

THE CHALLENGE OF DEFINING THE ENTITY ENTITLED TO THE EXERCISE OF THE RIGHT OF SELF-DETERMINATION UNDER INTERNATIONAL LAW*

Abstract

The topic of this article is: 'The Challenge of Defining the Entity Entitled to the Exercise of the Right of Self-determination under International Law'. The aim of the study is to determine the exact unit of the individuals (the people or self) entitled to the exercise of the right to self-determination under international law and whether or not such entity includes a minority group. The methodology employed in the research is doctrinal using both primary and secondary sources. Our findings is that the various legal instruments on the norm of self-determination have clearly failed to give a precise definition of the concept of self or people entitled to the exercise of the right to self-determination. This lacuna has given rise to a multiplicity of opinions amongst scholars, jurists and publicists as to the exact meaning of that concept resulting in a serious challenge as to when or where to apply the norm of self-determination. Moreover, there is a distinction being made between a 'people' and a minority group. While a 'people' is said to be the entity entitled to self-determination, a minority group is said not to be so entitled. It is our recommendation that a clear definition of the concept be provided by international legal instrument dealing on the rule of self-determination so as to ensure a better application and operation of the rule of self-determination and that the present distinction being made between a 'people' and a minority group be removed as it is clearly discriminatory and defeating to the purpose of self-determination.

Keywords: Right, Self-determination, International Law, Definition, Challenge

1. Introduction:

To argue that there is a right to self-determination without properly understanding the entity entitled to the exercise of that right is to engage in mere academic discourse without any practical significance. In the words of James Summers, 'As self-determination is a right of peoples, the people not only provides a logical starting point for a study of the right, but it is, in fact, hard to see how much headway can be made without at least some explanation for it'.¹ Again, according to Dakas C.J. Dakas, 'At the heart of the general controversy bedeviling the concept of self-determination are two fundamental questions: First, who is the 'self' that is entitled to 'self-determination'? Second, what is the 'self' entitled to 'determine'?'² It follows then that the understanding of the term 'people' or 'self' is the key to understanding the concept of self-determination. Again, it needs to be stated from the outset that the terms, 'self' and 'people' or 'peoples' refers to the one and same thing being the entity entitled to the exercise of the right to self-determination. However, despite all the frequent references to the term, 'self' or 'people' by numerous international legal instruments, it is quite curious to note that the term is still far from being free of controversies regarding its exact meaning or connotation up till this day. This is the core of this research paper.

2. Self-determination Defined

The term 'self-determination' has acquired so many meanings but all linked to the idea of freedom of choice or will. Generally, it has both group and individual aspects. To that extent, it may refer to the right of a 'people' or a 'person' to freely decide his or their political, economic, social or cultural future or to generally decide their fate without any external interference. In this light, Mia Abel has noted that, 'The quintessential definition of self-determination is having control over one's own life.'³ However, in a more strict and technical legal sense, self-determination is an international law concept which has to do with the right of a 'people' or a 'group of persons' as distinct from that of individual persons. According to Antonio Cassese, the wording of the legal instruments on self-determination 'does not offer any concrete indication' as to what it really means.⁴ This observation of Cassese regarding the uncertainty of the term, 'self-determination' was earlier recognised by J.G. Starke when he stated that, 'There still remains some difficulty as to what the expression 'self-determination' itself means or

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¹ J Summers, *The Idea of the People: The Right of Self-Determination, Nationalism and the Legitimacy of International Law*, published Doctoral Dissertation (Helsinki: University of Helsinki, 2004), at p.1.

² C J Dakas, 'Self-Determination, the Post-Colonial African States and the Challenges of Nationhood' in *Beyond Bar Advocacy: Multidisciplinary Essays in Honour of Anthony Okoye Mogboh*, SAN, edited by C.C. Nweze, et al, (Umuahia: Impact Global Publishers Ltd., 2011), at p.486.

³ M Abel, *Is There a Right to Secession in International Law?* published online on May 18, 2020 and accessed on 15th July, 2020.

⁴ A Cassese, 'Political Self-determination – Old Concepts and New Developments', in Cassese, A., ed., *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff and Noordhoff, Alphen aan den Rijn, 1979), pp.137-65 at 143-4.

includes.⁵ Notwithstanding the above observation, however, a look at the various definitions of the concept may throw some light on the meaning of the term. Thus, according to Oxford Advanced Learner's English Dictionary (8th ed.), the term 'self-determination', *inter alia*, refers to 'the right of a country or a region and its people to be independent and to choose their own government and political system'. For the Merriam Webster's Collegiate Dictionary⁶, the term, among other things, refers to the 'determination by the people of a territorial unit of their own future political status.' On its part, the BBC English Dictionary defines the term as 'the right of a country to be independent instead of being controlled by a foreign country, and to choose its own form of government.' On its part, the Black's Law Dictionary (10th ed.) gives a more technical, albeit rather too limited, definition of the term as 'The right of each culturally homogenous country to constitute an independent state.'

The above definitions basically cover the general conception of the term as it relates to the right of a group of people to freely decide or choose the nature of their future political life. However, to better understand the exact meaning and significance to which the term has acquired under the contemporary international law, a look at the opinions of learned authors and jurists will be germane at this point. To begin with, the International Court of Justice has described the concept of self-determination as, 'the need to pay regard to the freely expressed will of peoples'.⁷ On her part, Mia Abel has defined the term 'when applied politically' to mean 'the power of the people of a nation to decide how it is governed'.⁸ Furthermore, in his own definition of the term, Kwaw Nyameke Blay wrote that, 'Defined in its simplest terms, self-determination is the principle by virtue of which a people freely determine their political status and freely pursue their economic, social and cultural development. Self-determination is in essence the right of self-government'.⁹ On their part, Brownlie has defined the term as, 'the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups'¹⁰, while Roman Ediberto has equally offered his own definition of the term as, '[t]he right of a people or a nation to determine freely by themselves without outside pressure to pursue their political and legal status as a separate entity'.¹¹ What one can gather from all the above definitions is that self-determination is concerned with the right of a group of individuals acting collectively as a unit to freely decide on the affairs concerning their present and future life especially with respect to their political, economic and the legal issues regarding their relationships as well as their general mode of leadership.

3. Self or People as a Central Concept in Self-Determination

A glance through many international legal instruments on self-determination will readily reveal that the term 'people' has frequently been employed in the determination of the entity entitled to self-determination. For instance, Articles 1(2) and 55 of the UN Charter talked about self-determination of 'peoples'. On their part, the 1966 International Human Rights Covenants provided in their common Article 1 that '*All people* have the right of self-determination.' In the same vein, Article 20(1) of the African Charter on Human and Peoples' Rights also provided that '*All peoples* shall have the unquestionable and inalienable right to self-determination.' Other instruments such as the UN GA Res. 1514 (XV) of 1960 and Res. 1541 (XV) of 1960 also referred to the term, 'people' as the entity entitled to self-determination. However, despite the frequency of the occurrence of the term in those legal instruments, it does appear that the true definition of that term is still enmeshed in a lot of domestic and international power politics. Thus, while reflecting on the Biafran incidence *vis-à-vis* other successful cases of self-determination in the recent times, Maurice Cranston had cause to declare that, 'whether any group of human beings constitutes a people seems more often than not to depend on the fortunes of war and the strategic demands of the great powers than on the intrinsic legitimacy of their claims'.¹² In its memorandum submitted in June, 1945, the Secretariat of the Coordination Committee responsible for the drafting of the Charter of the United Nations explained the use of the word, 'peoples' thus:

No difficulty appears to arise from the use of the word 'peoples' which is included in the Technical Committee texts whenever the idea of 'all mankind' or 'all human beings' is to be emphasized...[T]he word 'peoples' is used in connection with the phrase 'self-determination of peoples.' This phrase is in such common usage that no other word seems appropriate. The

⁵ J G Starke, *Introduction to International Law*, 9th Edition, (London: Butterworths, 1984), at pp.119-121.

⁶ Frederick C Mish, et. al., *Merriam Webster's Collegiate Dictionary, (Tenth Edition)*, (Massachusetts: Merriam Webster Incorporated, 1993), p. 1008.

⁷ *14 Western Sahara (Advisory Opinion)*, ICJ Reports (1975), p.33, para.59.

⁸ M Abel, *Is There a Right to Secession in International Law?*

⁹ K N Blay, 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights' (1985), *J.A.L., Vol.29, No.2*, p.147.

¹⁰ Brownlie, *Principles*, at p. 599.

¹¹ R Ediberto, 'Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm', 53 U. Miami L. Rev. 943 (1999), at p.944, available at http://collections.law.fiu.edu/faculty_publications/316, accessed last on 6th February, 2023.

¹² Cited by Bradley Simpson, 'The Biafran Secession and the Limits of Self-Determination', *Journal of Genocide Research (July, 2014)*, p.350. See also Sir Ivor Jennings, 'The Approach to Self-Government,' (1956), pp.55-56, cited in 'Self-Determination Today: Metamorphosis of an Ideal' by Michla Pomerance, op. cit., at p.311.

question was raised in the Coordination Committee as to whether the juxtaposition of 'friendly relations among nations' and 'self-determination of peoples' is proper. There appears to be no difficulty in this juxtaposition since 'nations' is used in the sense of all political entities, states and non-states, whereas 'peoples' refers to groups of human beings who may, or may not, comprise states or nations.¹³

A simple interpretation of the above memorandum of the Coordination Committee is that all groups of human beings whether or not comprised of states or nations are all entitled to be identified with the term 'people'. This alone should have been the end to this argument as to the meaning of the term 'people'. Yet, that has not been the case. Thus, the challenge of accepting a common definition of the 'people' that will have the right to decide their fate through self-determination has remained with us up till today. Indeed, the need to have a clear understanding as to which group of individuals is entitled to the exercise of the right to self-determination can be easily seen from the fear earlier expressed by Robert Lansing, the then U.S. Secretary of State who followed President Wilson to the Versailles Peace Conference of 1919 when he noted in his diary thus: 'When the President talks of 'self-determination' what unit has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability...' ¹⁴ According to Dakas, there are three distinct historical epochs under which the term 'self' has acquired different meanings as follows:

In the *inter-war era*, the 'self' was construed with reference to the principle of nationality which, in turn, served as the primary basis for the redrawing of the map of Europe with due regard, in numerous cases, to ethnographic considerations. In the context of *African decolonization*, however, self-determination was generally implemented in such a manner that the 'peoples' entitled to the exercise of the right cohered with territorial units established by the colonial powers. In other words, self-determination did not entail the reconfiguration of the borders of the colonial state to reflect pre-colonial ethnographic realities...In the *post-colonial era*, while there is a general consensus that the right to self-determination transcends the colonial era, the determination of the 'self' remains the subject of considerable controversy.¹⁵

It may be argued that, standing alone, there is no difficulty in comprehending the term 'people' as a group of individuals living together in a particular geographical location who agreed to exist as one united legal entity for the purpose of promoting and protecting their legitimate common interest. However, when the concept is applied in the context of international law concept of self-determination as informed by the philosophical foundation of the concept, that definition may fall short of an adequate definition of a people. Again, it may also be stated that when the fears expressed by Robert Lansing in 1919 as to the exact unit of human beings which the concept of self-determination refers to is placed side by side with the definition of 'people' by the Secretariat of the Coordination Committee responsible for the drafting of the UN Charter in 1945, reproduced above, the conclusion one is likely to draw is that if there was any need for the fear of Lansing in 1919, such fears ceased to be of relevance in 1945 under the UN system. Consequently, all the questions raised by Dakas above ought to have been laid to rest.

However, as can be seen from the views of scholars, this argument has continued to linger prompting varying opinions from different writers as to what the term, 'people' or 'self' actually mean. Thus, in the opinion of Umzurike, the term 'self' can be defined as a '[c]ollection of individuals having a legitimate interest which is primarily political, but may also be economic, cultural, or of any other kind'.¹⁶ He further noted that it can also represent an identifiable group of people having common legitimate aims which group may include the whole population of a state or a part of the population of a state.¹⁷ On his part, Ved P. Nanda made a difference between 'peoples' and 'self' when he stated that 'peoples' can be seen as 'a social entity that have common ancestry, history, religion, language, culture...and possess an awareness or state of mind that they are not just a population but have a sense of identity', while 'self', on the other hand, encompasses the idea that a group should possess common characteristics and be conscious of their identity and that the claimant need not be oppressed or threatened with physical extermination, and should be distinguished by its evasion of assimilation by the dominant group.¹⁸

¹³ Documents of the United Nations Conference on International Organisations, U.N. Doc. WD/381, CO/156, 18 U.N.C.I.O. Doc.s.657-58 (1945).

¹⁴ R. Lansing, Saturday Evening Post, 9 April, 1921, p.7.

¹⁵ *Ibid.* at pp.486-487.

¹⁶ O U Umzurike, *Self-Determination in International Law*, 1972, at 195.

¹⁷ *Ibid.*

¹⁸ V P Nanda, 'Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era', *ILSA J. Int'l & Comp. Law*, 1997, 443 at 446.

With due respect, the above differentiation being made by Ved Nanda between ‘peoples’ and ‘self’ is akin to a differentiation between six and half a dozen. Again, his contention that the claimant need not be ‘oppressed or threatened with physical extermination’ is true only with respect to internal self-determination and not with respect to the external aspect. Secondly, his submission that the group’s ‘evasion of assimilation by the dominant group’ should be the distinguishing factor appears to contradict his earlier contention that it need not be oppressed or threatened with physical extermination. What then is the difference between oppression and an attempt to assimilate a minor group by a dominant group? Does it not amount to oppression when you seek to deny a people of their identity? I really find it difficult to appreciate Nanda’s differentiation above. The opinion of Ofuatye-Kodjoe is rather restrictive when he asserted that only a ‘[s]elf-conscious *politically coherent* community that is under the political subjugation of another community’ is entitled to exercise the right of self-determination and that the purpose of self-determination is therefore to ‘remove a community from the political domination of another group and permit it to gain control of its own destiny’ and thus to ‘remedy or eradicate deprivation’.¹⁹ Thus, this definition falls short of what will make an entity to be seen as entitled to right of self-determination.

Finally, for Obiora Okafor, ‘[a]ll oppressed peoples whether under colonial or internal oppressive domination are entitled to assert the right to self-determination and come therefore within the definition of peoples or nations for the purposes of the legal concept of self-determination’.²⁰ Again, as the right of self-determination is not limited to a situation of oppression, Okafor’s definition above is also restrictive for the purpose of self-determination. However, the definition is in line with paragraph 20 (2) of the African Charter on Human and Peoples Rights, which declared that the right is available to ‘all colonial and oppressed peoples.’ And as rightly noted by Okoronkwo, ‘Colonial’ and ‘oppressed’ are not co-extensive in Article 20(2). ‘Oppressed people’ covers a wider spectrum than colonial people and ‘must mean non-colonised peoples who are oppressed.’²¹

Apart from the individual opinions of the various learned authors cited above, in the opinion of the International Commission of Jurists, a ‘people’ should have the following seven characteristics namely: (1) a common history (2) racial or ethnic ties (3) cultural or linguistic ties (4) religious or ideological ties (5) a common territory or geographical location (6) a common economic base; and (7) a sufficient number of people.’²²

All the above seven characteristics listed by the ICJ constitute the objective elements in the definition of a people. However, the 7th criterion given by the Commission of Jurists namely, ‘a sufficient number of people’ is quite unclear especially as the phrase was not defined by the Commission. Apart from this, the other criteria appear to be in line with the objective elements contained in the definition provided in the *Final Report and Recommendations* of the 1989 UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples which described ‘people’ as:

1. A group of individual human beings who enjoy some or all of the following common features:
 - a) Common historical tradition;
 - b) Racial or ethnic identity;
 - c) Cultural homogeneity;
 - d) Linguistic unity;
 - e) Religious or ideological affinity;
 - f) Territorial connection; and
 - g) Common economic life.
2. The group must be of a certain number which need not to be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a state.
3. The group as a whole must have the will to be identified as a people or the consciousness of being a people.
4. The group must have institutions or other means of expressing its characteristics and will for identity.²³

The above definition of ‘people’ by UNESCO contains both the ‘objective’ and ‘subjective’ elements.²⁴

It is interesting to note that even before the coming into existence of the United Nations in 1945, the Permanent Court of International Justice (PCIJ) established under the League of Nations in its Advisory Opinion No. 17 which concerned *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal*

¹⁹ W Ofuatye-Kodjoe, ‘The Principle of Self-Determination in International Law’, 1977, 182 at 155-56.

²⁰ O C Okafor, *Self-Determination and the Use of Force in Contemporary International Law: An African Perspective*, being an unpublished LL.M Thesis, presented at the Faculty of Law, University of Nigeria, Nsukka, (Enugu Campus), (in the Library of the researcher), 1994, at p.138.

²¹ *Ibid.*, at 101.

²² Cited by J Falkowski, ‘Secessionary Self-Determination: A Jefferson Perspective’, at p. 210.

²³ 1990 February 22, Final Report and Recommendations, UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, available at <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>, accessed on 24th July, 2020.

²⁴ Ieva Vezbergaite, ‘Self-determination of Kurdish People: Undermining the Unity of the Turkish Nation?’ *IFF Working Paper Online No.9*, July, 2015, p.6.

Emigration opined that the criterion to be applied to determine what is a *community* as a distinct juridical person is the existence of:

[A] group of persons living in a given country or locality, having a race, language and traditions of their own and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another.²⁵

The above judicial interpretation of ‘community’ by the PCIJ is quite in line with the definition of ‘people’ given by UNESCO reproduced above. In the same vein, a close look at the definitions given by the International Commission of Jurists and that of UNESCO will reveal much common grounds, at least with respect to objective factors, save that unlike the Commission of Jurists which mentioned ‘cultural or linguistic ties’ as one factor, the definition by UNESCO mentioned ‘cultural homogeneity’ and ‘linguistic unity’ as two separate factors. Again, the UNESCO definition added the two factors of ‘the will to be identified as a people or the consciousness of being a people’ and the existence of ‘institutions or other means of expressing its characteristics and will for identity’. These additional subjective factors are absent in the definition given by the Commission of Jurists. Additionally, the characterization by UNESCO that the ‘group must be of a certain number which need not to be large... but which must be more than a mere association of individuals within a state’, is definitely better or rather more logical than the characterization by the International Commission of Jurists that it must have ‘a sufficient number of people’- a term not defined by the Commission.

It needs to be pointed out here that in its definition of a *State* as a person under international law, Article 1 of the *Montevideo Convention on the Rights and Duties of States, 1933*²⁶ listed four characteristics which every state is to have one of which is ‘a permanent population’. According to Malcolm Shaw, ‘The existence of a permanent population is naturally required and there is no specification of a *minimum number of inhabitants*, as examples such as Nauru and Tuvalu²⁷ demonstrate.’²⁸ This position is also supported by Harris who also opined that, ‘There is no *lower limit* to the size of a state’s population and territory.’²⁹

Therefore, applying the above characteristic of ‘a permanent population’ in the definition of a *state* to the definition of a *people* which is an entity that could possibly aspire to become a state, it is humbly submitted that the inhabitants of an area or the population of individuals who should qualify as a *people* need not be of any *lower limit* or of a *minimum number* so long as such population is not only bound together as one but is also faced with oppression and so desires to assert themselves as such and as well being *permanent* on a territory and not merely transitory such as that of a nomadic population. Consequently, when these modifications are added, the inclination to accept the definition by UNESCO as a better definition of a ‘people’ will become higher.

In line with the above definition by UNESCO, Ediberto Roman has argued that a group claiming to be a ‘self’ entitled to the right should possess certain ‘objective characteristics’ of a distinct group as suggested by the United Nations General Assembly Resolution 1541 such as a common ethnicity, language, history, or other cultural distinctiveness as well as ‘a subjective characteristic’ which enables them to share elements of group identity...which give rise to a parochial sentiment and which are thus likely to produce government based on consent. This subjective element is what will make the group to see themselves as one people, one community.³⁰ However, the pertinent question is as to whether the criteria to be applied in the determination of a ‘people’ or ‘self’ are to be purely *objective* or *subjective*? To this end, John Collins states that:

Though the United Nations may set criteria for achieving self-determination, the fundamental standards still revolve around the subjective and objective schools of thought. That is, what are the composite elements of ‘self’ in self-determination. Is ‘self’ to be viewed objectively (race, religion, language) or subjectively (will of the people)? It was earlier suggested that people with common objective traits must subjectively feel they are a unified people. In defining ‘self’, pure objective or subjective standards are inadequate.³¹

²⁵1930, P.C.I.J., No.17, 4 at 21, par.84..

²⁶ (1934) 165 L.N.T.S. 19; 28 A.J.I.L., Supp., 75, adopted by the 7th International Conference of American States, made up of fifteen Latin American States and the United States of America.

²⁷ Those two states which are recognized as members of the United Nations have a population of about 12,000 and 10,000 respectively.

²⁸ M N Shaw, *International Law*, pp.178-179.

²⁹ D J Harris, *Cases and Materials on International Law, Sixth Edition* (London: Sweet & Maxwell, 2004), p.100. Nauru, for example, has only 12,000 inhabitants and is only eight square miles in area.

³⁰ E Roman, ‘Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm’, 1999, *University of Miami Law Review*, Vol. 53, 943 at 958.

³¹ *Ibid.*, at 149.

As to whether all or some of the objective factors must be considered in conjunction with the subjective factors for the purpose of identifying a people, John Collins has equally opined that what is required is ‘elements of group identity...which give rise to a parochial sentiment’ amongst the members of the group. Thus, it is for the people who are properly ready to exercise their self-determination right to show that they share similar characteristics and traits and see themselves as one people, one community.³² Therefore, ‘a mix of the two would seem more appropriate. The examination of the will or wishes (subjective) of a people sharing similar language, racial and religious bonds (objective) would be the most effective and strongest implementation method...’³³ We cannot agree less with John Collins in his position above. But, in addition to those objective and subjective characteristics already given above, Pius Okoronkwo has equally noted that, ‘A group must have common grievances or interests that they wish to protect or preserve.’³⁴ With respect to the instances of such common grievances or interests, he explained that, ‘any group can qualify as ‘peoples’ and attain the right of self-determination if the group experiences: (1) external or internal domination; (2) oppression; (3) serious or grave human rights violations; (4) foreign or alien subjugation; (5) great repression; (6) threat of physical extermination; or (7) denial of representation and participation in the government of the state.’³⁵ It is worthy of note that the above experiences of common grievances are not meant to exist simultaneously or conjunctively as is depicted by the use of the term ‘or’. It is enough if one or more of it, which constitutes subjugation, oppression or exploitation, is in existence. Of course, a people do not necessarily need to possess all the objective factors mentioned above. It is enough that they possess some of them as well as the subjective factor of the consciousness of being identified as one people. This will form the basis for asserting their right of self-determination as a group.

4. Does the Definition of Self Exclude a Minority Group?

An important aspect of the definition of ‘self’ borders on the question as to whether a minority group is entitled to the exercise of the right. In this light, it has been argued by Maya Abdullah that a distinction is made between a ‘people’ and a ‘minority’ as the prevailing position in international law is that ‘the right to self-determination does not apply to minorities’ but to ‘people’.³⁶ In support of the above position of Maya, Christian Tomuschat has also opined that if every group that qualifies as a people in the ethnic sense were to be considered a people under the provision of Article 1 of the 1966 Human Rights Covenants, then present legal position would be marked by a blatant inconsistency.³⁷ This claimed position of international law that a distinction must be created between a ‘people’ and a ‘minority’ as it is only a ‘people’ as against a ‘minority’ that is entitled to the exercise of right to self-determination, as posited by Maya Abdullah and supported by Christian Tomuschat above, is quite problematic in many respects. In the first place, Article 1 of the International Human Rights Covenants being referred to by Tomuschat never excluded minorities from its application. Secondly, there is no definition of a *minority* which clearly differentiates it from a *people*. In fact, the definition of *minority* given in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, makes it even more pertinent for the application of the concept. According to Capotorti, a *minority* is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.³⁸

In a 2010 publication of the Office of the United Nations High Commissioner for Human Rights, it was noted that, ‘While the nationality criterion included in the ...definition [by Capotorti], has often been challenged, the requirement to be in a non-dominant position remains important.’³⁹ The report further observed that: ‘There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority)’.⁴⁰ The publication then concluded that, ‘In most instances a minority

³² *Ibid.*, at 150.

³³ *Ibid.* at 146. See also V P Nanda, ‘Self-Determination Under International Law: Validity of Claims to Secede’, (1981), *Case W. Res. J. Int’l L.*, Vol.13, Issue 2, 257 at 276.

³⁴ P I Okoronkwo, ‘Self-Determination and the Legality of Biafra's Secession under International Law’, *supra*, at p. 104.

³⁵ *Ibid.*

³⁶ M Abdullah, *The Right to Self-Determination in International Law*, at pp.12-13.

³⁷ C Tomuschat, ‘Self-Determination in a Post-Colonial World’, in C. Tomuschat ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993), pp.1-20 at 15-16.

³⁸ E/CN.4/Sub.2/384/Rev.1, para. 568.

³⁹ MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, 2010, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, HR/PUB/10/3, ©2010 United Nations.

⁴⁰ *Ibid.*

group will be a numerical minority, but in others a *numerical majority may also find itself in a minority-like or non-dominant position*, such as Blacks under the apartheid regime in South Africa.⁴¹

It can be seen from the above position of the UN Office of the High Commissioner for Human Rights that the definition of a *minority*, just like that of the *people*, is a question of fact determinable by both objective and subjective factors. Secondly, just as is the same with an oppressed people, a *minority* could still be the numerical majority and yet be in the position of dominance by the numerical minority- the very reason for the assertion of the right to self-determination by people. In other words, *minority* is not necessarily a matter of a lack of numerical strength *per se* but rather of a forced position of dominance. It follows then that the two terms of *minority* and *people* are not 'necessarily mutually exclusive'.⁴² Indeed, the assertion that the right to self-determination is not applicable to *minorities* but only to *peoples* is quite an uncomfortable one especially when it is borne in mind that it is often difficult to make a clear distinction between the two concepts. In other words, is it really necessary to attempt to make a distinction between the two when it is beyond doubt that a certain group of individuals may have characteristics of a people and of a minority at the same time? And, assuming that one is to accept the position of both Murswiek and James Falkowski that such group of individuals to be so-entitled to the exercise of the right to self-determination 'must constitute a majority',⁴³ in the particular territory where they are occupying, what then can be said about a *minority* which has the numerical majority? Again, if self-determination is about shaking off the yoke of subjugation, oppression and exploitation, is a minority group not entitled to protection against subjugation, oppression and exploitation either by a foreign or local authority? If they are, why is the difference in application? It is submitted, with respect, that such differentiation between 'people' and 'minority' in the application of the concept of self-determination is not only an unhealthy one but one which appears to defeat the very essence of that concept. Perhaps, it is in line with this unnecessary differentiation between a 'people' and a 'minority' that Ediberto Roman has identified what he called *two divergent formulation of self* namely the 'more controversial formulation' and the 'more conventional formulation'. According to him, 'A more controversial formulation of 'self' grants the right of self-determination to indigenous people and distinct minorities that reside in significant number within an existing state.' On the other hand, the *more conventional formulation* of 'self', could, '[d]eny the right to a group that would otherwise meet all of the traditional characteristics of a people. This could result in an aspiring 'self' being told, 'You are not really a people, but merely a minority,' or 'You are not really under 'colonial' or 'alien' rule at all.'⁴⁴ He then advised that, 'regardless of which definition of 'self' is adopted, the global community must end the selective recognition of the right to self-determination and acknowledge precedence. The right should be recognized universally.'⁴⁵ He, however, cautioned that:

Every state contains a minority group. If each group within a state can claim the right to self-determination and succeed, self-destruction of virtually every state could result. Thus, those who claim self-determination within an existing state (i.e. secession) must demonstrate all of the above criteria. If such criteria is met then, consistent with the role of the United Nations, such claims must be weighed against potential threats to regional and world peace.⁴⁶

Indeed, not every ethnic group is entitled to self-determination. Such claim must be justified in the face of the factors already discussed. However, with regard to this unjustified differentiation between a people and a minority group, it is my submission that it is better to align with the *more controversial formulation of self* as against the *more conventional formulation* as it is more in line with the humanitarian and philosophical foundation of the concept of self-determination.

Therefore, in view of the foregoing, it is my position that the argument that ethnic groups and minorities are not entitled to right to self-determination, '...frequently leads to the violation of the human rights of nationally, ethnically, racially or religiously defined population group.'⁴⁷ Secondly, this argument which is based on the wrong interpretation of the provisions of the legal instruments on self-determination which talk about a 'people', 'peoples' or 'all people' tend to ignore the fact that ethnic groups and minorities are also part of the group called

⁴¹ *Ibid.*

⁴² D Murswiek, 'The Issue of a Right to Secession-Reconsidered', in *Modern Law of Self-Determination*, edited by Christian Tomuschat, 1st Ed. (Springer, 1993), p.37.

⁴³ Murswiek's position is to the effect that, 'A people, as a group which can be holder of the right to self-determination exists only if it lives in a distinct territory, where it constitutes the majority and where it is able to speak its own language, develop its own culture, cultivate its traditions or practice its particular religion,' Murswiek, D., 'The Issue of a Right to Secession-Reconsidered', *supra*, at p.27. On his part, James Falkowski opines that, 'Self-determination applies to a group of persons who constitute a 'people'. Although numerous definitions have been proposed, a 'people' in its broadest sense is a majority of persons within a geographic area who desire to change their status', Falkowski, J., 'Secessionary Self-Determination: A Jeffersonian Perspective', 1991, *Boston University International Law Journal*, Vol.9, 209 at 210.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at p.959.

⁴⁶ *Ibid.* at pp.958-959.

⁴⁷ Michael Dusche, 'Human Rights, Autonomy and National Sovereignty', *Ethical Perspectives* 7 (2000)1, p.24

‘people’ or ‘peoples’ or ‘all people’. Moreover, none of such legal instruments in any place expressly excluded a minority or an ethnic group from exercising the right to self-determination or even from the definition of a people.

Indeed, by the definitions of *people* given by UNESCO, the International Commission of Jurists as well as the Permanent Court of International Justice reproduced above, an ethnic group or a minority can conveniently come under the definition of a *people*. What is important in every circumstance should be whether such *people*- as a minority, an ethnic group or even the entire population of a country- have established the major ingredient of self-determination namely the existence of subjugation, oppression or exploitation, against the dominant group. It follows, therefore, that denial of right to self-determination to a people based on their ethnic or racial definition or on the ground that they constitute a minority in a polity has no moral or legal justification whatsoever. This is more so the case in view of *Article 4 (1)* of the UN General Assembly *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*⁴⁸ which provides that: ‘States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law’.

As shown above, self-determination is one of the recognized international human rights by virtue of common article 1 of the 1966 International Human Rights Covenants. That being the case, it cannot be validly argued that minorities are not entitled to the right to self-determination.

5. Conclusion:

In summary, therefore, it is my humble submission that although there is no generally accepted definition of a ‘people’ who are entitled to the exercise of the right to self-determination, one is inclined to agree with Salome Ponsin that:

At the emergence of the concept, it concerned essentially colonized people...through the invocation of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Through the year, the concept finally started to concern all peoples as the ICCPR and ICESPR, before being re-focused on specific peoples: indigenous peoples and minorities through *Declaration on the Rights of Indigenous peoples*. This evolution seems to have followed the evolution of the state of peoples all around the year. When the large movement of promotion of freedom and peace all around the world started after the Cold War, the right to self-determination has been enlarged to more peoples. Then, when the colonial empires have been dismantled to the profit of the Human Rights, the notion has been re-focused on the peoples which were still in need of self-determination process: indigenous people and national minorities.⁴⁹

In conclusion, it is our humble recommendation that a precise definition of the entity entitled to self-determination be provided by the international community to avoid the present confusion on the exact meaning of the concept and that the present distinction being made between a *people* and a *minority group* be removed as it is discriminatory and defeats the purpose of self-determination.

⁴⁸ Adopted by General Assembly resolution 47/135 of 18 December 1992.

⁴⁹ S Ponsin, ‘The Right to Self-Determination in International Law: Basis and Critics’, *University for Peace Student Publication, 2016-2017 Academic Year*, p.9.