-Hermann Hoppe, *The Ultimate Justification of the Private Property Ethic*, 2(1) Liberty 20 (1988) (delineating "argumentation ethics").

[5] McGee, *supra* note 1, at 473.

[6] Hans-Hermann Hoppe, Democracy: The God that Failed 290 (Transaction Publishers 2001).

[7] *Id.*

[8] *See* Ryan McMaken and Jeff Deist, THE BREXIT EARTHQUAKE, https://mises.org/library/ryan-mcmaken-brexit-earthquake (last visited Dec. 16, 2020).

[9] Peter R. Breggin, M.D., *COVID-19 & Public Health Totalitarianism: Untoward Effects on Individuals, Institutions and Society*, https://breggin.com/coronavirus/NEW-COVID-19-LEGAL-REPORT.pdf (last visited Dec. 17, 2020).

groups to secede from states must be recognized, or the international system must reject the principle explicitly and entirely, at which point claims that the international system and its constituent states respect and represent their citizens' wills, and that their authority is based on anything other than brute force and threats thereof, would be severely undermined. In either case, the self-determination principle poses a threat to both states' and the international system's perceived legitimacy. If neither path is taken, then civil and nationalist strife between groups with divergent interests will be incentivized,[10] in part because citizens will have cause to increasingly distrust their states and the international system, and because different groups will be vying to control coercive state power.

Part I explains the international law principle of self-determination of peoples. It begins with a historical summary and analysis, and then describes its current incarnation as a legally binding human right, which some jurists and judges argue has reached the status of a peremptory norm of international law (*jus cogens*),[11] meaning a norm that no state has authority to violate under any circumstances.[12] This is followed by a delineation of specific issues the modern principle poses for the international system. Part II applies Austro-libertarian theory to the modern self-determination doctrine and its theoretical issues.[13] This paper concludes that the self-determination principle, if taken to its logical conclusion, has sown seeds that potentially lead to the delegitimization of statism and, by extension, the modern international system which rests upon the statist conception of government.

I. Self-Determination of Peoples – An Overview

The self-determination principle is an elusive concept that has been subject to various interpretations.[14] Therefore, it is necessary to explain its history and what the prevailing understanding of it is. Part I(A) explains and analyzes the history of the self-determination principle. Part I(B) lays out the modern understanding of the principle under international law. Part I(C) delineates important issues the principle poses for the international system.

[10] McGee, *supra* note 1, at 466 (stating that even a "limited but nonetheless expansive right of secession [that] does not include individual secession [] would help deter a majority's oppression of minorities and defuse tensions that otherwise could lead to revolution").

[11] For a discussion of whether self-determination has *jus cogens* status, *see* Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal 133-40 (Cambridge U. Press 1995)).

[12] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Rep. of the Study Group of the Int'l Law Comm'n Finalized by Koskenniemi*, ¶ 365, U.N. Doc. A/CN.4/L.682 (2006).

[13] Austro-libertarian scholars addressing "self-determination" have treated it as a political theory concept, rather than addressing it as a principle or right under international law. *See e.g.*, Mcgee, *supra* note 1, Rothbard, *supra* note 2, and Murray N. Rothbard, *Nations by Consent: Decomposing the Nation-State*, 11(1) J. of Libertarian Stud. 1 (1994). This paper sets out to apply Austro-libertarian theory to self-determination in its international law capacity.

[14] Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47(3) Int'l and Comp. L.Q. 537, 537 (1998).

A. History[15]

This paper adopts a three-phase framework to explain the history of the self-determination principle. In Phase One, we see self-determination as a non-binding political principle. In Phase Two, we see self-determination become a legal principle in the context of decolonization. In Phase Three, we see self-determination become a human right.

i. Phase One – Self-Determination as a Political Principle: Mid-Nineteenth Century to 1945

Phase One began during "the middle nineteenth century when the phrase 'self-determination' came into common usage."[16] "[S]elf-determination was not a right but was a [political] principle . . . that first allowed disparate people who spoke the same language . . . to group themselves together and form a new state. This 'grouping,' of course, did not occur without coercion and, in some cases, a good deal of violence."[17] Later on, this "principle of self-determination provided a guiding principle or rationale for dismembering the defeated Austro-Hungarian and Ottoman empires" after World War I.[18]

> As a political principle, but not a right under international law, self-determination in this period was subject to many limitations. The most obvious limitation, consistent with *realpolitik* concerns, was that the successful exercise of self-determination required the support of the victorious powers if there had been a war or the support of major powers even absent a war. Philosophically, 'external' self-determination or independence would be rejected if the resulting state would not be economically and politically viable.[19] Self-serving political restrictions made the principle of self-determination applicable to Europe, for instance, but not to colonial empires[.][20]

Self-determination in this phase, although dressed in terms of "allowing ethnic, linguistic, or religious groups to form various kinds of political units that might or might not become independent states,"[21] was in fact just a political front for the Allied powers' post-war imperial aspirations, implemented through the imposition of new state boundaries on Europe[22] to prevent,

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[15] *See generally* Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55(3) Wash. & Lee L. Rev. 773 (1998) (citing Hurst Hannum, *Rethinking Self-Determination*, 34(1) Va. J. Int'l L. 1 (1993)).

[16] *Id.* at 774.

[17] *Id.*

[18] *Id. See also* Hannum, *Rethinking Self-Determination*, *supra* note 15, at 3.

[19] *See* Hannum, *Rethinking Self Determination*, *supra* note 15, at 4.

[20] Hannum, *Right of Self-Determination*, *supra* note 15, at 774. *See also* Zubeida Mustafa, *The Principle of Self-Determination in International Law*, 5(3) Int'l Law. 479, 479 (1971).

[21] *Id.* at 776.

[22] Rothbard, *supra* note 2, at 231 (stating:

> wasn't the Wilsonian attempt to impose national self-determination and draw the map of Europe a disaster? And how! But the disaster was inevitable even assuming (incorrectly) good will on the part of Wilson and the Allies and ignoring the fact that national self-determination was a mask for their imperial ambitions.

according to Woodrow Wilson, "new or perpetua[l] old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world."[23]

ii. Phase Two – Self-Determination as a Legal Principle: Adoption of the United Nations Charter in 1945 and Decolonization

"Following a somewhat confused period between the two world wars,[24] . . . the United Nations Charter in 1945 marked the beginning of the second phase. This [] phase began . . . by identifying self-determination as a principle rather than as a right[,][25] . . . proclaimed in a manner that did not necessarily require [] dismember[ing] colonial empires[.]"[26]

> In both Article 1(2) and Article 55, the context seems to be the rights of the peoples of one state to be protected from interference by other states or governments. We cannot ignore the coupling of 'self-determination' with 'equal rights'[27]– and it was equal rights of *states* that was being provided for, not of individuals. The concept of self-determination did not then, originally, seem to refer to a right of dependent peoples to be independent, or, indeed, even to vote.[28]

"This situation gradually changed,"[29] and over about 20 years, international law saw a "shift from proclaiming a principle of self-determination in the Charter to recognizing a *right* of

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> For by its nature, national self-determination cannot be imposed from without, by a foreign government entity, be it the United States or some world League.
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> The whole point of national self-determination is to get top-down coercive power out of the picture and, for the use of force to devolve from the larger entity to more genuine natural and voluntary national entities. In short, to devolve power from the top downward. Imposing national self-determination from the outside makes matters worse and more coercive than ever).

[23] Woodrow Wilson, War Aims of Germany and Austria (Feb. 11, 1918), in 3 The Public Papers of Woodrow Wilson: War and Peace 177, 183 (Ray Stannard Baker & William E. Dodd eds., 1927)).

[24] *See* Mustafa, *supra* note 20 (stating that "[e]ven in the period between the two World Wars, the principle found no recognition in international law, as was amply demonstrated in the Aaland Islands case").

[25] *Id.* at 480 (stating that self-determination "was not even listed among the rights defined in the Universal Declaration of Human Rights" in 1948 (citing G.A. Res. 217 A (III) (Dec. 10, 1948)).

[26] Hannum, *Right of Self-Determination*, *supra* note 15, at 775 (citing U.N. Charter arts. 1(2), 55, the only two articles in the Charter that use the term "self-determination." Article 1(2) "provides that one of the purposes of the United Nations is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'." Rosalyn Higgins, Problems and Process: International Law and How We Use It 111-12 (Oxford U. Press 1994). "Article 55, on Economic and Social Co-operation, instructs the United Nations to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights – all in order to create conditions necessary for peaceful and friendly relations among nations 'based on equal rights and self-determination'." *Id.* at 112). *See also id.*, at 111 (stating that "contemporary . . . self-determination has been generated by the interplay of a variety of historical factors. . . . [I]t does not find its origins in the UN Charter. Other law-making mechanisms have been at work).

[27] *See* Higgins, *supra* note 26, and Mustafa, *supra* note 20, at 480.

[28] *Id.* at 112 (citing Cassese, *supra* note 11, at 34-42).

[29] Hannum, *supra* note 15, at 775.

self-determination[.]"[30] This occurred because, even though "the term ['self-determination'] originally had a rather limited and state-based meaning[,] there was nothing in the Charter that [] prohibited the emergence of a norm that required states not only not to interfere with each other but also to provide to dependent peoples the right to determine their own destiny."[31]

> [T]here began in the 1950s to be a moral stand taken on the issue by the General Assembly.[32] And, with the increase in Afro-Asian[, Latin American, and Socialist states gaining][33] membership in the 1960s, self-determination became increasingly invoked as a right of dependent peoples.[34] At first, several of the colonial powers resisted the idea that there was a legal right of self-determination. . . . But gradually their resistance to the idea of a legal right became more muted. They accepted broader interpretations of their duties[35] under [Article] 73(e), especially in terms of the provision of information to the United Nations on political progress. The development of the concept of self-determination was historically bound up with decolonization[36] – with the growing

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[30] *Id.*

[31] Higgins, *supra* note 26, at 113.

[32] *See* Mustafa, *supra* note 20, 480-81 (stating:

> During the fifth session of the General Assembly, Afghanistan and Saudi Arabia submitted a proposal in the Third Committee, which became the basis of an Assembly resolution calling on the Economic and Social Council 'to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination.' In February 1952, the General Assembly adopted another resolution by which it determined 'to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms: 'All peoples shall have the right of self-determination').

[33] *See id.*, at 485 (these states have "expressed dissatisfaction with modern international law which is largely a product of the European State system of the last few centuries").

[34] *See id.*, at 481-82 (listing UN resolutions invoking self-determination for colonial peoples, including: the Declaration on Granting Independence to Colonial Countries and Peoples, proclaiming that "[a]ll peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development[,]" G.A. Res. 1514 (XV) (Dec. 14, 1960); and the two covenants on Human Rights adopted by the General Assembly in 1966 – the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, which lay down the right of self-determination in identical terms, and declare "the States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote[, not ensure,] 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[,]" G.A. Res. 2200 A (XXI) (Dec. 16, 1966)).

[35] *See id.*, at 484 (stating:

> Many of the Western Powers [argued that] the Covenants on Human Rights . . . were designed to lay down rights which were universally acceptable, while self-determination confined to a colonial context, was limited to situations recognised as being of a transitory character by Chapters XI and XII of the United Nations Charter.
>
> This [] argument forced the supporters of the right of self-determination to accept it as a universal principle).

[36] *See id.*, at 483.

> agreement that it was obligatory to bring forward dependent peoples in independence if they so chose, even though Article 73 had spoken only of self-government.[37]

Self-determination in this phase was not understood to justify secession.[38] This was because there was consensus among states that their own territorial integrity should be maintained in the face of new, large amounts of state succession in the form of decolonization.[39]

This phase saw self-determination broaden from a non-binding political principle into a universal legal principle[40] that recognizes a right of colonial territories to "self-government," either through an independent state[41] or by other means.[42] Although the principle became universally accepted, the right it recognized was not universally applicable to all groups, being restricted only to peoples who happened to live in colonized territories. During this phase, we still see self-determination asserted and opposed by rival sides with realpolitik in mind. The newer U.N. members turned self-determination against those imperial powers that had crafted the idea, in order to politically separate from those powers (i.e., external self-determination, whereby newly decolonized territories would have independent international status), but they stopped short of allowing self-determination to apply to peoples as such (i.e., internal self-determination[43]), not even peoples within the newly decolonized territories.[44] The approach to

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[37] Higgins, *supra* note 26, at 113.

[38] Mustafa, *supra* note 20, 483-84 (explaining the opposition leveled against the proposition that self-determination justifies minority secession, at the San Francisco Convention and in the Third Committee of the General Assembly, from both powerful and newly decolonized states, but most vehemently from the latter). It is worth noting the contradiction of a state recently independent from colonization itself refusing independence to minorities within its territory. "[T]he political approach of most representatives, especially from the Socialist and Afro-Asian countries, [] was not conducive to a solution within the legal context," *id.* at 485, revealing how assertions of self-determination in Phase Two continued to be political fronts for state power. *See also id.* (citing U.N. A/AC.125/SR.68 and 69).

[39] Higgins, *supra* note 26, at 117-18 (quoting from General Assembly Resolution 2625 (XXV), which states:

> Nothing in the foregoing paragraphs 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 or independent states conducting themselves in compliance with the principle of [self-determination] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour).

[40] *See* Quane, *supra* note 14, at 538 (distinguishing "between the political and the legal principle of self-determination").

[41] Hannum, *supra* note 15, at 775 (citing *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960)).

[42] Higgins, *supra* note 26, at 113-14 (stating that self-determination "was never restricted to a choice for independence. A choice by the peoples of a territory to join with another state, or to remain in a constitutional relationship with the former colonial power, was equally acceptable").

[43] More on internal self-determination below, *see infra*, notes 52-54.

[44] Hannum, *supra* note 15, at 775 (stating that "the accepted mantra was that colonial territories would become independent. It did not matter how many 'peoples' were found within them, although obviously each contained many different peoples, nations, and ethnic groups. Thus, in general, territories, not peoples, enjoyed the right to independence"). *See also* Higgins, *supra* note 26, at 116 (stating that "many of the new states regarded self-

secession at this time was schizophrenic,[45] with Western states pushing the view that self-determination should not be a legal right, while the Third World states viewed self-determination as having no application outside decolonization.[46] These conflicting positions were adopted for the same reason – to resist the conclusion that self-determination meant secession at the expense of states' territorial integrity,[47] the West because it thought self-determination meant only independence,[48] while the Third World disagreed.[49] Ultimately, neither view would fully prevail.

iii. Phase Three – Self-Determination as a Human Right: Post-Colonialism

"The next phase [saw] the building of a bridge from self-determination as a legal obligation in the process of decolonizing, to self-determination as a human right."[50] The first step was when "[i]t came [] to be accepted that the right of self-determination was applicable not only to peoples under colonial rule, but also to the peoples subject to foreign or alien domination. This was spelled out in the UN Declaration on Friendly Relations of 1970[.]"[51] This period as well saw the adoption of a distinction between "internal" and "external" self-determination.[52] "Internal self-determination" means that, with some exceptions, peoples must be able to "'freely pursue their economic, social and cultural development'[]" within an independent state.[53] Crystallization of internal self-determination was due in part by Article 25 of the Covenant on Civil and Political Rights, which "provides that every citizen shall have the right to take part in the conduct of public affairs, to vote, and to be elected at periodic elections on the basis of universal suffrage, and to have access to public service in his country."[54]

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determination as a matter between them and their former colonial masters, but not as between them and their own population").

[45] *See supra*, note 38.

[46] Higgins, *supra* note 26, at 124.

[47] *Id.*, *supra* note 39.

[48] *Id.* at 118.

[49] *Id.*

[50] Higgins, *supra* note 26, at 114.

[51] *Id.* at 115. *See also id.*, at 115-16.

[52] *Id.* at 115-16 (stating:

> The Committee on Human Rights, when examining the report of a state party to the Covenant [on Civil and Political Rights], asks not only about any dependent territories that such a state party may be responsible for (external self-determination) but also about the opportunities this its own population has to determine its own political and economic system (internal self-determination)).

[53] *Id.* at 120 ("It is not only at the moment of independence from colonial rule that peoples are entitled freely to pursue their economic, social, and cultural development. It is a constant entitlement . . . to choose their own government").

[54] *Id.*

European states in this phase shifted their view on secession, adopting the position "that self-determination is a right that authorizes minorities to break away,"[55] based on the view that self-determination only meant independence.[56] The Third World states opposed this view "on the ground that it would allow certain powerful nations to work for the disintegration of other nations, by instigating artificial separatist movements within peoples united by mutual consent[.]"[57] This secession issue was ultimately resolved in favor of the view that there is no secession under self-determination, because the definition of peoples was restricted by existing state boundaries.[58] Ultimately, the modern incarnation of self-determination has arisen as a middle ground between the West and Third Worlds' opposing views.

B. The Modern Incarnation of the Self-Determination Principle Summarized

We can now summarize the modern understanding of the international law principle of self-determination. "Self-determination *is* a human right[,]"[59] but not an absolute right.[60] Moreover, it is a right held by groups – "peoples" – not individuals.[61] The term "peoples" is understood to mean the entire population of an independent state, regardless of their ethnicity, religion, or nationality.[62] Self-determination is, therefore, not a legal right of minorities as such.[63] Self-determination includes both the choice as to international status (external self-determination)[64] and adequate political participation in government along with economic, social, and cultural freedom (internal self-determination).[65] "[S]elf-determination is not an *authorization* of secession by minorities, [but] there is nothing in international law that *prohibits* secession or the formation of new states."[66] Secession justified by a claim of self-determination, if it is to occur, must be subordinated in the first instance to states' sovereign territorial integrity.[67]

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[55] *Id.* at 124.

[56] *Id.*, *supra* note 48.

[57] Mustafa, *supra* note 20, at 483.

[58] *Supra* note 39.

[59] Hannum, *supra* note 15, at 773.

[60] *Id.* at 777 (stating that "self-determination, except in the narrow context of decolonization, is not absolute").

[61] *Id.* at 774.

[62] Quane, *supra* note 14, at 571. *See also* Higgins, *supra* note 26, at 124.

[63] Higgins, *supra* note 26, at 124.

[64] *Supra* note 44.

[65] *Supra* note 53 and 54.

[66] Higgins, *supra* note 26, at 125.

[67] *Supra* note 39.

C. Modern Issues Posed by the Self-Determination Principle

Self-determination's new and unique status in international law has, expectedly, created questions regarding its status, extent, and relations to other international law doctrines. It also presents important political issues. This paper now turns to explain some of the major issues posed by the development and modern incarnation of self-determination.

i. Definition of "Peoples"

Tension exists between the definition of "peoples" under self-determination as a political principle and as a legal principle.[68] "[T]he political principle [] emphasize[s] criteria [to define 'peoples'] such as common history, race, ethnicity, and language which are commonly associated with the concept of a 'nation'."[69] In contrast, the prevailing legal principle defines "people" as the population of a given independent state.[70] National desires for the former definition puts pressure on the latter to conform.[71]

ii. Self-Determination vs. States' Sovereign Territorial Integrity

> In 1971, Zubeida Mustafa wrote that if self-determination were to go beyond [the right of non-self-governing territories] and recognize the right of self-determination as transcending legally established international boundaries, it would undermine the stability of the international order by placing it in a perpetual state of flux. It would also destroy the premise on which international law operates, viz., respect for the national unity and territorial integrity of States.[72]

Since then, self-determination has gone beyond and is now considered a human right.[73] Therefore, although the modern view subordinates self-determination and secession to states' sovereign territorial integrity, tensions remain,[74] especially when attempts are made to extend the political principle of self-determination into the legal sphere.[75]

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[68] Quane, *supra* note 40.

[69] *Id.* at 538. *See also* Rothbard, *infra* note 90.

[70] *Id.*, *supra* note 62.

[71] *Id.* at 568-70 (discussing the attempted secession of Biafra from Nigeria, and the successful secessions of Bangladesh from Pakistan and the former Yugoslavia). *See also* Rothbard, *supra* note 2, at 235-38 (from the June 1991 essay entitled "*Yugoslavian Breakup*").

[72] Mustafa, *supra* note 20, at 487.

[73] Hannum, *supra* note 59.

[74] Lea Brilmayer, *Secession and Self-Determination: A Territorial interpretation*, 16 Yale J. Int'l L. 177, 177-78 (1991).

[75] *See e.g.* Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 Case W. Res. J. Int'l L. 257, 263-65 (1981).

1. Drawing New Borders After Secession

Tension between secession based on self-determination and states' territorial integrity is typified by the international law principle of *uti possidetis juris*, which holds that pre-existing political borders must be maintained after state succession, unless otherwise provided by treaty.[76]

2. Do Self-Determination Claims Promote Violent Conflict?

One concern is that self-determination will promote violent conflict between states and groups attempting to assert self-determination against the state,[77] or between competing groups' respective self-determination claims.[78] Part of this concern is based on the problem of a successful secession leading to new minority groups within either the seceding territory or the remaining parent state.[79]

iii. Self-Determination vs. Majority Rule and Equal Rights

It has been questioned whether unilateral secession by minorities can be squared with liberal-democratic political theory that underlies much of the international system.[80] To the extent secession is paired with self-determination, questions for the former extend to the latter.

II. Applying Austro-Libertarianism to the Self-Determination Principle

Now that we understand the history and legal aspects of self-determination, this paper turns to apply Austro-libertarian legal, political, and economic insights to self-determination and the issues it has raised, in the order they are listed above in Part I(C).

A. Definition of "Peoples"

Austro-libertarians reject the notion of collective rights,[81] in part due to their methodological individualism.[82] Therefore, adopting this approach, we must reject the prevailing international law view that self-determination can be asserted only as a collective right of "peoples." "No society which does not have full self-ownership for everyone can enjoy a universal ethic. For this reason alone, 100 percent self-ownership for every man is the only

[76] Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 8(3) E.J.I.L. 478, 491-503 (1997).

[77] Quane, *supra* note 14.

[78] Hannum, *supra* note 15, at 780 (stating that "self-determination . . . has the potential to create serious conflict"). *See also* Quane, *supra* note 14, at 572 (stating that "self-determination may be conditioned by . . . the need to maintain international peace and security").

[79] *See* McGee, *supra* note 1, at 471 (addressing this issue from an Austro-libertarian viewpoint).

[80] Aleksandar Pavković, *Secession, Majority Rule and Equal Rights: A Few Questions*, 3 Macquarie L.J. 73 (2003).

[81] *See generally* Murray N. Rothbard, The Ethics of Liberty 113-20 (NYU Press, 2d ed. 1998) (1982) (explaining that the only justifiable rights are individuals' private property rights).

[82] Ludwig von Mises, Human Action: A Treatise on Economics 42 (Ludwig von Mises Inst., Scholar's ed. 1998) (1949) (explaining that collectives have no existence beyond the actions of their constituent individuals).

viable political ethic for mankind."[83] This insight is crucial for any inquiry into legal theory, because "law is a set of 'ought' or normative propositions."[84]

Self-determination then, to be theoretically viable, must, at its base, rest in the individual. But this is not the end of our inquiry, for humans are social creatures. Is it possible for Austro-libertarian theory, with its focus on individual self-ownership and private property, to extend to self-determination of groups? Yes, through contractual relations[85] between individuals – as Rothbard puts it, "nations by consent."[86] Putting aside practical hurdles to the realization of an Austro-libertarian legal regime in practice (given that the current legal paradigm is not aligned with this theory),[87] under pure Austro-libertarian theory[88] groups can only be considered to have a legally-cognizable "will"[89] when the individual members of the group voluntarily contract into the group's decision-making process. The reasons for a group's individuals contractually coming together – practical convenience, physical location, ideology, ethnicity, religion, culture, etc. – while meaningful,[90] are not, as such, decisive criteria or categories that a legal doctrine like self-

[83] Rothbard, *supra* note 81, at 46.

[84] Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2(1) Cato J. 55, 56. Rothbard goes on to state:

> Many writers and jurists have claimed the law is a value-free, 'positive' discipline. Of course it is possible to simply list, classify and analyze existing law . . . . But that sort of jurist is not fulfilling his essential task. . . . [T]he true jurist or legal philosopher . . . sets forth what the law should be . . . . If he does not, then he necessarily abdicates his task in favor of individuals or groups untrained in legal principles, who may lay down their commands by sheer fiat and arbitrary caprice. *Id.*

[85] For Austro-libertarian contract theory, *see generally* Rothbard, *supra* note 81, at 133-48; Williamson Evers, *Toward a Reformulation of the Law of Contracts*, 1(1) J. of Libertarian Stud. 3 (1977); and N. Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, 17(2) J. of Libertarian Stud. 11 (2003). To be clear, Austro-libertarian theory does not reject implicit or tacit agreement to contracts, nor that communities and circumstances can have generally-recognized legal default rules, established by custom or other source. The point is that true government by consent is possible only when government not only respects individuals' property rights but is directly derived from them.

[86] Rothbard, *Nations by Consent*, *supra* note 13, at 5 (stating that "[o]ne goal for libertarians should be to transform existing nation-states into national entities whose boundaries *could* be called just, in the same sense that private property boundaries are just[.]" "Total privatization would help solve nationality problems, often in surprising ways, and I suggest that existing states, or classical liberal states, try to approach such a system even while some land areas remain in the governmental sphere." *Id.* at 6).

[87] For a delineation and treatment of such practical hurdles, *see* McGee, *supra* note 1, at 470-73.

[88] *See* Rothbard, *Nations by Consent*, *supra* note 13, at 6 (briefly explaining pure anarcho-capitalism).

[89] *See* Mises, *supra* note 82.

[90] *See* Rothbard, *Nations by Consent*, *supra* note 13, at 1-3 (stating:

> The 'nation,' of course, is not the same thing as the state[.] . . . [E]veryone is necessarily born into a family, a language, and a culture. Every person is born into one or several overlapping communities, usually including an ethnic group, with specific values, cultures, religious beliefs, and traditions. He is generally born into a 'country.' He is always born into a specific historical context of time and place[.] . . .
> The 'nation' cannot be precisely defined; it is a complex and varying constellation of different forms of communities, languages, ethnic groups, or religions. . . .

determination can rest upon and remain logically consistent. Such reasons are mere factors within individuals' subjective value scales[91] that motivate their respective actions,[92] and as such are elusive to evidentiary inquiry beyond concretely manifested action.[93] What is objectively discernible are links between individuals and their private property,[94] and by extension the objective manifestations of these individuals' respective intents through the actual use and disposition of their property.

Ultimately, asking whether any particular "group" can be legally cognizable under a concept such as self-determination should be the same as asking whether this group was formed via voluntary contractual consent between the group's constituent individuals, for whatever reasons they chose. Only this conclusion is compatible with the indispensable methodological individualism underlying Austro-libertarianism. We see, then, that adoption of this view provides objective, property-based criteria upon which to determine what groups of individuals constitute "peoples" that can have self-determination attached to them, something international law has not provided. The problem with the modern doctrine here is that it assumes "peoples in [pre-colonial] independent states had already exercised the right of self-determination," while people in new, post-colonial states had not yet done so.[95] This view's flaw is its further assumption that citizens can be said to have consented to their state's rule.[96]

B. Self-Determination vs. State Sovereign Territorial Integrity

Because Austro-libertarians reject the institution of the state, viewing it as a divorce of law from justice because it is inconsistent with self-ownership and private property,[97] they have

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The question of nationality is made more complex by the interplay of objectively existing reality and subjective perceptions).

[91] *See* Mises, *supra* note 82, at 94-96 (explaining that individuals' subjective values have no existence apart from concrete action).

[92] Ludwig von Mises, Theory and History: An Interpretation of Social and Economic Evolution 11 (Ludwig von Mises Inst. 2007) (1957) (stating that "[m]an chooses first ultimate ends and then the means to attain them. *These acts of choosing are determined by thoughts and ideas*" (emphasis added)).

[93] *See* Mises, *supra* note 91. This does not mean Austro-libertarianism does not consider intent behind individuals' respective actions in addressing questions in contract and tort. On the contrary, intent is crucial in certain circumstances to determining whether a contract or a tort has occurred. But intent about what objective result an actor wants to achieve from action is not the same as the subjective value that they hoped to attain from this objective result. Under Austro-libertarian legal theory, inquiry into objective outcomes individual actors hoped to achieve, such as whether a person consented to a contract, is more applicable to legal issues than inquiry into subjective values individuals hoped to attain.

[94] *See* Kinsella, *supra* note 85, at 27 (stating that "the very purpose of property rights in scarce resources is to prevent conflicts over the use of resources. . . . One essential aspect of property is that it publicly demarcates one's bounds . . . . If the bounds are secret and unknowable, conflicts cannot be avoided" (citations omitted)).

[95] Quane, *supra* note 14, at 571.

[96] McGee, *supra* note 1, at 455 n. 15 (arguing against the "social contract" concept (citing Lysander Spooner, No Treason: The Constitution of No Authority 11 (1973), who criticizes the view that a state constitution can be viewed as a contract)).

[97] *See, e.g.*, Rothbard, *supra* note 81, at 160-97.

no theoretical obstacles to self-determination assuming supremacy over the sovereign territorial integrity of existing states.[98] Having dispensed with states' sovereign territorial integrity, there is, in theory, nothing stopping the Austro-libertarian from supporting unconditional secession from nation-states, even secession of the individual.[99] This position liberates self-determination from strained attempts to theoretically square it with state sovereign territorial integrity. Such attempts are an exercise in futility, due to the inherent inconsistencies between a group having self-determination – i.e., the right to choose their own government – and a principle that states' territorial integrity must take supremacy over the desires of peoples within those states to have the states' territorial control changed, replaced, or removed.[100]

i. Drawing New Borders After Secession

Accepting the radical theory of secession, Austro-libertarianism holds that individual property owners' voluntary contractual consent is the theoretical basis for how new national borders should be drawn after secession.[101] In the absence of a fully private property legal regime, the more a new state's boundaries align with the property rights and contracts of the individual residents of the state, then the less unjust the state's borders are.[102]

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[98] *See, e.g.*, Rothbard, *Nations by Consent*, *supra* note 13, at 3-5 (stating:

> [a] crucial flaw is the [] assumption . . . that every nation-state 'owns' its entire geographical area in the same just and proper way that every individual property owner owns his person and [] property[.] . . .
>
> It is absurd to designate every nation-state, with its self-proclaimed boundary as it exists at any one time, as somehow right and sacrosanct, each with its 'territorial integrity' to remain as spotless and unbreached as your or my bodily person or private property. Invariably, of course, these boundaries have been acquired by force and violence, or by interstate agreement above and beyond the heads of the inhabitants on the spot, and invariably these boundaries shift a great deal over time in ways that make proclamations of 'territorial integrity' truly ludicrous").

See also Rothbard, *supra* note 2, at 229.

[99] *See generally, e.g.*, Mcgee, *supra* note 1 (arguing for a radical right of secession based on the right to free association. McGee also addresses arguments against secession, *id.* at 456-61, and practical issues for to the application of the theory. *Id.* at 464-73.

[100] Rothbard, *supra* note 2, at 231 (stating that "[o]nly by boldly asserting the right of secession can the concept of national self-determination be anything more than a sham and a hoax").

[101] *Id.* at 230-31 (stating:

> there are no just national boundaries *per se*; [] real justice can only be founded on the property rights of individuals. . .
>
> National boundaries are only just insofar as they are based on voluntary consent and the property rights of their members or citizens. Just national boundaries are, then, at best derivative and not primary[.] . . . In practice, the way to have such national boundaries as just as possible is to preserve and cherish the right of secession).

[102] *Id.* at 232-33 (arguing that "[o]ne practical way of implementing self-determination and the right of secession is the concept of a partition referendum in which each village or parish votes to decide whether to remain inside the existing national entity or to secede or join another such nation"). For another treatment of practical issues concerning the application of secession in the real modern world, *see* McGee, *supra* note 1, at 464-73. *See also* Rothbard, *supra* note 86, at 5-6, 8-9.

ii. Do Self-Determination Claims Promote Violent Conflict?

The modern understanding of self-determination under international law is linked to peoples' relations to the institution of the state.[103] Therefore, it is no surprise that it could lead to violent conflicts. When one group achieves self-determination via the state, a coercive institution,[104] the majority necessarily achieves self-government for themselves at the expense of minorities within the state.[105] Thus, by applying Austro-libertarianism, thereby decoupling the concept of self-determination from the state and pairing it with a private property-contract theory of government, such conflicts between claims for desired treatment from the state disappear,[106] because no person could be forced to non-consensually associate their person or property with others. Under the theory of a private property legal regime, the problem of majority tyranny of minorities vanishes.

Secession, even in the modern day, would have benefits. The right to secede "would provide the majority . . . an incentive to consider the minority's rights and wishes and to improve conditions[.]"[107] Moreover, a proliferation of many, smaller nations and states would lead to a greater amount of free-trade between them, because autarkic economic policies by such smaller states would have a more deleterious effect on their populations' economic welfare than would otherwise be the case in a larger state.[108] This increased amount of mutually beneficial trade between peoples would incentivize peace between them.[109]

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[103] *Supra* note 62.

[104] Rothbard, *supra* note 97.

[105] *See* Hoppe, *supra* note 6, at 79 (stating:

> Mises grew up in a multinational state and was painfully aware of the antiliberal results of majority rule in ethnically mixed territories. Rather than majority rule, to Mises democracy meant literally 'self-determination, self-government, self-rule,' and accordingly, a democratic government was an essentially voluntary membership organization in that it recognized each of its constituents' unrestricted right to secession.

Citing Ludwig von Mises, Nation, State, and Economy: Contributions to the Politics and History of Our Time 50, 55 (NYU Press 1983) (who states that "[i]n polyglot territories, the application of the majority principle leads not to the freedom of all but to the rule of the majority over the minority. . . . Majority rule signifies . . . for a part of the people . . . not popular rule but foreign rule")).

[106] *See* McGee, *supra* note 1, at 466.

[107] *Id.* at 467. States "that did not meet the needs of their citizens would shrink in size or disappear." *Id.* at 467-68 (citing James M. Buchanan & Roger L. Faith, *Secession and the Limits of Taxation: Toward a Theory of Internal Exit*, 77 Am. Econ. Rev. 1023 (1987)).

[108] Rothbard, *Nations by Consent*, *supra* note 13, at 6. *See also* Hoppe, *supra* note 6, at 74 (stating that "[e]ven if as a result of a secessionist tendency a new government, whether democratic or not, should spring up, territorially smaller governments and increased political competition will tend to encourage moderation as regards exploitation").

[109] *See generally* Jong-Wha Lee & Ju Hyun Pyun, *Does Trade Integration Contribute to Peace?*, 20(1) Rev. of Development Econ. 327 (2016).

C. Self-Determination vs. Majority Rule and Equal Rights

Austro-libertarians argue that majority democratic rule is illiberal, and therefore counter to economic development and peace.[110] Aleksandar Pavković's rejection of unfettered unilateral secession is based on a conflation of liberalism with democracy,[111] an all-too-common misconception. He argues that secession should only be allowed where it does "not infringe the citizens' rights which the liberal-democratic parent state is endeavouring to protect. The conditions for secession [should] aim to ensure that the rights both of the secessionists and of the citizens of the parent state continue to be equally protected in spite of the secession."[112] What he fails to recognize is that statist, majority democrat rule necessarily implies unequal rights and subjugation of the minority to the majority.[113] A truly liberal social order, based on self-ownership, private property, and freedom of association and contract, can only occur when government by contract replaces statist majority rule. Only by decoupling self-determination from the state can it be attained by one group without necessarily taking it away from another.

Conclusion

From the above application of Austro-libertarian insights to the history of and issues posed by the self-determination principle, we see that there are multiple serious logical contradictions within its modern incarnation. This is largely due to the political, power-grabbing way that states invoked and debated over self-determination. At first, the imperial powers and the victors of World War I asserted self-determination as a political front for their redrawing of European political borders. This was followed by decolonization, when new states asserted self-determination to take political power away from not only the old powers but also any disaffected minorities in their territories unhappy with the new, majority-rule states. The problem of self-determination representing and creating conflict between peoples has been compounded by the international system's slavish adherence to the incoherent doctrine of sovereign territorial integrity. The statist political origins and context of the self-determination doctrine cannot be squared with self-determination properly understood. Rights on paper mean nothing if not recognized in practice, and the state cannot provide peoples with self-determination without thereby curtailing other peoples' ability to attain the same, no matter what states claim to the

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[110] *See* Hoppe, *supra* note 6, at 104-05 (stating:

> democracy is immoral [and] uneconomical. . . . [M]ajority rule . . . allows for A and B to band together to rip off C, C and A in tum joining to rip off B, and then B and C conspiring against A, and so on. This is not justice but a moral outrage[.] . . . [A]s for the economic quality of democracy, it must be stressed relentlessly that it is not democracy but private property, production, and voluntary exchange that are the ultimate sources of human civilization and prosperity. . . . Private property is as incompatible with democracy as it is with any other form of political rule (citations omitted)).

[111] Pavković, *supra* note 80, at 73.

[112] *Id.* at 74.

[113] Hoppe, *supra* note 6, at 82-84 (explaining how privileged governmental functions under democracy, held by temporary and interchangeable caretakers, lead to increased, more shortsighted exploitation of private property and production than even traditional monarchy. This is because democratic caretakers have access to present tax-value in their territory, but they do not own the capital stock from which this tax-revenue is derived. Therefore, they are not responsible for the long-term economic value of their territory and are not personally liable for the debts incurred by the state. This leads to greater taxation, public debt, monetary inflation, and their consequent economic perversions).

contrary in various documents. If all peoples are to attain equal right to self-determination, the understanding of self-determination must move past its current, inconsistent incarnation, through the aid of Austro-libertarian theory. A delineation of paths to the practical attainment of properly understood self-determination is largely beyond the primarily theoretical scope of this paper; such practical issues deserve more scholarly treatment.

Ultimately, we must conclude that the current international law incarnation of the self-determination doctrine cannot be theoretically sustained. Therefore, the international system is faced with a catch-22 dilemma – either self-determination must continue towards its logical conclusion, where it supplants states' sovereign territorial integrity, or it must be rejected explicitly and entirely. Neither option is desirable for states and their desire to retain power, the former because their sovereignty is toppled, the latter because they will lose the propagandistic cover that the state can consistently act as a rights protector. This latter outcome would incentivize nationalist backlash, as people would be told that their states put their own sovereign territorial integrity and power over the rights and desires of the populace. And attempting to split the difference between the two can only delay the choice between one of these paths, while tending to foster nationalist, ethnic, and religious conflict over the control of state power.

Through the doctrine of self-determination, the statist international system has likely made its own bed[114] – as the doctrine develops, we will see which side world leaders lie in.

[114] A British representative at the Third Committee of the General Assembly wondered "whether even States having no colonies were indeed prepared to face the consequences of assuming a legal obligation to promote the right of self-determination within their borders[.]" Mustafa, *supra* note 20, at 484-85.