

Self-Determination and International Law¹

Some Observations

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Self-Determination is a term widely used in contemporary international relations. Stated simply, it means the determination by a nation of its own polity.² National self-determination as a political principle has evolved in the last 150 years as a byproduct of the doctrine of nationalism in combination with other philosophical and political currents. Rousseau taught that sovereignty resides in the people and not in the monarch. Kant introduced the concept of the autonomy of the individual and of freedom being a condition for such autonomy. Fichte saw in the State the fulfillment of man's freedom. To Mazzini, national states were in consonance with nature's scheme: multi-national States were artificial. Politicians drawing upon these and other similar ideological bases engendered revolutions-big and small, tore up empires, forged unions and established continental hegemonies.

The tide of nationalism has continuously risen throughout the last and the current Century. With its growth, the concept of self-determination has not only established itself firmly, it has acquired a meaning different from and wider than what the term was believed to signify when the principle was first advocated. For subject people self-determination became equivalent to liberation from the colonial yoke; the people in weak but sovereign States equated it to patriotism and preservation of freedom; to minority groups within sovereign states, self-determination meant either secession or union with groups in a neighboring country. During World War I, even before the United States became a belligerent, President Wilson, addressing the Senate on January 22, 1917, emphasized that 'no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful'. Wilson made the principle of self-determination famous when, in his 'Fourteen Points',³ he demanded self-determination for the peoples of Central and Eastern Europe. A month later⁴, the President said: -

"Peoples and provinces are not to be bartered about from Sovereignty to Sovereignty People may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril"⁵.

During the years 1914-1919, the principle received considerable impetus. However, it was not only applied by idealists, it was also mis-applied by Machiavellians. Men as diverse as Wilson and Lenin proclaimed it.⁶ The Allies, largely under Wilson's influence, accepted self-determination as a peace aim. But, after the war had been won, while the Allied Governments 'gave effect to the demands of self-determination wherever they found it politically advantageous to do so', it was denied to peoples where 'self-determination threatened to thwart the territorial ambitions of the Victors'⁷. The principle of popular referendum or plebiscite, as a means of enabling peoples to attain national self-determination, or as a basis for allocating territory, received only partial recognition at the Peace Conference at Paris⁸. The principle was compromised by political, economic and strategic considerations and failed, as future history has shown, to provide basis for stable peace. It is true that the re-drawing of frontiers in the name of self-determination reduced the minorities of Europe from 54 millions to about 17 millions. Yet the new frontiers, designed deliberately to cripple the vanquished States, did leave substantial

1 Paper read on the occasion of the Inauguration of the Allahabad Centre of the Indian Branch of the International Law Association (December 2.7, 1967).

2 Concise Oxford Dictionary

3 Address of Jan. 8, 1918.

4 February, 1918: Address to Congress.

5 Wilson has been described as the greatest advocate of the doctrine of self-determination in regard to a number of territorial problems following the First World War by Oscar Svarlien in Dictionary of Political Science, Ed. Dunner-(Vision Press), 1965, p. 476.

6 Kurt Rabl *Selbstbestimmung Sifechtder Volker* (1963)' Review by Weiss berg (1965) AJIL, Vol. 59, p. 181.

7 Schuman: *Int. Politics* (3rd Edn.), 318.

8 Ibid

racial, linguistic and religious minority groups in most of the Central and Eastern European countries. Through provisions included in the Treaties of Peace signed in the years 1919 and 1920 effort was made to establish a system for the protection of these minorities. These provisions were declared in the treaties to be part of the fundamental law of the States concerned. The States, further, bound themselves to place the members of minority groups in a position of equality 'in law and in fact' and agreed that 'this obligation shall be placed under the guarantee of the League of Nations'. The League accepted the obligation through resolutions of its Council. As a result, the League was invested with a right of intervention in the internal constitutions of those States by such means as the Council may from time to time determine.⁹ In effect, these matters were recognized as being of general concern to international society, and as of importance to the peace of the world¹⁰.

The League Council considered, however, only such petitions sent by any individual or body of individuals, any organisation, national or international, any State, member of the League or not- as had 'in view the protection of minorities in accordance with treaties' i.e., which alleged an infraction of a minority treaty, and which were considered fit by a Committee of the League, called the Minorities Committee, to be placed before the Council. It will be seen that the minorities were not treated as legal entities possessing any international personality. Even organizations of minorities were not different in status from an individual. The petitions were regarded to be of the nature of information.

However, the view has been expressed, and not without some justification, that the League, in fact, did little to obstruct evasions of the minority treaties in Eastern and South-Eastern Europe during the period between the two World Wars. Of the principle of self-determination, it has even been said that it did not effectively extend beyond the peace-making at the end of the War¹¹. It is pointed out that the right of self-determination 'received no mention in the League Covenant even as a principle'. Be this as it may, it can scarcely be denied that 'the post-World War-I, round of self-determination spelled the end of European land empires'. Nor, indeed, did 'self-determination' exhaust itself either as a principle or as a force. For a while, it fell into the unprincipled hands of Hitler and became the instrument of destruction of peace.

As World War II broke out, and country after country was overrun by Hitler's hordes, self-determination was once more declared to be a peace objective. Outlining the 'Common principles' in the national policies of their countries, President Roosevelt and Mr. Winston Churchill referred to their respect for 'the right of all peoples to choose the form of government under which they will live'¹². After the entry of the United States in the War, this was re-affirmed in the Declaration of the United Nations which was signed by twenty-six nations¹³. When time came for giving effect to the principle, however, history once more repeated itself. The independence of the Baltic Republics was not restored. Nor was Poland granted a 'genuine right of Self-determination'. Former dependencies of the defeated States were adjudged (at any rate, at that time) unfit for self-rule. But when on October 24, 1945, the United Nations Organization formally came in existence, self-determination embarked on a new and more eventful career. The principle, as we shall see, matured into a right.

Article I of the United Nations Charter, in para 2, lays down, as a Purpose of the United Nations, the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and the taking of 'other appropriate measures to strengthen universal peace'. It will be seen that here 'self-determination' has been conjuncted to equal rights' and together with the latter referred to as a single principle.¹⁴ Also, respect for the aforesaid principle, as would be evident from the context, is viewed as measure to be taken to strengthen world peace. A reasonable interpretation of the provision is that 'peoples' have 'equal (political) rights' and that where in fact this be not so, this should be brought about through self-determination. In other words, since they are entitled to "equal rights" any peoples who are not independent should be allowed to determine their own polity. Further, that this is necessary for ensuring stable conditions of world peace. The association with 'equal rights' and use of the words 'to take' along with the expression 'other measures to

9 P. E. Corbett: 'What is the League of Nations?' (British Year Book of International Law, 1924, Vol. IV, p. 118, 136).

10 P. .J. Baker: 'The Codification of International Law' (British Year Book of International Law, 1924, Vol. IV, p. 38, 54).

11 Rupert Emerson: 'Self-Determination'. Proceeding of Am. Soc. of Int. Law (1966), p. 137.

12 The Atlantic Charter (August 14, 1941), third principle.

13 The Declaration was signed on January 1, 1942.

14 'Principle' has been used in the singular number here.

strengthen world peace' lend to 'self-determination' something of a positive content, something more than a pious feeling of respect for an abstract principle merely.

The provisions of Articles 55 and 56, read together, would also appear to justify such an interpretation. Art. 55 provides:

'With a view to the creation of conditions of stability and well-being', which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote

a.

b. . . .

c. universal respect for, and observance of¹⁵, human rights for all'

Under Art. 56, all Members of the U. N. 'pledge¹⁶ themselves to take joint and separate action in co-operation with, the Organization for the achievement of the purposes set forth in Art. 55"

It will, thus, be seen that one of the purposes of the U. N. is 'to develop friendly relations among nations', the basis for which is to be the principle of equal rights and self-determination of peoples'¹⁷; that for bringing about such relations among nations, creation of conditions of stability and well-being are necessary,¹⁸; that the Organization has undertaken an obligation to promote not only universal respect for, but also the observance of human rights for all¹⁹; that, for achievement of this objective, all Members (123 now) have pledged themselves to take joint and separate action in co-operation with the U. N.²⁰ Since, further, the world community has clearly accepted that the right of self-determination is a human right²¹, it is only logical to conclude that all Members of the U.N. have undertaken a duty to observe, i.e., to give effect, to the principle of self-determination of peoples in co-operation with the Organization, thus appearing to have elevated the principle from the plane of politics to the plane of law.²²

Recent discussions in the organs of the U. N. and actions taken from time to time would lend further support to such a view. On a number of occasions the action taken by the United Nations has been in fulfilment of the specific obligations of a specified category of Members under Article 73, and of the Organization itself as provided in Article 76.

Under Article 73 (Chapter XI), members of the U. N. having or assuming responsibilities for the administration of Non-Self Governing Territories are required to develop these territories towards self-government and free political institutions.²³ Under Art. 76 (Chapter XII), one of the basic objectives of the trusteeship system is the promotion of 'political. . . advancement of the inhabitants of the territories' concerned as well as their 'progressive deployment towards self-government or independence, as may be appropriate to circumstances' and as may be in accord with the 'freely expressed wishes of the peoples concerned'.²⁴ In furtherance of these objectives, the U. N. General Assembly, on December 16, 1952, adopted a resolution urging the members to speed up the process and recommending that the wishes of the peoples concerned be ascertained through plebiscites or other recognized means. A perusal of the provisions of Chapter XI and Chapter XII of the U.N. Charter would show that the basic idea underlying these provisions is the idea of self-determination. The two Chapters have come to be regarded as

15 Italics Supplied.

16 Italics Supplied.

17 UN Charter, Article 1, para 2.

18 UN Charter, Art. 55, opening para.

19 Ibid., para c.

20 UN Charter, Art. 56.

21 International Covenant on Economic, Social and Cultural Rights, Art. 1, and International Covenant on Civil and Political Rights, Art. 1. The two Covenants were adopted unanimously by the UN General Assembly on December 16, 1966.

(For text, See UN Monthly Chronicle, February 1961, pp. 41 et seq.).

22 See also Encyclopedia Britannica (1965), p. 306.

23 See UN Charter, Art. 73. para b.

24 See UN Charter, Art. 76, para b.

possessing an identity of aims and obligations.²⁵

Whether or not for reasons, in any measure, of loyalty to the purposes of the United Nations, the Western Powers embarked, after World War II, on a 'vast process of decolonization', divesting themselves of sovereignty over their dependencies and transferring it to the newly established States. As these 'newly self-determined' States came into existence and as more and more of them were admitted to membership of the United Nations, self-determination came to be proclaimed, time and again, from the platform of the World Organization with not only increasing vigour but greater weight as well. The principle of self-determination, already enshrined in the Charter, was thus translated into a right. As Rupert Emerson remarks, 'if all the resolutions of U. N. bodies which, in one guise or another, affirm the right of self-determination were to be laid end to end, they would, no doubt with symbolic justice, encircle the impressive array of the flags of 117 (now 123) Members which stretch in front of the U. N. Headquarters in New York.'²⁶

In 1955, the Economic and Social Council suggested the establishment of a commission to conduct a thorough study of the concept of self-determination along certain lines indicated by the Council. The General Assembly, finally considering the proposal in 1958, adopted a resolution recommending that member states should, in their relations with one another, give due respect to the right of self-determination, and that States having responsibility for the administration of non-self-governing territories should promote the realization and facilitate the exercise of that right by the people of such territories.²⁷ In this resolution, the General Assembly expressly recognized the right of self-determination of peoples and dependent entities²⁸. On December 14, 1960, the General Assembly unanimously adopted the 'highly important' Declaration on Granting Independence to Colonial Countries, wherein it was laid down unequivocally that:

'All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

In the aforesaid Declaration the General Assembly proclaimed the necessity of bringing to a speedy and unconditional end, colonialism in all its forms and manifestations and called for 'immediate steps' to be taken 'to transfer all powers to the peoples of territories which had not yet attained independence'.²⁹ This declaration has been called the MAGNA CARTA of the colonial peoples.³⁰ While the General Assembly turned down a Russian move to include a time-limit of one year for independence for all countries and non-self-governing countries, at its Sixteenth Annual Meeting (1961) it established a Special Committee³¹ to implement the Declaration. This Declaration is rightly regarded as providing a right to decolonisation. It has, in the hands of anti-Colonialist States, become a mighty weapon in the struggle to eliminate colonialism from Africa'.³²

The question whether Resolution 1514 (XV) created a legal right to decolonization has been hotly contested. One view is that this Declaration is no more than a valid interpretation of the Charter and is as such binding upon member States. The opposite view is that this amounts to legislation under the cloak of interpretation; that, in effect, the declaration seeks to amend the Charter; that, to be valid, the procedure provided for amendment must have been followed : since this has not been done, the Declaration is not binding. The latter view suffers from the infirmity that it ignores the fact that the Resolution in question is only one of a vast number of U. N. resolutions on the subject of colonialism. At least those principles of Resolution 1514 (XV) which have received frequent affirmation may well be said to have acquired validity as customary rules. There is also room for the view that unanimous Resolutions of the General Assembly create general international law. The right of collective

25 D. W. Bowett: 'Self-Determination and Political Rights in the Developing Countries', Proceedings of A. S. I. L., 1966, p. 134.

26 'Self-Determination', Proceedings, Am. Soc. of Int. Law (1966), p. 136

27 Everyman's United Nations (1959) p. 281-82

28 Starke: International Law (Fifth edn), p. 115

90 Votes in favour, none against; 9 members abstaining

29 For Text, see Resolution no. 1514 (XV) of General Assembly (1960).

30 By Mr. Quaisori-Sackey of Ghana, Security Council Records (18th year), 1042nd meeting, para 77.

31 The Committee of Seventeen: it was enlarged to a Committee of Twenty-four by a Resolution of Dec. 17, 1962.

32 C. J. R. Dugard: 'Organization of African Unity and Colonialism'- Int. and Comp. Law Qrly. (1967) Vol. 16, Jan. 1967, p. 174.

intervention in support of self-determination by dependent entities now undeniably exists. This is not to suggest that for the realization of the right to decolonization armed force could be employed by any Member State, except, perhaps, where it could be justified as being in self-defence as envisaged in Art. 51 of the Charter.

In relation to the validity of the principle contained in the aforesaid resolution as a rule of customary law, much has been sought to be made of the abstention by nine member States, including U. K., the U. S. A., Portugal and South Africa. It may be pertinent to point out that abstention, whatever else it may mean, is a clear indication that the abstaining State is not prepared to vote against the measure concerned.

'A major event in the field of protection of human rights and of the promotion of the Rule of Law'³³ was the unanimous adoption by the General Assembly at its twenty-first session (1966) of two Covenants viz., the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.³⁴ The voting recorded was 106 to none and 105 to none respectively. These Covenants reaffirm in a legally binding manner all the rights recognized in the Universal Declaration of Human Rights (1948), and the right of people to self-determination.³⁵ Article I in Part I of both Covenants, in identical provisions, lays down:

1. All peoples have the right of Self-determination³⁶. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.

2.

3. 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 United Nations Charter.'

The Covenants are to enter into force three months after the date of the thirty-fifth instrument of ratification or instrument of accession³⁷. It is hoped that the requisite ratifications would be forthcoming before the expiry of 1968, which is to be observed as the Human Rights Year. Meanwhile, it should be appreciated that the provision contained in para. I of Art. I, reproduced above, is merely declaratory of the customary rule of international law which has emerged from the practice of States in and outside the United Nations viz., that inhabitants of entities, including colonies, non self-governing territories and trust territories at any rate, have a right to determine freely the form of polity under which they shall live.

As evidence of practice and agreement outside the United Nations one may, in addition to the decolonization programme embarked upon during the two preceding decades by the colonial powers of the western world, look to important international agreements which, in effect, elevate self-determination from a principle to a right.

The organisation of American States by Resolution III adopted in January 31, 1962 at the 8th meeting of the Consultation of Ministers of Foreign Affairs, while re-iterating the Principles of Non-Intervention and Self-Determination already enshrined in the charter of the Organization, emphasizes that 'these principles are a basic part of the judicial system that governs relations among the republics of the hemisphere and makes friendly relations among them possible.'³⁸

Likewise, in the Charter of the Organization of African Unity, signed at Addis Ababa on May 25, 1963, one of the fundamental postulates of the Organization recited in the preamble is 'the principle of the inalienable right of all peoples to self-determination and to freedom, equality, justice and dignity'. Member States further declared in Article 3 of the aforesaid Charter their adherence, among other basic principles therein outlined, to the basic principle of 'absolute dedication to the total emancipation of the African territories which are still dependence'. The Charter is undoubtedly an international treaty and as such Art. 26 thereof provided for its registration with the U.

33 'International Covenants on Human Rights': Editor's Note, p. 52, the Int. Commission of Jurists, Summer 1967.

34 Annex to General Assembly Res. 2200 (XXI) adopted Dec. 16, 1966.

35 UN Monthly Chronicle, January 1967, p. 115, second column.

36 Italics Supplied.

37 Article 49 and Art. 27, respectively, of the Covenants.

38 See Am. Journal of Int. Law Vol. 56 (1962), p. 607.

N. Secretariat as envisaged under Art. 102 of the United Nations Charter.³⁹

The Agreement signed at U. N. Headquarters on August 15, 1962 for settlement of the dispute regarding West Iran between Indonesia and the Netherlands expressly provides for self-determination for that territory and the primary task of Indonesia, after transfer of administrative responsibility to her, is agreed to be the making of preparation for self-determination⁴⁰.

The French Declaration regarding Algeria made on March 19, 1962 also provided a guarantee for ultimate self-determination by Algerians which, it was expressly stated, may be full independence⁴¹.

In concluding, reference may be made to a Declaration of General Principles for a World Rule of Law adopted on July 6, 1963 by the Athens Conference on World Peace through Law, attended by delegates from over one hundred countries which stated that

'In order to establish an effectual international legal system under the rule of law which precludes resort to force, we declare that:

(1)

(2)

.....

(6) A fundamental principle of the international rule of law is that of the right of self-determination of the peoples of the world, as proclaimed in the Charter of the UN.⁴²

It was time now that apologists for Colonialists and former Colonialists stopped arguing that self-determination is not yet a binding rule by taking their stand on an alleged lack of a precise definition of 'peoples' and 'self-determination'. They would do well to leave their scope to be spelt out by appropriate bodies and tribunals as and when occasions occur. In the domain of international law, no less than that of municipal law, interpretation need not precede legislation.

39 See T. O. Elias: 'The Charter of the Organization of African Unity, Am. Journal of Int. Law, Vol. 59 (1965), p. 244 et seq.

40 See T. O. Elias: 'The Charter of the Organization of African Unity, Am. Journal of Int. Law, Vol. 59 (1965), p. 244 et seq.

41 See AJIL., Vol. 56 (1962), Official Documents.

42 See Am. Journal of Int. Law, Vol. 58 (1964), Notes and Comments, p.138.