

Whose Claim, to what Right?

A Taxonomy of the Self-Determination Genus

Tom Sparks*

Abstract

Invocations of self-determination are commonplace in international affairs, and are seen as occupying an important position in the international legal system. The International Court of Justice (ICJ) has declared the right of peoples to self-determination ‘one of the essential principles of international law’, and has stated that it is a norm of erga omnes character (Case Concerning East Timor, [29]), and it has even been argued that the concept has acquired ius cogens status (Cassese, 1995, p. 140). Nevertheless, the dark side of the concept cannot be denied: as Duursma has noted, ‘practically all’ armed conflicts relate to the exercise of self-determination (1996, p. 1), and it is not uncommon to see the concept invoked as a justification-claim for radically different outcomes. Rather than casting the concept into doubt, however, these circumstances should be taken to show yet more strongly that it is widely seen by those claiming it as powerful source of legitimacy for their cause.

This paper will argue that the widely used internal/external framework of classification of self-determination claims is not able to capture the complexities of the usages of the concept or of the different legitimacy-claims that it can represent. In focussing only on the outcomes sought it treats self-determination claims as a species: as of a single kind, but exhibiting perhaps different behaviours. It collapses the many types and sources of justification to which the concept variously refers, and thus inhibits the ability of the international legal system to distinguish between types of self-determination claims.

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By contrast, this paper will present a four-part taxonomy of such claims as distinct species within a self-determination genus. It will be argued that although the four kinds of self-determination claims—political, colonial, remedial and secessionary—share a deep root, they nevertheless have different ideational and historical foundations. The forms therefore rely on different justification narratives, and represent invocations of different principles. Thus, for example, although both seek as outcome the displacement of sovereignty, the principles underlying a claim to colonial self-determination and a claim to remedial self-determination are sufficiently different that they cannot be meaningfully compared, let alone equivalentised.

That conclusion has, of course, significant implications for the international legal system. In rendering both the forms and the justification narratives of self-determination claims more readily distinguishable, it enables claims of different kinds to receive different legal treatment. There are indications that, in the coming years, the already significant role self-determination plays in international affairs may increase, including in some of the most unstable and contested regions of the world. A renewed focus on the idea of self-determination and of the claims it can represent is therefore timely.

Keywords: Self-Determination; Self-Determination theory; International Legal Theory; Categorisation

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Table of Contents

1. The Internal/External Division of Self-Determination.....	7
1.1 “Internal” Self-Determination.....	8
1.2 “External” Self-Determination.....	10
2. Four Species of Self-Determination.....	12
2.1 Political Self-Determination.....	12
2.2 Secessionary Self-Determination.....	14
2.3 Remedial Self-Determination.....	17
2.4 Colonial Self-Determination.....	21
3. Taxonomy and Categorisation.....	24
4. Conclusion.....	28

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Tom Sparks

'If the names are unknown knowledge of the things also perishes.'

Carl Linnaeus¹

This paper will argue that the many uncertainties surrounding self-determination are at least in part explicable as problems of definition. The commonly used vocabulary of “internal” versus “external” claims to self-determination is insufficient to capture the complexities of the usages of the concept or of the different legitimacy-claims that it can represent. This distinction is focused on the outcomes sought by the appeals to the concept, and as such it has a tendency to treat self-determination claims as a *species*: as of a single *kind*, but exhibiting different behaviours. This reasoning collapses the many types and sources of justification to which the concept variously refers, and thus inhibits the ability of the international legal system to distinguish between types of self-determination claims. In short: self-determination claims are subject to an error of categorisation. By contrast, this paper will present a four-part taxonomy of such claims as *species* within a self-determination *genus*. Although it will argue that the four kinds of self-determination claims identified here—political, colonial, remedial and secessionary—share a deep root, it will refer to the ideational and historical foundations of the forms in order to show that they rely on different justification narratives, and represent invocations of different principles.

In section one this paper will discuss the current internal/external paradigm in order to show that it does not sufficiently delineate between types of self-determination claims, and it will propose a four-part taxonomy of self-determination. Section two will discuss the four kinds of self-determination claim identified, in order to show that these are more useful and appropriate lines upon which to draw distinctions. Finally, in section three, the paper will reflect on the philosophy of categorisation, and will show the importance of correctly categorising ideas both for the proper operation of the law, and in order to facilitate the study and understanding of concepts.

1 Carl Linnaeus, *Philosophia Botanica* (1751), in Frans Antonie Stafleu, *Linnaeus and the Linnaeans: The Spreading of Their Ideas in Systematic Botany* (Oosthoek 1971) 80.

Self-determination is among the most enduring of concepts of international organization, and has long influenced the shape and development of international law. Its dramatic emergence as a powerful claim to justification in the American Declaration of Independence of 1776 presaged and influenced its application throughout the Age of Revolution,² and this is often cited as its first occurrence.³ It remains a vital influence on modern day international law: it is cited in the Charter of the United Nations,⁴ was declared to be ‘essential’ by the International Court of Justice,⁵ and yet its application to the many national groups seeking independence worldwide is feared and resisted for its potential to destabilise the international order.⁶ Indeed, its violent history cannot be denied; Duursma has observed that ‘practically all’ armed conflicts relate to the exercise of internal or external self-determination.⁷ Yet proponents of its application and extension cite it as an emancipatory principle: a tool with the potential to realise

2 The term is Hobsbawm’s: Eric J Hobsbawm, *The Age of Revolution: Europe 1789-1848* (Weidenfeld and Nicholson 1962).

3 See e.g. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 11; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 172–73; but, contra, Elizabeth Rodríguez-Santiago, ‘The Evolution of Self-Determination of Peoples in International Law’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 202–04, who finds precursors of the modern concept in the Fifteenth Century debates over the European colonisation of the Americas. It is also at least arguable that the Declaration of Arbroath of 1320 exhibited some of the same ideas in protogeneous form

4 Charter of the United Nations and Statute of the International Court of Justice, signed 26 June 1945, in force 24 October 1945, Article 1(2): ‘The Purposes of the United Nations are: [...] 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’.

5 *East Timor (Portugal v Australia)*, Judgment, (1995) ICJ Reports 90, [29]: ‘In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable [...] it is one of the essential principles of contemporary international law.’

6 See e.g. Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 104; Cassese (n 4) 328; Lee Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) passim. In a similar vein Buchanan notes that ‘[s]ecessionist movements, and the efforts of states to resist them, have usually led to severe economic dislocations and massive violations of human rights. All too often, ethnic minorities have won their independence only to subject their own minorities to the same persecutions they formerly suffered’: Allen Buchanan, ‘Democracy and Secession’ in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 14.

7 Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press 1996) 1; see also Daniel Philpott, ‘Self-Determination in Practice’ in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 79; and Tesón, who describes it as a ‘profoundly illiberal’ concept: Fernando R Tesón, ‘Introduction: The Conundrum of Self-Determination’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 8.

self-rule, political empowerment, and the application of human rights standards,⁸ and Cassese goes further still, concluding that self-determination has acquired *jus cogens* status.⁹

The “Jekyll and Hyde” character of self-determination is just one of the intriguing questions bound up with this complex concept.¹⁰ There are few other principles in international legal affairs whose status, content and scope are so uncertain, and so contested.¹¹ There is a continuing and significant disconnection between the right of self-determination as it is often understood by those modern actors invoking the idea (often in pursuit of secession), and the panoply of references in legal texts and judicial decisions to the ‘right’ of self-determination (mainly references to “internal” self-determination).¹² The result is a legal norm of self-determination of uncertain scope, application, and result.¹³

8 See e.g. Guyora Binder, ‘The Case for Self-Determination’ in Robert McCorquodale (ed), *Self-Determination in International Law* (Ashgate Dartmouth 2000) 141 et seq; Daniel Philpott, ‘In Defense of Self-Determination’ (1995) 105(2) *Ethics* 352; Philpott (n 8); David Copp, ‘Democracy and Communal Self-Determination’ in Jeff McMahan and Robert McKim (eds), *The Morality of Nationalism* (Oxford University Press 1997); Tesón (n 8) 8 et seq; Dov Ronen, *The Quest for Self-Determination* (Yale University Press 1979).

9 Cassese (n 4) 140; see also Alain Pellet, ‘Kosovo – The Questions Not Asked: Self-Determination, Secession, and Recognition’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 272; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 51–53; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers Publishing Company 1988) 381–84.

10 Mégret, for example, describes ‘[i]nternational law’s attitude to self-determination [as having] oscillated in the last century between the temptation of encouraging group aspirations to forms of political and territorial power and a recoiling at the possible consequences for international order and stability.’ Frédéric Mégret, ‘The Right to Self-Determination: Earned, Not Inherent’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 48.

11 Tesón declares that ‘[n]o other area of international law is more indeterminate, incoherent, and unprincipled than the law of self-determination.’ Tesón (n 8) 1.

12 See, e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, (1971) ICJ Reports 16; *Western Sahara, Advisory Opinion*, (1975) ICJ Reports 12; *East Timor* (n 6); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, (2004) ICJ Reports 136.

13 Tesón (n 8) 1–2.

1. The Internal/External Division of Self-Determination

Many of the contradictions and confusions surrounding the concept of self-determination can be attributed to problems of definition. In international law self-determination is often understood to be a unitary concept,¹⁴ and is described as having two aspects or applications – the internal and the external.¹⁵ Indeed, Summers argues

14 See, e.g. Cassese (n 4) 11–33; Jens David Ohlin, ‘The Right to Exist and the Right to Resist’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) passim; Patrick Macklem, ‘Self-Determination in Three Movements’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 95; Rodríguez-Santiago (n 4); Duncan French, ‘Introduction’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 11; Jure Vidmar, ‘Unilateral Declarations of Independence in International Law’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 71–73; Katherine del Mar, ‘The Myth of Remedial Secession’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) passim; Mégret (n 11) 48–54; Anthony Whelan, ‘Self-Determination and Decolonisation: Foundations for the Future’ (1992) 3 *Irish Studies in International Affairs* 25; Snežana Trifunovska, ‘One Theme in Two Variations – Self-Determination for Minorities and Indigenous Groups’ (1997) 5 *International Journal on Minority and Group Rights* 175; Patrick Thornberry, ‘The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism’ in Christian Tomuschat (ed), *The Modern Law of Self-Determination* (Martinus Nijhoff 1993); James Crawford, ‘Outside the Colonial Context’ in WJ Allan Macartney (ed), *Self-Determination in the Commonwealth* (Aberdeen University Press 1988) 13; Elizabeth Chadwick, *Self-Determination in the Post-9/11 Era* (Routledge 2011) 7–8; Christian Walter and Antje von Ungern-Sternberg, ‘Introduction: Self-Determination and Secession in International Law—Perspectives and Trends with Particular Focus on the Commonwealth of Independent States’ in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 2; Philpott (n 8) 85–86; Rupert Emerson, ‘Self-Determination’ (1971) 65 *American Journal of International Law* 459; Nathaniel Berman, ‘Sovereignty in Abeyance: Self-Determination and International Law’ (1988) 7 *Wisconsin International Law Journal* 51; Binder (n 9); Hurst Hannum, ‘Rethinking Self-Determination’ (1993) 34 *Virginia Journal of International Law* 1.

15 See e.g. James Summers, ‘The Internal and External Aspects of Self-Determination Reconsidered’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) passim; Cassese (n 4); Salvatore Senese, ‘External and Internal Self-Determination’ (1989) 16 *Social Justice* 19; Duursma (n 8); Rodríguez-Santiago (n 4) 202 et seq; Vidmar (n 15) 71–73; del Mar (n 15) 79 et seq; Raič (n 4) 226–307; Robert McCorquodale, ‘Self-Determination: A Human Rights Approach’ (1994) 43 *The International and Comparative Law Quarterly* 857; Margaret Moore, ‘Introduction: The Self-Determination Principle and the Ethics of Secession’ in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998); Helen Quane, ‘The United Nations and the Evolving Right to Self-Determination’ (1998) 47 *International and Comparative Law Quarterly* 537; Jan Klabbers, ‘The Right to Be Taken Seriously: Self-Determination in International Law’ (2006) 28 *Human Rights Quarterly* 186; Howard R Berman and others, ‘Indigenous Peoples and the Right to Self-Determination’ (1993) 87 *Proceedings of the Annual Meeting of the American Society of International Law* 190; David B Knight, ‘Territory and People or People and Territory? Thoughts on Postcolonial Self-Determination’ (1985) 6 *International Political Science Review* 248; Whelan (n 15); Emerson (n 15) 465–66; Kelly Strathopoulou, ‘Self-Determination, Peacemaking

that this vocabulary is ‘now almost standard practice in the academic literature,¹⁶ even if (a fact which calls into question its usefulness) there is no universal agreement on to what the terms refer.¹⁷ By contrast it will be argued here that this internal/external dichotomy amounts to a conflation of the forms of self-determination, and thus impedes their analysis. Such a view of self-determination produces (even to a greater extent than is warranted) histories which show its development to have been chaotic, and legal analyses which show its status to be at best indeterminate.¹⁸ This paper will seek rather to demonstrate that a clearer and more coherent description of the concept is possible when self-determination is understood not a *species*, but a *genus*: it comprises at least three separate ideas, and a fourth, hybrid, form.

1.1 “Internal” Self-Determination

The internal/external vocabulary of self-determination is a distinction drawn on the basis of consequences. Internal self-determination is taken to be that which takes places within the pre-drawn boundaries of a State.¹⁹ It therefore refers primarily to what may be termed the political or the participatory aspects of self-determination—that no group within a State should be ‘denied meaningful access to government to pursue their political, economic, social and cultural development’²⁰—and secondarily

and Peace-Building: Recent Trends in African Intrastate Peace Agreements’ in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 283–85; Trifunovska (n 15).; Cristescu, *The Right to Self-Determination: historical and current development of the basis of United Nations Instruments*, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/404/Rev.1, p.5, *passim*. The internal/external classification was also discussed in some detail and employed by the Supreme Court of Canada in its decision in *Reference Re Secession of Quebec* [1998] 2 SCR 217, [126] *et seq.*

16 Summers (n 16) 230.

17 “Internal” and “external” do not appear to bear the same meanings in the work of all authors. Compare, for example, Whelan, who uses the term “external” to mean “non-intervention” (Whelan (n 15) 37), with McCorquodale, who uses the term to refer to secessions (McCorquodale (n 16) 863–64). This section takes “internal” to mean self-determination by the whole people of a State within its established borders, and “external” to mean the secession of a sub-State unit, which appear to be the modal usages of these terms.

18 There are other, and more potentially serious, consequences of this false conflation, too, than its impediment of academic understanding of the idea. As Mégret notes, the endorsement by the international community of self-determination in the colonial context was seen by some as an affirmation of a broader right to secede, and ‘[t]hose who took the principle too literally, from Katanga to Biafra, learned their lesson painfully.’ Mégret (n 11) 50.

19 Summers (n 16) 253–242; Klabbers (n 16).

20 *Reference Re Secession of Quebec* (n 16) [138].

to the principle of non-intervention²¹ and, depending on the strength ascribed to the principle *uti possidetis juris*, might be conceived as encompassing self-determination by colonial possessions and other non-self-governing territories.²²

Even if one accepts that these functions sit comfortably within the same category—a contention that will be challenged below—however, it is clear that the vocabulary of “internal” is insufficient to encompass them. It is clear, first, that this principle is not a purely internal matter, but rather has both inward-facing and outward-facing aspects: “internal” self-determination goes to the legitimacy of governments and political systems (inward-facing aspect),²³ and it guarantees the principles of sovereign equality and non-interference (outward-facing aspect).²⁴ In other words, the “internal” form of self-determination posits two distinct principles: it asserts, first, that the *form* of government is legitimate only if in accordance with the wishes of the people to which the government applies;²⁵ and, secondly, that the form and functioning of their government is a matter for the people of the polity alone, that no power or people can impose its will upon the polity, and that interference by a foreign power or people is thus illegitimate.²⁶ For this reason Waldron prefers to capture these ideas under the heading of *territorial* self-determination,²⁷ but while this vocabulary avoids the misnomer “internal”, it will be argued below that it does not move beyond the effects or manifestations of the concepts and so does not advance understanding of the different legitimacy-claims involved.

21 Whelan (n 15) 37.

22 For a discussion of the *uti possidetis juris* principle see Anne Peters, ‘The Principle of Uti Possidetis Juris: How Relevant Its It for Issues of Secession?’ in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014).

23 Patten calls this the “democratic” idea of self-determination: Alan Patten, ‘Self-Determination for National Minorities’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016). See *contra* Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 408, quoted at n 25 below.

24 Patten calls this the “statist” idea. Patten (n 24).

25 That is not to say, however, that the *Government* must accord with the wishes of the population, nor that the Government must be *democratic*. On the contrary, as Waldron has observed, ‘[i]t is important, however, not to identify self-determination and democracy. The right of self-determination is prior to democracy, for it includes the right to decide whether to have a democracy around here, and if so, what sort of democracy to have. Self-determination is violated when we forcibly impose democracy on a country from the outside.’ (Waldron (n 24) 408.)

26 Bas van der Vossen, ‘Self-Determination and Moral Variation’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 13–14. It is under this second heading that self-determination by a colonial entity would sit, if included in the “internal” category.

27 Waldron (n 24) 397–98.

1.2 “External” Self-Determination

The “external” self-determination category, by contrast, is usually taken to refer to claims to autonomy or to secession by territorially concentrated sub-State national groups.²⁸ It, too, encompasses a wide range of instances, from pure claims to secession based on a different identity, to secession *in ultimum remedium* as a result of severe abuses of rights of political participation or human rights;²⁹ and could provide an equally (un)comfortable home for the right of former colonies to self-determine.³⁰

As with so-called “internal” self-determination, the “external” category is too broad a church to be useful as an analytical or legal tool. Here it is the effect—the displacement of sovereignty—which is treated as the hallmark of the category,³¹ but it is immediately clear that this effect focus causes a conflation of different kinds of claims: the claim by a minority group of a right to independence purely as a function of its identity *qua* minority (that part of the norm Waldron calls “identity-based”,³² and Morris “national” self-determination)³³ is a vastly different *kind* of appeal to legitimacy than that of the politically excluded group or a group subject to discrimination which seeks secession as a remedy of last resort,³⁴ and different again from the claim of a colonised people subject to the rule of a foreign power to independence and self-government.³⁵ Moreover, as the historical experience will show, these forms have received different legal treatment, and have not, in fact, been treated as a single category.

28 Trifunovska (n 15); McCorquodale (n 16) 863–64.

29 *Katangese Peoples’ Congress v Zaire*, African Commission on Human and Peoples’ Rights, Communication no. 75/92(1995); Written Statement of the Kingdom of the Netherlands, 17 April 2009, *Kosovo Advisory Opinion* [3.6].

30 *Reference Re Secession of Quebec* (n 16) [138]; Cassese (n 4) 71–99.

31 *ibid* 19. As Mégret correctly observes, the displacement of sovereignty and the creation of a new State is the most extreme of a series of possible outcomes of self-determination claims of the kinds discussed here, and it may be that it is therefore artificial and misleading to categorise them according to their effects. Claims of the kinds discussed here could seek, rather than secession and statehood, increased minority protections, a degree of autonomy, federalism, or other outcomes entirely: Mégret (n 11) 45–46. Nevertheless, the focus on independence and the displacement of sovereignty is appropriate, it is submitted, not only because it is those manifestations of the claim which are archetypal of the categories, but also because those are the claims which are of the greatest interest to international law.

32 Waldron (n 24) 398.

33 Christopher W Morris, ‘The Case for National Self-Determination’ in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016); see also Moore (n 16); Martti Koskenniemi, ‘National Self Determination Today: Problems of Legal Theory and Practice’ (1994) 43 *International and Comparative Law Quarterly* 241.

34 Ohlin characterises this as a combination of the right to exist and the right to resist: Ohlin (n 15).

35 Cassese (n 4) 71–99. As Binder points out, the decision to treat cases of colonial secession separately from secessions from unitary or post-colonial States is a political decision based on a perceived difference between these cases, which she argues is unjustifiable: Binder (n 9) 226 et seq.

In contrast to the standard conception of an internal and an external application of the same unitary idea,³⁶ this paper argues that at least four kinds of claim which can fall under the broad heading of self-determination can be identified, which will be discussed below. These are, first, a claim on the part of a people of a political society (a polity) that they form a single political unit, and should be treated as such for the purposes of the governance of their shared social and political life, with the twin corollary claims that all individuals within that society should have the opportunity to participate in its government on the basis of equality, and that external interference in that socio-political life is unjustified. This will be referred to here as a claim to *political self-determination*. Secondly, an identity-based claim to secession and independence that treats the separate character of a group as sufficient justification for its independent nationhood, which will be termed *secessionary self-determination*. Thirdly, a claim to independent statehood by a group which has suffered a severe abuse of its rights *vis-à-vis* other groups within a State, and which seeks secession as an *ultimum remedium*. That principle will be called *remedial self-determination*.³⁷ Finally, it will discuss as having a separate character a claim by a colonial possession or other non-self-governing territory to independence and self-government, and this it will term *colonial self-determination*. Each will be examined in turn, in order to determine whether these delineations are justified by real and relevant historical or ideational differences, and whether such a typology offers a more coherent framework for the treatment of claims to self-determination by international law. It will be argued both that these categories express appropriate distinctions either in the theoretical basis of the claims or in the history of the concepts, and that they capture differences in legal treatment which has already begun to emerge, but which lack an adequate vocabulary for their expression.

36 Senese, for example, describes them as ‘two inseparable aspects of the same principle’: Senese (n 16) 19; see also Duursma (n 8) 78–80; Trifunovska (n 15). Tesón perhaps goes further still, treating the nationalistic and the remedial arguments as two competing justifications which apply to the same self-determination idea: Tesón (n 8) 8–11.

37 The term “remedial” is often attributed to Buchanan: Allen Buchanan, ‘Secession, Self-Determination, and the Rule of International Law’ in Jeff McMahan and Robert McKim (eds), *The Morality of Nationalism* (Oxford University Press 1997); Allen Buchanan, ‘Theories of Secession’ (1997) 26 *Philosophy & Public Affairs* 31; Buchanan, ‘Democracy and Secession’ (n 7).

2. Four Species of Self-Determination

2.1 Political Self-Determination

Political self-determination is the oldest of the four species discussed here, and has the unusual distinction that two of its earliest invocations are among its most iconic – indeed, are among the most influential documents in the development of the Western world. In 1776 and in 1789 the American and French revolutions sent shockwaves through the West’s political foundations,³⁸ and set in train the *Age of Revolution*, a period of extraordinary political and social change in Europe³⁹ which was typified by independence claims consciously modelled on the American⁴⁰ or (to an even greater extent) the French Declarations.⁴¹

Both declarations were claims to political self-determination, and particularly to the internal aspect of that principle: that the form of government in a State should be determined by the people who are subject to it. The French declaration (which Hobsbawm argues was the more influential of the two⁴²) declared that ‘[t]he principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.’⁴³ Here the claim is to the aggregated political rights of individuals assembled into a body politic. It stands as an assertion of a philosophical position that *authority* is distinct from *power*, and that rule is not self-justificatory, nor that it can be justified by historical or external factors (such as by reference to a divine right). Rather, in order to be legitimately exercised, power must be shown to have a legitimate source.⁴⁴

38 David Armitage, *The Declaration of Independence: A Global History* (Harvard University Press 2007) 67.

39 Hobsbawm (n 3) 1–4.

40 Armitage (n 39) 108.

41 Hobsbawm (n 3) 75.

42 *ibid* 73–75. Hobsbawm goes on to say that the French revolution created a set of political ideas the contestation for and against which defined the politics of the era (73), and created the ‘concept and vocabulary of nationalism’ (73-74). More significantly still, he argues that it was decidedly more radical than its American close contemporary. In a characteristically beautiful passage he notes that: ‘The results of the American revolutions were, broadly speaking, countries carrying on much as before, only minus the political control of the British, Spaniards and Portuguese. The result of the French Revolution was that the age of Balzac replaced the age of Mme Dubarry.’ (74-75.)

43 ‘Declaration of Human and Civic Rights of 26 August 1789’, via <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html>, accessed 23 June 2017, article 3.

44 Note, however, as discussed above, that the principle expressed in this claim is not an affirmation of democracy, but rather of a prior idea that the form of government must flow from the people. In other

Inherent in this statement, too, is a secondary claim, which has been described above as the external aspect of political self-determination: the principle of non-intervention. If, as the French declaration proclaimed, the exercise of power and authority is legitimate only where it flows from the nation, it is necessarily true that the exercise of power over the internal affairs of nation from sources external to it is similarly illegitimate. Although this aspect of political self-determination was not the major focus of the declaration and received less attention in the years that followed, it has come to be its dominant aspect, and is a vital concept of modern day international law. It is primarily this aspect of the self-determination idea that is referred to in the Charter of the United Nations, and (alongside references to colonial self-determination, discussed below) which has been developed in the practice of the UN and the International Court of Justice (ICJ).

The most important reference to self-determination in the UN Charter appears in Article 1, which declares that the development of ‘friendly relations among nations based on the principle of equal rights and self-determination of peoples’ to be a purpose of the Organisation.⁴⁵ This, along with the other institutional objectives listed in Article 1, finds a counterpart in the Article 2 obligations on the member States of the UN,⁴⁶ and particularly in article 2(1)—the guarantee of the equality of member States—and article 2(4).

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, *or in any other manner inconsistent with the Purposes of the United Nations*.⁴⁷

That principle, as was confirmed by the judgment of the ICJ in its decision in *Nicaragua*, extends to ‘the choice of a political, economic, social and cultural system, and the formulation of foreign policy’,⁴⁸ and it was this—the outward-facing aspect of political self-determination—that the Charter therefore established as a legal right. Its status

words, a dictatorship can conform with this principle if that were the form of government selected by the people of a political society. See Waldron (n 24) 408, quoted above at note 25.

45 UN Charter (n 4) Article 1(2).

46 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens & Sons 1951) 15; although for an indication that the Article 1 purposes were intended directly to bind members see United States of America Department of State, ‘Report of the Rapporteur to Subcommittee I/1/A to Committee I/1’ in *The United Nations Conference on International Organization; San Francisco, California, April 25 to June 26, 1945: Selected Documents* (United States Government Printing Office 1946) esp 478.

47 UN Charter (n 4) Article 2(4). [Emphasis added].

48 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment (1986) ICJ Reports 14, [205].

has subsequently been confirmed in the Declaration on Friendly Relations,⁴⁹ in common article 1 of the International Covenants on Human Rights,⁵⁰ and in the case law of the ICJ, most notably its judgment in *East Timor*⁵¹ and its opinion in the *Wall* advisory proceedings.⁵²

2.2 Secessionary Self-Determination

If political self-determination can be treated as international law's primary understanding of the term, the secessionary form is its antithesis. In stark contrast, it has been invoked only on a handful of occasions, and successfully in still fewer. While political self-determination—and particularly its external, non-intervention aspect—is

49 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to UNGA Res 2625 (1970) GAOR 25th Session 121.

50 International Covenant on Economic, Social, and Cultural Rights, signed 16 December 1966, in force 3 January 1976, 993 UNTS 3, Article 1(1-3); International Covenant on Civil and Political Rights, signed 16 December 1966, in force 23 March 1976, 999 UNTS 171, Article 1(1-3).

51 *Case Concerning East Timor (Portugal v Australia)*, Judgement, (1995) ICJ Rep 90. Although the *East Timor* case did not disambiguate political and colonial self-determination, it is argued that its famous statement (in paragraph 29) that 'the assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable' at least includes political self-determination, and may solely have been a reference to the political form. Certainly it is this form, the guarantor against intervention, which is most closely implicated in the context of the dispute, which involved the attempted annexation of the territory by Indonesia. See further Jonathan I Charney, 'Self-Determination: Chechnya, Kosovo, and East Timor' (2001) 34 *Vanderbilt Journal of Transnational Law* 455, 465; but, *contra*, Chinkin, Simpson and Rodríguez-Santiago, each of whom characterises the question as one of colonial self-determination: Christine Chinkin, 'East Timor: A Failure of Decolonization' (1999) 20 *Australian Yearbook of International Law* 35, 53; Gerry Simpson, 'Judging the East Timor Dispute: Self-Determination at the International Court of Justice' (1993–94) 17 *Hastings International and Comparative Law Review* 323, 335; Rodríguez-Santiago (n 4) 227.

52 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136. In the *Wall* advisory opinion the Court found that the right of political self-determination has an *erga omnes* character both in its negative (the obligation not to deprive) and positive (the obligation to promote) forms. See, in particular, paragraphs 121-122 and 159 of the opinion, and further Alexander Orakhelashvili, 'Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction' (2006) 11 *Journal of Conflict and Security Law* 119, 122; Caroline E Foster, 'Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory: The Advisory Opinion of the International Court of Justice, Human Security and Necessity' (2005) 2 *New Zealand Yearbook of International Law* 51, 76; Katja Samuel, 'Can Religious Norms Influence Self-Determination Struggles, and with What Implications for International Law?' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 304; Christopher Waters, 'South Ossetia' in Christian Walter and others (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 184–85; Rodríguez-Santiago (n 4) 230.

frequently cited as a necessary component of the post-Charter world order, secessionary self-determination is largely reviled as a dangerous and anarchic force which threatens instability, discord and conflict.

The different ideational foundations and legal treatment of remedial and colonial self-determination (discussed further below) require the construal of the secessionary form as a narrow category, defined only as those claims to independence which are premised on the separate character or identity of a group within a State. Historical examples of its use are few and far between, with separatist movements generally preferring claims to remedial self-determination—a better and longer established norm and one which carries a stronger perception of legitimacy—but its presence can occasionally be felt. It was a claim of this kind that was (successfully) made in the 1814 and 1905 secessions of Norway,⁵³ was the background to the Canadian Supreme Court’s judgement in the *Quebec* case,⁵⁴ appears to have been the justification invoked by the pro-independence movement in the 2014 referendum on Scotland’s status.⁵⁵

Secessionary self-determination is premised on a conviction that “peoples”, howsoever defined, have a right to determine how they are governed. This differs from the principle that underpins the political form—that the members of a society should determine their own government arrangements—because of the strength of the identity element. The definition of a “people” is unclear (Jennings’ acerbic remark that ‘the people cannot decide until somebody decides who are the people’ captures that uncertainty well⁵⁶), but most definitions include both subjective and objective elements. Raič, for example, defines a “people” as having a common history, ethnic identity, language, culture or religion, coupled with a ‘belief of being a distinct people distinguishable from any other people’.⁵⁷ For this reason, secessionary self-determination is sometimes criticised as being a profoundly illiberal principle, one that highlights national, ethnic or other identities over a common humanity, and which perpetuates

53 Knut Gjerset, *History of the Norwegian People* (AMS Press 1969) vol 2, 417; Karen Larsen, *A History of Norway* (Princeton University Press 1948) 376–87. Norway’s claim to independence cited no historical wrongs, nor did it claim a subsisting sovereignty, but rather expressed a claim of right to independence as a result of Norway’s separate character and nationhood.

54 *Reference Re Secession of Quebec* (n 16).

55 Scotland’s Future: Draft Referendum (Scotland) Bill Consultation Paper, Scottish Government Publications, February 2010, via <http://www.scotland.gov.uk/Resource/Doc/303348/0095138.pdf>, accessed 28/06/2017.

56 Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press 1956) 56.

57 Raič (n 4) 262.

and deepens divisions between people that are essentially arbitrary.⁵⁸ Together with the fear that its application could prompt a destabilising disintegration and balkanisation of the international order,⁵⁹ therefore, it is this radical nationalism which contrasts starkly with the inherent conservatism of the political form, and which renders secessionary self-determination suspect in many eyes. The political form is rooted in an historical reality: it accepts as a given the existence of societies and transforms that contingent *is* into an *ought*. The secessionary form engages in a process of social engineering, seeking to remake society in its own image, and transform its conception of *ought* into an *is*.

In contrast to political self-determination, too, it has long been assumed that secessionary self-determination is contrary to international law. The so-called “safeguard clause” found in many of the international proclamations of self-determination has contributed to this view, and has been taken as affirming the primacy of the principle of territorial integrity.

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.⁶⁰

However, that position was called into question by the Opinion of the International Court of Justice in the *Kosovo* advisory proceedings. There the Court characterised territorial integrity as a negative obligation on States (as an obligation *not to infringe*) rather than as a positive right accruing to them, and it declared that ‘State practice during [the eighteenth, nineteenth and twentieth centuries] points clearly to the conclusion that international law contained no prohibition of declarations of independence.’⁶¹ The Court treated secession as a legally neutral act: one of which international law would take account, but which is neither prohibited nor facilitated. In an advisory opinion not wanting for critics, it is perhaps this aspect of the Court’s reasoning that has attracted the most and the fiercest condemnation, and not least in the Declaration of Judge Simma. Simma characterised the Court’s negative treatment of territorial integrity as secession as teleological, and as a revival of a *Lotus* doctrine no longer representative of the reality of international law. He concludes with the

58 For an argument along these lines see David Held, *Cosmopolitanism: Ideals and Realities* (Polity Press 2010) 93–94; see also Tesón (n 8) 8 et seq; Buchheit (n 7) 28–31; Amitai Etzioni, ‘The Evils of Self-Determination’ (1992–93) 89 *Foreign Policy* 21, passim.

59 See e.g. Higgins (n 7) 104; Cassese (n 4) 328; Buchheit (n 7).

60 UNGA Res 1514 (XV), 14 December 1960, [6].

61 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, (2010) ICJ Reports 403, [79].

denunciation that ‘even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court’s answer in the slightest.’⁶²

Although, then, there remain significant ambiguities over international law’s attitude to secessionary self-determination, the *Kosovo* opinion indicates that its treatment may be moving from the hostile to the equivocal. One aspect is clear, however: there is at present no international law right to secede on purely national grounds. Two possible exceptions to this rule exist but, as will be discussed below, it is more appropriate to class these as separate norms with different justification narratives: colonial and remedial self-determination.

2.3 Remedial Self-Determination

In many ways remedial self-determination is the most intriguing of the idea’s forms. Like the political form it has deep historical roots, and indeed it shares too many instances and philosophical ties to that incarnation of the norm. It might be appropriate even to describe it as an offshoot or subdivision of that branch, but here will be treated more akin to a cutting (to continue to force a horticultural metaphor): a new and different plant but with the same genetic code. Yet despite these close links, in effects, in outward appearances, and in historical instances it appears to have more in common with secessionary self-determination, and so is often (mis)categorised as a form of “external” self-determination. It will be argued that this habitual categorisation is inappropriate in light of the philosophical foundations of the remedial form and the

62 Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 478, [8]. For criticism along the same lines see Dissenting Opinion of Judge Koroma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 467 [21-23]; Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 263–76, esp. 264-66; Peter Hilpold, ‘The International Court of Justice’s Advisory Opinion on Kosovo: Perspectives of a Delicate Question’ (2009) 14 *Australian Review of International and European Law* 259, 287; Alexander Orakhelashvili, ‘The International Court’s Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the “Foam on the Tide of Time”’ (2011) 15 *Max Planck Yearbook of United Nations Law* 65, 73; Nate Beal, ‘Defending State Sovereignty: The I.C.J. Advisory Opinion on Kosovo and International Law’ (2011–13) 21 *Transnational Law & Contemporary Problems* 549; Miodrag Jovanović, ‘After the ICJ’s Advisory Opinion on Kosovo: The Future of Self-Determination Conflicts’ [2012] *Annals of the Faculty of Law in Belgrade – International Edition* 292, 300–02; Marc Weller, ‘The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 188.

justification-claim it represents, and that it has contributed to an inconsistent legal treatment.

Remedial self-determination has been invoked on many occasions in international law, including in a substantial number of successful claims to independence. Prior to the decolonisation experience, it was the major justification-claim employed by entities seeking independence, and played a very significant role in reshaping the international order of States during the period Hobsbawm calls “the age of revolution”.⁶³ Like many of the ideas that defined the age, the foundations of remedial self-determination can be found in the American and French Declarations of 1776 and 1789.

The 1776 American Declaration of Independence was, as discussed above, one of the earliest expressions of the principles underpinning political self-determination: that the form of government to which a society is subject should be determined by the members of that society, and that its imposition upon them (either by a group within the society or by external actors) is illegitimate. The declaration stood for more than this, however: it was a claim to secession, and was intended to demonstrate to the world that the American action in throwing off British rule was just. Importantly, these two functions appear to be linked: the declaration did not make a claim to independence in pursuance of a positive right to secede, but rather cast its claim negatively, as a final resort to long privations and abuses that amount to a vacation of the link between government and the governed.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government[. ... W]hen a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.⁶⁴

In other words, the basis of the claimed right to remove the American territory from the control of the British State was the denial to the people of America of their right to political self-determination. *In extremis* this denial generated a secession claim as a remedy of last resort.

63 Hobsbawm (n 3).

64 Declaration of Independence of 4 July 1776, via <http://www.archives.gov/founding-docs/declaration-transcript>, accessed 27/6/2017.

A similar link between a government detached from the interests of wishes of the population and a right to secede was a (less central) feature of French revolutionary thought,⁶⁵ and reliance on a negative, remedial legitimacy-claim can be seen in a great many of the declarations of independence of the years that were to follow.⁶⁶

In the modern day the use of remedial self-determination has somewhat diminished, replaced in its dominance by the colonial form of the right. But modern expositions of the idea, too, show its link to political self-determination. In the course of the *Kosovo* advisory proceedings, for example, two States—the Netherlands and Germany—explicitly linked the denial of political self-determination and the right to secede. The written statement of the former argued that ‘the right to political self-determination may evolve into a right to external [secessionary] self-determination in exceptional circumstances, i.e. in unique cases or cases *sui generis*. This is an exception to the rule and should therefore be narrowly construed. The resort to external self-determination is an *ultimum remedium*.’⁶⁷ Similarly, Germany argued that the denial of a right to secede would ‘render the internal [political] right of self-determination meaningless in practice. There would be no remedy for a group which is not granted the self-determination that may be due to it under international law. The majority in the State could easily and with impunity oppress the minority, without any recourse being open to that minority.’⁶⁸ Similar principles were discussed in the *Katanga* and *re Secession of Quebec* cases, although in neither case was the norm applied.⁶⁹

Perhaps the strongest statement of the principle in the modern day, however, is to be found in the Declaration on Friendly Relations, proclaimed by the General Assembly on the 24th October 1970, and found to be representative of customary law by the

65 See e.g. Andrés Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (AW Sijthoff-Leyden 1973) 17–18; Cassese (n 4) 11–12; Hobsbawm (n 3) 75 et seq; Cassese (n 4) 174.

66 Armitage (n 39) 108–113 et seq; Hobsbawm (n 3) 73–75 et seq. For an excellent table listing many of the post-1776 declarations of independence see Armitage (n 39) 146–55.

67 Written Statement of the Netherlands, *Kosovo* Advisory Opinion, 17 April 2009, [3.6].

68 Written Statement of Germany, *Kosovo* Advisory Opinion, 15 April 2009, 33–34.

69 *Katangese Peoples’ Congress v Zaire* (n 29) [6]: ‘[I]n the absence of evidence that the people of Katanga have been denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variety of self-determination that is compatible with the sovereignty and territorial integrity of Zaire’; *Reference re Secession of Quebec* (n 16) [138]: ‘In summary, the international law right to self-determination only generates, at best, a right to external [secessionary] self-determination [...] where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In [these] situations, the people in question are entitled to a right to external self-determination *because they have been denied the ability to exert internally their right to self-determination*.’ [Emphasis added].

International Court of Justice in both its *Nicaragua* and *Kosovo* cases.⁷⁰ The “safeguard clause” of the Declaration asserts that:

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 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.⁷¹

Although the reference is oblique, the clause appears to accept the link between the protection of a State’s territorial integrity and its compliance with political self-determination. Indeed, the clause has been interpreted as declaring the existence of an international law right to secede *in ultimum remedium* where political self-determination is denied,⁷² but the acceptance of the link made is not dependent on so far-reaching a conclusion. It would be equally possible to read the clause as expressive of a legal *lacuna* to the effect that although secession is not enabled by a permissive rule, there exists a narrow exception to the general prohibition where political self-determination is denied. Secession for these groups may not be enabled or facilitated, but would at least be *not prohibited*.

A choice between these positions cannot be made on the basis of current international practice. Although the author tends towards agreement with the States, commentators and Judges cited above that the better reading of the safeguard clause of the Declaration is that it at least recognises an international law right to secede *in extremis* where political self-determination is denied,⁷³ practice remains mixed, and responses to claims to secession are generally *ad hoc*, incompletely theorised, and have a

70 *Nicaragua* (n 59) [188–191]; *Kosovo* (n 72) [80].

71 Declaration on Friendly Relations (n 60), [emphasis added].

72 The proposition is supported by the written submissions of a number of States to the Court in the course of the proceedings in the *Kosovo* Advisory Opinion, as well as academic commentators and ICJ Judges. See, for example, Written Statement of the Netherlands, *Kosovo* Advisory Opinion, [3.6-3.7]; Written Statement of Estonia, *Kosovo* Advisory Opinion, [2.1]; Written Statement of Finland, *Kosovo* Advisory Opinion, [8]; Written Statement of Poland, *Kosovo* Advisory Opinion, [6.8-6.9]; Written Comment of Switzerland, *Kosovo* Advisory Opinion, [60]; Written Statement of Germany, *Kosovo* Advisory Opinion, 32–37; Cassese (n 4) 108–19; Duursma (n 8) 25; Milena Sterio, *The Right to Self-Determination under International Law: ‘Selfistans,’ secession, and the Rule of the Great Powers* (Routledge 2013) 12–13; Rodríguez-Santiago (n 4) 235; Separate Opinion of Judge Cançado Trindade, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 523, [175–181]; Separate Opinion of Judge Yusuf, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (2010) ICJ Reports 618, [11–12].

73 *ibid.*

tendency to stress the *sui generis* character of the event,⁷⁴ all of which present obstacles to the search for a consistent interpretation. In the case law of the ICJ, too, the status of the norm of remedial self-determination is officially uncertain, with the Court having noted only that ‘radically differing views’ exist among States on its legality.⁷⁵

It seems likely that the conflation of forms plays a part in the status confusion that afflicts the remedial form (and other forms) of self-determination. While it might be expected from the discussion here that remedial self-determination, viewed as a corollary or an offshoot of the political form, would be similarly received to that form of the idea, it has more often been categorised as an “external” manifestation, and it may be that remedial self-determination has therefore suffered from being viewed as the thin-end of the secessionary wedge. Such an interpretation is suggested, for example, by the tendency of States to discuss remedial secession as an exception to a general rejection of external self-determination, without apparent recognition of the different legitimacy-claims involved.⁷⁶ That is not to say, of course, that no other considerations justify remedial self-determination’s status as illegal or non-legal, but rather that those may not yet have adequately been assessed. The inappropriate categorisation of the norm as a subset of secessionary self-determination has to some extent impeded a principled appraisal of its current and future role in the international legal system.

2.4 Colonial Self-Determination

Colonial self-determination does not have the deep historical roots of the remedial or political forms. On the contrary, it is a relatively recent development, having come about as a result of the decolonisation process under the auspices of the United Nations and (to a lesser extent) its predecessor, the League of Nations. Despite its relative youth it has swiftly been firmly entrenched, however: in the last century it has been by magnitudes the most commonly applied form of the idea, and has had at least as vast an impact on the shape and structure of the international order of States in

74 That the secession of Kosovo was a case *sui generis* was, for example, a feature of the statements to the Court of Denmark, Estonia, France, Ireland, Japan, Latvia and the Maldives.

75 *Kosovo* (n 72) [82]. This finding was criticised by Judges Cañado Trindade and Yusuf in their separate opinions. See *supra*, n 103.

76 See, for example, the written statements of Egypt, Estonia, Ireland, Norway, Russian Federation, Serbia, and Switzerland to the International Court of Justice in the *Kosovo* advisory proceedings.

recent history as the remedial norm had on the structure of international society in the age of revolution.

The decolonisation process began almost accidentally, precipitated by the words and actions of the European powers during the course of the First World War, but intended and desired perhaps only by Lenin's Russia and, though to a less ambitious extent, Wilson's America. During this globalised European war colonies became frontlines, both as direct theatres of engagement and battlegrounds of ideas.⁷⁷ The colonies of the European powers were vital to their prosecution of the conflict—they were sources of supplies, of raw materials, and of vital manpower—and both sides sought to gain an advantage by disrupting the ability of the powers to access the resources of the colonies. In an effort to maintain the loyalty of their own colonies and to win allies in their enemy's both sides made extravagant promises of greater independence or self-government,⁷⁸ a process which intensified following the rise to power of the Bolsheviks in Russia.⁷⁹

Although these events probably made some form of decolonisation process inevitable, it was the intervention of Wilson that provided the spark. Wilson's commitment to self-determination was not the general or absolute doctrine which appeared in Lenin's writings, but rather was a cautious application of the principle as a factor to be taken into account alongside the interests of the colonial powers.⁸⁰ His primary concern appears to have been to prevent the absorption of the colonies of the defeated powers into the empires of the victors,⁸¹ but his declaration that '[n]ational aspirations must be respected; peoples may now be dominated and governed only by their own consent' took on a life of its own,⁸² resulting in the Mandates system of the League of Nations, and the Trusteeship system of the United Nations.

Later, in the years following the Second World War and the establishment of the United Nations, a political consensus gradually emerged that colonial rule is illegitimate. The Trusteeship system of the UN built on the foundations of the Mandates system, but

77 Thomas D Musgrave, *Self-Determination and National Minorities* (Clarendon Press 1997) 15.

78 *ibid* 15–17.

79 The right of nations to self-determination was a mainstay of Lenin's political thought, and was the official policy of the Bolshevik movement. See e.g. Vladimir Ilich Lenin, 'The Right of Nations to Self-Determination' in Julius Katzer (ed), Bernard Isaacs and Joe Fineberg (trs), *V I Lenin: Collected Works* (Progress Publishers 1964) 413, 453–54.

80 Woodrow Wilson, 'Fourteen Points' (8 January 1918); Cassese (n 4) 21.

81 Letter from Woodrow Wilson, 'Reply to the Pope of 27th August 1917' (27 August 1917).

82 Woodrow Wilson, 'President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances' (11 February 1918).

whether the latter had applied only to those territories which were stripped from the defeated powers in WWI, Article 77 of the Charter made provision for States to place their colonial possessions into the system voluntarily.⁸³ This important declaration of principle that there existed no difference *in kind* between the territories stripped from colonial powers as a result of the two world wars, was accompanied by a number of statements on the proper governance of all non-self-governing territories:

Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognise the principle that the interest of the inhabitants of these territories are paramount[.]⁸⁴

That line of thought was carried further in resolution 1514 (XV) of the General Assembly, the '[d]eclaration on the granting of independence to colonial countries and peoples'.⁸⁵ That resolution demonstrates that a tipping-point had been reached in the development of opinion on colonialism. Paragraph 1 of the resolution declares that '[t]he 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'.⁸⁶ Paragraph two declares the existence of a right to self-determination of colonies, 'by virtue of [which] they freely determine their political status and freely pursue their economic, social and cultural development'.⁸⁷ That a right to self-determination by colonial peoples emerged during this period was confirmed by the ICJ in its decisions and opinions in *Namibia*,⁸⁸ *Western Sahara*,⁸⁹ and *East Timor*.⁹⁰

Colonial self-determination is something of an outlier; a form of self-determination justified primarily on a political consensus rather than a philosophical argument. That political consensus declares (correctly, in the author's opinion) that there is a difference in kind between the rule by a State of a territory in the character of a colony and its rule as an integral part of the State. Interestingly, however, that difference does not appear primarily to be remedial: although the historical experience of colonial rule (which, in general, well deserved its characterisation in resolution 1514 as subjugation, domination and exploitation) is likely to have informed the approach, it is *colonial rule*

83 UN Charter (n 4) Chapter XII, Article 77(c).

84 *ibid* Chapter XI, Article 73.

85 UNGA Res 1514 (n 71).

86 *ibid* [1].

87 *ibid* [2].

88 *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, (1971) ICJ Reports 16, [53].

89 *Western Sahara*, Advisory Opinion, (1975) ICJ Reports 12, [162].

90 *East Timor (Portugal v Australia)*, Judgement, (1995) ICJ Reports 90, [29].

itself, and not *abusive* colonial rule, which is treated as wrong and requiring remediation.

To this extent it could be treated as a subset of the remedial form of self-determination. After all, a people governed by a presence external to its society is a clear violation of the principle of political self-determination as described above, and thus could generate a remedial right. Despite this overlap in justification-narrative and philosophical basis, however, the unambiguous political acceptance of colonial self-determination marks it out as different. As has been discussed above, the legal status of the remedial form remains highly disputed and uncertain, whereas the right of colonial peoples to self-determination has been baldly proclaimed by States and by national and international Courts even while the status of the remedial form has been hedged, doubted or avoided altogether.⁹¹ For the sake of legal, if not philosophical, coherence, then, it must be treated as a separate idea.

3. Taxonomy and Categorisation

Although the concept of categorisation is now more commonly discussed in epistemology or biology, it has no less relevance for the lawyer than it did for the early taxonomists. Illegal and legal, law and non-law, judgment and dissent, subject and object, whether a person is innocent or guilty, whether the circumstance precluding wrongfulness applies, which Court has jurisdiction, what system of law governs the dispute, and many others besides are basic divisions which structure the legal universe and are necessary for the pursuit of the lawyer's craft. But the need to categorise in law runs deeper than these practical distinctions: law is a conceptual science, both in its academic study and in its "real" application. At a basic level the making and the application of law are exercises in categorisation, a fact which can be seen in the structure of rules, often expressed in the principle demand of the rule of law that like cases should be treated alike, and different cases differently. MacCormick rephrases the proposition, referring to it as a 'basic presupposition[] of legal thinking; that there are rules of law, and that a judge's job is to apply those rules when they are relevant

⁹¹ Compare, for example, the statements highlighted in the three preceding notes (n 85–87) with the Canadian Supreme Court in *Quebec* (n 16) at [135, 138], or the International Court of Justice in *Kosovo* (n 72) at [82].

and applicable.⁹² A similar observation is made by Fuller, who lists the failure to categorise as ‘the first and most obvious’ of his ‘eight routes to disaster’ in the lawmaking enterprise,⁹³ in which Rex finds himself ‘incapable of making [...] generalizations’,⁹⁴ and as a result cannot ‘achieve rules at all’.⁹⁵

That categorisation is intrinsic to the operation of law was perceived with extraordinary clarity by Derrida, who exposed a somewhat darker aspect of the relationship. The fact that law necessarily takes the structure of categories results, he argued, in an irreconcilable gap—an *aporia*—between law and justice, which he terms *the haunting of the undecidable*.⁹⁶ For Derrida no decision which applies a rule can ever be fully just because no individual application will ever accord sufficiently closely to the abstract idea the rule captures: to apply the rule is to disregard the difference between the individual and the ideal; to disregard the singularity of the case.

[I]f there us a deconstruction of all presumption to a determining certainty of a present justice, it itself operates on the basis of an “idea of justice” that is infinite, infinite because irreducible, irreducible because owed to the other—owed to the other, before any contract, because it has *come*, it is a *coming*, the coming of the other as always other singularity.⁹⁷

Nevertheless, the legal form necessarily consists of decisions which ‘cut[] and divide[]’,⁹⁸ and that too is a requirement of justice. The abandonment of such categorisations in favour of case-by-case application results in decisions that have not ‘been made according to a rule, and nothing allows one to call [them] just’,⁹⁹ and hence, according to Derrida, ‘[t]he undecidable remains caught, lodged, as a ghost at least, but an essential ghost, in every decision, in every event of decision.’¹⁰⁰

In other words: categorisation is an inherent element of law. Laws which do not take the form of categories are not law at all,¹⁰¹ but discretion.¹⁰² In fact, one may go further, and argue that all conceptual understanding is based on categories. That proposition

92 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 53.

93 Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39.

94 *ibid* 34.

95 *ibid* 39.

96 Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ in Gil Anidjar (ed), *Acts of Religion* (Routledge 2013) 252–53. Categorisation is implicated, too, in Derrida’s first *aporia*: the *Epokhē* of the Rule (see pages 251–252).

97 *ibid* 254. [Original emphasis; notes by the translator omitted].

98 *ibid* 252.

99 *ibid* 253.

100 *ibid*.

101 Fuller (n 99) 34–39.

102 Derrida (n 102) 252–54.

derives from the work of Plato, who argued that all concepts (and, indeed, all *things*) are *categories* defined by an ideal form, from which each actuality will diverge in certain ways. Those things which diverge only a little or which diverge in ways that are not essential to the “thing-ness” of the ideal may be referred to as being examples of it—notwithstanding that they exhibit differences—while things that diverge more significantly may be different things, conforming to a different ideal.¹⁰³ Every individual apple diverges from the ideal *apple* to some extent, but nevertheless they remain sufficiently alike to be properly called “apples”. “Apple” is a category, defined by its ideal form.

Plato demonstrates the power and importance of his idea of category in his dialogues on *Sophist* and *Statesman*, where he seeks to understand the nature of things by establishing what they *are*, and what they *are not*. He gives to his primary discussant, the Eleatic Stranger, several statements which assert the need for such delineations:

Whereas the right way is, if a man has first seen the unity of things, to go on with the enquiry and not desist until he has found all the differences contained in it which form distinct classes; nor again should he be able to rest contented with the manifold diversities which are seen in a multitude of things until he has comprehended all of them that have any affinity within the bounds of one similarity and embraced them within the reality of a single kind.¹⁰⁴

In other words, in analysing an occurrence, a concept or a thing, it must be possible to say whether something is or is not an example of the category. Kings he distinguishes from heralds, humans from birds, herdsmen from physicians; yet in each of these distinctions he finds similarities which, though they do not serve to delineate a single kind, are nevertheless relevant to the understanding of each idea.

With Aristotle categorisation acquired an even more central position. His logic was, like that of his teacher Plato, essentialist; motivated by a belief that the true natures of things could be discerned through the pursuit of pure knowledge.¹⁰⁵ Aristotle’s *Categories* divided all things into ten parts—substance, quantity, qualification, relation, place, time, affect, possession, action and passion—and these he appears to have understood both as the highest *kinds*, and as an enumeration of the possible types of predicates.¹⁰⁶ In turn, he argued that these predicates could stand in one of five

103 Plato, *The Republic* (Benjamin Jowett and Tom Butler-Bowdon eds, Capstone 2012) 356–60; William A Welton, ‘Introduction’ in William A Welton (ed), *Plato’s Forms: Varieties of Interpretation* (Lexington Books 2002).

104 Plato, *Statesman* (Benjamin Jowett tr, Project Gutenberg eBooks 2013).

105 Karl Popper, *The Open Society and Its Enemies* (7th edn, Routledge 2012) 33–34.

106 Aristotle, *Categories* (Ella Mary Edghill tr, University of Adelaide Press 2015) 1b25.

relations to its subject: definition, genus, differentia, property, or accident,¹⁰⁷ and here the fundamental importance of categorisation is most starkly shown. In the relations of definition, genus and differentia there is a necessary acceptance both that the singular falls within a category, but that it is possible to explain what something is *uniquely*, which of its features are *shared with other ideas* sufficiently closely that these should be grouped together, and which of its features *mark it as different*. Things and knowledge about things, then, are necessarily categorised, compartmentalised and arranged into hierarchical relations from the *katêgoria—the highest discrete groupings, each of which neither overlaps with nor falls within any other grouping—to the species—the singular, indivisible, essential thing*.

As in ancient Greece in the thought of Plato and Aristotle, and in the work of Linnaeus and the early taxonomists,¹⁰⁸ categorisations are still referred to by modern epistemology as a central aspect of learning and of knowledge.¹⁰⁹ To categorise is to understand; to understand is to categorise. It is for this reason that a reappraisal of the categorisation of self-determination claims is warranted. Although lawyers make classifications all the time, they do not necessarily do so with a theory of classification in mind, and the consequences of misclassification are therefore not always apparent. It has been argued here that that the customary categorisation applied to self-determination claims—the language of “internal” and “external”—is inappropriate, and that this miscategorisation has a distorting effect with consequences both for international law’s regulation of the norms, and in practice.¹¹⁰ But there is another consequence: the miscategorisation of self-determination claims inhibits understanding of the idea. In dividing self-determination into claims that are internal and those that are external in effect, international law has recourse only to the *hoti* (the understanding of *the fact*; the result) and not to the *dioi* (the understanding of *the*

107 Stafleu (n 2) 26.

108 ‘Implicit in Linnaeus’s justification for the need for an efficient classification [...] is the assumption that classifications enable the taxonomist to make indicative generalizations regarding living thing’: *ibid* 48.

109 See, e.g. Hahn and Chater, who argue that ‘[t]he cognitive system does not treat each new object or occurrence as distinct from and unrelated to what it has seen before: it classifies new objects in terms of concepts which group the new object together with others which have previously been encountered. Moreover, the cognitive system also judges whether new objects are similar to old objects’: Ulrike Hahn and Nick Chater, ‘Concepts and Similarity’ in Koen Lamberts and David Shanks (eds), *Knowledge, Concepts, and Categories* (Psychology Press 2013) 43; see also Evan Heit, ‘Knowledge and Concept Learning’ in Koen Lamberts and David Shanks (eds), *Knowledge, Concepts, and Categories* (Psychology Press 2013) 7 et seq.

110 See e.g. Mégret (n 11) 50.

reason why; the cause).¹¹¹ As a consequence it seeks to compare things that are not alike, and it lacks a conception of the ideal to which each category corresponds.

4. Conclusion

This paper has considered the presumption that self-determination is a unitary norm, one that applies in different spheres as different manifestations or aspects of the same idea. That conception—self-determination as *species*—presents a problem for international law both on a conceptual and a practical level. As a practical matter, it inhibits disambiguation. The idea of self-determination as a species encourages a homogenising view of the norm, where those manifestations that are viewed as more useful or acceptable are nevertheless treated with suspicion, are hedged with caveats, and are restricted, for fear of an inadvertent transfer of the colour of legitimacy to the other forms. If this is a single norm then it becomes more difficult to say that it is illegal in some situations and legal in others; it becomes more difficult to draw the dividing line between its acceptable and unacceptable applications; and there is a presumption that legality in one sphere will bleed over into other areas of the norm's application. Evidence of such attitudes can be seen in the practice of States in relation to self-determination, and instances in which they have been reluctant to accept the legality or applicability of self-determination principles—perhaps because they fear the resultant presumption of legality that will reflect onto other areas of the norm's application—have been highlighted in the discussion above.

By contrast, thinking of self-determination as a *genus* rather than a *species* separates the ideas from one another and gives the cognitive distance necessary to conceive of them differently. That one form of self-determination is legal or illegal need have no effect on other species within the genus, and changes in the status or operation of one species do not necessarily have any impact on another. It is such a division that has been suggested here. It has been argued that the typical division of self-determination claims into “internal” and “external” manifestations of a unitary self-determination idea is inadequate: it requires that unlike cases are treated alike, and that relevant differences are not appreciated between different manifestations of the concept. Rather, it has been argued that the kinds of self-determination should be divided on

111 Aristotle, *Posterior Analytics* (ES Bouchier tr, BH Blackwell 1901) I.13 (33–35).

the basis of the justification-claims that each form makes, an exercise which produces three distinct forms of self-determination—political, secessionary and remedial—and a fourth (the colonial) form which appeals primarily to a political rather than to an essential justification. These are not differences between lap-dogs and Labradors; this is a question of dogs and wolves.

Disambiguating the forms of self-determination is not purely an intellectual exercise, but also has practical consequences. An understanding of the different forms of the claim, of the different justification-claims made, and their different treatment by the law enables precedents to be differentiated appropriately, both by Judges and by individuals. As Mégret notes, the endorsement by the international community of self-determination in the colonial context was seen by some as an affirmation of a broader right to secede, and '[t]hose who took the principle too literally, from Katanga to Biafra, learned their lesson painfully':¹¹² the misapplication of precedents can have very real effects. But the failure of distinction also results in a fear of precedents, and one that restricts the application of one of international law's most humanitarian ideas. The political, colonial and (at least in the opinion of the author) its remedial forms of self-determination represent a human voice in a statist world. They should not be rejected for the spurious reason of keeping the secessionary wolf from the legal door.

112 Mégret (n 11) 50.