

Parting the long grass: Public International law and the right to self determination. By Tinashe Chinopfukutwa*

Introduction

The right to self-determination is perhaps one of the most fundamental group rights entrenched, espoused and conferred by various international legal instruments. However, it is also axiomatic that the right to self-determination has been used as a rickety chariot for the conveyance of fallacious and contesting ideologies. It is indeed arguable that the right to self-determination is one of the most over used and at times abused terms. The enormous political and emotional overtones have tended to cloak and cloud the precise nature, scope of operation as well as limits to the right to self-determination. To further exacerbate the uncertainty and malaise have been the contra distinct and varied perceptions regarding the existence of an external right to self-determination. The object of this writing will therefore be to explore the various legal instruments, judicial decisions and various state practices in an attempt to proffer an exposition of the meaning, nature of the right to self-determination as well as the limits thereto.

Historical Development of the right to self-determination

It is a sine quo non and indispensable condition of any discussion regarding the right to self-determination that the historical and chronological dimension of the concept have to be fully canvassed. Mesopotamia and the Early Greek States provide examples of the early manifestations of this right¹. The historical narrative provides further evidence of this concept especially in the 19th century after the Napoleonic epoch as peoples subjugated by states that are more powerful started asserting their right to self-determination with the subsequent consequent that nationalism emerged as a strong political tool and ideology in Europe.

The right to self-determination also features in President Woodrow Wilson 's fourteen points which were designedly made to provide a political compass determining the course the world was to take after the First World War. In 1941, the Allies of the Second World War signed the Atlantic Charter, which gave recognition to the right to self-determination of nations. In January 1942, twenty-six states signed the declaration by the United Nations, which gave recognition to

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¹ Unterberg BM , Self Determination ,Encyclopedia of American Foreign policy , 2002

the principle of self-determination. The consequent ratification of the same by states put the right to self-determination within the context and purview of International law and diplomacy.

It appears that the contemporary right to self-determination is a progeny of the process of decolonization. The right to self-determination became the major panacea and one of the pillars upon which the colonized and subjugated people founded their fight against colonial and alien domination.² Colonization by its very nature involved the oppression and subjugation of the colonized territories by the Western Imperial powers. It is therefore unsurprising that in the 1960s as the colonial empires were crumbling there was an associated growing tide calling for the exercise to self-determination. This close association between decolonization and self-determination has often misled other commenters into commenting that there cannot be talk of self-determination outside the decolonization context. As will be shown below in this writing, such a standpoint is not only untenable but also clearly unsupported by state practice. However, the International Court of Justice in its Namibian and Western Sahara³ advisory opinions confined the right to self-determination exclusively within the domain of the process of decolonization. Nevertheless, it is submitted that the period of decolonization resembles and embodies the highest watermark in the development and conceptualization of the right to self-determination.

The Legal Conceptualization of the right to self determination

Article 1 of the United Nations Charter provides for the right to self-determination. It states as follows *‘the purpose of the United Nations is.....to develop friendly relations between states based on the principle of equal rights and the self-determination of peoples , and to take other appropriate measures to strengthen universal peace.’*⁴ Article 1 of the International Covenant on Civil and Political Rights also confers the right to self-determination. In specific terms, it provides to the following effect, *‘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’*⁵.’ The International Covenant on Economic Social and Cultural Rights also provides for the right to self-determination.⁶

In light of the mass and impeccable weight and abundance of legal instruments recognizing and giving effect to the right to self-determination, the right to self-determination can thus be summarized as the right of peoples to freely chart their political, economic socio –cultural destiny. It also entails an option to become an independent state, to associate with an existing

² J .Duggard , International Law A South African Perspective ,4th edition , page 101

³ (1975) ICJ Reports 12 at 121-2

⁴ Article 1 (2) of the Charter of the United Nations

⁵ Article 1 (1) of the International Convention on Civil and Political Rights

⁶ International Covenant on Economic Social and Cultural Rights , 16 December 1966 , 993 U.N.T.S3 [I. C. E .S. R]

state, or to disintegrate from an existing state.⁷ The right to self-determination invariably is a dual faceted phenomenon, that is, it involves a right to internal self-determination as well as the right to external self-determination. The right to internal self-determination is defined by F Pratezanic as *‘the right of a people or nation to determine freely by themselves, without any outside pressure, their political and legal status as a separate entity; preferably in the form of an independent state, the form of their government of their choice and the form of their economic, social and cultural system.’*⁸

Rosalyn Higgins also summarizes the contents of the doctrine as the right of people to *“determine their political and economic and social destiny”*⁹ Equally Shaw defines the right as the right of peoples to determine their own political, economic and social destiny.¹⁰ All the above conceptualizations of the internal right to self-determination merely revolves around the principle that peoples have a right and are entitled to freely determine their political, social and economic institutions, elect and choose their representatives and also to participate in the governance affairs of their respective nation. It is therefore needless to point out that due to the very nature of the right to internal self-determination this facet of the right to self-determination rarely generates much controversy, complications and difficulties on the international plane unlike its cousin –the right to external determination which is to be discussed immediately below.

The right to external self-determination refers to a situation whereby people determine their international political status. John Duggard describes it as *“the right to secede and form their state.”*¹¹ The external right to self-determination entitles a people to make a determination as to whether they should enjoy complete political independence or merely self-independence or merger or any other form of association in one way or the other. The right to external self-determination even entitles peoples to make a determination as to remain under colonial rule or any other form of dependent political relationship. Indeed as can be discerned from the foregoing discussion closely linked with the right to external self-determination is the right to secession. Therein lays the problem. Given the controversy surrounding the external right to self-determination in general and the right to secede in particular, it is only proper that this be given and accorded separate analysis below.

⁷ Examples are : the people of Gibraltar who preferred their colonial status under British rule than having a separate existence as an independent state .Also The Falkland Islands preferred to remain a British colony than joining Argentina and Puerto Rico the latter both of which had elected to maintain a close association with the United States.

⁸ “The basic collective human right to self-determination of Peoples and Nations as a prerequisite for peace: Its practical application and philosophical background” in *Reveu De droit International* (1991) Vol 69 , 263

⁹ “Post Modern Tribalism and right of secession “ , in *Peoples and Minorities in International Law* (1993) , ed C Brolmann et al , Martinus Nijhoff publishers , 32

¹⁰ See Shaw L , *Title to Territory in Africa* (1986) , Clarendon Press , London , 93

¹¹ John Duggard , *International Law : A South African Perspective* , 4th edition , 102

Does the external right to self determination confer the right to secede ?

In order to fully resolve and answer this question one needs to appreciate the concept of territorial integrity of states as well as the principle of *Uti Possidetis*. The concept of territorial integrity dictates that the territory of an existing state is sacrosanct and thus as a consequent cannot be altered. Closely connected with this is the principle of *uti possidetis* which basically provides that colonial boundaries however arbitrarily drawn should be respected.

The Organization of African Unity endorsed the validity and even sanctified colonial boundaries when it passed the Cairo Resolution of 1964. In the resolution passed in Cairo on the 21st of July 1964 the heads of African States and Government affirmed that the African borders on the day of Independence constituted a tangible reality and therefore solemnly “*pledge themselves to respect the borders existing on attainment of national independence*”¹². It is therefore quite evident that the spirit behind the resolution was that the borders of African States were to become sacrosanct and inviolable from the date of the resolution. Consequently no African state was to lay claim on another fellow African state. The borders were frozen as they were. The reason for this standpoint is quite self-evident.

Invariably almost every African State had been an unwilling victim of the artificial borders drawn at the Berlin Conference. Therefore, to accept and permit that self-determination was applicable to various groups of people within a state was to invite and induce a state of collective insecurity, every member wanted to protect itself on its vulnerable soft under belly of artificially drawn colonial boundaries.¹³ It is therefore unsurprising that the International Court of Justice in the Western Sahara and Namibia opinion confined the right to self-determination to the process of decolonization.¹⁴

In light of the foregoing, this will beget the question as to whether there is no right to self-determination outside the context of colonization. Put more poignantly, is it only people of non-self-governing territories who are entitled to exercise the external right to self-determination or is it that people of independent states are entitled to the same as well? An immediate implication

¹² AGH/RES 16(1)

¹³ Jeffrey Herbst, “The Creation and Maintenance of Boundaries in Africa” 1989 Vol 43 ,4 Autumn p670

¹⁴ The view of the Court in the above cases is reflected in the separate opinion of Judge Dillard in the Western Sahara case wherein he stated that the right to self determination has emerged as a norm of International Law ...applicable to the decolonisation of those non self governing territories which are under the aegis of the United Nations , (1975) ,ICJ Reports 12 at 121 -2

flowing from the conclusion that there exists no right to external self-determination outside the context of decolonization would be that the right to would be nugatory and redundant since virtually no state is under colonial rule anymore. This has led one writer to wittingly remark

*“self-determination in the African context was not interpreted as a doctrine creating a populist entitlement to democracy, since decolonization was always followed in short by the single party state and authoritarian rule. It seemed that the new governments of the former colonies regarded self-determination as a unique event occurring only at the time of the colony’s independence. What has been called one man, one vote, one-time”*¹⁵

It is submitted that the notion that the right to self-determination cannot exist outside the context of decolonization is untenable, misleading and erroneous for the simple reason highlighted above that this would imply that the right has become redundant since no state is colonial domination in the contemporary era. It can therefore be forcefully but respectfully argued that the right to external self-determination does exist outside the colonial context. Closely related and a proximal cousin of the principle of *uti possidetis* is the principle of territorial integrity which guarantees validity and existence of contemporary borders. This principle was proclaimed by resolution 1514 (XV) and was invoked by the United Nations in 1960-1 to block the secession of the Katanga province from the newly independent Congo¹⁶. This principle was also utilized as one of the reasons for the non-recognition of the Bantustan States.¹⁷

In light of the foregoing discussion, the following deductions and observations can be made. Firstly that the right to self-determination does exist outside the context of decolonization. Secondly and more importantly, that there is an apparent conflict and tension between the right to external self-determination and the principle of territorial integrity no wonder why Duggard observes as thus “because internal self-determination does not conflict with¹⁸ territorial integrity it is the preferred specie of self-determination.” In cognisance of this apparent conflict between the principle of territorial integrity and the right to external self-determination. And also in full appreciation of the fact that on the international plane secession is a factual reality and thus consequently, the crucial issue that will need to be resolved are the circumstances and situations in which International law recognizes and regularizes the exercise of the right to external self-determination. This is going to be addressed below.

¹⁵ Thomas F, “Postmodern Tribalism and the right of Succession” in *Peoples and Minorities in International Law* 1993 ed C Brolmann et al, Martinus Nijhoff publishers, 10

¹⁶ See Security Council Resolution S/5002 of 24 November 1961

¹⁷ General Assembly Resolution 31/6A (1976)

¹⁸ J. Duggard, *International Law, A South African Perspective*, 4th Edition, page 102

Circumstances under which secession is permitted and recognized under International law.

From the onset it need be noted that secession does not pose difficult questions in situations where the parent state consents to the secession. For instance, in 2006 Montenegro seceded peacefully from the state of Serbia and Montenegro with the consent of Serbia. On the same trajectory and much more recently, in 2011 a referendum was held in South Sudan to ascertain whether the region should secede from Sudan. South Sudan voted overwhelmingly in favor of independence the central government of Sudan accepted the outcome of the referendum with the consequent that South Sudan became the world 's newest state and was admitted into the United Nations in July 2011.

Difficulties however emanate when the government of a state insist on the perpetuation of its territorial integrity and resists, often with bloody consequences, the secession of a region opposed to the central government of the state. It is such situations which epitomize and provide classic examples of the conflict between territorial integrity and the right to external self-determination. It is perhaps also ironical to note that these are situations in which the rules of international law seem least clear.

It is worthwhile to appreciate that in practice recognition plays a crucial role in ascertaining the legitimacy and indeed legality of any purported secession.¹⁹ It would follow that if there are a number of states recognize a seceding region this will tend to lend credence to the region 's claim for secession . How problems abound if one takes into account the fact that recognition remains the sole prerogative of states and that in exercising that prerogative they are often influenced by political rather than legal considerations. Resultantly, it is difficult to ascertain clear principles from recognition in this field.

However since separatist movements have always been in existence and will always be in existence several scholarly theories have been propounded and promulgated to define the exceptions which validate secession. The first theoretical cluster involves what are known as

¹⁹ See J Duggard and D Raic "the role of recognition in the law and practice of secession " in M Kohen (ed) *Secession : International Law Perspectives* (2006) 94 ; C Ryngaert and S Sobrie " Recognition of States " (2011) 24 *Leiden Journal of International Law* 467

Remedial Only theories while the second theoretical cluster involves what are known as Primary Rights Theories. In the context of the Remedial Only theories, the underlining thinking is that states are generally permitted to secede if and only if they have suffered injustices to which secession is the only appropriate remedy. Such injustices can include denial of the right to internal self-determination accompanied by human rights violations. This is aptly captured by learned J . Duggard when he points out that *“the cases where secession has been successful are characterized²⁰ by two phenomena.....the denial of the right to internal self-determination accompanied by violation of human rights and the exhaustion of attempts to secure internal self-determination”* The following legal principle it seems was apparent and induced the secession of Bangladesh whereby it took place after persistent political and economic oppression which resulted in a military crackdown and also in the case of Yugoslavia whereby breakdown of the Yugoslavia Federation was due to the persistent refusal of Serbia to cooperate in a constructive way to the changes in the Yugoslavia social political structure which had become apparent by the end of the cold war .

The second cluster of theories is known as the Primary Right Theories. These are in turn divided into Ascriptive theories and Associative theories. The former postulates that peoples are entitled to secede when they are bound with commonalities like ethnicity , culture or language that exist independently of any actual political association . The Associative theory on the other hand dictates’ that no common ascriptive characteristics are needed if a heterogeneous group of people voluntarily decide to form an association with another state and secede from their current state. Allen Buchanan captures this point well²¹ . Thus according to the associative theory no common ascriptive characteristics are needed for a heterogeneous group of people to secede when they have made such a decision on a voluntary basis, this is best exemplified by the associative pure plebiscite theory of the right to secede which states that people are entitled to secede if the option to secede is chosen by the majority in a plebiscite. This latter approach is inherent in the South Sudan case whereby the secession of the South Sudan region from Sudan was a consequent of a referendum held to decide whether the region should secede.

Conclusion

In light of the foregoing discussion, it can be conclusively deduced that the right to self-determination is indeed a legal right under International law. It can also be discerned that the right to self-determination, that is, the right to internal self-determination and the right to external self-determination. The former is the preferred specie of self-determination since it does not conflict with the principle of territorial integrity. Due to the principle of territorial integrity, it is highly apparent that the right to self-determination does not, as a general rule include the right to

²⁰ Ibid , page 104

²¹ Allen Buchanan ,Theories of Secession ,Philosophy and public affairs ,Vol 26 , (Winter 1997) ,34-35

secede. However as shown above there are some exceptions to this rule which can operate to legitimize secessions under international law.

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