



INTERNATIONAL LAW ON THE RIGHT OF SELF-DETERMINATION

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ABSTRACT

“Self-determination is an expression of the individual and collective right to democracy which is now recognized as a principle of legitimacy underlying modern international law.”

- **Dr. Alfred de Zayas**

The right of self-determination is a keystone in the United Nations human rights system and has been granted a privileged place in two major international treaties, namely the International Covenant on Civil and Political Rights (hereinafter, “ICCPR” or “the Covenant”) and the International Covenant on Economic, Social and Cultural Rights. Article 1 of both Covenants clearly establishes the right of all peoples to self-determination, including their right to freely determine their political status and freely pursue their economic, social and cultural development, and the corresponding obligation of States parties to respect and promote the realization of that right.

The paper deals with the right of self determination as an essential component of international law and how it has acquired the position of Jus Cogens during the years as agreed by most jurists and authors.

The I.C.C.P.R. gives all peoples the right to self-determination, to freely determine their political status and freely pursue their

economic, social and cultural development. I.C.C.P.R., obligates States to promote the realization of the right of self-determination, and respect it in conformity with the provisions of the Charter of the United Nations. The peoples’ right to self-determination is an inalienable right of erga omnes character.

The author had tried to lay down the essential conditions to exercise this right and whether there are any limitations to it or not?

Finally the author through various international instruments has tried to establish the importance of the right of self determination of the people in the world community and the relevant international safeguards in that regard.

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¹ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United



Article 1 Of ICCPR

1. All people 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.

2. All people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State 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

Though no clear definition of the concept of “self-determination” has been provided by the Human Rights Committee when interpreting article 1 of the ICCPR.² By contrast, the Committee Against Racial Discrimination has shed some light on this issue by identifying and defining two aspects of the right to self-determination:

Nations, UNGA Res. 2625 (XXV), U.N. Doc. A/8082 (1970) [hereinafter ‘F.R.D.’]

²Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993)

1. The internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.³ In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level,
2. The external aspect of self-determination implies that all people have the right to determine freely their political status and their place in the international community based upon the principle of equal rights

As to the subjects of the right of self-determination, no definition of “peoples” has been provided either by the Human Rights Committee, although there seems to be a wide international consensus that this right is not limited to colonial peoples, with clear examples of secessions having occurred in recent times as an exercise of peoples’ right to self determination.⁴

³John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006), Dugard and Raic, supra note 19, at 104.

⁴Tomushcat, supra note 23, at 38-42; CASSESE, supra note 19, at 118; F.L. Kirgis Jr., The Degrees of Self-Determination in the United Nations Era, 88 A.J.I.L. 304, 305-306 (1994); S.R. Chowdhary, The Status and Norms of Self-determination in Contemporary International Law, 24 ESSAYS ON INTERNATIONAL LAW AND RELATIONS IN HONOUR OF A.J.P. TOMMES 72, 80 (1977); SIMMA,; BUCHHEIT, at 220-3; Y. Dinstein, Collective Human Rights of Peoples and Minorities, 25 INT’L. COMP. L.Q. 102, 108 (1976); H. HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 471 (1990); R. McCorquodale, Self-determination: A Human Rights Approach, 43, INT’L. COMP. L.Q. 241 (1994); A. Cristescu, The Right to Self-Determination, Historical and Current Development



Implicitly acknowledging this fact, in its Concluding Observations on thereport of Azerbaijan, the Human Rights Committee called that, under article 1 of the Covenant, the principle of self-determination [applied] to all peoples and not merely to colonized peoples.⁵ According to CCPR General Comment No. 12, article 1 (3) imposes specific obligations on States parties to respect and to promote the realization of the right of self-determination, not only in relation to their own peoples but also vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising that right.⁶ This obligation would therefore extend to people outside the jurisdiction of the States parties.⁷

In *Gillotet al v France*⁸, in every self-determination process, limitations of the electorate were legitimized by the need to

on the basis of United Nations Instruments, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, 26, (1981); CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 119 (2006) [hereinafter 'CRAWFORD']

⁵ Concluding Observations of the Human Rights Committee on Azerbaijan, adopted on 3 August 1994. CCPR/C/79/Add.38; A/49/40, para. 4.

⁶ CCPR General Comment No. 12, op.cit., para. 6.

⁷ UNESCO, Final Report and Recommendations, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, 22 Feb, 1990, U.N. Doc. SHS89/CONF.602/7, 22 (1990), Katangese People's, supra note 53; *KevinMgwangaGunme v. Cameroon*, Comm. No. 266/2003, 2009 A.C.H.P.R., 26 Ann. Activity Rep. (2008-09) ¶ 170, (Mar. 27) [hereinafter 'KevinMgwanga']; *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, Comm. No. 279/03-296/05, 2009 A.C.H.P.R., 28 Ann. Activity Rep. (2009-10), ¶ 220 (May 27).

⁸ *Gillotet al. v France*, Communication No. 932/2000, Views adopted on 26 July 2002.

ensure a sufficient definition of identity. JudgeSchwebel stated in the Nicaragua case⁹ that it is lawful for a foreign State to give to a people struggling for self-determination moral, political and humanitarian assistance.

THE RIGHT TO SELF-DETERMINATION IS A PEREMPTORY NORM OF INTERNATIONAL LAW POSSESSING AN ERGA-OMNES CHARACTER.

The I.C.C.P.R.¹⁰ gives all people the right to self-determination, to freely determine their political status and freely pursue their economic, social and cultural development. I.C.C.P.R., obligates States to promote the realization of the right of self-determination, and respect it in conformity with the provisions of the Charter of the United Nations. The peoples' right to self-determination is an inalienable right of erga omnes character.¹¹

Erga omnes are obligations owed to the international community as a whole.¹² Thus, all

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 351 (June 27) (Separate Opinion of JudgeSchwebel) [hereinafter 'Nicaragua'].

¹⁰ International Covenant on Civil and Political Rights, entered into force on 16th December 1966, 1057 U.N.T.S 407, art. 1, ¶ 1

¹¹ *East Timor (Port. v. Aus.)*, 1995 I.C.J. 90, 102 (June 30) [hereinafter 'East Timor']; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, 171-2 (July 9) [hereinafter 'Legal Consequences']

¹² *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter 'Barcelona Traction']; BRIAN D LEPARD, *CUSTOMARY INTERNATIONAL LAW* 264 (2012).



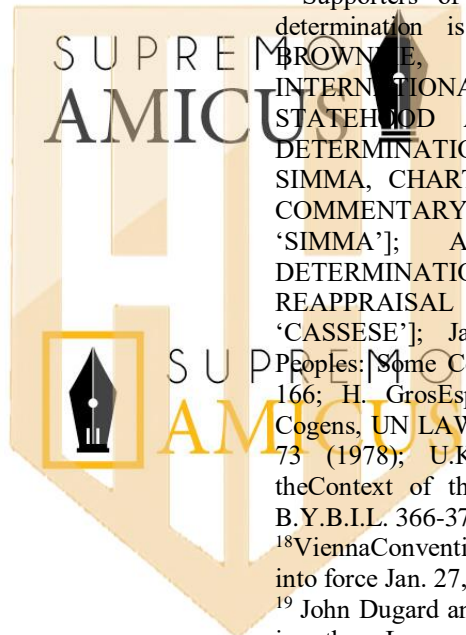
States have an obligation to promote the realisation of the right to self-determination. Because of its fundamental importance, Judge Ammoun¹³, emphasized that the right to self-determination is an inalienable right of ergaomnes character.¹⁴

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States have an obligation to promote the realisation of the right to self-determination. Because of its fundamental importance, Judge Ammoun¹⁶, emphasized that the right to self determination is based on the ‘norm

of juscogens’¹⁷, derogation from which is not permissible under any circumstance.¹⁸

Territorial integrity must be exercised in conformity with a State’s obligation under, inter alia, the law of self-determination, the law concerning human rights and humanitarian law.¹⁹ In case of breach of jus cogensrules or ergaomnes obligations, any constraints derived from the principle of national sovereignty can be brushed aside.²⁰ self determination is based on the ‘norm of juscogens’²¹, derogation from



¹⁷ Supporters of theview that the right of self-determination is part of jus cogensinclude: I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (1991); D. RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 218-219 (2002); BRUNNO SIMMA, CHARTER OF UNITED NATIONS, A COMMENTARY 316 (2012) [hereinafter ‘SIMMA’]; ANTONIO CASSESE, SELF DETERMINATION OF PEOPLE: A LEGAL REAPPRAISAL 133-136 (1995) [hereinafter ‘CASSESE’]; James Crawford, The Rights of Peoples: Some Conclusions, RIGHTS OF PEOPLE, 166; H. GrosEspiehl, Self-Determination and Jus Cogens, UN LAW/FUNDAMENTAL RIGHTS 167-73 (1978); U.K. and Argentina’sStatements in theContext of the Falklands/Malvinas Dispute 53 B.Y.B.I.L. 366-379 (1982).

¹⁸ViennaConvention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331, art. 5

¹⁹ John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006)

²⁰ Christian Tomuschat, Secession and Self-determination, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 40 (2006)

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¹³Barcelona Traction, supra note 17

¹⁴East Timor (Port. v. Aus.), 1995 I.C.J. 90, 102 (June 30) [hereinafter ‘East Timor’]; LegalConsequences of the Construction of a Wall in theOccupiedPalestinianTerritory, 2004 I.C.J. 136, 171-2 (July 9) [hereinafter ‘LegalConsequences’]

¹⁵ Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter ‘Barcelona Traction’]; BRIAN D LEPARD, CUSTOMARY INTERNATIONAL LAW 264 (2012).

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RIGHT TO SELF-DETERMINATION AS CUSTOMARY INTERNATIONAL LAW

The court whose function is to decide in accordance with the international law such disputes as are submitted to it, shall apply:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

- b) International customs, as evidence of general practice accepted as law;
 c) The general principles of law recognised by the civilized countries.
 d) Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²⁵

Article 38 refers to international custom as evidence of general practice accepted as law', and briefly²⁶ remarks that 'what is sought for is general recognition on among States of a certain practice as obligatory'. Although occasionally the terms are used

'SIMMA'; ANTONIO CASSESE, SELF DETERMINATION OF PEOPLE: A LEGAL REAPPRAISAL 133-136 (1995) [hereinafter 'CASSESE']; James Crawford, The Rights of Peoples: Some Conclusions, RIGHTS OF PEOPLE, 166; H. Gros Espiell, Self-Determination and Jus Cogens, UN LAW/FUNDAMENTAL RIGHTS 167-73 (1978); U.K. and Argentina's Statements in the Context of the Falklands/Malvinas Dispute 53 B.Y.B.I.L. 366-379 (1982).

²²Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331, art. 5

²³ John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006)

²⁴ Christian Tomuschat, Secession and Self-determination, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 40 (2006)

²⁵ Quebec, ;Katangese Peoples', ; Thomas D. Musgrave, Self Determination and National Minorities, in OXFORD MONOGRAPHS IN INTERNATIONAL LAW 76 (1997); A. BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW, 357-359 (2007); L. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF DETERMINATION, 92-97 (1978) [hereinafter 'BUCHHEIT']; Thomas M. Franck, Postmodern Tribalism and the Right to Secede, in PEOPLE AND MINORITIES 13-14 (1993).

²⁵ F.R.D., , ¶ 5(4); United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 15 Aug, 1997, UN doc. HRI/GEN/1/Rev.3, 13, ¶1-2 and 6 (1997).

²⁵ F.R.D., ¶ 5(4); K. Doehring, Self-Determination, in THE CHARTER OF THE UNITED NATIONS, A COMMENTARY 57 (2002); James Crawford, State Practice and International Law in Relation to Secession, 69 B.Y.B.I.L. 114 (1998); C. Tomuschat, Self- Determination in a Post-Colonial World, in MODERN LAW OF SELF DETERMINATION, 8-11 (1993)

²⁶ Law of Nations, 6th edn.(1963), 61, ICJ Reports(1951),191:'Customary international law is the generalization of the practice of states.'



interchangeably, 'custom' and 'usage' are terms of art and have different meanings.²⁷ A usage is a general practice which does not reflect a legal obligation, and examples are ceremonial salutes at sea and the practice of exempting diplomatic vehicles from parking prohibitions.²⁸

STATE PRACTICE AND JUDICIAL OPINIONS SUPPORT A RIGHT TO EXTERNAL SELF-DETERMINATION OF AN OPPRESSED PEOPLE.

State practice supports the right of a people, within a territory, not representing the population of the territory as a whole to secede.²⁹ The International Commission of Jurists, in its report on Bangladesh's secession, stated that "if one of the constituent peoples of a State is denied equal rights and is discriminated against, it is submitted that their full right of self determination will revive."³⁰ Bangladesh came into being when the Bengalis of Pakistan seceded from Pakistan; Israel

established itself as a State by secession from Palestine;³² Eritrea seceded from Ethiopia after a gruesome struggle.³³ The South Sudanese people seceded from Sudan in 2011.³⁴ The Albanian people of Kosovo seceded from Serbia in 2008;³⁵ and Abkhazian people and South Ossetian people seceded from Georgia in 2008.

As far as the other element of *opinio juris* is concerned is it well established *ius cogens* is established by the participation of the world community in the F.R.D.³⁶ The 1993 Vienna Declaration,³⁷ the Helsinki Final Act³⁸ which advance a right of external-self determination for a part of population of an independent State suffering human rights violations and systematic oppression at the hands of the parent State. The subjective belief of States in such a right is also showcased through the recognition of Bangladesh, Eritrea, Kosovo, and South

²⁷ Kosovo, Separate Opinion of Judge Youssaf, at 621, ¶ 9; at 523, ¶ 228., Quebec, *supra* note 29, ¶ 123-124, International Commission of Jurists, The Events in East Pakistan, 8 International Commission of Jurists Review 23, 70 (1972) [hereinafter 'The Events in East Pakistan']

²⁸ Parking Privileges for Diplomatic Case, ILR 70,396 (Fed. Admin. Ct., FRG)

²⁹ John Dugard and David Raic, Role of Recognition in the Law and Practice of Secession, in SECESSION: INTERNATIONAL LAW PERSPECTIVES, 103, 106 (2006)

³⁰ International Commission of Jurists, The Events in East Pakistan, 8 International Commission of Jurists Review 23, 70 (1972) [hereinafter 'The Events in East Pakistan']

³¹ CRAWFORD, 393 (Bangladesh proclaimed its independence on Mar. 26, 1971).

³² *Id.*, at 432 (State of Israel was unilaterally declared on 14 May 1948).

³³ UNSC Res. 828/1993, U.N. Doc. S/RES/828 (1993) (Eritrea became an independent state and was immediately admitted to the UN).

³⁴ Dugard and Raic, *Supra* 4 at 155 (South Sudan became an independent State on July 9, 2011).

³⁵ Dugard and Raic, *Supra* 4 at 159. (The democratically elected leaders of Kosovo unilaterally declared independence on Feb. 17, 2008).

³⁶ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), U.N. Doc. A/8082 (1970) [hereinafter 'F.R.D.']

³⁷ Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993)

³⁸ Organization for Security and Co-operation in Europe, Conference on Security and Cooperation in Europe: Final Act of Helsinki, Aug. 1, 1975, 14 I.L.M. 1292, art. 1(a)(VIII)



Sudan.³⁹ External right of self-determination is available to a minority as a last resort when the parent State lacks either the will enact and apply effective guarantees.⁴⁰ In the Quebec Case, the Court recognised -:

the right of a people to secede unilaterally when denied their right to internal self-determination stating that “where a definable group is denied meaningful access to pursue their political, economic, social and cultural development, the people in question are entitled to right to external self-determination because they have been denied the ability to exert internally their right to self-determination as a last resort.”⁴¹

The right of external self determination was also recognized in the Katangese Peoples’ Congress v. Zaire⁴² and Kevin Mgwanga Gunme v. Cameroon⁴³.

Conclusion

The recognized sources of international law establish that the right to self- determination of a people is normally fulfilled internally

through a people’s pursuit of its political, economic, social and cultural development within the framework of an existing State.

A right to external self-determination arises in exceptional cases, legitimising secession from an independent State. The flagrant discrimination of the internal self-determination gives right to the people of that particular country to exercise external self-determination which can be realised through the “establishment of a sovereign and independent State, or the free association or integration with an independent State.” Systematic oppression ranging from denial of participatory rights, to serious and systematic discrimination and other violations of human rights of the member of one part of the population of a State give rise to a legitimate secession legitimate.

³⁹ Bangladesh was admitted to the UN in 1974; Eritrea was admitted to the UN in 1993; South Sudan was admitted to the UN in 2011; Kosovo has been recognized by 100 states as of January, 2015

⁴⁰ The Aaland Islands Questions, Report Presented to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B.721/68/106; Quebec, supra note 54, ¶ 134.

⁴¹ Id.

⁴² Katangese Peoples’ Congress v. Zaire, Comm No. 75/92, 1995 A.C.H.P.R., (2000) A.H.R.L.R. 72 (8th Annual Activity Report)

⁴³ Kevin Mgwanga Gunme v. Cameroon, Comm. No. 266/2003, 2009 A.C.H.P.R., 26 Ann. Activity Rep. (2008-09) ¶ 170, (Mar. 27)