

## **What's In a Name? Peoples, Minorities, Indigenous Peoples, Tribal Groups and Nations**

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International law has accepted groups and endowed them with certain rights and obligations. A group's categorization determines exactly which rights it has. If a group is defined as a people, it has the right to self-determination. An indigenous people enjoys the right to internal self-determination. Tribal groups are treated as indigenous peoples by international law. Minorities, on the other hand, do not enjoy the right to self-determination, but enjoy more detailed rights in the areas of language, culture and politics. Nations may be the link between minorities and peoples, or may be simply a category of its own. As different names lead to different legal consequences, it is worth delineating the groups. Categorization is only possible to a certain degree. Grey areas can be minimized but not eliminated.

**Keywords:** peoples; minorities; nations; tribal groups; indigenous peoples

Students of minority rights law inevitably come across the right to self-determination, that is, a people's right to self-determination. A cascade of questions ensues: Who is a people? How does a people differ from a minority? What does the right to self-determination entail? Is there a right to secession? Is autonomy an alternative to self-determination or a way of exercising the right to self-determination? Many more questions come to mind.

To answer these questions, we turn to the definition of a people and the related concepts of minorities, indigenous peoples, tribal groups and nations. According to the UN Declaration on the Rights of Indigenous Peoples, peoples enjoy the right to self-determination. Nations also have the right to self-determination even though international treaties always refer to peoples. Peoples (and nations) have been defined using two very different methods: the "territorial approach" and the "characteristics approach". The latter, which looks at the defining characteristics of a people, is very similar to the way minorities

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are defined. In short, these definitions, and groups, need to be disentangled.

International law has us believe that the answer is all in the name. For example, if a group is named a people, the right to self-determination is the consequence. If a group is named a minority, self-determination is not possible. In other words, definitions have legal consequences (Lehman, 2006/2007: 515). Kingsbury has termed this the positivist approach (Kingsbury, 1998). The aim here is to provide an overview of definitions against the backdrop of self-determination. As not all groups have a right to self-determination, clearly delineating one group from the other would be ideal. This, however, proves to be difficult, as there are overlapping grey areas and uncertainties in the way groups are categorized.

The reluctance of states to grant a group rights is another problem that necessitates clear categorization of groups. Lehman notes incidents where states use the lack of proper definition as an excuse for not granting rights usually associated with a specific group (Lehmann, 2006/2007: 524). The same line of argument is applicable to minorities (de Azcárate, 1945: 4; Alfredsson, 2005: 163-165).

International law was and is made for states by states. States have established international organizations, which are partly accepted as actors under international law and have certain rights and obligations. The rise of human rights has meant that even individuals have now been, albeit reluctantly and unsurely, admitted to join the illustrious circle of actors under international law. Groups, on the other hand, seem to have no place under international law. International law is a fragile system that depends on identifiable actors. Groups can form and dissolve, their composition can change, and issues of legitimacy, leadership and accountability are often raised. Groups are simply not a reliable partner for international law. Nevertheless, it has been necessary for international law not only to accept groups into its vocabulary but to endow them with certain rights and obligations.

The groups to be examined are: peoples, minorities, indigenous peoples, tribal groups and nations. These groups are closely connected, overlapping or even synonymous. Each group will be defined in its own terms. Later sections will draw on the understanding of the initial definitions. After the definitions have been presented, their components will be collected and compared based on a table that offers an overview of overlapping grey areas. The findings in the table will be discussed with reference to the right to self-determination, as self-determination is at the crux of whether a group wants to be a people, a minority, an indigenous people, a tribal group or a nation.

## **1. The people**

There are two approaches used to define a people. The classic approach, to which we became accustomed during the era of decolonization, for now will be called the territorial approach. This approach has some obvious weaknesses and has led to what we will call the characteristics approach.

The two approaches differ widely. The territorial approach looks at all the persons within a defined territory, usually the territory of a state, and calls them a people. A people equals one territory or one state with one people. The characteristics approach, on the other hand, identifies a people by the common characteristics of its members. This means several peoples could live within one and the same territory. As will be shown below, the characteristics approach mirrors the method used to define minorities.

### ***1.1 The territorial approach***

When considering the territorial approach to defining a people, we need to differentiate between three components relating to self-determination: the situation on the ground, the theory and the practice. One would expect the situation on the ground and state practice to converge, as state practice shapes the situation on the ground and vice versa. Unfortunately, this is not always the case with the territorial approach, which leads to many conflicts and uncertainties. States do not always act on the basis of reality. Regarding the issue at hand, they do not even act according to theory.

The concept of self-determination was laid down in the UN Charter and was implemented in the context of decolonization in Africa. The situation on the ground in Africa offers a clear picture. It shows how before, during and after decolonization, virtually all states in Africa are multi-national. The important factor here is *before* decolonization; the colonies themselves were multinational.

Practice is what the world has seen in the context of decolonization and what has become the accepted understanding of a “people”. The practice of keeping colonial boundaries in place after independence meant that there could only be one people per colony that gained self-determination, and in the form of independence.

This practice was based on the principle of *uti possidetis*, which simply meant that colonies would become independent on the basis of the colonial boundaries (Murray & Wheatley, 2003: 214-215). Mukua Matau has argued that it would, of course, have been possible to draw new boundaries, in theory. African states were and are artificial entities. However, the African elites who confirmed the colonial borders benefited from the set-up. A

redrawing of boundaries would have meant loss of power. Thus, Matau contends, even speaking of border changes in Africa would amount to treason (Matau, 1995: 1119).

Regardless of the reasons, practice during decolonization was to award self-determination to peoples on the basis of territorial (colonial) units. In the aftermath of the first wave of decolonization, self-determination was denied to groups within the newly independent states on the grounds that they had already exercised their right to self-determination when becoming independent.

Biafra is a perplexing case of self-determination and defining the “who” in self-determination. When the Ibo tribe sought independence from the newly independent state of Nigeria, a civil war followed. The government won and the question of whether the Ibos constituted not only a minority, but a people, became inconsequential. International lawyers were unsatisfied with the unanswered question: ‘The moot point remains that the Biafrans would have been a people had they won the civil war against the Nigerian army’ (Castellino, 2000: 70). Does this imply that power and force determine the categorization?

In cases like Biafra, practice and reality clearly contradict each other. Despite the existence of multinational colonies, the populations in the colonies were treated as one people per colony.

The theory on self-determination seems to have taken reality, or the situation on the ground, as a starting point. When looking at UN resolutions and international treaties, it becomes clear that one territory can include several peoples. UN General Assembly resolution 1541 fleshes out the somewhat brief GA resolution 1514. It speaks of ‘a territory and its peoples’ (UNGA Res. 1541: principle II). Quite apparently, several peoples can exist within the boundaries of a given territory. One can further conclude that a territory does not automatically equate to one people. Of course, one can imagine a homogenous population in a state where the theory that one state equals one people is true. However, this is not the case with the majority of states around the world. Richard Kiwanuka has shown that several definitions of “people” are necessary in the African context and only one is the territorial approach (Kiwanuka, 1988).

Chronologically, the situation on the ground existed before either theory or practice on self-determination came into play. Theory and practice followed closely. Theoretically, self-determination became international law with the UN Charter. However, General Assembly Resolution 1541 laid the basis for self-determination and decolonization. Reality and theory converged, but state practice took a different path. This discrepancy is addressed by the characteristics approach.

## ***1.2 The characteristics approach***

The characteristics approach is fundamentally different from the territorial approach. Here, group composition and the common characteristics of its members determine a group's category and if it is eligible for certain rights.

Under UNESCO's direction, an International Meeting of Experts on Further Study of the Concept of the Rights of Peoples took place in 1989. The final report lists seven characteristics that are 'inherent in a description (but not a definition) of a "people"' (UNESCO, 1990: para. 22). According to this list, a people enjoys *some or all* of the following common features: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, and common economic life. The report goes on to call for 'a certain number which need not be large [...] but which must be more than a mere association of individuals within the state.' A subjective component is also added: 'the group as a whole must have the will to be identified as a people or the consciousness of being a people.' Lastly, it is possible that a people 'must have institutions or other means of expressing its common characteristics and will for identity' (*ibid*).

As Jane Wright has rightly pointed out, 'it is difficult to think of a minority which does not fulfil most of the criteria' (Wright, 1999: 627), indicating that peoples and minorities cannot be meaningfully distinguished from each other. Unfortunately, the list of criteria is not commented on or explained in the report. A number of authors, Yoram Dinstein and Aureliu Cristescu for example, have endorsed the characteristics approach, and look toward objective and subjective factors when defining the term people (Dinstein, 1976: 104; Cristescu, 1981: para. 279).

It is interesting that the UNESCO description has not been adopted in an international governmental document. The description was made by experts, not state representatives. The UNESCO report was not even adopted by the General Conference of UNESCO. It remains a document referred to in Academia, but has either not reached the international governmental level or is not wanted there.

The characteristics approach has an arguable weakness. In nation-states, a characteristics approach may be appropriate; however, in settler states such as Canada, the United States and Australia, the case is different. Here, "people" is used in a civic sense, almost a territorial sense, and not in the ethnic sense that the characteristics approach advocates (Mabry, 2008: 14). Do these states have a wrong understanding of the term people? Hardly. They simply have their own understanding. Different understandings of the same

term, or the same understanding of different terms, are the main challenges in disentangling the categories. The term “nation” takes on this challenge below.

### ***1.3 Intermediate conclusion***

A people can be determined in two very different ways. If one were to take the territorial approach, it would mean that every new state that came about through secession since the adoption of GA resolution 1514 has breached international law. The territorial approach does not allow for secession, as there can only be one people in one state.

In reality, the populations in most states of the world are made up of at least two different ethnic or cultural groups. Thus, an approach that takes these characteristics into account when defining a people is useful if international law wants to be applicable to real situations. In this context, UNESCO’s description seems to be a good starting point.

We are thus left in a confused position, with two opposing approaches to defining peoples; one that is only applicable to a few states but has gained widespread recognition, and one that captures the essence of a people but remains unnoticed or unwanted by international lawyers and politicians. In fact, both approaches are needed.

## **2. Defining the minority**

When looking at the term “minority”, we again find an inability or unwillingness to settle on a clear definition (de Villiers, 2012-2013: 97-101); there is no legally binding definition of the term. The most widely accepted working definition is the one Francesco Capotorti proposed in 1977 in connection with Article 27 of the ICCPR. At the time, he was UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. He defines a minority as the following:

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. (Capotorti, 1991: para. 568)

Several other definitions have been put forward, including two prominent ones by Pablo de Azárate, Director of the Minority Section at the League of Nations, and Jules Deschênes of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.<sup>1</sup> All three definitions span over 50 years, during which a World War changed world politics. Yet, all three definitions essentially take the same approach: the characteristics approach. They all emphasize objective factors – observable differences in culture and

language – and two subjective factors – consciousness of these differences and the will to preserve these differences. Of course, the definitions vary in terminology. While Azcárate uses the terms linguistic and cultural differences, Deschênes and Capotorti refer to ethnic, religious or linguistic differences. However, the overall approach is the same and the categories overlap. This indicates that there is a consistent approach toward defining minorities that goes back at least eighty years.

There is nothing corresponding to the territorial approach to peoples when defining minorities. Territory is relevant in determining if a group is settled primarily in a region or whether its members are spread out; a fact that can have consequences on certain rights.

Returning to the idea of theory, reality and practice, the theory has been considered. The question now is whether the characteristics approach corresponds to the situation on the ground and to practice. This is difficult to ascertain, as legal definitions seldom answer the question of what constitutes a minority. Former OSCE High Commissioner on National Minorities Max van der Stoep is renowned for stating the following: ‘I would dare to say I know a minority when I see one.’ He went on to say: ‘The existence of a minority is a matter of fact and not of definition’ (van der Stoep, 1993).

On the subject of reality, minorities that enjoy the protection offered under international law fit Capotorti’s definition, with possibly one exception of his criteria. His nationality requirement has been much discussed (Musafiri, 2012: 495-497, Park, 2006: 86-87) and even rejected by the Human Rights Committee (CCPR, 1994: para. 5.1). In terms of the practice, some states do not pay attention to Capotorti’s nationality requirement while others consider it an essential component. The case of practice is further complicated by the fact that minorities may exist according a legal definition, but if a state does not recognize a minority and its rights, not much is gained from the definition. France is a prime example of the denial of a minority’s existence within its territory; though the Bretons meet Capotorti’s requirements, they do not enjoy the applicable minority rights under international law.

Recognition by the state is not part of the theoretical definition, but plays a crucial role in practice. This points to a gap between theory and practice. However, this gap is by no means as wide as it is in the context of peoples. There are even those who advocate that theory is superfluous and it is only important that minorities to enjoy their rights (Alfredsson, 2005: 163; European Commission for Democracy through Law, 2007: para. 12).

The UN Working Group on Minorities made a puzzling contribution to the debate on minorities and peoples. In its commentary on the UN Minority Declaration, the UN Working Group on Minorities explicitly states that individuals belonging to an ethnic or national group

may seek protection under minority rights. These same individuals may, when acting as a group, make claims based on the right to self-determination (Working Group, 2005: para. 15). Minority rights presuppose the existence of a group; without it, there is no member who can claim minority rights. According to this commentary, the same group of persons can be a people and a minority. For the aim of self-determination, the group is a people while individuals in the group are members of a minority. Clear delineation of the categories is either not possible or not desired.

Overall, a minority has been defined in a way that, though not legally binding, is accepted by states and minorities alike. One could fear that the definition is not used in practice and therefore has little impact. A key determinant in minority rights is the state in which the minority lives; though minority rights are based on international law, the state remains responsible for guaranteeing them. Without recognition from the state, minority rights are withheld from the minority.

### **3. Indigenous peoples**

Echoing the approaches to defining peoples and minorities, there is no binding definition for the term “indigenous people”, a noteworthy lacuna considering that about 300,000 million persons belong to indigenous peoples (Corntassel & Hopkins, 1995: 346). Martinez Cobo’s somewhat lengthy definition from 1986 is commonly referred to:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. (Martinez Cobo, 1986: para. 379)

This definition is a far more technical than Capotorti’s. Nevertheless, Martinez and Capotorti have similar approaches. Both draw on objective and subjective factors. To be considered an indigenous people, a connection to the territory stemming from pre-invasion or pre-colonial times is necessary, a decisive criterion that is addressed below in the section on tribal groups. Moreover, the group has to consider itself different and has to have a desire to preserve these differences, two requirements seen in Capotorti’s approach.

According to the UN Declaration on the Rights of Indigenous Peoples, there are two crucial components in the description of indigenous peoples: the original habitation of the land and the reliance on the land for the way of living (Article 26 (2)). This includes land for



herding, agriculture, hunting and fishing. The two criteria are specific to indigenous peoples, though some argue they are also applicable to tribal groups.

The World Bank also relies on a historical relationship with the land when defining an indigenous people. The revised 2013 version of Operational Policy 4.10 applies the very wide definition of ‘a distinct, vulnerable, social and cultural group’. In addition, it lists four criteria that must be satisfied to varying degrees: self-identification, ancestral territory, customary cultural, economic, social and political institutions differing from the majority, and an indigenous language (World Bank, 2005/2013: para. 4). The definition’s broad scope covers not only indigenous peoples, but also indigenous ethnic minorities, aboriginals, hill tribes, minority nationalities, scheduled tribes and tribal groups (World Bank, 2005/2013: para. 3). Rather elegantly, the World Bank closes any gaps between minorities and indigenous peoples by introducing a specific category for indigenous ethnic minorities.

A third institution, the International Labor Organization, has offered a definition in Convention No. 169 on Indigenous Peoples. It covers both indigenous peoples and tribal peoples (ILO, 1989: Art. 1 (1)). The ILO does not explicitly require the subjective. Tribal peoples are simply those that are different and at least partly govern themselves according to their own customs and laws. Indigenous peoples have longstanding ties with their land and retain some or all of their social, economic, cultural and political institutions. The word ‘retain’ indicates a forward-looking temporal element.

In all three definitions, distinctiveness from a larger society cannot be the decisive characteristic of an indigenous people, just as it cannot be for a minority. Both must have an inherent way of life, its own laws and an element of time. The latter is stressed more in reference to indigenous peoples.

Interestingly, membership in an indigenous people differs from membership in a people or in a minority. The territorial approach does not allow the individual to choose the people to which he or she belongs. Similarly, the characteristics approach seems to offer membership by birth. The possibility of opt-out may exist, as consciousness and religious affinity can be changed or deselected. Even then, an individual may still belong to a people according to the UNESCO report, which requires only the *majority* of criteria be fulfilled.

Membership in minorities is treated very differently from one minority to another. Until the late 1990s, Russian passports included information on nationality – in this case, membership in an ethnic minority. There was no opt-out possibility. Conversely, Danish and German minorities in the Danish-German border region were not required to offer this information. The 1955 Copenhagen-Bonn Declarations, which still serve as the basis for the

regional minority regime, establish that no official authority may ask about membership in a minority. Thus, there are no official records of number of members in these two minorities, and no official opt-in or opt-out procedures. The individual is more or less free to select or deselect membership.

Membership in an indigenous people, on the other hand, requires both self-identification of the individual and consent of the group (Martinez Cobo, 1986: para. 381). As Martinez Cobo notes: ‘This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference’ (*ibid*: 382). Disputes about membership can ensue, as seen in the Lovelace case before the Human Rights Committee (CCPR). Sandra Lovelace had been denied indigenous rights on the basis of Canadian national law because she had married outside her tribe. It was maintained that in doing so, she had left her tribe and could not recover her indigenous rights. The CCPR, in favour of Lovelace, found that her absence of a few years had not severed her ties with her tribe and she should still enjoy indigenous rights under Canadian national law (Sandra Lovelace, 1977).

It is remarkable that the state has no role in determining membership, though hardly surprising when considering the history of indigenous peoples with dominant groups. If the state were to determine membership and the existence of the group, it could forego its international obligations by simply rejecting the existence of indigenous peoples in their territory, a practice not unknown when dealing with minorities.<sup>2</sup> Because self-identification alone is insufficient and acceptance of the group is required for membership, ill-founded and potentially abusive uses of indigenous peoples’ rights can be prevented.

Martinez Cobo argues that indigenous peoples often have a strong indigenous identity and tend to be uninvolved with the majority population (Daes & Eide, 2000: para. 23). This leave-me-alone attitude may be one reason why indigenous peoples are granted the right to self-determination. It is presumed that they have no interest in joining the modern state, international relations and world politics (Corntassel & Hopkins, 1995: 344-345).

Article 3 of the UN Declaration on the Rights of Indigenous Peoples is a true copy of common Article 1 (1) of the ICCPR and the ICESCR; it does not restrict self-determination to its internal form. Article 4 of the Declaration, however, provides this restriction: “Indigenous peoples, in exercising their right to self-determination have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

In short, self-determination for indigenous peoples is not risky for the state because it stays within the state’s boundary (Kingsbury, 438-440). Indigenous peoples are explicitly

granted the option of keeping away from the majority population. Though, Article 5 of the Declaration provides the right for indigenous peoples to participate fully in the life of the state, *if they so choose*.

Here lies another point of difference between indigenous peoples and minorities. While the purpose of minority rights is to include minorities in the majority population while maintaining their distinctiveness, indigenous rights aim at autonomous development (Daes & Eide, 2000: para. 8). The two sets of rights seem to differ fundamentally. At the same time, if a group decides to rely on the internationally accepted framework – the minority rights regime and the indigenous rights regime – it could define itself according to which rights it wishes to claim. Of course, it would have to fulfil the objective criteria as well.

Another point that needs to be addressed is indigenous peoples claiming minority rights (Daes & Eide, 2000: para. 18; Working Group, 2005: para. 17). The Human Rights Committee speaks of ‘members of indigenous communities constituting a minority’ (CCPR, 1994: para. 3.2). Sweden, for example, extends protection under the Framework Convention to its Sami people. Curiously, it is not possible for minorities to claim indigenous rights, namely that of self-determination. However, there have been instances where minorities were granted rights over the natural resources in the territory in which they normally reside.

The two UN Declarations – one on minorities and one on indigenous peoples – show two distinct approaches toward rights. The titles alone indicate different approaches. The UN Declaration on the Rights of Persons Belonging to National Minorities uses an individual approach, though a group existence is presupposed. The UN Declaration on the Rights of Indigenous Peoples seems to be more collective. In truth, it includes both collective and individual rights.

In sum, when comparing indigenous peoples to peoples and to minorities, five points stand out. Firstly, indigenous peoples are defined by the group characteristics approach. Secondly, membership can be contested, as both the individual and the group must agree. Thirdly, both peoples and indigenous peoples enjoy self-determination, though indigenous self-determination is restricted to the internal form. Fourthly, indigenous peoples may claim minority rights, but minorities cannot as readily claim indigenous rights. Lastly, minority rights are individual rights, whereas indigenous rights can be both individual and collective.

#### **4. Tribal groups**

Tribal groups rarely attract attention on their own; they are often mentioned in the context of indigenous peoples and the same rules often apply. ILO Convention No. 169, for example,

addresses both indigenous and tribal peoples. Like indigenous peoples, tribal groups are defined as being different and having their own traditions and laws. Then how do we differentiate a tribal group from an indigenous people?

Literature suggests there is a geographical, or more precisely, a historical distinction. Indigenous peoples have been split into three categories: groups subjected to colonialism, groups that meet all the criteria of the first category but were not subjected to colonialism (the so-called non-state nations), and groups in which settlers occupied the land. Examples of the three categories, respectively, are: groups in Africa and parts of Asia, East Asian groups in states that were not colonized such as China and India, and native groups in the Americas and Australia (Cornthassel & Hopkins, 1995: 352-353). While the latter native groups have been, without a doubt, accepted as indigenous peoples, the first category and, to a certain degree, the second category have been marginalized in the discussion of indigenous rights.<sup>3</sup> These two categories may, however, find themselves under the heading of tribal groups or tribal peoples, which are often mentioned alongside indigenous peoples (Musafiri, 2012: 490-493).

Whether or not it is justified to refuse to call African groups indigenous has little practical relevance. These groups exercise self-identification, often define themselves as indigenous peoples and have forums within the United Nations where they can participate. This is both clever and a last resort; there is no Permanent Forum for Issues Concerning Tribal Peoples. The Secretariat of the Permanent Forum on Indigenous Issues states that for all 'practical purposes the terms indigenous and tribal are used as synonyms in the UN system when the peoples concerned identify themselves under the indigenous agenda' (Secretariat, 2004: para. 6).

What also becomes clear is that tribal peoples are not necessarily the first to inhabit a territory. They do not fulfil the "prior-criterion" otherwise fulfilled by indigenous peoples. For this reason, the Saramaka people brought its case against Suriname before the Inter-American Court of Human Rights as a tribal people and not an indigenous people (Saramaka, 2007: para. 79). On the basis of criteria known to be applicable to indigenous peoples, the Court established the Saramaka people as a tribal people (Saramaka, 2007: paras. 80-84). Whatever the case may be, the Secretariat of the Permanent Forum on Indigenous Issues does not stress the importance of the "prior-criterion".

Two points need to be considered. First, the assertion that Africa is inhabited by tribal peoples instead of indigenous peoples is problematic. It has been argued that the term tribal is too broad and encompasses almost all groups within Africa (Lehmann, 2006/2007: 516). The concept of tribe is then rendered meaningless. Secondly, if the "prior-criterion" is not

important in defining a tribal group, we are almost back at the definition of a minority, though a close connection to the land remains a differentiating factor.

Tribal peoples are, at times, the same as indigenous peoples and share many defining characteristics with minorities. To make matters more confusing, tribal peoples are also closely connected to nations. According to Douglas Sanders's historical narrative, the terms tribe and nation were used interchangeably depending on the historical context (Sanders, 1993: 29-33). Tribes in the New World were described alternately as tribes or nations, and later on, only as tribes. According to Sanders, the term tribe implied wandering savages while the term nation implied civilization. In colonial times, the term tribe was preferred. After World War II, this view was rejected along with colonization. The term tribe faded into the background while the term nation was readopted. However, the story does not end here. Presently, there is no consistent use of the terms tribal people and nation in the United States and Canada. In Canada, the term nation and even the term peoples were long rejected due to their suggestion of self-determination. Today, the terms 'first nation' and 'band' are accepted.

In conclusion, the picture remains blurry. Tribal groups are mostly, but not entirely, the same as indigenous peoples. The difference in definition has little practical relevance as both enjoy the same rights. Tribal peoples may also be considered nations, with whatever attached connotations.

## **5. Nations**

Self-Determination may be limited to peoples and indigenous peoples. However, when Woodrow Wilson introduced the principle after World War I, self-determination was applied to nations and conceived in its internal form (Knight, 1985: 254-258). It was only after World War II that self-determination became a right for peoples.

Gudmundur Alfredsson suggests that the term nation was too ethnically loaded and, for practical purposes in the United Nations, was replaced by the term peoples (Alfredsson, 2005: 170). He posits that the terms nation and peoples can be used interchangeably. While Alfredsson's explanation may be the simplest and therefore the most desirable, the two terms carry different connotations and are used differently. If Alfredsson is correct, today's global organization would be called the United *Peoples* and not the United *Nations*. Where Alfredsson is correct, however, is that nations and peoples can be the same group of persons. The definition of nation seems to rely on ethnicity and, as a result, seems to follow the characteristics approach: '[E]thnicity is what makes a nation' (Mabry, 2008: 13).

Dinstein thought it important to distinguish between peoples and nations. However, his approach only further complicates categorization:

A nation is easy to define inasmuch as it consists of the entire citizen body of the State. ... In each State there is one nation ... but within the compass of one state and one nation there can exist several peoples, large and small. (Dinstein, 1976, 103-104)

Here, we see the territorial approach to defining a nation. However, when defining a people, Dinstein rejects the territorial approach and calls upon the objective and subjective factors of the characteristics approach (Dinstein, 1976: 104). Ultimately, both nations and peoples have been defined according to territory and characteristics.

The term nation carries two different meanings. In many states in Western Europe, for example, nation implies citizenship in a state. On the other hand, in Eastern Europe and many other regions, nation implies an ethnic bond (Bagley, 1950: 10). Originally, the Latin word *nation* meant origin or membership of a community, a relationship with a community into which one was born (Frunda, 2005: para. 12). The French revolution gave birth to the concept of nation as citizenship, while the understanding of nation as a cultural, unifying entity emerged in Germany. It is emphasized several times in a report to the Parliamentary Assembly of the Council of Europe that these two concepts coexisted peacefully for several centuries (Frunda, 2005).

No generally accepted definition of the term nation exists, let alone a legally binding one. This would necessitate choosing between at least two concepts of nation. In his report, rapporteur György Frunda's uses a definition of nation he attributes to 'Mr Nick'. The definition takes the characteristics approach and includes both concepts of nation:

A nation is a specific political, social, economic and cultural community, often with a common language, culture and history, living in neighbouring territories, with 'independent' political institutions and social organisations; it presupposes a politically sovereign people, master of its own territory, with its own economic life and its state or, failing this, which aspires strongly to these things. (Frunda, 2005: para. 25)

The first part of the definition describes characteristics we have seen when defining other groups. In the last part, however, Nick defines a nation as a politically sovereign people, or at least a people that aspires to be politically sovereign, master of its own territory, with its own economic life and its state (see also Cobban, 1970: 48). Here, external self-determination seems to be the defining characteristic that sets a nation apart from the other groups. Frunda concludes:

I consider that both definitions of "nation" are still valid today. A new definition is therefore unnecessary. What is important, from both a political and a legal standpoint, is genuine acceptance of every individual's right to belong to the nation which he feels he

belongs to, whether in terms of citizenship or in terms of language, culture and traditions.  
(Frunda, 2005: 22)<sup>4</sup>

Frunda goes on to examine the use of the terms nation and people and finds that in states such as Spain, Italy and Slovenia, the two terms coexist in their respective constitutions (Frunda, 2005: 43-48). This is arguably a solution to understanding how the United *Nations* is based on the *people's* right to self-determination.

Frunda speaks only of the term nation with respect to Europe, while Capotorti in the 1970s attempted to define minorities on a global level. He received a comment from the Soviet Union that no minorities existed in its territory as defined by Capotorti. In the Soviet Union, only 'nations' and 'nationalities' were referred to. At the time, the term 'nationalities' was also being used in Yugoslavia. It covered the same groups of people as the term minorities in other countries. In Romania, the term minority was substituted with the term 'co-inhabiting nationality' (Capotorti, 1991: 34). While the Soviet Union, Yugoslavia and Romania used the same term, they did not attach the same meaning to the word.

China operates with the concept of nations. The Han-Chinese is one of 56 nations recognized in the China. Yet, it makes up more than 90% of the population and is traditionally in power. The other 55 nations vary considerably in size and are often described as ethnic minorities.

Outside of Europe's borders, European states advocated the civil or territorial approach regarding peoples during decolonization. For example, decolonization in Africa was about peoples, and possibly tribal groups or indigenous peoples, but never about nations. While this may be true for Africa, the term nations is a familiar term in the East Asian context.

By the characteristics approach, virtually all states in the world are multinational. Exceptions are states such as Iceland or Portugal, where one group of persons exists. In these cases, the nation and the people is the same, the terms interchangeable, thus proving Alfredsson's argument correct. The picture remains unclear and could perhaps be simplified by adopting a term for all persons within one state. It would have to be one term – be it people or nation or something entirely different – agreed upon by international law.

## **6. Comparing definitions**

The five categories – people, minority, indigenous people, tribal group and nation – show large overlaps, which are presented in table 1 below. Tribal groups overlap with indigenous peoples to the largest extent, with the aforementioned "prior-criterion" as the only

differentiating factor. As they are treated the same within the UN system, the category tribal group has been omitted from the table. The other four categories are included in the table, with both people and nation divided into a territorial approach and a characteristics approach.



Table 1. Comparing definitions

	<b>People territorial app.</b>	<b>People char. app. (UNESCO)</b>	<b>Minority (Capotorti)</b>	<b>Indigenous People (Martinez Cobo)</b>	<b>Nation Char. App. (Nick)</b>	<b>Nation terr. app.</b>
<b>Territorial approach</b>						
One state = one ...	x					x
<b>Characteristics approach</b>						
<i>Characteristics/differences</i>						
Common tradition		x	(x)	(x)	x	
Racial or ethnic characteristics		x	x	x		
Cultural characteristics		x	x	x	x	
Linguistic characteristics		x	x		x	
Religious or ideological charact.		x	x (religion only)			
<i>Consciousness</i>						
Consciousness		x	x	x	(x)	
Preservation of characteristics			x	x		

<i>Territory</i>						
Territorial connection over time		x	(L)	x	x	
Way of living				(L)		
<i>Common institutions</i>						
Common economic life		x			(x)	
Institutions		x		x	x	
Legal system				x	(x)	
<i>Other factors</i>						
Number of persons		x	x			
Non-dominant position			x	x		
Nationality requirement			x			
Historical continuity/'prior'				x		
Aspiration of becoming a state					x	
<b>Self-Determination Consequence</b>	x	x		x (internal only)	x (very probably)	x

An x in the table indicates that the respective factor is mentioned in the definition. An (x) indicates that the factor is not mentioned explicitly, but by the wording of the definition, the factor is fulfilled. Lastly, an (L) indicates that the factor is included in a definition in the wider literature or wider description of the category.

The territorial approach, or what is also known as the civic approach, is only applicable to peoples and nations. This, however, has already posed a challenge to the international system. Four (five if we include tribal groups) categories can be defined by a characteristics approach, or what is also known as the ethnic approach. As the term ethnic itself is unclear, its connotations having changed over time from racial to cultural (Knight, 1985: 249-259), the term characteristics will be used here. Likewise, the term territorial will be kept, as it aptly covers the process of decolonization.

As clearly shown in the table, the different categories share many factors. The wording of criteria may vary slightly from definition to definition, but the meaning is the same. In these cases, an x is warranted. For example, common tradition is only explicitly mentioned in relation to peoples. Nick's definition of nation includes common characteristics (language, culture and history), which can be taken to mean the same. Capotorti's definition of minority, on the other hand, only indirectly includes common tradition.

In terms of the subjective factors, it is interesting to note that a nation is not conscious of being a nation, or at least consciousness is not a defining characteristic of a nation. In Nick's definition, consciousness is not required, but it is implied in common history, language and culture. For the other groups, consciousness is indispensable; without it, there is no people, minority or indigenous people. It can be argued that nations have surpassed the need for consciousness. A nation, with a stronger sense of independence and self-understanding, requires less effort to preserve its defining characteristics than, say, a minority fighting for its identity. Of course, if consciousness were the decisive difference between nations and minorities, there still would be no clear delineation of the two categories. Moreover, who can decide if a group is fighting for its identity against a "majority other" or if a group is above the need for self-affirmation?

The assumption established in the introduction was that different names have different legal consequences. Decolonization, a prime example of the territorial approach to peoples, was based on self-determination. When it comes to the characteristics approach, matters become uncertain. Common Article 1 of the ICCPR and the ICESCR does not specify peoples as defined by the territorial or characteristics approach. As it is stressed that *all* peoples have a right to self-determination, both territorial and characteristics approaches to

defining peoples receive an x for this criterion. Minorities, on the other hand, do not enjoy a right to self-determination. According to the CCPR, one must distinguish between the rights of Article 1 and of Article 27 of the ICCPR (CCPR, 1994: para. 3.1.). According to the UN Declaration on Indigenous Peoples, indigenous peoples have a right to internal self-determination. Of the many overlaps between categories, minorities and indigenous peoples seem to overlap significantly. In fact, indigenous peoples claim minority rights. It is of popular opinion that a distinction between minorities and indigenous peoples is critical (Aukerman, 2000: 1019; Daes, 1996: para. 47; Martínez, 1995: para. 95).

When it comes to the self-determination of nations, we again distinguish between the territorial and characteristics approach. By the territorial approach, self-determination is inherent, as the nation will have already achieved the status of independent state. By the characteristics approach, there is no international treaty, declaration or resolution that explicitly awards nations a right to self-determination, but several arguments point in favour of it. Firstly, internal self-determination was historically conceived to be awarded to nations (Barten, 2014: 188-189). Secondly, by Alfredsson's claim that nations and peoples are interchangeable, nations have the same rights as peoples. Thirdly, institutions are a strong requirement when defining a nation, and institutions are arguably a prerequisite for independent statehood. Finally, it would be contradictory to establish a category of persons that strongly aspire for statehood, and withhold exactly that from the category. In sum, all groups, with the exception of minorities, feature a right to self-determination.

Self-determination has only been treated generally thus far and in its external form – independent statehood. The table would look slightly different if we considered internal self-determination, where minorities might receive an x. Still, no source of international law explicitly states that minorities have a right to any kind of self-determination. In fact, documents such as the General Comment by the CCPR and the UN General Assembly Resolution 2625 on Friendly Relations seem to preclude a minority's right for self-determination entirely. It can be argued that autonomy arrangements fall under the category of internal self-determination (Barten, 2014). Thus, to deny a minority the right self-determination is to deny its autonomy, and to deny that autonomy is inherent in self-determination. This leaves the question, what constitutes internal self-determination if not autonomy? While these are valid considerations, they go beyond the scope of the definitions currently being discussed.

As the definitions of the five categories overlap to a large extent, it seems incomprehensible that all groups enjoy self-determination with the exception of minorities.

This is, however, the accepted legal situation today. With overlapping grey areas and different sets of rights available to each category, a group hypothetically could make a strategic and legally informed decision about its self-identification. In practice, however, this is an impossible undertaking. As groups evolve, their interests evolve. The immediate context in which they live changes over time. International laws and rules for self-determination also change. Hopping from one category to another is not feasible.

Clearly, categorization is difficult when there are many of the same elements in play. What are the defining elements in each category? The definition of indigenous peoples incorporates a strong temporal element; indigenous peoples have historical continuity with their territory. They also have a distinct way of life and often prefer to be left alone. Nations have strong identities and seek independence, if they have not already achieved it. Peoples have a right to self-determination. But what is characteristic of a minority that differentiates it from the other groups? This is more difficult to answer. For one, its non-dominant position might be crucial; it implies an ongoing struggle against the majority. While a minority has a strong sense of identity, its identity seems to be challenged more than that of indigenous peoples or nations. Minorities seek preservation and integration simultaneously, without striving for independence; they wish to take part in the majority state while preserving their defining characteristics. Indigenous peoples seek preservation, but tend to break away from the state without threat to the state.

State involvement is a factor that is notably absent from the table. The state has no place in the definitions of any of the five categories, in theory. In practice, recognition by the state is the first step in claiming rights under international law, or domestic law for that matter (Delgamuukw, 1997 and Renteln, 1999: 53). If the state refuses a group's status as a minority, as was the case in France, then no internationally guaranteed minority rights are applicable. As the central government in Spain continues to refuse the Catalans' right to self-determination, the relationship between the Catalans and the Spanish in Madrid will become increasingly strained. While the 2014 referendum showed a majority for independence, the Catalan government has not yet acted on the result, though this in no way indicates that it is satisfied with the current situation. In Scotland, a peaceful referendum on independence was held under the notion that the Scottish are a people. The central government in London allowed the referendum and was ready to accept the result. Here, the state had a key role in defining the group and its rights.

## **Conclusion**

Kingsbury differentiates between a positivist approach and a constructivist approach toward definition. The latter sees a concept in constant flow and development, depending and reacting on international society. He argues that neither of the two approaches suffices on its own (Kingsbury, 1998: 415). Kingsbury's argument may be the most fitting conclusion here.

Clear categorization could reduce legal uncertainty and ultimately makes the world an easier place in which to live. While we can minimize the grey areas, we cannot make them disappear altogether. When dealing with issues of global significance, different languages and their terminologies can confuse meaning. Moreover, global issues present a variety of cultural settings. For example, indigenous peoples subjected to colonization are distinct from indigenous peoples overruled by settler populations.

In addition to the multitude of actors, languages and setting, we must also take into account international society and political interest. Kingsbury's constructivist approach adds a dynamic layer to explaining terms and concepts. He maintains that terms and concepts change. The right to self-determination is a prime example. The understanding of the terms peoples, nations and minorities have also changed with social, cultural and political context. Where the positivist approach falls short in its attempt at clear categorization with clear legal consequences, the constructivist approach uses context in order to provide answers. The positivist approach is only the first step in understanding peoples, minorities, indigenous peoples, tribal groups and nations.

The challenge with the constructivist approach is that context can prevent objective judgment. In fact, constructivists deny that an objective truth exists. However, to rely solely on context would grant states the power to offer and withhold rights. While the Catalans may objectively fulfil the criteria of being a nation or a people, the Spanish context prevents them from enjoying their right to self-determination. A certain measure of objectivity borrowed from the positivist approach could prevent struggle and conflict.

The positivist approach has failed to produce definitions that can be objectively legally applied. In this sense, constructivists are correct to deny an objective truth. In the future, students of minority rights law will have to consider national, regional and international contexts when attempting to define a group and grant the group its corresponding rights.

## Notes

1. See the definition of the former director of the Minority Section at the League of Nations Pablo de Azcárate, 1945: 4 and of Jules Deschênes, 1985. See also the PCIJ's advisory opinion on the *Greco-Bulgarian "Communities"* where PCIJ also puts forward objective and subjective factors in determining the meaning of the term community. PCIJ, 1930: 21.
2. For many years, Turkey only referred to the Kurds as 'mountain Turks'. France still denies the existence of minorities within its territory. In the US, several groups have been denied tribal status by the Federal government. For all these examples see Corntassel & Hopkins, 1995: 349.
3. See for example Kingsbury, 1998. Kingsbury quotes China's statement that indigenous peoples are an inherent Western concept that can only be applied in a post-colonial context. Following this line of thought, only African and a few Asian groups could be considered indigenous peoples. This opposes the general opinion in the literature on indigenous peoples. In 1999, Special Rapporteur Miguel Alfonso Martínez followed Kingsbury's original argument and found the term indigenous peoples 'particularly inappropriate in the context of the Afro-Asian *problematique*.' See ECOSOC, 1999.
4. The Parliamentary Assembly of the Council of Europe accepted the existence of two different meanings of nation. See CoE Doc PACE, 2006.

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