Indigenous Self-Determination: A Response to Massad

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This post is part of a symposium on Joseph Massad's essay "Against Self-Determination." All contributions to the symposium can be found here.

In his essay, Massad argues that the dominant form of self-determination has actually been used to reject various nations' claims to self-determination. States only became open to the recognition of the right of self-determination, Massad claims, when such recognition would not include independence. Massad draws analogies between the Palestinian case and the cases of indigenous peoples around the world and discusses how colonisers ignored the sovereignty of existing nations in their quest for territorial expansion. International law, Massad notes, has been another tool that allows states to nullify the strength of self-determination.

The Case of Indigenous Peoples

Using indigenous peoples as part of a uniform cluster of nations striving for independence may undermine the complexities of their case, as indigenous peoples themselves have repeatedly stated in the United Nations fora that they do not view self-determination as a route to their independence. Even in 1987 a Declaration of Indigenous peoples proclaimed by indigenous leaders stated:

> The right of self-determination is fundamental to the enjoyment of all human rights. From the right of self-determination flow the right to permanent sovereignty over land—including aboriginal, ancestral and historic lands—and other natural resources, the right to develop and maintain governing institutions, the right to life and physical integrity, way of life and religion.[1]

In 1992, the preamble of the *Indigenous Peoples Earth Charter* also viewed self-determination beyond independence:

> We indigenous peoples maintain our inherent right to self-determination. We have always had the right to decide our own forms of government, to use our own ways to raise and educate our children, to our own identity without interference.[2]

Similar is the spirit of the 1993 *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*:

> We declare that indigenous peoples of the world have the right to self-determination, and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property…[3]

More generally, Indigenous peoples' vision of self-determination was explained throughout the UN Declaration on the Rights of Indigenous peoples, the first instrument that explicitly recognizes the right of indigenous peoples to self-determination. During the elaboration of the draft Declaration, indigenous leaders from all over the world stated that self-determination for them is about *respect for their identities, control* of all aspects of their lives, and *inclusion* in the decisions that affect them. It is "the right to negotiate freely [indigenous] peoples" political status and representation in the States in which they live," a kind of "belated State-building," through which indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed and just terms, after many years of isolation and exclusion.[4] In this respect, indigenous peoples cannot easily be put in the same position as Palestinians and other nations whose claim to self-determination has clearly been in the service of independence.

The right of indigenous peoples to self-determination was indeed recognized in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The recognition of the right to self-determination to a subnational group—having a scope consistent with the indigenous claims—has been hailed a huge success of international law. Using the same language as common article 1 of the International Covenants, the Declaration recognizes the right to freely determine their political status and pursue their form of economic, social, and cultural development. However, territorial integrity is once again included in the text and article 4 turns the head of the international community away from the possibility of independence towards the internal aspect of the right, namely the right to determine their internal status.

James Tully has noted that the indigenous is a struggle "within the structure of dominion… with the aim of modifying it in the short term and transforming it in the long term."[5] And certainly indigenous peoples have risen to this challenge. Even before the explicit recognition of the right of indigenous peoples to self-determination, the transnational indigenous movement had applied the concept in an imaginative and revised way. In this way, they infused the right with a new approach. They did so before Marc Weller said in 2008 that the right really needed "to break away from that [old] restrictive paradigm."[6] Richard Falk has argued that "the semantic confusion that is implicit in statistic views of self-determination has been avoided confronting the actual situations of either captive nations and even more insistently, the various lamentable situations of indigenous peoples."[7] Both Lightfoot and I have argued that indigenous leaders have pushed the revision of self-determination to go beyond the existing understandings and applications of the right [8]

This does not mean that secession is completely off the radar though. As with other “peoples,” remedial self-determination is in theory a possibility under very strict conditions. International law may allow the right to secession when the government does not represent the whole of the population without distinction of any kind, when it commits gross and continuous violations of human rights, and when all other means have been exhausted. In *Loizidou* v. *Turkey*, Judge Wildhaber commented:

> Until recently in international practice the right of self-determination was in practical terms identical to and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way.[9]

Yet, the International Court of Justice missed the opportunity to confirm such a possibility in the Kosovo case.

In this respect, self-determination was indeed used to maintain the international status-quo regarding international borders. Is this surprising? Although there has been some progress in the last decades, international law is still very much based on the Westphalian system where States make the rules of international governance. And States are not suicidal. Therefore, the emphasis is indeed on the maintenance of international borders rather than their change. A generous scholar would also agree that limiting the option of independence in general allows the multicultural state to exist: the idea of one nation–one state cannot be accommodated anymore.

In any case, we international scholars on indigenous rights have been satisfied that the current recognition of indigenous self-determination has been fulfilling the current claims of indigenous peoples. And these kinds of claims distinguish indigenous nations from nations such as Palestinians and others who have always used the right to self-determination to promote their independence.

Self-Determination v Sovereignty

Yet, the inaction and lack of progress in realizing self-determination since the adoption of the UNDRIP has put a question-mark on the way self-determination has been used in the Declaration. The slow progress has started revealing an on-going tension between the understanding of self-determination among North American Indigenous peoples, and its understanding by Indigenous peoples in Asia or Latin America. This difference is nothing new. In the last stages of the elaboration of the Declaration in the United Nations, Indigenous peoples from North America would not accept any text without an unqualified right to self-determination, whereas other indigenous groups were ready to settle without it as long as their wider human rights were protected. In other words, Indigenous

peoples from North America placed more emphasis on their sovereignty claims, while Indigenous peoples from Asia, Africa, and Latin America placed more emphasis on the human rights model. The tension was settled by compromises by both parties as the Declaration became a reality. But now in the post-Declaration era this difference has taken on renewed importance. There is disappointment among Indigenous peoples in the North that recognition of self-government in the Canadian context maintains the colonial context and the power relations between indigenous peoples and the Canadian state.[10] On the other hand, Indigenous peoples in Latin America, Asia, and other parts of the world still emphasize the human rights model for indigenous rights.

The post-Declaration concerns of some scholars reflect the Massad argument. Indeed, maybe self-determination does not advance their Indigenous claims for sovereignty. In harmony with Massad's reluctance, Antony Anghie asks whether the postcolonial world can really deploy "the law that had enabled its suppression in the first place."[11] In the case of indigenous peoples, Patrick Macklem has recently suggested that self-determination can only accommodate indigenous claims to a certain degree. He argues that the purpose of the current right to self-determination has recently been modified and its new purpose is actually "to mitigate adverse effects associated with how international law distributes sovereignty around the globe and how it authorizes its exercise by sovereign States."[12] By declaring the existence of international indigenous rights, including the right of indigenous peoples to self-determination, international human rights law, he argues, "comprehends indigenous peoples as international legal actors," but does not "entitle indigenous peoples to acquire sovereign power as of right." It does not vest sovereignty in indigenous peoples, as sovereignty is understood in international law. Instead, international indigenous rights vest in indigenous peoples because international law vests sovereignty in States.[13]

Karen Engle maintains that the indigenous movement as a whole has shifted its emphasis from self-determination to culture, land, and participation, the "soft edge" of indigenous claims.[14] The "sovereignty v human rights" debate emphasises the distinction between the indigenous struggle vis a vis the struggle of other sub-national groups. Indigenous claims are based on sovereignty, whereas other sub-national groups' claims are based on human rights, the argument goes. This makes indigenous peoples a "special case" among sub-national groups in international law. Current international law cannot accommodate indigenous rights; it is like trying to fit "a square peg in a round hole."[15]

Erueti offers an "interpretative mixed model" on the basis of the political history of the negotiations of the Declaration.[16] This model, which advances both the decolonization/sovereignty and the human rights understandings of indigenous self-determination, seems to allow for both models, where indigenous rights and

indigenous self-determination are seen both as deriving from a decolonization and a human rights model. This model is a more inclusive and comprehensive basis for indigenous self-determination and addresses concerns on the one hand, of depriving indigenous self-determination from the shield of the current human rights conundrum, and on the other of using the recognition of indigenous self-determination merely to maintain the status quo.[17]

In conclusion, Massad makes an important argument regarding self-determination, one that has started being central in the way we tackle the realisation of indigenous self-determination in the future. From being seen as a perfect example of a new, more inclusive era of human rights law, indigenous self-determination increasingly invites questions about its real contribution to indigenous struggles for a better future. In this context, Massad's piece makes an important contribution.

NOTES

[1] As quoted in J. Burger, "Indigenous peoples: Their rights and international action in the international year and beyond" in *Indigenous Peoples, Human Rights and Global Interdependance*, ed. Patricia Morales (Geneva: International Centre for Human and Public Affairs, 1994), 43.

[2] The *Kari-oca Declaration*, May 30, 1992, https://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/KODeclaration.html (accessed June 24, 2019).

[3] The Mataatua Declaration was adopted in 1993 at the end of the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, June 12–18, 1993, Whakatane, attended by 150 indigenous representatives from 14 states. See http://aotearoa.wellington.net.nz/imp/mata.htm (accessed June 24, 2019).

[4] Erica-Irene Daes, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1993/26/Add1 (1993), para. 26.

[5] James Tully, "The Struggles of Indigenous Peoples for and of Freedom," in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton, and Will Sanders (Cambridge: Cambridge University Press, 2000), 36 at 50.

[6] Marc Weller, *Escaping the Self-Determination Trap* (Leiden: Martinus Nijhoff, 2008), 11.

[7] Richard Falk, "The Rights of Peoples (in Particular Indigenous Peoples)," in *The Rights of Peoples*, ed. James Crawford (New York : Oxford University Press, 1992), 27.

[8] Sheryl R. Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016); Alexandra Xanthaki, *Indigenous Rights and UN Standards: Self-Determination,Cculture, Land* (Cambridge: Cambridge University Press, 2007).

[9] "*Loizidou* v. *Turkey* (Merits), European Court on Human Rights, December 18, 1996, Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal," *Human Rights Law Journal* 18, no. 2 (August 1997): 59.

[10] Glen Sean Couthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[11] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 9.

[12] Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015), 164.

[13] Ibid., 156.

[14] Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*

(Durham, NC: Duke University Press, 2010), 123–32.

[15] Claire Charters, "Review of Alexandra Xanthaki, *Indigenous Rights and UN Standards: Self-determination, Culture and Land*," *Human Rights Law Review* 9, no. 3 (2009): 509, 517.

[16] Andrew Erueti, "The Sovereignty of Human Rights Symposium: The Politics of International Indigenous Rights," *The University of Toronto Law Journal* 67, no. 4 (Fall 2017): 569–95.

[17] Ibid.