ASSIGNMENT

The Basis of right to self determination

Submitted by

Nasir Qadri

LLM Human Rights 2018

Supervisor

Professor Abdul Rauf
United Nation & Human Rights

International Islamic University Islamabad

INDEX

The Basis of Right to Self-determination.

INTRODUCTION

Self-determination, which is a controversial issue in public international law, has many characteristics formulated on different legal platforms. The implementation of self-determination has always been more controversial than its content. It has served as a powerful slogan and a vital justification for the independence of many peoples, most significantly the independence of colonial peoples. In fact, the colonial context is what specifically comes to mind when the right to self-determination is brought up and it is the colonial aspect of the right to self-determination that is uncontested, for the right to self-determination consists of many elements and it has several aspects.[1] Self-determination represents the absolute legal right people have to decide their own destiny in the international order. Self-determination is a core principle of international law arising from customary international law, but also recognized as a general principle of law, and codified under a number of international conventions and protocols. The right of people to self-determination is a cardinal principle in modern international law (commonly regarded as jus cogens rule). The interesting thing about this right is the fact that it is linked to many of the most important and fundamental principles of public international law and that it incarnates the concept of the right of peoples to determine their own destiny without outside interference or subjugation, presupposing all peoples are equal.[2]

First of all, the right to self-determination complements fundamental principles of public international law like State sovereignty, the equality of States and territorial integrity, including the prohibition of force and the principle of non-intervention.[3] With self-determination as a slogan minorities or indigenous groups raise claims of either secession from an already sovereign State entity or independence and freedom from foreign domination. This right does not only exist under public international law but also under international human rights law where it contains,

[1] Maya Abdullah, The Right to Self-Determination in International Law: Scrutinizing the Colonial Aspect of the Right to Self-determination (University of Gooterborg, 2006) 4 available at <https//gupea.ub.gu.se>bitstream>agu…pdf> accessed on 6 November, 2017

[2] Ibid

[3] Ibid

among other things, the equal rights of peoples within a State. Secondly, there is the aspect of economic and political self-determination which is closely related to the principles of non-intervention and noninterference aimed at guaranteeing territorial integrity. This aspect is often seen in the light of colonialism and its remnants today where the term neo-colonialism is often used. Thirdly, the right to self-determination is used as an argument in miscellaneous situations in international law such as questions relating to liberation movements, rebels, aid and assistance or intervention against these groups and movements.[4] As a matter of fact, there are many situations in the world where the right to self-determination is of great convenient importance.

An important characteristic of the right to self-determination is that it could be external or internal. In the colonial context, its external manifestation represents the aspiration to form an independent State vis-à-vis other States and the international community. The external aspect of self-determination requires action from and imposes obligations on States to support and facilitate a people's aspirations to reach independence.

Conversely, self-determination outside the context of decolonization has an internal nature that consists of a people's right to freely pursue their economic, social and cultural development, ideally through democratic governance.

Some authors like Ove Bring attach another element to the internal aspect of self determination, namely the right to freedom from outside interference and intervention in accordance with the principles of the UN and international law. Bring states that most often what is meant by internal self-determination is the element of non-interference, a negative obligation imposed on States (as opposed to the *positive* obligation imposed regarding external self-determination).[5] Others, whose focus is on democratic governance as a means of realizing peoples' right to self-determination and protecting human rights, attribute the principles of non-intervention and non-interference to the external aspect of the right.[6] What the exact content of the internal and external aspects of the right to self-determination is however of little importance since we, first of all, are not dealing with two different rights but with the same right,[7] and secondly there are no differences of opinion regarding the material content of these two aspects of the right.

[4] Ibid
[5] Bring, Ove, FN-stadgan och världspolitiken - om folkrättens roll i en (föränderlig värld, Stockholm, 2002) 202-203
[6] Ibid
[7] Raic David, Statehood and the Law of Self-Determination, (The Hague, 2002) 202

EVOLUTION OF THE RIGHT TO SELF-DETERMINATION

The notion and opinion that people have a right to decide their own fate in matters of politics, territory, livelihood, and thus have a right to self-determination has probably existed since the dawn of mankind, but as to the practicability of the ideal, it can be traced back to the French revolution and the awareness created by its emergence. It then continued to take shape on the international scene as the modern Nation States emerged as a result of a growing awareness of national identity in Europe during the nineteenth century, not only by virtue of the bourgeois nationalism but also by virtue of socialist forces, as in Russia in the beginning of the twentieth century.[8] While this was happening European colonial powers still had a firm grip of control over their respective colonial territories and During World War I manipulators found the term or the principle of self-determination useful for propaganda of the allied forces to gain advantage with the different minority groups, for instance within the Ottoman Empire.[9] The initial appearance of the principle of self-determination as it has come to be known today was materialized after the First World War.[10] It is possible to state that; self determination was "the touchstone for peacemakers at Versailles". The President of United States of America (hereinafter referred to as "US") Woodrow Wilson described the national self-determination as "an imperative principle of action".[11] The American president Woodrow Wilson was a strong advocator of the principle of self-determination and in 1918 he presented his famous Fourteen Points to the Congress. However, Wilson's attempt aiming to incorporate self-determination into the Covenant of the League of Nations in order to "universalize the principle applied in the postwar settlements" has failed[12], and therefore this principle could not obtain the status of legal principle at that era.[13] As a result, in Shaw's words; *in the ten years before the Second World War, there was relatively little practice regarding self- determination in international law*.[14] In spite of the vagueness of his views on self-determination and despite the fact that his text was

[8] Ibid (n 5)187-188
[9] Ibid
[10] Malcolm N. Shaw, International Law, (5 edn Cambridge University Press, 2003) 225
[11] Henry J. Steiner and Philip Alston, International Human Rights in Context (Oxford University Press, 2000) 1252-1253
[12] The proposal made by President Wilson was challenged by a 'powerful opposition, not least among some of Wilson's own advisors, and was defeated'
[13] Ibid (n 10) 225
[14] Ibid

criticized and didn't succeed at the time, self-determination as a principle began to gain momentum and importance as a principle, and later as a right, in international law.

At the end of World War I the League of Nations was created and with that the mandate system which was intended to eventually grant independence to the colonies of the defeated powers, Germany and Turkey.[15] History would later have it that the League of Nations collapsed, the United Nations was created instead after World War II and national liberation and independence claims and struggles would take place in all of the colonies, including those of the States who landed victory in the war. When the UN was formed in 1945 the right to self-determination was already an established term on the international scene and the fact that it was included in the UN Charter was therefore not surprising.[16] Nevertheless, according to some commentators the inclusion of the right to self-determination in the UN Charter was not an obvious move for the UN to make, since the issue of self-determination was still controversial at the early stages of development of the right. Some States were reluctant to its inclusion in the charter even though the Americans and the British had already proclaimed the right to self-determination in the Atlantic Charter.[17] Finally, primarily due to Soviet pressure, self-determination was included in the UN Charter.[18] This right would eventually develop into a more established and accepted right under international law and it would even come to include the notion of a human right with the adoption of the two International Covenants on human rights in 1966. One writer, Hurst Hannum, makes a distinction between the period prior to the adoption of these texts and the period after, where in his view, this right is seen more as a human right.[19]

The emergence of an actual right to self-determination took place in a colonial context.

Conversely, one could argue that the right to self-determination was used to justify decolonization. Thus, during the 60's and 70's it was at its strongest position as far as the right to liberation from colonial powers and issues of development go.[20] It was in the period after the First World War, with the League of Nations and President Wilson's visions that the rights of the

[15] Ibid (n 5) 187-189
[16] Ibid
[17] The Atlantic Charter, in which President Wilson and Prime Minister Churchill expressed the right to self-determination, was adopted in 1941. In 1942 the charter was made a part of the Declaration by United Nations and was signed be 26 allied nations, <http://www.un.org/av/photo/subjects/hrhis.htm> 6 November, 2017
[18] Ibid (n 7) 199-200
[19] McCorquodale Robert, Self-determination in international law, (Vermont Publishers, 2000) xiv
[20] Ibid (n 1) 10

colonial peoples really started to gain significance.[21] Later on and as the colonial peoples fought for their independence the right to self-determination became a self-evident right and the newly formed UN recognized and established this right in the Charter of the UN, first and foremost in its article 1(2). It has since been reaffirmed in numerous declarations and other texts by the UN.

THE RIGHT OF SELF DETERMINATION UNDER INTERNATIONAL LAW

In understanding the establishment and practice of the principle of self-determination under international law, it is important to outline that, there are basically two fundamental elements of the principle of self-determination operational in both postulation and practice under international law. These two elements are however mutually conflicting in themselves. The first imperative element is the one relating to sovereign equality, territorial integrity and non-intervention. This entails an obligation in international law to respect the sovereignty of an independent State by refraining from the use of force or from interfering with the internal affairs of that State in other ways. The second element regards the very essence and the raison d'être of the right to self-determination in the first place, namely the idea that peoples have a right to govern themselves, where a people is not self-governing. This is an intrinsic dilemma that causes much controversy among experts and States. For instance, it forces upon us the question of whether secession is possible, whether it is a right or whether, on the contrary, it is prohibited. For where only a portion of the population of an internationally recognized State has claims of self-determination it naturally collides with the claims of territorial integrity of the whole population and of that State. The point of this collision is the present fate of for example the proscribed Independent People of Biafra (IPOB) Group in Nigeria, The Kurdistans in the Iraqi State as well as Catalonian in the Republic of Spain, amongst a host of other examples across the globe. These groups all have one thing in common; they are a portion of the population of internationally recognized States and are seen lying claims to their rights as a group to self-determination. The reaction of the States involved in this examples are equally similar, i.e. those agitations, calls and plan for attaining self-determination are read as a violation of domestics laws of each of the States consisting in acts of illegal succession read as treason against the sovereign independence and territorial integrity of the States.

[21] Ibid

The reason the right to self-determination is so important in international law today can partly be attributed to the fact that this right is an extension or expression of some fundamental principles in international law, namely the principles of sovereign equality, territorial integrity and non-intervention (in all its forms whether it is the prohibition of the direct use of force or other forms of intervention). These principles are simply connected to one another and so the definition and application of one will be of importance to the definition and application of the others.[22] The subjects of international law are first and foremost States and modern international law is based on the principle of sovereign equality. This principle constitutes customary international law.[23] Furthermore, the right to self-determination is included in the UN Charter. This incorporation is, according to Ove Bring, not just a mere codification but also a sign of a development of a new principle in international law, namely the principle of *people's* equal rights and self-determination of *peoples* (as apposed to *States*), as it is expressed in article 1(2) and 55 of the charter. In the latter the principle of international economic and social cooperation is also expressed. This, according to Bring, must be understood as all peoples having an equal right to self-determination and, once self-determination is attained, an obligation is posed on other States not to intervene in the internal affairs of that State.[24] This is a common view and as one author commented on Articles 1 and 55: "in each the context was clearly the rights of the peoples of one State to be protected from interference by other States or governments. It is revisionism to ignore the coupling of 'self-determination' with 'equal rights'- and it was the equal rights of S*tates* that was being provided for, not of *individuals*".[25] The view that the right to self-determination only concerns States may have been what the drafters of the UN Charter had in mind and it may still be valid today but it is not the only aspect of self-determination, as many commentators view it. To begin with the Charter did not define important terms such as "people", most probably intentionally in order to keep the scope vague and open to many interpretations so as to please the many different wills of the Member States. Secondly, another valid interpretation of the term "equal rights", beside it being "equality of States", is the World War II perspective and the rejection of ideas of racial superiority and conquest. The latter is a broader definition and covers

[22] Ibid
[23] Ibid
[24] Ibid (n 5) 40-42
[25] R. Higgins, Postmodern Tribalism and the Right to Secession, Comments, in: Brölmann et al. (eds.), cited in Raic, Ibid (n 7) 201

the inherent equality of peoples.[26] It becomes even more worrisome when a distinction is made or brought between 'people' and 'minority'. This becomes a thing of concern because it is established under international law that the right to self-determination does not apply to minorities.[27] This gives rise to yet another definition problem. It is unclear where the line between people and minority should be drawn. Nonetheless, the right to self-determination is used to affirm minority rights, at least on a political level, and the claims of certain minorities' right to self-determination are often seen in the literature.

Territorial integrity and the principle of *uti possidetis*, which too are an expression of self-determination, must be seen in the light of decolonization.[28] As the colonies were given independence the so called "salt water theory" developed through the UN practice as a practical solution to problems that were anticipated when colonies, that in many cases were not ethnically homogenous, were to be given independence. The principle of *uti possidetis* means that the holder of the right to independence is territorially defined and includes all inhabitants of the whole colony which is separated from the governing metropolitan State by a barrier of salt water. This meant that the fragmentation of a colonial territory was not accepted.[29] Furthermore, in certain cases of non-classical colonization where the governing power was not an alien white European oppressor but instead ethnically or culturally close to the dominated people, the right to independence and self-determination did not exist in that particular context as far as international law was concerned. The principle of *uti possidetis* is thus applied at the moment of independence where it "freezes" the colonial borders. The principle of territorial integrity applies to an already sovereign State and in the case of the colonies, only *after* independence.[30] The Declaration on the Granting of Independence to Colonial Peoples, the General Assembly

[26] Ibid

[27] "The right to self-determination in the twenty-first century" by Hannum Hurst, Washington and Lee Law Review, vol. 55, no. 3, Summer 1998 at http://www.findarticles.com/p/articles/mi_qa3655/is_199807/ai_n8801110/pg_2 6 November, 2017

[28] Ibid (n 1) 13

[29] Exceptions were allowed however. The UN did not insist on territorial integrity in cases where the clear wish of the majority of all inhabitants showed otherwise, as in the case of the separation of the Ruanda- Urundi into the separate States of Rwanda and Burundi. Raic, Ibid (n 7) 209

[30] Ibid (n 7) 207-209

Resolution 1514[31], affirms the principle of territorial integrity and Resolution 1541[32] expresses the core meaning of the saltwater theory and the principle of *uti possidetis*.

Self-determination is obviously connected to one of the most fundamental norms in modern international law and the UN system, namely the prohibition of the use or the threat of force which is laid down in article 2(4) of the UN Charter and is considered a principle of customary international law. This principle has two definitions. The principle and the definition of the term force can be interpreted either restrictively or extensively. The former interpretation aims at limiting the scope of this prohibition giving States a large space to act and intervene in the affairs of other States without it being a breach of international law. This standpoint is usually taken by militarily powerful States. The latter deems illegal virtually all acts threatening the sovereignty of another State and this position is taken by most Member States.[33] Those who support this position emphasize the inalienability of territorial integrity and political independence of States.

The principle of non-intervention is yet another essential principle in customary international law that is closely linked to self-determination and it is founded upon the principles of sovereign equality and territorial integrity. This principle also encompasses political and economic intervention. In the Nicaragua Case the International Court of Justice stated that coercive methods used to affect the political, economic, social and cultural systems of a State constitute a breach of the customary principle of nonintervention[34]. One can also speak of the weaker form of intervention, namely interference, which covers a broad spectrum of acts that may or may not be prohibited in international law.

The principle of self-determination at a point of its evolution especially after it had been captured under the United Nations Charter, 1945, a link began to be between the right to self-determination and the right to development. Development here covering international economic and social collaboration and the right to exploit and explore one's natural resources. This aspect of self-determination and the discussions concerning the international economic market and its

[31] The Resolution 1514 states that: "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"

[32] In General Assembly Resolution 1541 (XV) on Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit Information Called for under Article 73 of the Charter (1960), a non-self-governing territory is defined as a "territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it"

[33] Ibid (n 5) 69-70

[34] Ibid (n 10) 797-798

rules and effects on the Third World can still be found in the frame of the UN. And even though the focus on these issues today, several decades after the decolonization process, is only to be found in the developing countries whereas in the West there is hardly any debate concerning the subject at the governmental level the growing interest in these issues and subsequently the existence of such a debate in Western media indicates its importance for people all over the world regardless of State practice or legal commentary.[35] In any case, the UN, have continued in this campaign issue since the majority of its member countries are developing countries.

This aspect of the right, the aspect concerning developmental issues, is also part of international human rights law. Self-determination in human rights law is seen as a collective right, a peoples' right. In spite of the visions the UN had for the international community, and although the right was mentioned in the UN Charter, it was never included in the Universal Declaration of Human Rights (UDHR) that was adopted in 1948. Instead, in 1966, the International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural Rights, the so called two International Covenants, were finally adopted after more than a decade and a half of the adoption of the Universal Declaration of Human Rights, during which period the struggle to create these two instruments was immense. Their ratification would take yet another decade. The Covenants share an identical first article that states peoples' right to self-determination, their right to the free disposal of their natural wealth and resources and the right to development.[36]

LEGAL TEXT AND DOCUMENTS ON SELF-DETERMINATION UNDER INTERNATIONAL LAW

The United Nations Charter, 1945

Under the United Nations Charter[37] self-determination is mentioned in Article 1(2) as well as Article 55. The Dumbarton Oaks proposals which originally constituted the basis of the UN Charter did not contain any article referring to self-determination. As Heather A. Wilson states; "it was not until the San Francisco consultations that the Soviet Union proposed an amendment

[35] Ibid (n 1) 15-16
[36] Ibid
[37] 1945

which included in the text of Article 1(2) and Article 55 the words 'based on respect for the principle of equal rights and self- determination of peoples.[38]

Article 1(2), which is a part of the Chapter I dealing with the principles and purposes of the UN, refers to the concept of self-determination while laying down one of the four purposes of the body. In addition, in the Article 55, the self-determination of peoples is cited as a principle on which 'peaceful and friendly relations among nations' are conceived to be based.[39]

Nevertheless, Shaw explains that, It is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding right, but the majority view is against this. Not every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations.[40] Furthermore, H. Wilson points to the fact that the UN Charter does not refer to a right of self- determination and that it does not clarify 'who the 'self' is that enjoys this principle which should be respected by nations'.[41]

To summarize, it is possible to state that, while the scope and definition of the right are unclear but its development into a rule of law in international public law almost indisputable. Its' one field of application that is free from doubts is that of foreign domination and other forms of alien governance and subjugation, which initially referred to colonialism, but has evolved beyond that to include current forms of alien governance[42]; the manner in which UN Charter conceives the right of self-determination is far from being directed to create a binding legal norm, but it rather constitutes the mere expression of a political principle.[43]

UN General Assembly (GA) Resolution 1514 (The Declaration on Granting Independence to Colonial Countries and Peoples)

The Declaration on the Granting of Independence to Colonial Countries and Peoples[44] adopted by the GA in 1960 by eighty-nine votes in favour, none against with nine abstentions,[45] stated

[38] Heather A. Wilson, International Law and the Use of Force by National Liberation Movements (Oxford University Press, 1988) 58-59

[39] Ibid

[40] Ibid (n 10) 226

[41] Ibid (n 38) 59

[42] Ibid (n 1) 18

[43] Burak Cop and Dogan Eymirlioglu, The Right to Self Determination in International Law Towards the 40th Anniversary of the Adoption of ICCPR and ICESCR 2005) *Perceptions*, 118 available at <sam.gov.tr>uploads>2012/02>burak…pdf> accessed 6 November, 2017

[44] United Nations General Assembly Resolution 1514 (XV)

[45] Abstaining states were Australia, Belgium, the Dominican Republic, France, Portugal, Spain, South Africa, the UK,

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'.[46] The linkage of self- determination (which was conceived until 1960 as a political principle having a weak legal context) to the political status of peoples can be viewed as an important step towards its inclusion to the International Covenant on Civil and Political Rights (ICCPR) afterwards. Similarly, the reference to the "economic, social and cultural development" of peoples can be interpreted as a sign of the inclusion of the right to self-determination to the Article 1 (common to ICCPR) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) six years later.[47]

In the same respect, Joshua Castellino notes that Resolution 1514 links self-determination to "better standards of life and larger freedom", and therefore this norm "was already accepted to a certain extent as being one that promoted better standards of life and freedom".[48] It is possible to argue that Castellino's point indirectly implies that Resolution 1514 developed the concept of self-determination by defining it with certain notions referring to human rights. Furthermore, Castellino points to the Resolution's perception of self-determination which considers this norm as a fundamental human right by stating that, one of the important results of the Declaration is that it included self-determination as a fundamental human right, bringing it within the scope of the Universal Declaration of Human Rights 1948.[49]

The two International Covenants

The International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") and the International Covenant of Economic, Social and Civil Rights (hereinafter referred to as "ICESCR") constitute perhaps the most crucial phase in the evolution of this right. The most important legal texts concerning human rights on the international level are the International Covenant on Political and Civil Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), although the West and the developing world each have a distinctly different opinion on which covenant is more important. Nevertheless, both of the two

---

and the US available at Wilson, Ibid (n 38) 68

[46] Ibid (n 10) 227

[47] Ibid (n 43)

[48] Joshua Castellino, International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity (Martinus Nijhoff Publishers, 2000) 22-23

[49] Ibid

covenants, adopted in 1966, are important from a legal point of view due to the high number of signatures and to the customary nature of some of their contents.[50] Self-determination is a key right in these instruments and in human rights law. What must be remembered here is the context in which these two covenants were adopted. In the year 1966, the voice of Third World countries was loud and the impact of the decolonization wave was probably at its peak.[51]

"In accordance with the wishes of the Assembly expressed in 1952", both the ICCPR and the ICESCR (adopted by the GA in 1966) included the right of self-determination in their Common Article 1.[52] This article stipulates in its first paragraph 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.[53]

According to H. Wilson, "widespread adoption of these Covenants would give the right to self-determination legal force established by treaty".[54] Indeed, the Covenants constituted at the year of their adoption the most important legal norm ever on the question of self-determination. Before the Covenants, only certain GA resolutions had material provisions regarding self-determination. Since the decisions of the GA are of recommendatory nature, and therefore deprived of any binding value; the inclusion of the right to self-determination to two multilateral covenants meant that from then of this right would enjoy a higher ranking in the hierarchy of legal norms.

In addition Castellino states that, in terms of the Covenants, "... the right of self-determination is not restricted to a political or civil right but propounded as the gateway to economic, social and cultural rights".[55] Another significant feature of the Covenants is that; "... [they] do not restrict the right of self- determination to colonized or oppressed peoples but include all peoples". However, the term all peoples used in the Covenants is still "open to interpretation" despite the fact that many decades passed after the adoption of the Covenants. State practice is not sufficient

[50] Ibid (n 1) 21-22
[51] Ibid
[52] Ibid (n 38) 75
[53] For examining the first paragraph, and also the two other paragraphs laying down the manner in which the right to self-determination will be materialized, see P.R. Ghandhi, Blackstone's International Human Rights Documents (Oxford University Press, 2004) 64
[54] Ibid (n 52)
[55] Ibid (n 48) 31

to indicate what forms a people, and according to Jennings[56]; "... this is one of the biggest controversies surrounding the principle of self-determination".[57]

Other characteristics of the Common Article 1 worthy of highlighting are that; this article envisages the free determination of "political status" and "economic, social and cultural development" of all peoples that should also be able to "freely dispose of their natural wealth...".[58]

According to H. Wilson, although the Covenants haven't got widespread ratification, they still prove that self-determination is a legal right besides being a political principle:

Widespread ratification of the Covenants has not occurred, although this is probably not because of Article 1. Without such ratification the Covenants remain a not insignificant piece of evidence suggesting that self-determination is considered to be a legal right as well as a political principle.[59] Furthermore, it is a fact that these Covenants obtained many more ratification since 1988, the year of the publication of Wilson's book which contains the argument quoted above.

This being said, there have also been some countries supporting a "restricted interpretation" of self- determination; such as India, which posed the following reservation to the Article 1 at the time of its ratification:

... India declares that the words "the right of self-determination" appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States...[60]

During the discussions in the committees dealing with the preparation process of Covenants, some delegates opposed to the inclusion of Article 1 by arguing that the UN Charter referred to the principle of self-determination, but not to a right. On the other hand, the advocates of the right of self-determination "insisted that this right was essential for the enjoyment of human rights and should... appear in the forefront of the Covenants".[61] Finally, the Covenants were adopted as they have the provision that proponents of the right of self-determination wanted to

[56] Jennings' opinions are cited in Castellino, Ibid
[57] Ibid (n 48) 32
[58] Ibid
[59] Ibid (n 38) 76
[60] Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accomodation of Conflicting Rights (University of Pennsylvania Press, 1996) 41-42
[61] William Twining, ed. Issues of Self-Determination (Aberdeen University Press, 1991) 85

be in the text. This was the major sign of development of the concept of self-determination which has evolved from a political principle to a legal norm associated with human rights.

The 1970 Declaration (The Friendly Relations Declaration)

The Resolution 2625 adopted in 1970 by the GA and bearing the name of "the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN" (henceforth called "1970 Declaration") "was meant to be a clarification of the purposes and principles of the United Nations".[62] This resolution, which stipulated that "by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine... their political status", also imposed to all states the obligation to respect the right of self-determination in accordance with the UN Charter. As Shaw states; the 1970 Declaration "can be regarded as constituting an authoritative interpretation of the seven Charter provisions it expounds".[63]

Due to the fact that the 1970 Declaration passed with no vote against, and therefore it was adopted with a wide consensus, it is argued that this Resolution "can be considered as encompassing norms of jus cogens". Although GA resolutions are ranked low in the hierarchy of sources of international law laid down by the Article 38 of the Statute of International Court of Justice (ICJ), in the event of the unanimous adoption of a resolution, it has been argued that it reflects international custom or state practice which enjoy higher ranking amongst the sources. In this respect, Castellino points out that "Brownlie himself, and others, notably Thornberry, argue that the entire 1970 Declaration can be said to contain norms of jus cogens since they were passed consensually by member states and are therefore evidence that custom exists in international practice to this effect".[64]

Despite the fact that this resolution "arguably looks at self-determination in a wider context than the domination of people by a 'white' power', another more contentious discussion was 'highlighted' as well: 'the debate between territorial integrity and self-determination'. One has to

[62] Ibid (n 48) 34
[63] Ibid (n 10) 228
[64] Ibid (n 48) 34-35

admit that the norm of territorial integrity once again prevailed to the gains of peoples due to the envisaged realization of self- determination.[65]

Other UN Resolutions

The right to self-determination and rules of international law related to it are addressed in countless Resolutions, both in those of the Security Council (SC) and those of the General Assembly (GA). The Friendly Relations Declaration and the Declaration on the Independence of Colonial Peoples might be two of the most important Resolutions and of a distinct legal nature, but these are not the only significant Resolutions adopted in the United Nations.[66] To begin with there are numerous Resolutions regarding specific situations and specific conflicts. There are also declarations concerning the right, or aspects of it, in general and which are not linked to a certain people or specific circumstances. In this context the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (GA Resolution 2131(XX), 1965) is of interest. It has been followed by many GA Resolutions that recalled and reaffirmed its importance. Other GA Resolutions, that do not necessarily have the same strong legal status as the Friendly Relations Declaration and Resolution 1514, or any legal status at all, include numerous Resolutions on non-interference in the internal affairs of States like the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affaires of States (Resolution 36/103, 1981). There are also countless Resolutions prohibiting unilateral economic measures as a means of political and economic coercion against developing countries.[67]

Another important General Assembly (GA) Resolution that is linked to self-determination and the issues mentioned above is the Declaration on the Right to Development, the GA Resolution 41/128 of December 1986. The importance of this declaration is most noteworthy in the area of human rights law and in the framework of the UN system. While this collective right that to a large extent belongs to the area of economic, social and cultural rights clearly has been and still is the subject of high importance on the UN agenda one cannot yet speak in terms of a legal right in international law.[68] The right to development is based on the idea of self-determination,

[65] Ibid (n 48) 39-40
[66] Ibid (n 1) 28
[67] Ibid
[68] Ibid (n 10) 224

including economic self-determination, and the free disposal of one's natural resources. Furthermore, it is connected to the United Nations Charter, especially art 55, to Friendly Relations Declaration and other texts and principles, containing the notion of international cooperation. These issues have been developed and are evoked, almost exclusively, by Third World advocates and countries.[69]

LEGAL STATUS OF THE RIGHT TO SELF-DETERMINATION

Until recently the majority of Western jurists did not recognize this right as having legal content due to its vague scope and the fact that it represents a "concept of policy and morality"[70] as Ian Brownlie puts it. But the developments in international law have led to a change and Western jurists do accept this right as a legal principle today. Brownlie, for instance, states that the generality of the right and its political nature do not deny it legal content.[71] The change of attitude towards the legal status of self-determination is in large due to the work of the UN that has resulted in the elaboration of the right and the affirmation of its legal status. The huge amount of documents dealing with the right testifies to its importance as a concept. Its legal status exists as customary international law, as treaty law or as a general principle of law, although some controversy surrounds the latter aspect.[72] The Colonial Declaration as well as the Friendly Relations Declaration constitute binding interpretations of the UN Charter due to their authoritativeness and their being evidence of opinio juris. The two International Covenants are not only binding treaties but also constitute authoritative interpretations of many provisions found in the Charter of the UN. Additionally and beside these instruments dealing with the right in general, there are other UN Resolutions treating specific situations relating to self-determination.[73]

Furthermore, the ICJ has affirmed in the East Timor Case that the right to self-determination has an "erga omnes character".[74] The Court went on stating that the right of peoples to self-determination is "one of the essential principles of contemporary international law".[75] Many

[69] Ibid (n 1) 29
[70] Ibid (n 10) 518
[71] Ibid
[72] Ibid (n 10) 178
[73] Ibid (n 10) 178-179
[74] East Timor (Portugal v. Australia), Judgment 30 June 1995 ICJ Reports 1995, 90
[75] Ibid (n 10) 180; Ibid (n 7) 218-219

authors will even go further to state that it constitutes a norm of jus cogens. The firm manner in which the numerous GA Resolutions are formulated, the State practice, where States have repeatedly expressed the obligation to respect the right, the rulings of the ICJ and the strong standpoint taken in the doctrine supporting the idea of jus cogens are all factors, according to Raic, supporting the notion that this right constitutes jus cogens. In addition to that, the International Law Commission takes the stand, in light of, inter alia, the East Timor Case, that the obligation to respect the right is jus cogens.[76]

In concluding this consideration, the legal status of the right to self-determination can be summarized as follows. Its mention in the United Nations Charter was of monumental importance. Although it was laid down as a vague principle, the fact that it was included in the charter made future developments, mainly by way of customary international law, possible.[77] The 1960 UN Declaration on Granting Independence to Colonial Countries and Peoples helped affirm the principle as a right and gave it its colonial shape, meaning it affirmed peoples' right to freedom from colonial rule. Six years later, the two International Covenants were adopted. These Covenants play a double role, that of treaty law and of yet another tool in the elaboration of customary international law, as they are used to interpret the UN Charter. Their identical first article means that the right to self-determination does not end with independence since the external aspect of the right is affirmed. For instance, the importance of respecting the political independence and territorial integrity of States and thus the prohibition of outside interference is stressed.[78] Subsequently, and with the adoption of the 1970 Friendly Relations Declaration the scope of the right was extended to other areas. Statements made and stands taken by States before, during and after this period in history together with State practice, rulings by international courts and more constituted usus and opinion juris that in conjunction are necessary in crystallizing customary international law.[79]

CONCLUSION

Thus, it has been established that the right to self-determination is a legal right under public international law and human rights law, although its exact scope is not clear and it is doubtful

[76] Ibid (n 7) 217-219
[77] Ibid (n 1) 31
[78] This fact is established through numerous case laws concluded at the International Court of Justice and other domestic superior courts
[79] Ibid (n 77)

that it ever will be given the political nature of the right. It has also been made clear that the one element that is more or less free from contentions is the right to self-determination in the colonial context, since the actual emergence of the right took place in the light of colonialism and the process of decolonization. It is also this aspect that has become the benchmark for ascertaining whether this right to self-determination is still relevant today or whether it belongs to the pages of history books.

whether this right, no matter how legalized can be enforced separately from political will and advantage, the right does not just belong to the books of the annals of history. It is a right readily placed fresh on the shelf of world politics, available to be tested at any given time.

Bibliography

Primary Sources

Cases

Conventions

Resolutions

Secondary Sources

Textbooks

Journals

Online Sources