THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

COMMENTARY, CASES, AND MATERIALS

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Martin Scheinin, while agreeing with the decision, believed that greater weight ought to have been accorded to Article 1 in the interpretation of Article 25:

> I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.[20]

Invoking Article 1 in the interpretation of other ICCPR rights is an important and creative means of securing partial protection for some aspects of the right of self-determination, as long as the HRC insists that Article 1 proper is non-justiciable. It is a route which the CESCR may be tempted to follow under its own Protocol for individual communications.

The broader question remains, however, whether the HRC is correct to dismiss Article 1 claims per se—and whether the CESCR should take a different path. Article 1 of the First Optional Protocol to the ICCPR provides that complaints may be made in respect of a violation of 'any' ICCPR right.[21] Article 1 complaints are thus not expressly excluded. The HRC's restrictive approach rests on a fallacious conceptualization of self-determination rights as exclusively 'collective' and thus as inappropriate for individual vindication, and on an overly restrictive approach to standing.

In an appropriate case, where the author(s) of a communication is recognized as the legitimate representative of a 'people', it is hard to see why a blanket inadmissibility rule should be upheld. Collective rights can only be enjoyed by individuals who comprise the group, and the general international law on self-determination contains certain principles to identify a people's legitimate representatives (such as through recognition by a relevant regional organization or UN procedures).

In an early case, the HRC dismissed a complaint brought by a Canadian indigenous leader (a Grand Captain of the Mikmaq tribe), but appeared to contemplate that, on the right facts, a claim may be admissible if a person 'is authorized to act as representative on behalf of' a group.[22] It would remain necessary for the

[20] *Diergaardt et al v Namibia*, Individual Opinion of Martin Scheinin (concurring), [15–26].
[21] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, 999 UNTS 171, entered into force 23 March 1976).
[22] *A.D. (The Mikmaq Tribal Society) v Canada*, HRC Communication No. 78/1980 (29 July 1984), [8.2].

person to prove that she was individually affected by the violation of the group's rights, but that too is conceivable in the right case. Under the Optional Protocol to the ICESCR (unlike under the Optional Protocol to the ICCPR), there is express provision for communications to be submitted on behalf of groups,[23] lending further support to the view that collective claims of self-determination ought to be recognized.

Article 1(1)

'ALL PEOPLES'

There has been long-running debate about the meaning of 'peoples'. As the following extracts from the drafting records suggest, the intended meaning of the phrase is somewhat unclear, given the significant differences of opinion expressed by states. Attempts were variously made to understand the term by reference to the legal status of territories, the inherent characteristics of groups, or the aspirations of political movements:

> 37. It was said further that the right of self-determination might also be understood to refer to peoples at present struggling for their independence. The view was expressed that the Commission should define self-determination and should attempt to decide how far mere separatist movements or vague aspirations to self-government should be included in the concept.
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> 38. Some members expressed the view that the right of peoples to self-determination was also applicable to peoples which had already formed independent national States whose independence was threatened.
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> 40. The opinion was expressed that it was unnecessary to attempt to define self-determination, which should be proclaimed for all peoples with special emphasis on the peoples of Non-Self-Governing Territories.
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> 41. With regard to the word 'peoples', it was said that no distinction should be made on the grounds that peoples were under the sovereignty of another country, that they lived in a particular continent, that they were independent territories or were within the territory of a sovereign State.
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> 42. It was also suggested that 'peoples' should be interpreted to mean all peoples that could exercise the right of self-determination, that such a people should inhabit a compact territory and that its members should be related ethnically or in some other way.
>
> 43. Other views were that 'peoples' should apply to large compact national groups; that the right of self-determination should be granted only to those who made a conscious demand for it; and that peoples who were politically undeveloped should be placed under the protection of the International Trusteeship System, which would prepare them for the exercise of the right of self-determination.[25]

[23] Human Rights Council, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted on 10 December 2008, entered into force 5 May 2013), Article 2(2)(b).
[25] Commission on Human Rights, E/2256 (14 April–14 June 1952), 5–6 [37, 38, 40–43].

The core of self-determination was certainly seen to involve colonial situations, but that did not necessarily exhaust the concept of peoples:

> 39. Much of the discussion on article 1 had related the question of self-determination to the colonial issue, but that was only because the peoples of Trust and Non-Self-Governing Territories had not yet attained independence. The right would be proclaimed in the covenants as a universal right for all time. The dangers of including the article had been exaggerated. It was true that the right could and had been misused, but that did not invalidate it. It was said that the article was not concerned with minorities or the right of secession, and the terms 'peoples' and 'nations' were not intended to cover such questions.[34]

Some delegations wished self-determination to apply to "nations" in addition to 'peoples':

> 44. It was thought, by those who wished to include a reference to 'nations' in the article to be inserted in the covenants, that this addition would result in a more precise and comprehensive statement of the principle. It was pointed out that General Assembly resolution 421 D (V) had referred to 'peoples and nations' and that resolution 545 (VI), now before the Commission, also referred to 'peoples and nations' in the first and second paragraphs of the preamble to the resolution and in paragraph 1 of the operative part.[35]

Likewise:

> 10. The text of the clause, as it appeared in General Assembly resolution 545 (VI), read: 'All peoples shall have the right of self-determination.' The words 'all nations' were added in order to emphasize the universal character of the right. There were nations which had formerly been sovereign but were no longer masters of their own destinies; and nations, now independent, which might lose their right of self-determination.[36]

Reference to 'nations' was subsequently omitted. The wider term 'peoples' arguably already encompasses many 'nations', although not necessarily 'nations' constituted by sub-state minorities.[37] Difficulty in identifying 'peoples' resulted in a compromise in 1955 to leave it undefined, albeit subject to a general understanding that minorities were not covered by it:[38]

> 9. The word 'peoples' was understood to mean peoples in all countries and territories, whether independent, trust or non-self-governing. Suggestions were made to the effect that 'peoples' should apply to 'large compact national groups', to 'ethnic, religious or linguistic minorities', to 'racial units inhabiting well-defined territories', etc. It was thought, however, that the term 'peoples' should be understood in its most general sense and that no definition was necessary. Furthermore, the right of minorities was a separate problem of great complexity.[39]

On becoming parties to the ICESCR, a number of states lodged reservations or declarations on the scope of Article 1. Most prominently, India declared that the right applies 'only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people

[34] UNGA Third Committee, A/3077 (8 December 1955), 14.
[35] Commission on Human Rights, E/2256 (14 April–14 June 1952), 5–6 [44].
[36] UNGAOR, A/2929 (1 July 1955), 42. [37] See further below.
[38] See further below. [39] UNGAOR, A/2929 (1 July 1955), 42.

or nation—which is the essence of national integrity'. That statement attracted objections from France, Germany, the Netherlands, Pakistan and Sweden, principally on the basis that it attached impermissible conditions or limitations on a right which applies to all peoples and not only those under foreign domination. Bangladesh also understood Article 1 as applying in 'the historical context of colonial rule, administration, foreign domination, occupation and similar situations', attracting objections on similar grounds from France and the Netherlands, the latter on the basis that the Bangladeshi position was inconsistent with the Declaration on Friendly Relations 1970.

On ratification, Indonesia declared that Article 1 does 'not apply to a section of people within a sovereign independent state and cannot 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'. In support of this view, it invoked the Declaration on Friendly Relations 1970, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Vienna Declaration and Program of Action 1993. Thailand similarly declared that Article 1(1) 'shall be interpreted as being compatible with that expressed in the Vienna Declaration'. Neither declaration attracted objections, in contrast to the Indian and Bangladeshi statements. The latter provoked greater reactions because it sought to exclude the right of self-determination of the peoples of independent states, whereas the latter less controversially excluded internal minority self-determination.

The absence of a definition of 'peoples' was admittedly thought to make it 'difficult for the proposed human rights committee or any machinery established to act in any particular case'.[40] The treaty bodies have nonetheless given shape and form to the term 'peoples' over time. The CERD's General Recommendation No. 21 of 1996 is the most explicit general statement on the scope of self-determination by any of the treaty bodies:

> 4. In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.[41]

[40] UNGA Third Committee, A/3077 (8 December 1955), 12.
[41] Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 21: Right to self-determination, A/51/18 (23 August 1996).

The international law of internal self-determination may not yet require, however, full democratic political governance of the state for the benefit of its people, with the emphasis instead on freedom from foreign interference, the sovereign equality of states,[42] and various rights of political participation which do not also presuppose a particular political system. Practically, however, democracy is the form of governance most compatible with such rights.

As regards external self-determination, in its *Kosovo Advisory Opinion* in 2010, the International Court of Justice (ICJ) affirmed that it includes 'a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'.[43] It found it unnecessary, however, to consider whether any other groups (such as minorities) were entitled to self-determination. Other ICJ cases involving self-determination were likewise limited to similar situations of colonialism or occupation (such as Namibia, East Timor and Palestine).

In the *Quebec Secession* case in 1998, the Canadian Supreme Court shared the CERD's classification of self-determination into internal and external varieties:

> 126. …The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[44]

Internal self-determination is ordinarily exercised through the population enjoying political representation and rights of equality and non-discrimination:

> 130. While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.[45]

According to the Supreme Court, external self-determination is limited to three situations:

> 138. In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group

[42] Thürer and Burri, 'Self-Determination', [17].

[43] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ('*Kosovo Advisory Opinion*'), 22 July 2010, (2010) ICJ Reports 403, [79].

[44] *Reference re Secession of Quebec* [1998] 2 SCR 217, [126].

[45] *Reference re Secession of Quebec* [1998] 2 SCR 217, [130].

> is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three 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.[46]

The Court left open the possibility—avoided and declared controversial by the ICJ in the *Kosovo Advisory Opinion*—of remedial self-determination for groups whose rights are systematically violated. On the facts, the people of Québec were not such a group. Under the right conditions, however, persecuted minorities may be entitled to exercise self-determination through secession, beyond ordinary rights of political participation and minority cultural rights. As discussed later, the African Commission has expressly admitted the possibility, but in no case to date has it upheld such right on the facts.

As Nowak presciently observes, if internal self-determination requires the observance of various political rights, 'it contains the seeds of a right of revolution against dictatorships that systematically and grossly violate human rights'.[47] A conceptual link may be drawn here to a clause of the preamble to the Universal Declaration of Human Rights, which states:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law…

MINORITIES

Historically, state practice has been equivocal on whether minorities are entitled to self-determination. (The definition of minorities is considered in the chapter on Article 15 of the ICESCR.) Since the time of the League of Nations, questions of minority protection and self-determination were often co-mingled in situations where a state is in transition, as the *Aaland Islands* case of 1921 suggests:

> THE PRINCIPLE OF SELF-DETERMINATION AND THE RIGHTS OF PEOPLES
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> …Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.
>
> Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted…
>
> DE FACTO AND DE JURE CONSIDERATIONS. THEIR INTERNATIONAL CHARACTER.
>
> 3. It must, however, be observed that all that has been said concerning the attributes of the sovereignty of a State, generally speaking, only applies to a nation which is definitively

[46] *Reference re Secession of Quebec* [1998] 2 SCR 217, [138].

[47] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel, Kehl, 2005) ('*CCPR Commentary*'), 23.

NATURE OF STATE OBLIGATIONS

Article 15 not only requires states to refrain from interfering with the rights of individuals and groups to participate in cultural life; it also imposes positive obligations on states to take steps to ensure such participation. According to General Comment No. 21:

> The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State Party both abstention (i.e. non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).[60]

More specifically, the Committee has analyzed state obligations under Article 15 in terms of the obligations to respect, protect and fulfil the right:

> The right of everyone to take part in cultural life, like the other rights enshrined in the Covenant, imposes three types or levels of obligations on States Parties: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfil. The obligation to respect requires States Parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States Parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States Parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in Article 15, paragraph 1(a) of the Covenant.[61]

The Committee has also outlined the "necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination",[62] indicating that the right to take part in cultural life requires availability, accessibility, acceptability, adaptability and appropriateness of cultural programmes:

> (a) *Availability* is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;
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> (b) *Accessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban

[60] CESCR, General Comment No. 21, [6].
[61] CESCR, General Comment No. 21, [48]. See further [49]–[55], which set out the relevant obligations in more detail.
[62] CESCR, General Comment No. 21, [16].