

# THE RIGHT TO SELF DETERMINATION: A CONCEPTUAL ANALYSIS

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...perhaps no other question of political philosophy, or international law, pregnant with such unutterable calamities, has ever been so partially and superficially examined as the right of self determination.<sup>1</sup>

– Albert Taylor Bledsoe

## *INTRODUCTION*

The basis of self determination today is no longer ethnic or cultural but rather territorial, to which has been added, for good measure, the classic majoritarian principle, which does not address the disturbing question of the “tyranny of the majority”.<sup>2</sup> Today’s self determination is neither “national” self determination nor the right of a people nor that of a minority defining itself as a people or part of a people, but the right of a colony to independence or union with another state and the right of a majority in a colony or an already independent state. In view of the fact that the frontiers of colonisation were with few exceptions not based on ethnic boundaries, the supposed “people” are in most instances not peoples but an array of ethnic groups, several of which are cut off from their ethnic kin by frontiers. Apart from colonies and other similar non-self governing territories, the right of self determination is extended only to territories under occupation and to majorities that are victims of similar policies. Once independent, self determination comes to reinforce non interference and sovereignty over one’s territory, as well as the right of a people to a government and socio-political structure of their own choice .

## *THE RIGHT OF PEOPLES TO SELF-DETERMINATION*

The right of peoples to self-determination seems to be really accepted.<sup>3</sup> This right has an external aspect - the right to establish a state or choose the state to which

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1 W. Ofuote-Kodjoe, *The Principle of Self Determination in International Law*, 129-47 (1997)

2 A. Heraclids, *The Self Determination of Minorities in International Politics* 1-2 (1991).

3 Rupert Emerson, Self Determination, *AJIL* 65, 459-75 (1997). Michla Pomerance, *Self Determination: The Metamorphosis of an Ideal*, *Israel Law Review*, 19, 310-39 (1984); Alexander Kiss, “The People’s Right to Self Determination”, *Human Rights Journal*, 7, 165-75 (1986).

the people wish to belong, and an internal one - the free choice of government, namely, democracy. The principle of self determination has been hailed and acclaimed by many in the last 40 years, so that some consider it to be the paramount norm of legitimacy.

However, a close look at the principle of self determination reveals that it is fraught with ambiguities. As a political concept it was supported and partially applied by Woodrow Wilson, the President of the United States, when he drew the map of Europe after the First World War, but it was only partially implemented.<sup>4</sup> At that time, the legal aspect of self-determination was studied by two expert committees in the context of Anland Islands, and they reached the conclusion that it was not a binding rule of International law.<sup>5</sup> In particular, the committees were against the existence of a right to secede.<sup>6</sup> Self-determination is mentioned in the United Nations Charter, probably not as a binding rule per se, but as a goal. It is not mentioned in the 1948 Declaration of Human Rights, although the reference in Article 21 of each citizen's right "to take part in the government of his country, directly or through freely chosen representatives" may be considered an implied reference to the internal aspect of self-determination, that is, representative government.

Within the context of decolonisation during the 1960's, self determination was given more weight by several landmark United Nations General Assembly resolutions and granting of independence to a greater number of former colonies.<sup>7</sup> A far-reaching provision on "the principle of equal rights and self-determination of peoples" was included in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>8</sup> This declaration, although not binding, nevertheless enjoys considerable political clout. The Helsinki Final Act of the Conference on Security and Co-operation in Europe (CSCE) also dealt with the subject in its Principle VIII.<sup>9</sup> Although the Final Act is not binding, its influence has grown since the end of the Cold War.

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4 Thomas M. Frank, *The power of Legitimacy Among Nations* 154-159 (1990).

5 The Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aland Island question, League of Nations, Official Journal, Special Supplement no. 3, 5 (Oct. 1920); The Aland Islands Question, Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B.7. 21/68/106, 27 (16 April, 1921).

6 Report of the International Committee of Jurists, 5; Report of the International Commission of Rapporteurs, 28.

7 G. A. Res. 1514 (XV), 14 December 1960 and G. A. Res. 1803 (XVII), 14 December 1962.

8 G. A. Res. 2625 (XXV), 24 October 1970.

9 For a discussion of Self Determination in the context of the 1975 Helsinki Final Act, see Thomas Buergenthal, "CSCE Human Dimension: The Birth of a System", in *Collected Courses of the Academy of European Law*, 1, 14-15 (1992).

The recognition of self-determination as a rule came in 1976 with the entry into force of the two International Covenants, one on civil and political rights, the other on economic, social and cultural rights.<sup>10</sup> Both had been opened for signature in 1966. The first Article of each Covenant provides that:

“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.”

The second paragraph deals with rights over natural resources, and the third relates to the promotion of self-determination, inter alia, with regard to non-self-governing and trust territories. This article leaves many questions open and suggests a number of ambiguities.

### **WHICH GROUPS QUALIFY FOR SELF-DETERMINATION?**

The first and foremost problem is the lack of a generally accepted definition of “people”. Most definitions include two elements: the existence of objective links, such as cultural and historical ties, and a common subjective wish to belong together. But these are also the ingredients of the notion of an ethnic group, and it is difficult to draw the line between people and ethnic. The distinction is important since only “peoples” have the right to self-determination, while ethnic groups may merely enjoy minority rights.<sup>11</sup> The lack of a clear definition of the notion of people introduces a severe ambiguity and an element of subjectivity, often leading to a double standard in the recognition of the right to self-determination in specific cases and, in the words of Thomas M. Frank,

“[t]he gradual descent of self-determination into unprincipled conceptual incoherence.”<sup>12</sup>

A secondly hotly debated question is whether the right to self determination applies only to colonial situations, or whether peoples within existing independent states may also claim it in order to justify a right of secession.<sup>13</sup> The texts recognise self determination of “all peoples.” On the other hand, the international community is in principle opposed to any violation of the territorial integrity of existing states.

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10 The relevance of the principle of self determination in the context of decolonisation has been recognised by the International Court of Justice in two of its advisory opinions: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Rep. 16 (1971); and the *Advisory Opinion Concerning Western Sahara*, *ibid.*, 12 (1975).

11 On the interaction of minorities rights and peoples' right to self determination, see Patrick Thornberry, “Self Determination, Minorities, Human Rights: A review of International Instruments”, *Int'l Comp. L. Quar.*, 38, 867-80 (1980).

12 Frank, *supra* n. 4 at 162-5.

13 It seems that the inhabitants of a non-independent territory have the right to self determination irrespective of whether they constitute a “people”.

Hence, most authors consider the right of self determination to be limited.<sup>14</sup> Others, however, have tried to strike a balance between the two norms. Frank, basing his idea on “the notion of entitlement to equality”, proposes that “self determination is a right applicable to any distinct region in which inhabitants do not enjoy rights equal to those accorded to all people in other parts of the same state,”<sup>15</sup> while Lee C. Buchheit considers “remedial secession” as the ultimate remedy permitted in cases of oppression.<sup>16</sup> According to Lea Brilmayer, secession is lawful where the seceding group not only aspires for self determination but also claims disputed territory based on a historical grievance.<sup>17</sup>

Allen Buchanan maintains that “there is a moral right to secede, but it is a qualified right. Two of the chief qualifications are (a) that secession be consistent with the requirements of distributive justice as they apply to the resources the secessionists appropriate, and (b) that secession does not deprive third parties (in particular the children and later descendants of the secessionists) of their fundamental rights and liberties.”<sup>18</sup> The most obvious justifications for secession are the re-appropriation of territory wrongfully taken and discriminatory redistribution. Under certain circumstances it may be permissible to impose exit costs or to use other constitutional devices to achieve a proper balance between the interest in secession and the interest in majority rule.

As for the practice of states, the position is ambiguous. While the secession of Katanga from Congo-Leopoldville (today Zaire) and of Biafra from Nigeria were not welcomed, Bangladesh was recognised and admitted to the United Nations.<sup>19</sup> According to French human rights expert Alexander Kiss, the means to overcome the contradiction between the right to self determination and the general opposition to a right of secession is the establishment of autonomy: The entity seeking to secede would be granted autonomy rather than independence, as a compromise.<sup>20</sup>

Another problem related to the question of who qualifies for self determination concerns minorities within the majority that strives for self determination. If a minority also constitutes a “people”, whatever that may mean, does it have a right to define itself, independent of the majority?

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14 Pomerance, *supra* n. 3 at 68. Author speaks of situations of colonial and alien domination. On the other hand, Daniel Turp, an expert on French-Canadian issues, considers that a right to secession does exist under the 1966 Human Rights Covenants. See Daniel Turp, “The Right to Secede in International Law”, *Canadian Yearbook of International Law*, 20, 147-70 (1982).

15 *Supra* n. 4 at 168.

16 Lee C. Buchheit, *Secession: the Legitimacy of Self Determination*: 222 (1978) see also Robin White, “Self Determination: Time For a Reassessment?”, *Netherlands International Law review*, 28, 147-70 (1981).

17 Lea Brilmayer, “Secession and Self Determination: a Territorial Interpretation”, *Yale Journal of International Law*, 16, 177-202 (1991).

18 Allan Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991).

### *SOME ADDITIONAL QUESTIONS RELATING TO SELF-DETERMINATION*

What are the modalities of self-determination? According to earlier United Nations General Assembly resolution:

“The establishment of sovereign and independent State. The free association or integration with an independent State or emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”<sup>21</sup>

But in recent years the General Assembly has dealt with self-determination as if it were a synonym of independence.

The principle of self-determination contradicts the rule of *uti possidetis*, according to which newly established states' boundaries should follow those that existed in colonial times. In the past, this principle used to be applied mainly in Latin America,<sup>22</sup> but in 1986, in setting the Frontier Dispute between Burkina Faso and Mali, the International Court of Justice declared it to be universally applicable.<sup>23</sup>

Since many consider the principle of self-determination to be a superior rule, one could have expected that it should be universally applicable, but it does not apply in Latin America or in Africa. In these continents the stability of boundaries based on the delimitation, as illustrated by boundary settlements between Latin American states and by certain resolutions of the Organisation of African Unity,<sup>24</sup>

There is another crucial question: What is the relation between the right to self-determination and the prohibition of the threat or the use of nuclear force included in Article 2(4) of the United Nations Charter? As mentioned above, the only exceptions to this prohibitions are self-defence (under Article 51) and collective enforcement measures authorised by the Security Council (under Chapter VII). Nevertheless, some politicians and writers maintain that the use of force is also permitted for the achievement of self-determination.<sup>25</sup> Others have rejected this

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19 For a comparison of this case of secession with other attempts that have failed, see Buchheit, 138-215.

20 Kiss, *supra* n. 3 at 173. Ian Brownlie also considers self government or autonomy, associated status and federalism to be proper means of self determination. See Ian Brownlie, “The Rights of Peoples in Modern International Law” from *The Right of Peoples*, James Crawford (Ed.), 1988.

21 Resolution 2625 (XXV), 24 October 1970.

22 A.O. Cukvurah, *The Settlement of Boundary Disputes in International Law* 112-6 (1967).

23 See “Frontier Dispute” (*Burkina Faso/Mali*), I.C.J. Rep. 566 (1986). The Court was aware of a possible incompatibility with self determination, see pp. 566-7.

24 Eduardo Jimenez de Arcega, *Boundaries in Latin America*, 45-9 (1989). I. Brownlie, “Boundary Disputes in Africa”, *ibid.*, 56-60.

25 See George Saab, *Wars of National Liberation* 100-1 (1988).

opinion since it contradicts the UN Charter.<sup>26</sup> An additional question pertains to whether armed hostilities between people and the central government are subject to the rules of international or internal armed conflicts?<sup>27</sup> These questions provide much food for thought, which is beyond the scope of this article.

For some, while the concept of self determination is still a merely political maxim,<sup>28</sup> for others it has always been a legally binding principle rule in the 1960's and 1970's with the practice of decolonisation and adoption of the 1966 Human Rights Covenants.<sup>29</sup> Assuming it has binding force, it may be asked whether it is a rule of jus despotism, which permits derogation by consent, or whether it is jus cogens, a peremptory norm prevailing over other rules.<sup>30</sup>

### **CONCLUSION**

Groping as we are today in the unknown terrain of our bi-polar world, which has proved more hazardous than anticipated, we are called upon to come to grips with new challenges and a far more complex environment. The most productive way out is to avoid self defeating policies. From the international normative viewpoint, this means revising the principles of conduct that are known to be unrealistic and ambiguous. Of great significance today is the clarification of the international community's stand on self determination and secession and clear cut policy on the two. We must arrive at a suitable criteria for determining a qualified right to unilateral self determination - from autonomy to independence. Ultimately, only if we are both principled and pragmatic can we be in the position to cope with what is one of the most intractable problems of our post-bipolar world and provide imaginative solutions to facilitate conflict resolution.

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26 Pomerance 48-62; John R. Dugard, "The Organisation of African Unity and Colonialism: An inquiry into the Plea of Self Defence as a Justification for the Use of Force in the Eradication of Colonialism", *International and Comparative Law Quarterly* 16, 159-70 (1967).

27 For an analysis of the various questions and opinions, see Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements*, (1988) and Edward Kwakwa, "Review Essau", *Yale Journal of International Law*, 11, 199-212 (1979).

28 For a critical comment on Self Determination from a political and historical point of view, see E. Kedourie, "What's Wrong with Nationalism? What's Right with Balance of Power? A Conversation" in *State and Nation in Multi-Ethnic Societies* (Uri Ratan et al., Eds., 1986) 224-9.

29 Kiss, 165, 174.

30 According to Ian Brownlie, it is "probably" a regard to Jus Cogens but there are many problems of application "particularly with regard to the effect of self determination of the transfer of territory" in Ian Brownlie, *Principles of Public International Law*, 513-115 (1990).