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The Principle of Self-Determination in International Law

The principle of self-determination has widely been invoked in recent years, especially by spokesmen of countries which have, until lately, been under foreign domination. Broadly speaking, this principle has two connotations—the internal and the external. The internal aspect implies the right of the people of a state already recognized by international law to determine their own form of government. The external aspect concerns itself with the right of a people to determine their nationality and statehood. This paper is devoted exclusively to the study of self-determination in the latter context. Is self-determination a legal right backed by legal obligations? Its moral basis has been recognized widely, but its validity in international law is still disputed.

Although politically this principle found specific formulation in President Wilson's famous Fourteen Points announced in 1917, there was no mention of it in the Covenant of the League of Nations. Even in the period between the two World Wars, the principle found no recognition in international law, as was amply demonstrated in the Aaland Islands case. This archipelago, inhabited mainly by Swedes, became a part of the new Finnish State which was established after Finland broke away from Russia in November 1917. Sweden demanded the right of self-determination for the Aalanders. But the Commission of Jurists, which was appointed by the Council of the League in 1920 to give an opinion on certain objections raised by Finland, declared categorically: "Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation."¹

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¹*The Question of the Aaland Islands: Report of the Commission of Jurists*, LEAGUE OF NATIONS OFFICIAL JOURNAL, October 1920, Special Supplement No. 3, p. 5.

Again in 1944, self-determination received no mention in the Dumbarton Oaks proposals. At the suggestion of the Soviet Union, the San Francisco Conference rephrased Article 1(2) of the United Nations Charter, laying down as one of the purposes of the organisation, "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Similarly, Article 55 also refers to self-determination as a principle rather than a right, and as ancillary to peaceful and friendly relations among nations.

There has been much difference of opinion among jurists with regard to the question whether the Charter creates legal obligations for member states with respect to human rights. Some authorities, such as Professor Lauterpacht, have held the view that the international legality of human rights is derived from the fact that they prominently figure in the statement of the purposes of the United Nations; and that members are under a legal obligation to act in accordance with these purposes.² Another school of thought holds that human rights in the Charter have no juridical character, and do not constitute legal norms under positive law.³

Self-determination, however, falls into a category of its own. The Charter does not bracket self-determination with the other human rights, but subordinates it to the development of friendly relations among nations. The lack of legal validity of self-determination is further borne out by the fact that it was not even listed among the rights defined in the Universal Declaration of Human Rights,⁴ which, though not a legally binding instrument, did serve to lay down the minimum standard which States were expected to achieve. This lack of precise definition of the term self-determination as a human right, makes it difficult to believe that the Charter could have intended to introduce a new concept into positive international law, rather than uphold the principle as a political and moral force.⁵

This ambiguous position did not obtain long. During the fifth session of the General Assembly, Afghanistan and Saudi Arabia submitted a proposal⁶ in the Third Committee, which became the basis of an Assembly

²H. Lauterpacht, *International Law and Human Rights*, London, 1950, pp. 145-8. See also Paul Guggenheim, *Traité de Droit International Public*, Geneva, 1953, pp. 298-305; and M. Ganji, *International Protection of Human Rights*, Geneva, 1962, pp. 116-119.

³Charles de Visscher, *Theory and Reality in Public International Law*, Princeton, 1968, pp. 129-133, 175; Hans Kelsen, *The Law of the United Nations*, London, 1950, pp. 29-33; P. Drost, *Human Rights as Legal Rights*, Leyden, 1965, pp. 28-29.

⁴Resolution of the General Assembly 217 A (III) dated 10 December 1948.

⁵Self-determination did not figure in the Bill of Rights which Professor Lauterpacht drew up in his report to the Human Rights Commission in May 1948, U.N. E/CN.4/89.

⁶U.N. A/C.3/L.88.

resolution calling on the Economic and Social Council "to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination."⁷ In February 1952, the General Assembly adopted another resolution by which it determined "to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms: 'All peoples shall have the right of self-determination.'"⁸

Thus, self-determination as a "right" rather than a "principle" gained recognition and was reaffirmed as such in various United Nations resolutions. In 1960, the Declaration on Granting Independence to Colonial Countries and Peoples proclaimed: "All peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."⁹ The two Covenants on Human Rights adopted by the General Assembly in December 1966, also lay down the right of self-determination in identical terms. They further declare: "the States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right in conformity with the provisions of the Charter of the United Nations."¹⁰

But these developments in the United Nations do not conclusively establish self-determination as a right in positive international law. Whatever legal force self-determination could derive in future would be from the Covenants on Human Rights when they come into force, and then too, only between the parties to these instruments.

Even in the Covenants, the status of self-determination is not free from ambiguity. This right stands in a class by itself, as compared to the other substantive rights enumerated, in the sense that it applies to collectives and not to individuals, as in the case with all other economic and political rights. Self-determination cannot be applied to individuals, but has been understood as being exercised either by whole peoples of a territory seeking freedom from colonial rule, or by substantial groups markedly distinguished from the remainder of the community in which they live by virtue of their physical characteristics, habitual language, religious belief or political affiliations.

⁷General Assembly Resolution 421 D(V), 4 December 1950.

⁸General Assembly Resolution 545 (VI), 5 February 1952.

⁹General Assembly Resolution 1514 (XV), 14 December 1960.

¹⁰General Assembly Resolution 2200 A (XXI), 16 December 1966.

In order to establish self-determination as an effective right, it is necessary to reach a scientific and objective definition of the word "peoples" to which it is applicable. But no such definition has been given in the two Covenants. Another anomaly is that the article on self-determination has been included in identical terms in both the Covenants, although these are clearly distinct from one another in their character: the Covenant on Civil and Political Rights recognises certain rights as already existent, and imposes upon States the legal obligation to enforce them; whereas the Covenant on Economic, Social and Cultural Rights may be defined as a "promotional" instrument which binds its signatories to take steps to achieve progressively the specified rights.

In other words, it is recognised that the standards laid down are incapable of immediate implementation. This incompatibility between the two Covenants, and the inclusion of self-determination in both, makes its character ambiguous. Furthermore, the provision on self-determination is included in the operative part of the Covenants, but it manifests a pre-ambular character by the fact that it precedes Part II which lays down general rules governing implementation. The position of the article on self-determination has given rise to the view that the provisions on implementation do not apply to Part I (self-determination).¹¹

A further analysis of the Covenants brings out two other aspects which add to the vagueness surrounding the nature of this right: first, parties are called upon to *promote* and *respect* this right (and not *respect* and *ensure* it as they are called upon to do in the case of other civil and political rights); secondly, self-determination is the only right mentioned in the Covenants, respect for which has been qualified by "the provisions of the Charter of the United Nations."

This leads to the conclusion that self-determination is not recognised as an absolute right by the Covenants. In order to determine the cases in which the right would be applicable, and the form it would take, it is necessary to refer to United Nations practice and the preparatory work involved in the drafting of the Covenants.¹² Further insight can be gained from the records of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, which was set up by the General Assembly in 1963 to draft a report for the

¹¹E. Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, INTERNATIONAL PROTECTION OF HUMAN RIGHTS; Proceedings of the Seventh Nobel Symposium, Oslo, 1967, p. 111.

¹²Discussions on this issue took place in the Human Rights Commission, the Economic and Social Council, and in the Third Committee and the plenary meetings of the General Assembly.

progressive development and codification of the seven principles laid down by the Assembly. One of these was the principle of equal rights and self-determination.¹³ The major question which emerged is whether self-determination is confined to colonial situations alone, or should be applied also by governments to people living within their territorial jurisdiction. In other words, does international law recognise the right of secession as a corollary to the right of self-determination?

The question of secession in the context of the right of self-determination had been anticipated even at the San Francisco Conference. The consensus which emerged, and as reported by the Committee charged with the drafting of Chapter I of the Charter, was: "Concerning the principle of self-determination, it was strongly emphasized on the one side that this principle corresponded closely to the will and desires of the peoples everywhere, and should be clearly enunciated in the Chapter; on the other side it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession."¹⁴

In the Third Committee of the General Assembly, the move for the inclusion of an article on the right of self-determination in the Human Rights Covenant was spearheaded by the Soviet Union and supported by the Afro-Asian countries. Since it was directed mainly against the colonial Powers, there developed a clear trend that self-determination was applicable in the cases of non-self-governing territories only. In fact, many representatives who opposed the inclusion of the right of self-determination in the Human Rights Covenants on the ground that it would allow certain powerful nations to work for the disintegration of other nations, by instigating artificial separatist movements within peoples united by mutual consent, were told by the Afro-Asian spokesmen that self-determination did not imply the right of secession.

Faced with the problem of powerful minorities demanding autonomy, these newly emerging countries were most vehement in denying that the right of secession was a corollary of the right of self-determination. They insisted that this right did not apply to minorities living within a state, since their interests were protected by the provisions on minorities in various international instruments. Thus, the representative of Iraq declared that

¹³The Special Committee was set up by Resolution 1966(XVIII) dated 16 December 1963. Resolution 1815(XVII) dated 18 December 1962 listed the following principles of international law for discussion: 1) Threat of use of force; 2) peaceful settlement of disputes; 3) non-intervention; 4) cooperation; 5) equal rights and self-determination of peoples; 6) sovereign equality of States; 7) good faith.

¹⁴UNCIO, Documents, Volume 6, Document 343, pp. 296-7.

“the right of self-determination applied to a people under foreign domination, whether it could be defined as a nation or not, but not to a separatist movement within a sovereign State.”¹⁵ Iran also maintained that “the right of self-determination must never be confused with the right of secession.”¹⁶

Many of the Western Powers opposed the inclusion of an article on self-determination in the Covenants, on the ground that it was a political problem which should be tackled by political machinery rather than by a judicial body. They further argued that if self-determination were not to be recognised as a universal principle applicable to all peoples, but was to be interpreted as a right pertinent only to non-self-governing territories, it did not warrant inclusion in legal instruments such as the Covenants on Human Rights. The Covenants were designed to lay down rights which were universally acceptable, while self-determination confined to a colonial context, was limited to situations recognised as being of a transitory character by Chapters XI and XII of the United Nations Charter.

This weighty argument forced the supporters of the right of self-determination to accept it as a universal principle, thus adding a new dimension to the whole problem, the complexity of which was accurately summed up by the British representative in the Third Committee: “The draft Covenants were legal texts, imposing definite obligations on States . . . and under Article 40 (Article 41 of the Covenant) a complaint could be brought against them (States) before the Human Rights Committee. That Committee consisting of nine men (the Covenant finally provides for eighteen) selected for their experience of human rights rather than of statesmanship, would then rule on claims which the States complained against had been unable to settle by patient statecraft. The claims would be many, for the right of self-determination meant in essence that any group which could be regarded as a people should be free to choose the government under which it wished to live. It would thus apply to all the many situations involving disputed territory, claims by a group on one side of a border to be united to brethren on the other side, and claims by minorities . . . The concept of self-determination could not be whittled down to exclude minorities or groups wishing to secede; its great force lay precisely in the fact that it was all-embracing. He therefore wondered, in view of the many areas of the world where questions involving the issue of self-determination arose or could arise, whether even States having no colonies were indeed prepared to face the consequences of assuming a

¹⁵U.N. A/C.3/SR.671, 25 November 1955.

¹⁶U.N. A/C.3/SR.888, 21 November 1958.

legal obligation to promote the right of self-determination within their borders . . . ”¹⁷

This issue failed to be resolved in the Third Committee of the General Assembly and in the Economic and Social Council, basically due to the political approach of most representatives, especially from the Socialist and the Afro-Asian countries, which was not conducive to a solution within the legal context. Apart from the USSR and Yugoslavia¹⁸ who accepted in principle the right of secession of a group within a sovereign state, no other member proclaimed itself in favour of this right. Neither was any attempt made to lay down a legal and scientific definition of the term “peoples.” The Covenants on Human Rights, with their ambiguous article on the right of self-determination, were adopted by the General Assembly with the backing of the Afro-Asian, Latin American and Socialist states—significantly states which have expressed dissatisfaction with modern international law which is largely a product of the European State system of the last few centuries.

However, a clearer concept of self-determination has emerged in the Special Committee on the Principles of International Law, which is essentially a legal body. By its terms of reference, the Special Committee’s function is to formulate declarations on various principles which would not be legally binding, but which, combined with other instruments of legal validity, would contribute to the codification and progressive development of international law. In the Special Committee, it was generally agreed that the right of self-determination was directly relevant to the emancipation of colonial people, but it could not be limited to colonial situations. Hence, the need was recognized to define the criteria of applicability of this right, since its indiscriminate application could lead to the disruption of the international order.

It is interesting to note that there was broad agreement on the principle that the right of self-determination could not constitute a license for secession to disrupt the national unity and territorial integrity of sovereign states. But no agreement could be reached on how to balance the right of self-determination as a universal principle, with the maintenance of the territorial integrity and sovereignty of states. The Afro-Asians, more apprehensive of demands for secession by national minorities, were suspicious of any reference to self-determination in the context of national states.¹⁹ But in the colonial context they demanded that colonial rule be

¹⁷U.N. A/C.3/SR.642, 24 October 1955.

¹⁸Statement of the Soviet representative in U.N. A/C.3/SR.372 and the Yugoslav draft resolution in the Human Rights Commission, U.N. E/CN.4/L.22 dated 15 April 1952.

¹⁹U.N. A/AC.125/SR.68 and 69.

declared illegal, that people under colonial domination be authorized to use force and invite outside help to secure self-determination, and that colonial Powers be prohibited from using force against subjugated colonies.²⁰

On the other hand, the Western powers, chiefly the United States and Britain, insisted that self-determination be applied not only to a colony, a non-self-governing territory, a Trust Territory, a zone of military occupation but also to "a territory which is geographically distinct and ethnically or culturally diverse from the remainder of the territory of the State administering it." But in the proposals which they submitted, these powers added that "States enjoying full sovereignty and independence, and possessed of a representative government, effectively functioning as such with respect to all distinct peoples within their territory, shall be considered to be conducting themselves in conformity with this principle as regards to those peoples."²¹ The Afro-Asian members of the Special Committee opposed the inclusion of this article because they feared that even these provisions in an international instrument would encourage secessionist movements.

The Special Committee has yet to resolve this dilemma. But given the strength of Afro-Asian opposition to the proposal that the right of self-determination be specifically defined as being applicable in the national context, it seems unlikely that an article along such lines would be included in the draft declaration. United Nations practice has been to limit the scope of this right. Thus, in the Congo crisis of 1960, no consideration was given whatsoever to the Katangese claim to self-determination. Even the Afro-Asian world has tended to accept the colonies which have emerged as international personalities as a *fait accompli*, and has not questioned their legal status though they were arbitrarily carved out.

Self-determination has been taken to apply to political units which constituted colonies. And it has been understood that once this right has been exercised by the inhabitants of a colony at the time of the departure of the colonial ruler, it is not considered feasible to grant it to smaller units within that framework. This has been borne out by the absence of Afro-Asian sympathy for Morocco's claim to Mauritania, Iraq's claim to Kuwait and Biafra's efforts to secede from the Nigerian Federation.

This leads to the conclusion that self-determination in international law is viewed to be synonymous with the right of non-self-governing territories

²⁰Proposals on self-determination submitted by Czechoslovakia U.N. A/AC.125/L.16; 12 Afro-Asian countries and Yugoslavia, U.N. A/AC.125/L.31; and 4 Socialist countries U.N. A/AC.125/L.74.

²¹Proposals on self-determination submitted by the United States U.N. A/AC.125/L.32 and the United Kingdom U.N. A/AC.125/L.44.

to independence. Such territories can easily be distinguished by virtue to their being geographically and racially distinct from the metropolitan country which governs them, but with which these territories do not share political power. If international law were to go beyond this and recognize the right of self-determination as transcending legally established international boundaries, it would undermine the stability of the international order by placing it in a perpetual state of flux. It would also destroy the premise on which international law operates, viz., respect for the national unity and territorial integrity of States. This has led to the following observation by a writer on international law: "Self-determination refers to the right of the majority within a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and to permit political changes within them."²²

Furthermore, self-determination is a political principle, and even if it is given a legal garb by being incorporated into legal instruments, it would be difficult to enforce it as a legal right; and it is doubtful whether a judicial body would agree to adjudicate an issue purely on the basis of this right. The attitude of the International Court of Justice in the Case Concerning the Right of Passage over Indian Territory is most revealing. Among other actions to justify its conduct in impeding Portuguese passage over Indian territory, India advanced the claim of the right of self-determination of the population of the Portuguese enclaves.²³ In its final submission, Portugal specifically asked the Court, *inter alia*, "to hold that the arguments of India set out above under A, B and C are without foundation" (B related to "the application of the provisions of the United Nations Charter relating to human rights and the right of self-determination of peoples").²⁴ But the Court circumvented this fundamental question by declaring that "it is no part of the judicial function of the Court to declare in the operative part of its judgment that any of those arguments is or is not well-founded."²⁵

²²Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, London, 1963, p. 104.

²³ICJ Pleadings, *Case Concerning the Right of Passage over Indian Territory*, Vol. II, Counter-Memorial of the Government of India, p. 151. Vol. III, Rejoinder of the Government of India, pp. 305-6. Vol. IV, Argument of Professor C.H.M. Waldock, Counsel of the Government of India, pp. 857-60.

²⁴ICJ Reports 1960, *Case Concerning the Right of Passage over Indian Territory*, pp. 16-19.

²⁵*Id.*, at 32.