

**BOOK FORUM**

Karen Knop, *Diversity and Self-Determination in International Law*  
(Cambridge University Press, 2002)

**I****DIVERSITY AND SELF-DETERMINATION: THROUGH A GLASS  
DARKLY**

HURST HANNUM\*

It is difficult to review a book that itself consists largely of descriptions, reviews, and/or interpretations of others' work. Indeed, Knop's *Diversity and Self-Determination in International Law*<sup>1</sup> is a tour de force that not only refers to but also critiques most of the contemporary legal scholars who have addressed self-determination issues, including Brownlie, Cassese, Chaumont, Craven, Crawford, Franck, Higgins, Pellet, Schachter, Turp, the present reviewer, and many others. Knop also analyses in depth four judicial or quasi-judicial explications of self-determination: the International Court of Justice (ICJ) *Western Sahara Advisory Opinion*<sup>2</sup>, *Opinion No 2 of the Conference on Yugoslavia's Arbitration Commission* of the Badinter Arbitration Commission<sup>3</sup>, the ICJ's Judgment in the *East Timor (Portugal v Australia)*<sup>4</sup> case, and the 1981 decision of the United Nations' Human Rights Committee in the case of *Sandra Lovelace v Canada*.<sup>5</sup> Her 38-page bibliography attests to the comprehensiveness of her discussion.

Of course, Knop surveys existing work for a purpose: through the lens of self-determination, she hopes to 'illuminate the deep structures, biases and stakes in the

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<sup>1</sup> Karen Knop, *Diversity and Self-Determination in International Law* (2002).

<sup>2</sup> [1975] ICJ Rep 12; 59 ILR 30 ('*Western Sahara*').

<sup>3</sup> (1992) 31 ILM 1497 ('*Opinion No 2*').

<sup>4</sup> [1995] ICJ Rep 90 ('*East Timor*').

<sup>5</sup> GAOR, 36<sup>th</sup> sess, Supp No 40, UN Doc A/36/40 (1981); 68 ILR 25 ('*Lovelace*').

development of meaning in international law.’<sup>6</sup> She finds in the development of self-determination ‘glimmers of striving toward an ideal of interpretation for our age of diversity.’<sup>7</sup> Focussing on process rather than on the content of the norm, Knop examines how the identity of those who hold the right to self-determination and their participation in the processes of interpreting that right have been addressed in a number of different contexts. In particular, she examines how marginalised groups (colonial and indigenous peoples and women) have had an impact on the developing meaning of self-determination in the twentieth century.

Knop focuses on the right of external self-determination or secession, although many of her case studies seem far removed from secessionist issues. Knop admits that the *Lovelace* case<sup>8</sup> does not readily fit this category,<sup>9</sup> and the participation of women in inter-war plebiscites and their submission of communications to the United Nations Trusteeship Council are only marginally related to issues of secession. Nonetheless, Knop identifies ways in which selected decisions have taken marginalised groups into account in the course of developing the right to self-determination, primarily through a textual analysis of international judgments and parsing the writings of academics. While the effort is at times informative (the accounts of the success of women in gaining voting rights in post-1919 plebiscites and anecdotes about women’s early voices from United Nations trust territories just mentioned are both interesting and informative), there is ultimately little new ground explored.

Knop supports her thesis by selective, and at times far-fetched, analyses of the opinions of various commentators and/or judges. She identifies the ways in which “marginalized”<sup>10</sup> voices, such as those of the Sahrawis of Western Sahara or the East Timorese, have been indirectly taken into account by international bodies, focussing on cultural and gender differences.

Since I understand that Professor Knop will have the opportunity to respond to these reviews of her book, I will cast modesty aside and focus on her treatment of *Opinion No 2*<sup>11</sup> of the Badinter Commission, in which she criticises the respective approaches of Matthew Craven and myself.<sup>12</sup> The former is offered as an example of the ‘categories’ approach to self-determination, in which analysts seek to ‘broaden the interpretation of self-determination by establishing the independent existence of new categories and rules.’<sup>13</sup> The latter is said to be an example of the ‘coherence’ approach, which ‘imparts a single powerful story of identity’<sup>14</sup> in order to interpret self-determination norms outside the classic colonial context. Both of

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<sup>6</sup> Knop, above n 1, 5.

<sup>7</sup> Ibid.

<sup>8</sup> GAOR, 36<sup>th</sup> sess, Supp No 40, UN Doc A/36/40 (1981); 68 ILR 25.

<sup>9</sup> Ibid 16; see footnote 52.

<sup>10</sup> Knop, above n 1, 5.

<sup>11</sup> (1992) 31 ILM 1497.

<sup>12</sup> Knop, above n 1, 167-90.

<sup>13</sup> Ibid 50.

<sup>14</sup> Ibid.

these approaches, in Knop's view, miss or obscure the Commission's 'conceptual originality: its refusal to confine the recognition of identity in international law within the territory of the state.'<sup>15</sup>

While I do not agree with all of Knop's interpretations of my own writings, her analysis of my negative commentary on the Badinter Commission's opinion remains well within the bounds of legitimate scholarly criticism. Her analysis of the decision itself, however, is flawed in several respects and reflects the rather conclusory use of assumptions for which she frequently criticises others. The problems begin in the first sentence of her description of the opinion, which she observes 'began with the familiar position that the right of self-determination cannot involve changes to borders.'<sup>16</sup> Of course, that was precisely the issue - whether the internal republican borders of the former Yugoslavia had to be accepted as new international borders - and it is wholly insufficient to dismiss it by simply referring indirectly to the concept of *uti posseditis juris*, the subject of *Opinion No 3*<sup>17</sup> of the Commission.

Nor are we encouraged to think of the actual situation in Yugoslavia at the time and the Commission's impact on it when Knop dismisses another essential issue by way of a footnote, stating that 'it is not necessary to engage the more technical debate about whether Yugoslavia is a case of dissolution or secession and what that implies.'<sup>18</sup> Since the Commission explicitly rejected the argument that some of Yugoslavia's republics were seceding from the Yugoslav state (whether persuasively or not), the relevance of its subsequent opinions to the cases of external self-determination with which Knop's book is purportedly concerned would seem to be considerably diminished.

Knop's easy analogy of the dissolution of Yugoslavia to the process of decolonisation, where colonial territories rather than the ethnically defined 'peoples' within them enjoyed the right to independence, simply doesn't ring true in the case of Yugoslavia, unless the arbitrators were engaging in a culturally relativist exercise that treated the federal Yugoslav government (or the Serbs) as a neo-colonial power. This is not suggested by Knop, who claims to the contrary that the Commission's opinion 'interprets self-determination as potentially expressing a trans-state dimension'<sup>19</sup> analogous to Economic Union citizenship.<sup>20</sup> This is done so that 'the concept of nationality could be used to recognize a Serbian identity which cut across state borders.'<sup>21</sup> She cites with approval Alain Pellet's interpretation of the Commission's opinion as evidence of a 'new geometry of identity', in which

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<sup>15</sup> Ibid 169.

<sup>16</sup> Ibid 170.

<sup>17</sup> *Conference on Yugoslavia Commission (Opinion No 3)* (1992) 31 ILM 1499 ('*Opinion No 3*').

<sup>18</sup> Knop, above n 1; see footnote 228.

<sup>19</sup> Ibid 188.

<sup>20</sup> Ibid 189.

<sup>21</sup> Ibid 186.

recognition of sub-state and trans-state identities may end up equating self-determination with the right of 'multicultural democracy'.<sup>22</sup>

While many would welcome the nuanced vision of self-determination discovered by Knop in *Opinion No 2*, such a positive interpretation doesn't explain why Croats and Slovenes should not have sought multiculturalism in the Socialist Federal Republic of Yugoslavia itself, and it is unlikely to satisfy Kosovar Albanians today. And the constant invocation of 'no change in borders' by the Commission is a strange example of 'conceptual originality,' whatever bones it may have decided to throw to the new Serb and Croat minorities in Bosnia and Herzegovina.<sup>23</sup>

Knop's interpretations are not necessarily incorrect, but she appears to be guilty of one of the practices she regularly criticises: applying concepts of self-determination to subject peoples without any input from them. She makes no attempt to understand or even identify the local 'voices' that are so important to her reading of *Western Sahara*<sup>24</sup> and other cases, thus imposing far too easily a 'European' view of democracy and tolerance on a region that had known little of either trait. As Knop admits, 'the attempt [in *Opinion No 2*] is to integrate Yugoslavia into modern Europe by restructuring the right to self-determination from the superiority of *demos* over *ethnos* to their transnational or post-national reconciliation in the intellectual vein of the European Union.'<sup>25</sup> It is difficult to see the distinction between this imposition of European values on Yugoslavia and the similar imposition that Knop criticises elsewhere, where the ignored voices are women or indigenous people. Finally, Knop's interpretation of the opinion seems itself to be quite a stretch, as evidenced by her frequent use of words such as 'might be .... could be.... implicit in.... could be used.... it is possible'. Some interpretation of obscure or conclusory texts is obviously necessary, but the strain here and elsewhere often seems excessive.

Moving to the broader message of the book, the real disappointment of *Diversity and Self-Determination* is that it does not help us either to interpret the concept of self-determination in the future or to understand how its past interpretation has differed from that of any other international legal concept. Of course, relatively powerless groups were generally unable to participate in the creation of international law. Of course, expanding the participation of those directly affected by international law would better recognise 'diversity' (a term curiously undefined). Of course, interpretation is 'inevitable'<sup>26</sup>, but it is not clear how closer textual

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<sup>22</sup> Ibid 187-8. Pellet served as legal adviser to the Commission, and it is thus not surprising that he would take a generally positive view of its opinions. See Steve Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission* (2000) 136.

<sup>23</sup> Ibid.

<sup>24</sup> [1975] ICJ Rep 12; 59 ILR 30 ('*Advisory Opinion*').

<sup>25</sup> Knop, above n 1, 170.

<sup>26</sup> Knop, above n 1, 380.

reading will help us ‘analyse better what judging across difference might look like’<sup>27</sup> - or, indeed, understand what ‘judging across difference’ means.<sup>28</sup>

Knop does suggest in her conclusion two directions for future research: ‘how to take account of a marginalised group’s standpoint without simply replacing one stereotype with another.... [and] whether all arguments [about self-determination] deserve equal respect.’<sup>29</sup> These may be important questions, but there is little in the book to suggest the directions in which we should turn for answers.

Despite the evident research and technical craftsmanship that went into *Diversity and Self-Determination*, the reader is left with little more than the familiar conclusions of feminist and critical legal scholars that international law treats people unequally and that interpretations of international law tend to privilege international lawyers. Even if one assumes that diversity is a positive value and that all interpretative ‘voices’ are of equal importance, *Diversity and Self-Determination* does not offer any indication as to how either law or its interpretation should change to more closely reflect these values. Stories of inter-war successes by the suffragette movement<sup>30</sup> and the inclusion of indigenous people in the process of drafting a United Nations’ declaration concerning them<sup>31</sup> are encouraging. In the end, however, the message seems to be merely that everyone’s (often self-serving) interests should be represented at every level of international law. To some this may constitute international democracy, but it sadly tells us little about how competing rights and claims to ‘self-determination’ are to be understood in the twenty-first century or how the conflicting voices inevitably raised in such circumstances are to be weighed.

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Ibid.

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Ibid 380.

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Ibid 380-1.

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Knop, above n 1, Chapter Six.

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Knop, above n 1, Chapter Three.

## II DENYING SELF-DETERMINATION IN ORDER TO SAVE IT

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Karen Knop suggests that ‘the better interpretation of self-determination is one that engages on a basis of equality all those directly effected’<sup>1</sup>, especially those who have been historically “marginalized in the interpretation of self-determination”<sup>2</sup> such as ‘the colonized, ethnic nations and indigenous peoples and women within those groups’.<sup>3</sup> She analyses cases in which ‘an international legal authority has been squarely confronted with some aspect of the debate’<sup>4</sup> and concludes that often these authorities have used the opportunity to extend participation to the marginalised. While these attempts have not always succeeded, to Knop ‘their instructiveness lies in the attempt, and in their hope, in the recognition of inclusion and equality as essential to interpretation’.<sup>5</sup>

Certainly ideal types may be useful heuristic devices, and Knop may well believe that ‘all legal texts assume and create a world’<sup>6</sup>, but can lawyers actually create the world they assume? Unfortunately, Knop’s analysis gives little regard to the considerations driving the real-life people (as opposed to putative Peoples) whose conflicts have produced some of the cases she analyses, and the world she assumes is thus not the one that we live in. Of course she may assert that she is striving to create a better one, but one sure way to find dystopia may be to try to achieve utopia. Ironically, using the principles that Knop advocates as the grounds for making real-life decisions in international politics and law seems likely to deny people the right to determine their own identity and thus the right to determine their own affairs. Put differently, Knop’s devotion to diversity, if taken seriously, would require imposing state structures on people in ways that they themselves reject, thus denying self-determination in the name of extending it.

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<sup>1</sup> Karen Knop, *Diversity and Self-Determination in International Law* (2002) 5.

<sup>2</sup> Ibid 5.

<sup>3</sup> Ibid 3.

<sup>4</sup> Ibid 11.

<sup>5</sup> Ibid 5.

<sup>6</sup> Ibid.

Both the limitations of space and the nature of my own expertise lead me to concentrate on Knop's analysis of the right to self-determination by the Serbian people in Croatia, Bosnia and Herzegovina that was given by the European Community's Arbitration commission of the Peace Conference on Yugoslavia, chaired by Robert Badinter ('*Badinter Commission*' or '*Badinter*'). Knop finds this decision to have been 'conceptually original' in 'its refusal to confine the recognition of identity to international law within the territory of a state' but rather gave 'legal existence, through a common nationality, to a Serbian nation overlapping the states of Yugoslavia, Croatia and Bosnia-Herzegovina.'<sup>7</sup> She also saw the opinion as 'creative' in that it 'produce[d] in international law a more complex and, presumably the Arbitration Commission hoped, a truer picture of identity'.<sup>8</sup> Thus Knop thinks that the opinion embodied a 'hope: that by decoupling Serbian nationality from citizenship or residency in a multicultural Croatia and Bosnia-Herzegovina, nationality can recognize legally the importance of ethnicity, and the values of democracy and pluralism legally required of the territorial state can temper the excesses of ethnic nationalism'.<sup>9</sup>

With all due respect to Knop's hopes, this analysis grants a post-factum wisdom to *Badinter's Commission* comparable to claiming a bullseye after firing in the opposite direction from the shooting range and then placing a target wherever the bullet has struck. The decision did not noticeably 'temper the excesses of ethnic nationalism', and that 'overlapping Serbian nation' has been almost completely driven from Croatia while helping partition Bosnia into separate ethnic territories. These are no more multicultural than Bohemia or Silesia after the expulsion of the Germans, Kosovo following North Atlantic Treaty Organisation's victory and the expulsion of the Serbs, or the regions of Turkey that had until then been inhabited by Armenians after April 1915. Far from decoupling nationality from territory, the politics that drove Yugoslavia's demise linked these two factors as strongly as had been the case in the rest of central Europe in the twentieth century.

Thus the *Badinter Commission's* decision failed to ward off conflict because its reasoning was completely irrelevant to the ways that the people on the verge of war saw themselves and their situations. Despite the best intentions of international lawyers and post-modern theorists, the peoples of ex-Yugoslavia rejected the concept of multi-ethnic democracy by voting, in free and fair elections, for separate nationalist parties that were committed to creating separate ethnically-defined nation states.<sup>10</sup> They saw themselves in 1991, and see themselves now, as separate communities, each entitled to be sovereign in its own state and thus with superior rights over minorities who might – or might not – be permitted to remain.<sup>11</sup> Indeed,

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<sup>7</sup> Ibid 169.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 190.

<sup>10</sup> See Susan Woodward, *Balkan Tragedy* (1995); Paul Shoup and Steven Burg, *The War in Bosnia and Herzegovina* (1999).

<sup>11</sup> See Robert Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts* (1999).

had they not seen themselves in this way and voted accordingly, there would have been no need to destroy their common state. In this configuration the whole point of the national state is to ensure that minorities, even if citizens, are not part of the sovereign body, the *nation*.<sup>12</sup> Thus *Badinter* was calling for the soon-to-be-ex-Yugoslavs to renounce the very political principles and beliefs that they had voted for in free and fair elections and that ensured that they would no longer be Yugoslavs. Specifically in regard to the Serbs, *Badinter* was stating that they should simply accept a transformation from equality under socialism to despised minority in their own homes and homelands since these were to be defined as belonging to another nation. It is no wonder that *Badinter* failed; the only wonder is that *Knop* could possibly think that he in any way succeeded.

The ethnic nationalist position is not simply a claim that international law might choose to recognise, but also, and far more importantly, a firm set of beliefs that determine what governments obtain the consent of which peoples. Denying self-determination to those who demand sovereignty means either imposing a government on people who reject it (eg on the Serbs and Croats in Bosnia,<sup>13</sup> more than half of the population; on Kosovo Albanians until June 1999)<sup>14</sup> or pretending that de facto independent states do not exist (eg Republika Srpska, Kosova after June 1999).<sup>15</sup> The former course requires violations of human and political rights; the latter, denial of trade and economic status in order to starve the population into submitting to the government they reject – hardly a practice that honours human, political or social rights.

*Knop* attempts to get around this problem by proposing that international law can develop new forms of identity and even that 'the right of self-determination can ... mean the right to multicultural democracy'.<sup>16</sup> Presumably, a population so misguided as to define their community in ethnic terms thereby deprive themselves of the legal right to self-determination even if they set up real states. Yet it is just this formulation that turns the principled requirement of diversity into the actual denial of self-determination. To say that recognition should be accorded only to

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<sup>12</sup> Ibid 67-83. A parallel would be the status of non-Jews in Israel. They are citizens but not among the bearers of sovereignty, since Israel as a Jewish state belongs to Jews alone. For a discussion of the central European roots of Zionism as political philosophy see Shlomo Avineri, 'The Presence of Eastern and Central Europe in the Culture and Politics of Contemporary Israel' (1996) 10 *East European Politics & Societies* 163. For a discussion of the concept of Israel as the model of an 'ethnic democracy' privileging the ethnic majority see Sammy Smooha, 'Ethnic Democracy: Israel as an Archetype' (1997) 2 *Israel Studies* 199. Smooha suggests that newly independent states such as Croatia will adopt this form of discriminatory constitutional structure (200).

<sup>13</sup> See David Chandler, *Bosnia: Faking Democracy after Dayton* (1999); Robert Hayden, 'Intolerant Sovereignities and "Multi-multi" Protectorates in the Balkans' in Chris Hann (ed), *Postsocialism: Ideals, Ideologies and Practices* (2002) 159; Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention* (2002).

<sup>14</sup> Cf Ireland in 1923, East Bengal in 1971, East Timor until 2000, the West Bank and Gaza after 1967.

<sup>15</sup> Cf Turkish Republic of Northern Cyprus.

<sup>16</sup> *Knop*, above n 1, 188.

those who think like post-modern liberals denies not only political self-determination but even freedom of thought and association to everyone not a post-modern liberal. Knop's position then becomes rather like that of John Rawls late in his life, that 'liberal and decent peoples', not states, should be the real actors in international society,<sup>17</sup> but she does not tell us what happens when people are not liberal as, sadly enough, most are not.<sup>18</sup>

None of this is to say that ethnic nationalism is normatively good; but it does get votes, and it is hard to base a democracy on the principle of denying the validity of what the people believe to be their true identity and interest. At the same time, it is also true that creating ethnic states in territories that have diverse populations is brutal, dangerous and likely to undermine democracy. Perhaps the best approach would be not to stress the right to the normative good of a multicultural democracy but rather the hazards of rejecting it.

In that case, Karen Knop has looked in exactly the wrong places. The *Badinter Commission*, like most other international legal authorities, had the luxury of ignoring political reality because the people making the decisions were not going to be the ones to suffer if they got it wrong. Better to look at a court that would have to live with the reality of potential partition rather than being in a position just to regret from afar those not sufficiently enlightened to see the wisdom of its creative marshalling of principles. Knop's book actually begins with passing reference to such a case, the Supreme Court of Canada's 1998 decision in *Reference re Secession of Quebec*,<sup>19</sup> but she does not include that opinion in her analysis, presumably because it was a matter of domestic Canadian law.<sup>20</sup> Pity. The Canadian Supreme Court's decision is messy, recognising the complexities of the situation, even the possibility that a unilateral secession, though unconstitutional, might succeed. The effect was to warn all concerned that there was no easy answer and that any attempt to secede would be a political act with dangerous and unpredictable consequences. Badinter, on the other hand, pretended that abstract principles determine political reality on the most deeply felt and contested issues confronting the soon-to-be-ex-Yugoslavs, and delivered opinions that were therefore utterly unresponsive to them. His commission thereby failed either to avert war or to alleviate its intensity.

It is hard to see how Knop's approach can offer anything likely to be useful to any authority charged with rendering a real decision on recognition of the right to self-determination by the only kinds of political actors ever likely to assert such a right

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<sup>17</sup> John Rawls, *The Law of Peoples* (1999) 81.

<sup>18</sup> Rawls, on the other hand, while not being exactly clear on how people are to run their affairs without states, actually posited that 'liberal and decent peoples have the right ... not to tolerate outlaw states' meaning those neither liberal nor decent (81). This would seem a call for liberal jihad, which in fact was pretty much what NATO's bombing of Yugoslavia in 1999 amounted to. See Robert Hayden, 'Biased Justice: Humanrightsism and the International Criminal Tribunal for the former Yugoslavia' (1999) 47 *Cleveland State Law Review* 549.

<sup>19</sup> [1998] 2 SCR 217.

<sup>20</sup> Knop, above n 1, 1-3.

in practice. Were Knop to mean what she says; we should either isolate the non-diverse by non-recognition of any de facto states that they might create, thus starving the weakest among them (who are likely to be precisely the historically marginalised groups that Knop wants to benefit); or else we should invade militarily and install a government based on diversity whether the recipients like it or not. Perhaps these courses of action can be justified under some theory but surely not under one of self-determination.

### III

## ENGAGING DIVERSITY THROUGH THE INTERPRETATION OF INTERNATIONAL LAW

WENDY LACEY\*

In *Diversity and Self-Determination in International Law*,<sup>1</sup> Karen Knop offers an alternative account of self-determination to the traditional scholarly analysis. Knop's emphasis is placed on the *interpretation* of self-determination rather than on its *articulation* and *application* throughout history. Thus, instead of merely searching for the meaning of self-determination as reflected in international practice, and treating cases as examples of the application of a norm, Knop encourages the reader to 'abandon the rigid optic of the scholarship on self-determination', and acknowledge what she refers to as the 'fluidity of interpretive practice'.<sup>2</sup> This fluidity, which assumes both difference and flexibility in interpretation, allows us to engage with the issue of diversity in international law.

For Knop, the issue of diversity arises by virtue of the inequalities and biases upon which international law rests, and the fact that differences in culture and gender pose particular problems for the interpretation of international law. These inequalities stem from the fact that although entities other than sovereign states have been recognised as limited subjects of international law, 'it has not led to a role for them in constructing international law'.<sup>3</sup> Self-determination is particularly relevant in this context, as the right in international law directly affects non-state groups, who tend to be marginalised both domestically and internationally. Knop observes that '[w]hile self-determination ... involves speaking about and to nations, peoples and minorities, it has rarely involved speaking with them'.<sup>4</sup> Knop's analysis is limited to the issue of external self-determination, and whether this includes a right of secession or independence.

A major premise of Knop's approach rests on her adoption of a critical perspective of international law based on the exclusion of many groups from its development - including those most affected by that development. What distinguishes Knop's

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<sup>1</sup> Karen Knop, *Diversity and Self-Determination in International Law* (2002).

<sup>2</sup> Ibid 16.

<sup>3</sup> Ibid 8.

<sup>4</sup> Ibid.

analysis, however, is her constructive account of attempts in international law to meet and even address these underlying inequalities. While Knop acknowledges that in cases involving self-determination the outcome has not always been entirely positive for the groups involved, each case contains positive examples of attempts to engage with the diversity of views of participants. This engagement is based on an understanding of the equality of those involved, and entails the adoption of the idea of inclusion, leading, according to Knop, to a better interpretation of the rule in question.<sup>5</sup> Within the development of self-determination, therefore, and specifically in the examples that Knop details, the author claims that ‘we may find glimmers of striving toward an ideal of interpretation for our age of diversity’.<sup>6</sup>

The book itself is divided into three parts. Part I is dedicated to establishing the theoretical basis of Knop’s analysis, and in particular, how approaches to identity, participation and interpretation will directly affect whether groups are included or excluded in the interpretation of self-determination. Knop treats identity as the construction of a group’s identity under international law, and participation as the possibility for a group having a voice in the process and being able to contribute their own perspective.<sup>7</sup> In addition to these two bases for including or excluding groups from the interpretation of self-determination, Knop adds interpretation itself, in the sense that one’s choice of interpretive theory will determine the legal reasoning employed, and will set the limits and terms of conversation.<sup>8</sup>

Chapter two details how one’s approach to interpretation has implications for the identity of groups claiming self-determination. Here, Knop distinguishes her interpretive approach from the more common and conventional accounts of self-determination in international law, which tend to either involve ‘an exercise in doctrinal pigeon-holing or the furtherance of the proper principle’.<sup>9</sup> The first approach Knop terms the ‘categories approach’ to self-determination, the latter the ‘coherence approach’. According to Knop, neither conventional approach properly accounts for the complexity of self-determination and its interpretation in international law: ‘[T]he 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’.<sup>10</sup>

In chapter three, Knop also details how the notion of ‘pandemonium’ or chaos has tended to be invoked by commentators in a manner that obscures from clear view the internal inconsistencies in their analyses. In this context, the approach taken by Rosalyn Higgins,<sup>11</sup> on the subject of external self-determination, comes under

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<sup>5</sup> Ibid 5.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 4.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 374.

<sup>10</sup> Ibid 1.

<sup>11</sup> Rosalyn Higgins, ‘International Law and the Avoidance, Containment and Resolution of Disputes’ (1991) 230 *Hague Recueil* 9, 23-41.

strong criticism by the author for involving a failure to adhere to the process or policy-oriented theory of international law that Higgins espouses. In Knop's view, Higgins incorporates a notion of pandemonium that masks the adoption of a rigid rules-based theory, which has implications for participation (restricting the right to secession), and which effectively brings to a halt any further legitimate variations in interpretation. Thus, Knop's analysis of Higgins' work, which is also considered together with the work of Thomas Franck on external self-determination,<sup>12</sup> helps to establish the link between interpretation and participation.

Part II of the book is devoted to providing a detailed analysis of cases in international law where the problem of diversity arose in the context of interpreting self-determination. In this section, Knop considers the *Western Sahara Advisory Opinion*<sup>13</sup> of the International Court of Justice, as well as that Court's decision in *East Timor (Portugal v Australia)*.<sup>14</sup> In addition, the author examines the *Conference on Yugoslavia Arbitration Commission (Opinion No 2)*.<sup>15</sup> In considering these cases, Knop draws out their significance as examples of engagement with the views of previously marginalised groups. In addition, she manages to detail the judgments as occasions involving judicial response to the challenge of diversity that becomes possible through the process of engagement.

In considering the general approach taken by the various judges in responding to this challenge, Knop observes that, '[t]he approach to their interpretation attempts not only to include, but also to equalize'.<sup>16</sup> They represent the effort of judges 'to interpret the international law of self-determination impartially such that their judgment would be valid across cultures'.<sup>17</sup> The manner in which this is actually achieved is through what Knop refers to as the creative use of a particular legal construct to this end. In *Western Sahara*<sup>18</sup> it involved the consideration of the doctrine of terra nullius and the concepts of legal ties and legal entity; in *Opinion No 2*<sup>19</sup> it involved the concept of nationality; and in *East Timor*<sup>20</sup> it concerned the matter of the "sacred trust".<sup>21</sup> What Knop identifies as the unifying feature in all three cases is 'the concern with a better picture of identity',<sup>22</sup> and with respect to the two International Court of Justice decisions, an additional similarity lies in the 'concern to equalize cultures through participation'.<sup>23</sup>

<sup>12</sup> Thomas Franck, 'Postmodern Tribalism and the Right to Secession' in Catherine Brölmann, René Lefebvre and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (1993) 3-27.

<sup>13</sup> [1975] ICJ Rep 12 ('*Western Sahara*').

<sup>14</sup> [1995] ICJ Rep 90 ('*East Timor*').

<sup>15</sup> (1992) 31 ILM 1497 ('*Opinion No 2*').

<sup>16</sup> Knop, above n 1, 110.

<sup>17</sup> Ibid 210.

<sup>18</sup> [1975] ICJ Rep 12.

<sup>19</sup> (1992) 31 ILM 1497.

<sup>20</sup> [1995] ICJ Rep 90.

<sup>21</sup> Knop, above n 1, 210.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

This theme of engagement and response is extended by Knop to consideration of the development of relevant texts under United Nations' auspices, including the International Labour Organisation, and the United Nations' Working Group on Indigenous Populations. Here, the relevant texts include the International Labour Organisation's *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*<sup>24</sup>, and the working group's *Draft Declaration on the Rights of Indigenous Peoples*.<sup>25</sup> One point specifically made in this chapter, is that how an institutional interpreter (such as the International Labour Organisation or the United Nations' Working Group) constitutes its authority will help in determining how it engages the contributors of both insiders and outsiders, and also how this engagement is received by them.<sup>26</sup>

Part III of the book pursues a general theme raised in the first stages of the book, yet pursues it in a specific context. This underlying theme is the notion that the history of self-determination, told through decisions, judgments and other authoritative texts, represents a history of 'successive encounters with marginalized groups – from nomadic desert peoples to indigenous women – and their perspectives on international law'.<sup>27</sup> In this section, Knop examines the marginalisation of women in international law, and looks at this history of self-determination as a series of instances where women have challenged their position as 'unequal members and unequal participants in the process of self-determination'.<sup>28</sup>

Knop's approach offers an alternative view of the history of self-determination, and one that illuminates the problem of diversity in international law. In doing so she highlights a process of engagement with groups otherwise marginalised in international law, and also a process whereby judges and institutions have sought to respond to this challenge. This response has involved ideas of inclusion and equality in the interpretation of international law, and illustrates a constructive attempt to address the embedded inequalities in international law and the present challenges posed by the issue of diversity. Knop's analysis of the history of self-determination is achieved through identifying the bases upon which groups are either included or excluded in the interpretation of international law: identity, participation and interpretation.

Throughout the book, Knop's analysis provides a valuable alternative view of this history. Its value also rests on the acknowledgment of the problems that flow from inequalities in the international legal system, and of the challenges posed by

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<sup>24</sup> Adopted by the International Labour Conference on 27 June 1980, 28 ILM 1382 (entered into force 5 September 1991).

<sup>25</sup> See Knop n 1, 248-74; Daes, Explanatory Note Concerning the Draft Declaration of the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (1993).

<sup>26</sup> Ibid 274.

<sup>27</sup> Ibid 12.

<sup>28</sup> Ibid 277.

diversity in the contemporary legal setting. Yet Knop's most significant insight is in her examination of the constructive attempts to deal with these issues in the history of self-determination. That judges and institutions have attempted to face the challenge in a manner that included notions of inclusion and equality is important. To the extent that it may offer the basis for an approach to the interpretation of international law generally is significant. However, the potential scope for the application of such an approach is what remains unclear. In particular, Knop leaves unanswered the question of whether it would be limited to areas where groups or individuals have become the objects of international law, despite playing no role in its development. Are marginalisation and the notion of challenge within the concept of engagement necessary pre-requisites? Or is the approach to interpretation more generalist, offering a template for future engagement with non-State actors and for meeting the broader challenges of diversity in the interpretation of international law? If a generalist approach is taken, then the progressive and even revolutionary aspect of Knop's approach is likely to widen. According to Knop, the approach outlined in the book 'holds promise for the interpretation of "universal" laws that were made without universal participation and that systematically operate, whether intentionally or not, to the disadvantage of those excluded from their making'.<sup>29</sup> In the end, the reader is left with the intriguing question of how far beyond the issue of self-determination this promise extends.

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<sup>29</sup>

Ibid 110.

**IV**  
**NARROWING THE FIELD: A REPLY TO HURST HANNUM,  
ROBERT HAYDEN, AND WENDY LACEY**

KAREN KNOP\*

Whether a group has the right to choose the sovereignty under which it lives – the right of external self-determination, most often, the right of secession<sup>1</sup> – continues to be a pressing issue in many parts of the world. This lasting and widespread importance explains why so many international lawyers have written on the question of a right of self-determination. Indeed, we would be troubled if the issue had not attracted much attention.

Given the varied and complex nature of self-determination claims, we might equally expect that between them, international lawyers would have approached the legal dimensions from a number of different angles, perhaps drawing on a number of other fields of knowledge. By and large, however, this has not been the case. The scholarship has tended to take one of two forms. One is to derive the true norm on self-determination from the primary sources of international law. This form sometimes shades into what the best norm would be, drawing on political theory for the rigour that the raw material of international law lacks. The other common form of scholarship on self-determination is the case-study. The predominance of these two forms has produced a rich vein of thought on the norm itself and a wealth of understanding about its application to the facts on the ground in a number of places. Hurst Hannum is a significant contributor to the first, and Robert Hayden to the second, although this characterisation does not do justice to the fullness of Hayden's work on the former Yugoslavia.

My aim in *Diversity and Self-Determination in International Law* was to engage with and complement the twin depths of the existing literature on self-determination by exploring a terrain that is quintessentially legal, that of legal interpretation, argument, and reasons for judgment; and by bringing to it a new perspective, that of diversity. Hannum and Hayden evidently differ from Wendy Lacey in the extent to which they value, or even register, the book's approach. As I read their reviews, Lacey is alone in entering into the project of the book. Instead, Hayden and particularly Hannum appraise the book as precisely one of the modes of self-

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<sup>1</sup> For the sake of brevity, I will refer throughout simply to 'self-determination.'

determination scholarship that I sought to differentiate it from: the recipe for rules. It is as if the only alternative to contributing in one of these two modes is to fail by their standard, which, according to Hannum and Hayden, I have neatly done.

I have chosen to focus my comments on this reader-response because I think that its implications go beyond my particular book. What seems to be at work here is a fundamental difference in expectations for scholarship in the field of international law generally. I will address Hannum's response at greater length because he is both deliberate and thoroughgoing in his limiting of the available ways in which my book might contribute and hence in his narrowing of the field. Hayden's response strikes me as more in the nature of a misapprehension and is basically confined to my discussion of the Yugoslavia case, although his misapprehension is presumably formed by a similar difference in expectations. I am certainly not saying that Hannum and Hayden are not entitled to look for the usual payoff. What disappoints me is that they seem to do so in a way that fails to recognise the existence, the value, and the relevance of other modes of scholarship on self-determination.

## I THE TERRAIN OF THE BOOK

Leaving aside the perspective of diversity for now, I want to begin by clarifying and justifying the differences in terrain between *Diversity and Self-Determination in International Law* and the two more familiar enterprises of the rule clarification and the case-study. Unlike rule clarification, my analysis does not focus on the primary sources of international law. Instead, it operates on secondary sources: what Article 38(1)(d) of the *Statute of the International Court of Justice 1945* refers to as the 'judicial decisions and the teachings of the most highly qualified publicists of the various nations.' Indeed, in opening with the comment that this feature of the book makes it difficult to review, Hannum implies that the book is parasitic on the work of others. Moreover, rather than use the subsidiary means of judicial decisions and the writings of eminent international lawyers to determine the correct rule on self-determination, I dwell on the difficulties of the rule's interpretation. While Hannum accepts that interpretation is inevitable, its very inevitability seems to render it uninteresting to him or, at least, uninteresting absent some nifty solution which he does not find.

Unlike a case-study, the discussion in *Diversity and Self-Determination in International Law* does not provide an in-depth account of the factual situation in a given case: for example, the full history of the region, the views genuinely held by the different groups, the real stakes, the likely or actual result of the various solutions. In its discussion of cases, the book examines the arguments presented by the groups who were before the relevant tribunal, the tribunal's decision, and the treatment of the different arguments in the reasons given for the tribunal's decision. It makes no claim about the authenticity of the arguments, nor about the efficacy or wisdom of the rule of decision per se. Although Hannum and Hayden register - and criticise - this remove from reality, their inclination to attribute some straightforward prescription for reality to my account of the cases nevertheless leads

them on occasion to misconstrue the book's methodology. My reading of a group's argument about the meaning of self-determination is confused with a Romantic endorsement of its authenticity, or my identification of the originality of a decision on self-determination is taken as approval of its particular version of the rule. Much of Hayden's disagreement in fact rests on the latter misunderstanding.

In my view, the criticisms of the book's terrain as derivative, lacking in practical dividends, and unrelated to reality are misplaced. The interpretation and application of an international legal rule by an adjudicator is one of the places where the rubber meets the road. Despite the equation of authors and judges in Article 38(1)(d) of the *Statute of the International Court of Justice 1945*, authors tend to work from the primary sources with a view to stating and applying the rule, whereas judges are additionally confronted with the arguments made by the parties before them and with the need to justify their interpretation to those parties in light of their arguments. Based on this difference alone, it seems possible that there are dimensions of the rule on self-determination or the rule in action that are not captured by the existing scholarly modes of rule clarification and case-study respectively. By comparing how authors interpret self-determination with how judges do, the book shows that the literature focused on the primary sources of international law or on the factual context has indeed missed something systematic about the contestation and interpretation of self-determination in the leading cases. In particular, the rule has repeatedly been met by a certain type of challenge to its legitimacy, and decision-makers have responded in a certain way. Whether or not this observation is useful, it is not derivative - a point attested to, ironically, by the fact that despite Hannum's introductory description of the book as an extensive survey of existing work, he goes on to disagree with its outlandishness.

Nevertheless, why should we care about the surplus meaning that the book finds in the cases? One practical reason is that it is not surplus. Any account of self-determination that does not attend to it will not sum up the decisions adequately and hence will not offer much guidance or have much predictive power. The book demonstrates that the leading cases on self-determination all contain a wild card, and each a different wild card: an interpretive or conceptual twist of their own that none of the authorial statements of the rule would have led us to expect and hence insist on criticising or factoring out. As I will discuss shortly, the book further offers a reading of the cases that sees this creativity as a valuable pattern. But even if there is no value in the pattern or no pattern at all, the book's interpretation of the cases reveals the wild card specific to each and thus the inadequacy of the mainstream accounts of self-determination. While Hannum criticizes the analyses of the cases as 'selective and at times far-fetched,' he also grants that the 'interpretations are not necessarily incorrect.' It follows that, at a minimum, they disturb the usefulness as well as the neatness of the various ways that the decisions have been reconciled in the literature. At least insofar as what courts have done in the past and may do in the future is 'real,' the book's terrain is thus not unconnected to reality.

## II THE PERSPECTIVE OF THE BOOK

If my discussion so far has seemed a little abstract, it is because I have attempted to make a case for the terrain of *Diversity and Self-Determination in International Law* as distinct from a case for the perspective that I bring to it, which is that of diversity and to which I now turn. As I understand their reviews, Hannum and Hayden do not reject the perspective of diversity as such. Rather, Hannum in particular considers its prescriptive rewards to be negligible, or if not negligible then crude-line.

Hannum's estimation of the book's forward-looking contribution as slim to none proceeds from his devaluation of its terrain of legal interpretation, argument, and reasoning. In his negative appraisal of the book's prescriptive potential, he eliminates the importance of this terrain almost entirely. Since there is virtually nothing left to study, it is scarcely surprising that the perspective of diversity yields next to no new insight. The same is true for his assessment of the historical and critical contributions made by the book in bringing the challenges of diversity to bear on the authoritative interpretation of self-determination by judges and other third-party decision-makers.

A comparison of the book's goals with Hannum's response shows, however, that his standards for newness reflect a rather impoverished vision of history, critique, and, indeed, reconstruction in international law. Since he deletes the praxis of interpretation, history appears to be simply a matter of who was there and what the outcome was, critique is all about the bottom line, and the book's reform message is straightforwardly procedural. By this standard, the perspective of diversity adds a new sound bite or two to the history of self-determination, nothing new to its critique, and nothing workable to its reform.

The introduction to *Diversity and Self-Determination in International Law* expresses the hope that the value of the book's approach lies,

not only in the richer and more precise understanding that its matrix of diversity gives of the current scholarly controversy over a right to secede and the precedents that figure in the controversy ... [but also] in what this concrete case-study contributes, in turn, to the analysis of diversity in international law generally, starting with a new micro-history. Whereas the scholarship on self-determination treats the importance of judgments, arbitral decisions and other authoritative texts of self-determination as stepping stones in the development of the right, the book shows their importance as successive encounters with marginalized groups - from nomadic desert peoples to indigenous women - and their perspectives on international law.<sup>2</sup>

We have only to think of the shift from a great-men view of history to that of the masses, the emergence of histories of everyday life, and the advent of African-American history in the United States or Subaltern Studies among Indian historians

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<sup>2</sup> Karen Knop, *Diversity and Self-Determination in International Law* (2002) 11-12.

to recognise the contribution that perspective has made to the field of history. Yet for Hannum, a new optic on the history of self-determination does not seem to qualify as 'new ground'. Rather, only facts about the history of self-determination count as new. Thus, some of his few words of praise are devoted to the new facts that *Diversity and Self-Determination in International Law* imparts about women's lobby groups at the 1919 Paris Peace Conference or about women petitioners from United Nations trust territories in the 1950s and 1960s, both of which are deemed 'interesting and informative'. Insofar as some of these facts about participation lead to surface results that can be called successes, they appear to assume a relevance to Hannum beyond the merely interesting because they can qualify as 'encouraging' in the measurement of progress in international law. To judge from his review, then, Hannum's idea of international legal history does not appear to go much beyond a collection of data points.

Hannum's attitude toward what counts as a new critique of self-determination is related to his view of historical scholarship. 'Presenting an alternative account of self-determination as a series of challenges from the margins' – to quote again from my introduction – reveals the 'counter-hegemonic function that self-determination has sometimes performed; operating not just as a norm to be applied, but as an opportunity to expose the exclusions and inequalities of international law. More broadly, the book introduces and develops the critiques of cultural and gender biases that emerged in this practice.'<sup>3</sup> But because feminist and critical legal scholars have already told us that 'international law treats people unequally,' Hannum is familiar with this conclusion, so unless it produces some new reform proposal, this critique is ho-hum for him. Given the obvious conceptual progress made in the past by distinguishing substantive from formal equality, or effects discrimination from facial discrimination, for example, it is puzzling that he assigns so little value to an investigation into the variety of forms that discrimination takes in the interpretation of self-determination and indeed international law. Although the bottom line of inequality is familiar, the potential contribution made by the analysis, even without more, seems evident.

Hannum's opinion that the book's reading of the cases provides little positive direction is similarly sustained by his inattention to, if not rejection of, the relevance of interpretation. To use an example from the book, how does the International Court of Justice in *Western Sahara*<sup>4</sup> redress the cultural specificity of international law's conception of sovereignty or legality? The book shows that it differs from judge to judge: the Court's interpretation explores the full potential of liberalism, some of the separate opinions have recourse to sociological functionalism, another one resembles a Rawlsian overlapping consensus. It further shows that what the opinions in *Western Sahara* share with each other and with the other decisions discussed is a responsiveness, however partial and ad hoc, to the critiques of cultural bias, gender bias, or both that were raised in argument. The perspective of

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<sup>3</sup> Ibid 14.

<sup>4</sup> [1975] ICJ Rep 12 ('*Western Sahara*').

diversity enables us to see an effort at universality and an ideal of universality at work in these concrete contexts. Broadly speaking, the book argues that the interpretive responses thus rendered visible are unified by some combination of attention to identity, meaning the law's depiction of a group's identity, and participation, meaning the actual involvement of a group or other means of incorporating the consideration of its perspectives. Hannum is quite right that this common structure does not offer a detailed set of directions. This need not mean, however, that its discovery is without value or that it offers no guidance. The nature of an ideal is such that we cannot always know beforehand what it demands in a specific situation. Nevertheless, its establishment through the cases seems significant, as does an understanding of the range of ways that the judges in those cases have tried to meet the ideal through interpretation.

As all three reviews highlight, the fact that the book's argumentation is case-based has both advantages and disadvantages. To the extent that the book's reading of the cases is persuasive, it establishes that an ethic is already embedded in the legal interpretation of self-determination. The corresponding disadvantage is that this ethic is not fully worked out, as it might have been if developed in the abstract, through the contemplation of every possible good and bad scenario. This trade-off seems to me to be defensible. Especially if practicality is to be our touchstone, then a proposition with support in law seems at least as useful a starting point as a more complete proposal developed without reference to the law or with no support in law. I emphasise in the book's conclusion and here again that it is a starting point because I fully agree with the commentators that further development is needed.

Hannum's and Hayden's reviews work well together to indicate some of the directions that this development might take. Although Hayden mistakes my reading of the European Communities' Conference on Yugoslavia Arbitration Commission opinions for approval of their "multi-multi"<sup>5</sup> identity solution to the dilemmas of self-determination in the region and for a paradoxical readiness to impose it on an unreceptive population, his account of the political realities in the former Yugoslavia serves to reinforce Hannum's concern that the normative implications of the book's analysis are crude-line. In the conclusion, I discuss the need for 'a hard look at the pitfalls as well as the promise of the history' that I present, and I signal in particular the question of whether 'all arguments deserve equal respect'.<sup>6</sup> Presumably because Hannum regards the book's law reform message as banal to none, he finds it particularly unsatisfactory that its close reading of the cases does not point to an answer. It is unclear whether this is an objection to the book's methodology or a criticism that the book does not use that methodology to the fullest. As I have already indicated, the case-based methodology is a strategic trade-off. But if we accept the trade-off, then it seems that we must accept that decisions are, among other things, fact- and path-dependent. Cases arise in a

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<sup>5</sup> See Robert Hayden, 'Intolerant Sovereignties and "Multi-Multi" Protectorates: Competition Over Religious Sites and (In)tolerance in the Balkans' in Chris Hann (ed), *Postsocialism: Ideals, Ideologies and Practices in Eurasia* (2002) 159, 170.

<sup>6</sup> Knop, above n 2, 380-1.

context and they are decided in the order that they arise. Their contexts and their order may not produce a judicial consideration of the limits that Hannum agrees need to be explored.

Hayden also debates what he regards as the book's institutional implications, noting that as an international rather than a local legal authority, the Yugoslavia Arbitration Commission did not have to suffer the consequences of its decision. It is difficult for me to see how my discussion of the meaning of a leading international decision could be misconstrued as approval of the decision-maker's jurisdiction, but I concur with Hayden that institutional design is an important consideration and, in fact, pursue its importance in the chapter on indigenous self-determination. I agree as well that any comprehensive proposal *de novo* should include an institutional dimension and should learn from experience in developing this dimension.

Unlike Hannum and Hayden, Lacey is inclined to make the book's analysis more radical and asks whether the ethic it identifies could extend beyond those groups who have been objectified by international law and have resisted. In the introduction, I explain the book's focus as follows:

The book chooses to look at the central processes and institutions of international law because they have been heavily, and usually rightly, criticized, but often without much attention to whether they are actually impervious to change. It is as if each assault on the citadel is the first. But this erases, however inadvertently, whatever valiance and impact any earlier critical efforts may have had; it restores the original fortifications because international law, the target of criticism, is taken to remain the same. The book seeks instead to recuperate one history of critical engagement and the potential of this one history.<sup>7</sup>

Nevertheless, Lacey's response is a powerful and welcome reminder that discursive investigations must expand beyond the central texts of international law to the edges of international law's encounter with the Other and also that an ideal of interpretation, however derived, must be alive to those who continue to be invisible to the texts of international law.

In conclusion, I should like to express my appreciation to Peter Radan for organizing these reviews and, of course, for his own scholarship on self-determination. I am also grateful to the reviewers for their thoughtful appraisals, each of which deserves more detailed consideration than this reply permitted. When I first read the reviews, I was struck by the way in which their specifics were animated by a fundamental difference in attitude toward the kind of international legal scholarship that the book represents, and I chose to focus my reply on this difference because of its broader significance. Regardless of whether the book succeeds on its terms, I remain convinced that the kind of scholarship it attempts is worth attempting and am glad to have had an opportunity to try to explain why.

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<sup>7</sup> Knop, above n 2, 26.

