Introduction

It is a commonplace that international lawyers differ on whether the right[1] of self-determination of peoples in international law includes a right of secession, and if so, in what circumstances. In the 1998 *Reference re Secession of Quebec*,[2] which put the question squarely to the Supreme Court of Canada, the Canadian government, the Quebec *amicus curiae*, and intervenors including the Nunavik Inuit,[3] the Ad Hoc Committee of Canadian Women on the Constitution, and the provincial government of Saskatchewan could all find support for their positions among international lawyers.[4] Indeed, the number of new states and self-determination movements to emerge from the end of the Cold War has only broadened the range of views on self-determination, some spying a new norm in these developments and others distinguishing them in various ways.

But beyond the fact of disagreement, the cross-section of opinions on secession in the Quebec reference brings home a feature of the international law discourse on self-determination that many international lawyers may register, but few engage: its unhelpful generality. The accounts of self-determination that compete in the literature are so neatly logical and linear as to either miss or generalize away much of what is involved in the actual interpretation of self-determination. One of

[1] As will be seen, some authors analyse self-determination as a legal right and others as a legal principle. The terms 'right' and 'principle' are used somewhat loosely in the Introduction, and this usage should not be seen as prejudging the issue of norm-type.

[2] *Reference re Secession of Quebec*, [1998] 2 SCR 217, (1998) 37 ILM 1340.

[3] The Nunavik Inuit were represented by the intervenor Makivik Corporation.

[4] The facta and accompanying expert opinions of the Attorney General of Canada and the Quebec *amicus curiae*, and the submissions of the Ad Hoc Committee of Canadian Women on the Constitution are reprinted in A. F. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000).

the few to criticize this body of literature, Nathaniel Berman dismisses its broad dichotomies as inadequate to the complex production of meaning in a concrete case.[5] Yet the habit of reading each new decision on secession as the validation of one simple definition over another perpetuates the international law discourse of self-determination as a contest of impervious generality or what James Crawford, another of its rare critics, slightingly calls the 'programmatic'.[6] Indeed, by reconstructing the specificity and historical context of the judgments that figure in the standard formulations of self-determination, Berman and Crawford do much to demonstrate the weaknesses of these formulations as description. Berman identifies patterns of imagination and invention in the judgments that undermine the predictive value of the competing rules, while Crawford stresses the relevance of colonialism inside and outside the International Court of Justice.

This book does not set out to establish a single best account of whether and when the right of self-determination of peoples in international law includes a right to independence. Nor, any more than Berman or Crawford do, does it simply aim to prove that the standard answers fail to capture the richness and detail of the key cases and events – which no summary could accomplish. Instead, it seeks to show that there is something important that these answers systematically ignore: the challenge of diversity for the interpretation of self-determination and – conversely – the implications of the interpretive history of self-determination, once seen in this light, for the challenge of diversity in international law and perhaps law more generally.

As a rough intuition, this relationship between diversity and self-determination is suggested too by the Quebec secession reference. What seemed troubling about the legal answers that the scholarship on self-determination offered the court was their starkness, because it was so unlikely to appear legitimate to the judges and, relatedly, to the full range of those implicated in the judgment: Canadians, Québecois,

[5] N. Berman, 'Sovereignty in Abeyance: Self-Determination in International Law' (1988) 7 *Wisconsin International Law Journal* 51 at 93–4. See similarly M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241 at 264–9.

This is perhaps also implicit in complex case-studies of secession by international lawyers. See e.g. E. Stein, *Czecho/Slovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (Ann Arbor: University of Michigan Press, 1997).

[6] J. Crawford, 'The General Assembly, the International Court and Self-Determination' in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Cambridge: Grotius Publications, 1996), pp. 585–605 at p. 586.

indigenous peoples, minorities, women. Indeed, a number of the lawyers and experts involved in the case laboured to present the court with a less open-and-shut view of the international law of self-determination. And the innovative structure of the decision – the housing of much of it in the Canadian constitution, the development of the constitution's deep principles of federalism, democracy, constitutionalism and the rule of law and the protection of minorities, the appeal to an inclusive constitutional history and the finding of a duty to negotiate supported and informed by these principles and this history – seems to testify to the court's recognition that the broad legitimacy of the judgment required engagement with a diversity of perspectives and that the approach it took to interpretation was related to its ability to engage.

The problems posed by differences of culture and gender for the interpretation of international law are exceptionally acute for self-determination because its interpretation directly affects non-state groups as well as states. Moreover, the groups involved, including the colonized, ethnic nations and indigenous peoples and women within these groups, tend to be marginalized both internationally and domestically. As distinct from interest groups, these groups are generally characterized by an experience of membership as non-voluntary and immutable and correspond historically to patterns of social and political inequality and negative stereotyping.[7] For such groups, differences of power and voice often combine to exclude them unfairly from the making of the law, placing pressure on its interpretation to begin the work of inclusion. The book investigates the importance of one particular question of self-determination – when it gives rise to independence – as a place, perhaps without equal, where international law has had to contend with the challenge of diversity for interpretation. In this, it differs from Crawford's essay, which pursues the challenge only with respect to diversity among states and considers a fairly limited and statist set of interpretive responses. Berman's scholarship analyses how the verisimilitude of various international judgments and other influential writings on issues of nationalism derives from the author's image of the nationalist subject, be it peoples, nations or minorities, and the interaction of that sociological impression with the author's image of international law and institutions.[8] Berman's primary interest, however, is in exploring the

[7] I borrow here from M. S. Williams, *Voice, Trust, and Memory. Marginalized Groups and the Failings of Liberal Representation* (Princeton: Princeton University Press, 1998), pp. 15–16.

[8] See e.g. N. Berman, '"But the Alternative is Despair": Nationalism and the Modernist Renewal of International Law' (1993) 106 *Harvard Law Review* 1792; N. Berman, 'The

construction of the individual vision rather than its responsiveness to the claims of those it implicates.

As the challenge of diversity, the book distinguishes three ways in which groups affected by the right of self-determination of peoples may be included in or excluded from its interpretation: *participation*, *identity* and *interpretation*. What is meant by *participation* is whether these groups have a voice in the process. In addition to actual involvement in the determination of meaning, participation refers to other means of building in consideration of their perspectives. Whereas participation is concerned with the procedural possibilities to speak, *identity* relates to what is said. Identity refers to international law's construction of the identity of a group; the capacity of international law, as a type of language, to describe and thereby to help shape our perception of a group, its history and entitlements. This image that informs and is, in turn, reinforced by international law may or may not be consistent with the self-image of the group or its parts. So identity too involves inclusion or exclusion. *Interpretation*, the third form of responsiveness, signifies the room that the interpreter's theory of law, his model of law and legal reasoning, makes for argument and the kinds of arguments it recognizes as valid. The choice of an interpretive theory determines how to speak; it sets the limits and terms of the conversation about meaning that may be had in international law. As such, interpretation rules in or out the sorts of reasoning that resonate most strongly with the groups affected. Participation, identity and interpretation thus name different ways in which those who see themselves as subjects of self-determination might experience the process of formulating its meaning, negatively, as yet another imperial imposition or, more positively, as engagement. These three aspects of the challenge of diversity, while distinct, are also interrelated, and the book demonstrates the variableness and complexity of their interrelation.

It may already be evident that participation, identity and interpretation offer both a framework for analysis and a measure for legitimacy. As a set of questions about the scholarship and case-law on

International Law of Nationalism: Group Identity and Legal History' in D. Wippman (ed.), *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998), pp. 25–57; N. Berman, 'Legalizing Jerusalem or, Of Law, Fantasy, and Faith' (1996) 45 *Catholic University Law Review* 823; N. Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (1992) 4 *Yale Journal of Law and the Humanities* 351; N. Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework' (1992) 33 *Harvard International Law Journal* 353; Berman, 'Sovereignty in Abeyance'.

self-determination, they illuminate the deep structures, biases and stakes in the development of meaning in international law. As a standard, they suggest that the better interpretation of self-determination is one that engages on a basis of equality all those directly affected. While important recent work in legal and political theory argues in the abstract for a similar ideal of judgment[9] or the rule of law,[10] the intention of this book is a different one. The book shows that, historically, participation, identity and interpretation express some of the claims actually made by groups marginalized in the interpretation of self-determination and, as important, some of the responses crafted by judges and other institutional interpreters of self-determination. The development of self-determination in international law is thus of broader relevance because in it we may find glimmers of striving toward an ideal of interpretation for our age of diversity. While such moments may be downplayed as relatively few, minor or even unsuccessful by this very standard, their instructiveness lies in the attempt, and their hope, in the recognition of inclusion and equality as essential to interpretation.

The remainder of the Introduction expands on the book's approach to self-determination and methodology.

Approach

The international legal texts on self-determination, like all legal texts, assume and create a world.[11] And our recognition or acceptance of the

[9] See e.g. M. Minow, 'Identities' (1991) 3 *Yale Journal of Law and the Humanities* 97; M. Minow, *Making All the Difference. Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990); J. Nedelsky, 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law Journal* 91; J. Nedelsky, 'Judgment, Diversity and Relational Autonomy', J. A. Corry Lecture, Queen's University, Canada, October 1995 (unpublished); M. C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995); E. Scarry, 'The Difficulty of Imagining Other Persons' in C. Hesse and R. Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), pp. 277–309; C. R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996); J. Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

[10] See e.g. D. Dyzenhaus, 'Recrafting the Rule of Law' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999), pp. 1–12 at pp. 5–10; N. MacCormick, 'Rhetoric and the Rule of Law' in *ibid.*, pp. 163–77.

[11] See J. B. White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 *University of Chicago Law Review* 684, reprinted in J. B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wisc.: University of Wisconsin Press, 1985), pp. 28–48. See also J. B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown & Co., 1973), pp. 243–503.

world created in a particular reading of self-determination is part of what convinces us about that reading. In this sense, the texts on self-determination construct and are constructed on *identity*. The universe they define looks quite different, however, from the community of formally equal sovereign states posited by other international legal norms. Public international law overwrites everything with the narrative of sovereign sameness in order to establish a discourse where all states are equal.[12] In contrast, the subjects of self-determination are by definition not states, but communities and even cultures. By creating an image of non-state groups, including Islamic communities, nomadic tribes, the colonized, ethnic nations and indigenous peoples, and of women within these groups, the interpretation of self-determination introduces a diversity and particularity into international law. But this has also internalized assumptions about identity that perpetuate and justify inequalities of culture and gender.

In the vast United Nations documentation on colonies and their readiness for self-determination, for instance, the colonial world was constructed – exoticized and domesticated, marvelled at and pitied, recorded and reformed – in post-World War II international law. While dispatches from states administering colonies often took the tone of the sage imperialist, the UN visiting missions were latter-day explorers for the international legal system, their reports sometimes sprinkled with their excitement about the voyage[13] or allusions to children's stories of adventures and faraway places.[14] Whatever the authorial voice, the central narrative of these texts was progress. The UN Charter envisaged the exercise of self-determination by colonial populations, but only when they were judged sufficiently politically, economically, socially and educationally advanced. Until then, the colonies were to be administered by Western states as trust or non-self-governing territories

[12] See *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, ICJ Reports 1992, p. 240 at p. 270 (Separate Opinion of Judge Shahabudeen). See generally B. Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599.

[13] E.g. 'It was an exciting moment when, after flying for a day and part of the next day, at last the island appeared looking like a small ball of green and brown in the vast blue ocean,' wrote a UN visiting mission to the trust territory of Nauru in 1962. UN Visiting Mission to the Trust Territories of Nauru and New Guinea, 1962, Report on Nauru, UN TCOR, 29th Sess., Supp. No. 2, UN Doc. T/1603 (1962), para. 20.

[14] I. Parghi, 'Beyond Colonialism? Voice and Power in the UN Trusteeship System' (unpublished research paper, Faculty of Law, University of Toronto, 1997) 34 (citing references to the *Arabian Nights* and the famous story of the British explorer Stanley's remarkable sang-froid when he came upon Dr Livingstone lost in deepest Africa).

under UN supervision.[15] Because the Charter made the encouragement of respect for human rights without distinction as to sex a basic objective of the international trusteeship system,[16] the status of women in the trust territories was treated as a measure of a territory's readiness for self-determination.[17] In this way, the characterization of women became part of the story of progress told by the international law of self-determination. For example, the discussion of the Mututsi women in a report from the early 1950s by Belgium, which administered Ruanda-Urundi as a trust territory,[18] illustrates a keen eye for (if not also a hint of irritation at) the respect and authority some Mututsi women enjoyed in their own society, and a blind faith that European gender relations epitomized the goal of equality.

> The proud and haughty Mututsi women as a general rule never left the family compound; they did no manual work except for a little basket-making. They supervised the work of others. Then [sic] they travelled with their husbands, they were borne in litters. The mother of the Mwami played an important political role; a number of Batutsi women have governed *chefferies* and *sous-chefferies* with undisputed authority . . .
>
> . . .
>
> Women, and especially mothers, are held in high esteem. Whereas in some parts of Central Africa, they are treated as beasts of burden, in Ruanda-Urundi they are almost on an equality with their husbands . . .
>
> Up to the present the indigenous women have shown little desire to give up their customary role of wife and mother. This apathy would not, however, have justified neglect of the question by the Administration . . . The status of women will be raised chiefly by means of slow and persevering action.
>
> Visits to hospitals and dispensaries and attendance at religious services have liberated the Mututsi women from the seclusion in which they lived. School education has sharpened the young girls' minds and awakened their intelligence. The presence of a number of European families, especially those of colonists, has given the Africans the example of real partnership between men and women and shown them what an important part women can play.[19]

If international law benevolently envisages those worthy of self-determination, it also contemplates, with apprehension, those who will clamour unwisely for it. It seems in part the prospect of controlling the

[15] Charter of the United Nations, 26 June 1945, 59 Stat. 1031, 145 BFSP (1943–5) 805 (1953), c. XI–XIII.
[16] *Ibid.*, Art. 76(c). [17] See Chapter 7 below.
[18] The trust territory of Ruanda-Urundi became Rwanda and Burundi in 1962.
[19] Commission on the Status of Women, Information Concerning the Status of Women in Trust Territories, CSW, 7th Sess., UN Doc. E/CN.6/210 (1953), pp. 13–14.

excitable races that so alarmed Robert Lansing, Secretary of State to President Wilson, about any recognition of a right of self-determination. Before the peace conference ending World War I, Lansing wrote:

> The more I think about the President's declaration as to the right of 'self-determination,' the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and create trouble in many lands.
>
> What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder, and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli not rely on it? . . .
>
> The phrase is simply loaded with dynamite.[20]

What is remarkable about Lansing's reasoning is not only the view of 'certain races', but the role of this assumption about *identity* in justifying his conclusion about the form of *interpretation*. In effect, Lansing argues that the hot-bloodedness of these races demands the clearest of rules. They cannot be trusted to acknowledge or respect legal distinctions among claimants for self-determination. So whatever the merits of a more nuanced rule or broader principle on self-determination, the rabidity of the Irish, the Indians, the Egyptians and others makes a simple 'no' rule the only prudent formulation.

While self-determination thus involves speaking about and to[21] nations, peoples and minorities, it has rarely involved speaking with them. States are the paradigmatic subjects of international law. The jumping-off point for most definitions of international law is that it is law made by states to govern relations between them. The recognition of other entities as limited subjects of international law has not led to a role for them in constructing international law. Hence, although peoples may have a right of self-determination, they have in fact been largely excluded from *participation* in the interpretation and development of the right.

[20] Note of 30 December 1918, quoted in R. Lansing, *The Peace Negotiations – A Personal Narrative* (New York: Houghton Mifflin Co., 1921), p. 97.

[21] This is true whether or not, as some writers have argued, the right of self-determination in international law is 'the right of State A to claim from State B that the latter State respect any peoples' self-determination' and whether or not a particular rule of self-determination is addressed to states. G. Arangio-Ruiz, 'Human Rights and Non-Intervention in the Helsinki Final Act' (1977-IV) 157 Hague Recueil 195 at 230. See the discussion in A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 141–7 and in R. Ranjeva, 'Peoples and National Liberation Movements' in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Paris: UNESCO/Dordrecht: Martinus Nijhoff, 1991), pp. 101–12.

This attitude toward *participation* fits with an image of *identity*, much as Lansing's analytical argument about norm-type followed from his characterization of the groups likely to claim self-determination. Historically, the depiction of minorities and peoples as irrational, inferior or backward made it seem natural that they not participate in international law. Chris Tennant demonstrates generally how from 1945 to 1993, the representation of indigenous peoples in the international legal literature changed from ignoble to noble primitive and how this change in representational practices paralleled a change in the engagement of international institutions with indigenous peoples.[22]

Even when various individual and collective entitlements to petition international institutions did exist, the attitude toward the petitioners influenced the effectiveness of this participation. During the period of decolonization after World War II, for example, much use was made of a broad right to petition the United Nations concerning trust territories.[23] However, native petitioners tended to be regarded as objects of paternalism and well-meaning curiosity. A 1953 UN pamphlet on the United Nations' work for dependent peoples, as the inhabitants of trust and non-self-governing territories were termed, opened with a 'you are there' account of a petitioner from the French-administered Cameroons addressing the General Assembly. Having placed the reader in 'the public gallery of one of the great committee rooms' of the General Assembly, above the tiers of attentive delegates seated at 'curved and polished tables', the description, heavy with approving wonder, of the petitioner proceeded:

> It is an eloquent voice, expressing thoughts and ideas as fluently as might those who listen. It is also the voice of a practical mind . . .
>
> It is a man – a humble and modest man – who has made a long and costly journey from his native land to tell of the desire of his people to rise above their present low level of development and their political dependence.[24]

If assumptions about identity undermined such opportunities as there were for groups claiming self-determination to participate in, challenge or vindicate the construction of themselves and their right to choose their place in the international legal order, their *participation* could also

[22] C. Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993' (1994) 16 *Human Rights Quarterly* 1.
[23] UN Charter, Art.87(b).
[24] United Nations, *A Sacred Trust. The Work of the United Nations for Dependent People* (1953), p. 1.

be affected by the approach taken to *interpretation*. In resolving the issue of what self-determination means, an author validates or authorizes a theory of the interpretation of international law. The choice of an interpretive theory determines how to talk about the meaning of self-determination: it endorses one kind of reasoning and invites one kind of response to argument. In defining the sort of conversation we can have in international law about self-determination, an interpretive theory also contemplates and advantages a certain sort of speaker.[25] Consider, for example, the seemingly innocuous classification of self-determination as a legal rule or a legal principle.[26] As Lansing's note has already illustrated, such an analytical first step may have a profound effect on interpretation by establishing how and how far the meaning of self-determination can be developed. Michel Virally[27] argues that reasoning with rules is essentially conservative: this painstaking induction keeps time with a homogeneous and stable international society, such as the vanished world of European diplomacy prior to World War I. Principles, which add a deductive dimension to the interpretation of international law, respond to the imperatives of a diverse and changing international society. In addition, the classification of self-determination as rule or principle may establish who can speak effectively about its meaning. The elaboration of a rule tends to be a narrower and more technical exercise than the interpretation of a principle. To build an effective argument for the evolution of a rule requires an extensive knowledge of precedents, mastery of traditional methods of interpretation, and professional reputation. But, as between developed and developing world, state actors and non-state actors, there are obvious disparities in access to the necessary evidence of state practice and in the proficiency and stature needed to turn it to advantage. Moreover, the most readily available evidence of state practice is the national digests prepared by or with the government of the state concerned, which favours states with the resources and expertise to compile them.[28] In contrast, principles may, to quote Virally's warning, 'constituent une idée-force, accessible à tous, échappant, par

[25] See White, 'Law as Rhetoric', 697. See also J. B. White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), especially pp. 97–102.

[26] See Chapter 1 below.

[27] M. Virally, 'Le rôle des "principes" dans le développement du droit international' in *Recueil d'études de droit international: En hommage à Paul Guggenheim* (Geneva: Faculté de droit de l'Université de Genève & Institut universitaire de hautes études internationales, 1968), pp. 531–54 at pp. 539–45.

[28] See Cassese, *Self-Determination of Peoples*, p. 93; V. Lowe, 'The Marginalisation of Africa' (2000) 94 *Proceedings of the American Society of International Law* (forthcoming);