Unknown Title

Introduction / Definition

Self-determination has two aspects, internal and external. Internal self-determination is the right of the people of a state to govern themselves without outside interference. External self-determination is the right of peoples to determine their own political status and to be free of alien domination, including formation of their own independent state. However, independence is not the only possible outcome of an exercise of self-determination. In international law, the right of self-determination that became recognized in the 1960s was interpreted as the right of all colonial territories to become independent or to adopt any other status they freely chose. Ethnic or other distinct groups within colonies did not have a right to separate themselves from the "people" of the territory as a whole. Today, the right of groups to govern themselves is increasingly intertwined with human rights norms, in particular the rights of minorities and indigenous peoples. While no right to secession has yet been recognized under international law, it is possible that such a right may be accepted in the future as an exceptional measure, if a distinct group of people is systematically denied the right to participate in the government of the state or if individuals within such a group suffer systematic and gross violations of human rights that make their participation in that state impossible.

Historical Evolution

Other entries in this Encyclopedia trace the political development of the concept of self-determination and related issues. This short essay is confined to a discussion of attempts to define this elusive phrase in legal terms, through international treaties and other texts. Those looking for "the" definition of self-determination will be disappointed, for many of the texts are deliberately ambiguous or even contradictory. Nonetheless, we must ultimately try to articulate the international norm of self-determination in terms that are sufficiently precise so that it continues to be relevant in the post-colonial era. One of the earliest proponents of a right to self-determination was U.S. President Woodrow Wilson. A month after his famous "Fourteen Points" speech to the U.S. Congress in January 1918 (in which the term "self-determination" does not appear), he proclaimed: "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril....[1] Despite Wilson's injunction, attempts to turn self-determination from a "mere phrase" into a binding norm did not occur for over 40 years, following the deaths of tens of millions in two major wars. While the Covenant of the League of Nations did indirectly address the principle of self-determination (without using the word) in the system of mandates that it established, identification of the mandates and implementation of the system was wholly dependent on politics, not law.[2] In most of the territorial adjustments that followed the end of World War I, winners and losers were determined by the political calculations and perceived needs of the Great Powers rather than on the basis of which groups had the strongest claims to self-determination. The scope of the principle of self-determination was analyzed by two groups of international experts appointed by the League of Nations to examine the case of the Åland Islands, a culturally and linguistically Swedish territory that wished to reunite with its cultural motherland, Sweden,

rather than remain part of the new Finnish state, which became independent of the Russian Empire in December 1917. The first body of experts was clear that self-determination had not obtained the status of international law. It observed that [a]lthough the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.[3] The second group of experts reached a similar conclusion as to the scope of self-determination, which it termed "a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion."[4] To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.[5] However, this commission did suggest that, at least under extreme oppression, a kind of self-determination by Åland citizens might be possible "as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[6] The "principle" of self-determination is mentioned only twice in the Charter of the United Nations, both times in the context of developing "friendly relations among nations" and in conjunction with the principle of "equal rights... of peoples."[7] The reference to "peoples" clearly encompasses groups beyond states and includes at least non-self-governing territories "whose peoples have not yet attained a full measure of self-government."[8] As decolonization progressed, however, the vague "principle" of self-determination found in the Charter soon evolved into a "right" to self-determination. This evolution culminated in the decade between 1960 and 1970, when the great majority of former colonies became independent. The first notable text, the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration on Colonial Independence"), was adopted by the UN General Assembly in 1960.[9] Premised, inter alia, on the need for stability, peace, and respect for human rights, the Declaration on Colonial Independence "[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and declares that "[a]ll 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." It further declares that "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence." Paragraph 6 of the declaration sets forth another fundamental principle, without which one almost never finds a UN reference to self-determination: "Any 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." The final paragraph reiterates "the sovereign rights of all peoples and their territorial integrity." While the thrust of the resolution may be clear -- all colonial territories have the right to independence -- a closer reading reveals a host of uncertainties. First, although the title of the resolution refers only to "colonial" countries and peoples, operative paragraph 2 refers expansively to the right of "[a]ll peoples" to self-determination. Operative paragraph 5 goes even farther, in its call for the transfer of all powers to trust and non-self-governing territories "or all other territories which have not yet attained independence." Are peoples to be equated with territories, as suggested by the final paragraph? Are there self-governing territories that are nonetheless entitled to independence? What is "alien" subjugation: subjugation by non-citizens? foreigners? a group ethnically distinct from the group being "subjugated"? Is subjugation permissible so long as it is not by aliens? The answers to some of these

questions might be sought in General Assembly resolution 1541, which was adopted the day after the Declaration on Colonial Independence.[10] Resolution 1541 sets forth a list of principles to guide states in determining whether they should transmit information under article 73e of the Charter on "non-self-governing" territories; in effect, it defines at least one of the categories of peoples entitled to self-determination. The resolution first notes that Chapter XI of the Charter is applicable "to territories which were then [in 1945] known as the colonial type" and that the obligation to report continues until "a territory and its peoples attain a full measure of self-government."[11] Principle IV states, “Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”, and Principle V mentions a number of other factors. There is no mention of the right of self-determination, nor is there any reference to the Declaration on Colonial Independence adopted only a day before. The remaining principles concern territories, not peoples, and the quotation immediately above clearly suggests that a single territory can be home to many peoples, implicitly rejecting any separate right to self-determination for peoples within existing colonial territories. Ethnic difference between a colony and its metropolitan state is relevant, however, as one of the factors to be weighed in determining whether that colony is non-self-governing.[12] Self-determination was addressed, if not necessarily clarified, ten years later in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ("Declaration on Friendly Relations").[13] This declaration is believed by many legal commentators to reflect customary international law, and it remains the most authoritative statement on the meaning of self-determination. The Declaration on Friendly Relations reiterates that "all peoples" have the right to self-determination and identifies two purposes which will achieved by its realization: 1) promoting friendly relations and co-operation among States and 2) bringing a speedy end to colonialism. No definition of peoples is offered, and neither of the purposes suggests that one of the goals of self-determination is to provide every ethnically distinct people with a state. The resolution reaffirms that self-determination may be achieved through independence, free association, or integration, as well as through "the emergence into any other political status freely determined by a people." The principle of territorial integrity or political unity would seem to be superior to that of self-determination, since "[n]othing in the foregoing paragraphs" shall be construed to authorize or encourage "any action" which would impair this principle. However, this restriction applies only to those states which conduct themselves "in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government *representing the whole people* belonging to the territory *without distinction* as to race, creed or colour." (emphasis added) The requirement of representativeness suggests internal democracy, but it cannot mean that the only government that can be deemed "representative" is one which specifically recognizes all of the various ethnic, religious, linguistic, and other communities within a state. A more persuasive interpretation, which would be consistent with the concerns of most UN member states when the declaration was adopted in 1970, is that a state will not be considered to be representative if it formally excludes a particular group from participation in the political process, based on that group's race, creed, or color; the paradigm at the time was apartheid in South Africa, which was a major international concern until the transition to majority rule in the mid-1990s. The mere fact that a democratic, non-discriminatory voting system results in the domination of political life by an ethnic majority in a particular state does not necessarily mean that the state is unrepresentative within the terms of the Declaration on Friendly Relations, although it may violate subsequent norms of minority rights that have been proclaimed, beginning in the 1990s.[14] For example, the Indo-Pakistan war which led to the independence of Bangladesh broke out only two months after the

adoption of the Declaration on Friendly Relations, but the vast majority of UN members did not consider that Pakistan's treatment of East Pakistan/Bangladesh fell within the proscriptions of the cited paragraph; thus, Bangladesh was deemed not to have a right to self-determination as it was defined in the Friendly Relations Declaration. In between its adoption of these two declarations, the General Assembly concluded its work on two major human rights conventions, the Covenant on Economic, Social, and Cultural Rights and the Covenant on Civil and Political Rights [CCPR]. Both entered into force in 1976 and now have more than 160 state parties. While most of the debates on the texts of the new covenants occurred in the UN Commission on Human Rights, the General Assembly itself directed[15] that an identical first article be included in each of the covenants:

Article 1 i) All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development. ii) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. iii) 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 Charter of the United Nations.

The relatively straightforward language of the first paragraph, in particular, is commonly cited as evidence of the universality of the right to self-determination, although its formulation does little to make the scope of the right more precise. Nevertheless, both the reference to "all" peoples and the fact that the article is found in human rights treaties intended to have universal applicability suggest a scope beyond that of decolonization. The Human Rights Committee, the body of experts created to oversee implementation of the CCPR, adopted a "General Comment" on article 1 in 1984, but the eight-paragraph document does little more than restate the text of the covenant.[16] The committee created to oversee the Convention on the Elimination of All Forms of Racial Discrimination adopted an equally short but somewhat more substantive General Comment in 1996.[17] The committee recalled that self-determination had both internal and external aspects but emphasized that none of its actions should be construed as being inconsistent with the principles of territorial integrity and national unity.[18] "In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State."[19] Neither committee attempted to define "peoples" or otherwise address the definitional difficulties inherent in the right of self-determination as it has been articulated by the United Nations. In 1975, the International Court of Justice was presented with a limited opportunity to address more fully the content of the right or principle of self-determination, in the context of competing claims to the colony of the Spanish Sahara. The Court was not called upon to determine the actual content of self-determination (which it refers to variously as a "principle" and a "right"), however, and it simply defined the principle as "the need to pay regard to the freely expressed will of peoples."[20] At the regional level, the Helsinki Final Act, adopted by the Conference on Security and Cooperation in Europe in 1975, was a significant political agreement on a broad range of issues of concern to the Soviet Union, eastern and western Europe, Canada, and the United States.[21] Among the "Principles Guiding Relations between Participating States" was respect for the "equal rights and self-determination of peoples." Principle VIII states: By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural

development.[22] The reference to "all" peoples "always" having the right to determine their internal and external political status goes beyond the more terse formulation found in the covenants on human rights, but an expansive interpretation of this formulation is difficult to square with the principles of the inviolability of frontiers (Principle III) and the territorial integrity of states (Principle IV), which are also proclaimed in the Helsinki Final Act. Given the reality of Soviet domination of Eastern Europe until the late 1980s, the 1975 Helsinki formulation is more properly seen as reaffirming the right of the people of a state to be free from external influence in choosing its own form of government. In any event, commitments by states in the CSCE process were clearly meant to be political only, and neither the 1975 Helsinki Final Act nor subsequent CSCE/OSCE documents are legally binding treaties. In Africa, where decolonization obviously was a paramount concern for decades, it is the principle of territorial integrity that has been supreme in practice. In 1964, at the second Assembly of Heads of State and Government, the Organization of African Unity (with the notable exception of Somalia, which had irredentist claims against Ethiopia and Tanzania) decided to accept the existing colonial frontiers as definitive.[23] The confusion between Africa's commitment to the self-determination of peoples and the territorial integrity of states was noted by the International Court of Justice in the Frontier Dispute (Burkina Faso/Mali) case, where it concluded: At first sight this principle of uti possidetis juris or the inviolability of colonial frontiers conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.[24] The African Charter on Human and People's Rights,[25] which was adopted in 1981, also contains an article that addresses self-determination, but it does little more than repeat earlier formulations, with all their ambiguities.

Article 20 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Again, given both the history and subsequent practice of African states in rejecting any right to secession from existing states, this article is best understood as reflecting the right of a state to be free from outside interference, rather than as an ethnically specific right for a group to choose its own political status. [1] 56 Congressional Record at 8671 (Feb. 11, 1918). [2] See generally Quincy Wright, Mandates under the League of Nations (Chicago: Univ. of Chicago Press, 1930); R.N. Chowdhuri, International Mandates and Trusteeship Systems: A Comparative Study (The Hague: Martinus Nijhoff, 1955). [3] Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, League of Nations Off. J., Spec. Supp. No. 3 (Oct. 1920) at 5. [4] The Aaland Islands Question, Report presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7.21/68/106 (1921) at 27. [5] Id. at 28. [6] Id. [7] United Nations Charter, arts. 1(2), 55. Curiously, however, the French text of the

Charter does refer to respect for the "right" of self-determination, the "principe de l'égalité de droits des peuples et leur droit à disposer d'eux-mêmes" (literally, the "principle of equality of the rights of peoples and their right to dispose of themselves"). [8] UN Charter, art. 73. [9] UN G.A. Res. 1514 (14 Dec. 1960). [10] UN G.A. Res. 1541 (XV) (20 Dec. 1960). [11] Id., Principles I and II. [12] Id., Principle IV. [13] UN G.A. Res. 2625, Annex (24 Oct. 1970). [14] See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, adopted 29 June 1990, reprinted in 29 Intl. Legal Mat. 1305 (1990), paras. 35-39; Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, UN G.A. Res. 47/135 (1992); European Charter for Regional or Minority Languages, signed 5 Nov. 1992, entered into force 1 Mar. 1998, Europ. T.S. No. 148; Framework Convention for the Protection of National Minorities, signed 1 Feb. 1995, entered into force 1 Feb. 1998, Europ. Europ. T.S. No. 157. [15] UN G.A. Res. 545 (VI) (5 Feb. 1952). [16] Human Rights Committee, General Comment No. 12: The right to self?determination of peoples (Art. 1), adopted 13 March 1984, UN Doc. A/39/40, Annex VI (1984). [17] Convention on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 21: Right to self?determination, adopted 23 August 1996, UN Doc. A/51/18 (1996). [18] Id., para. 6. [19] Id. [20] Id., para. 59. [21] See Final Act of the Conference on Security and Cooperation in Europe, adopted 1 Aug. 1975, reprinted in 14 Int'l Legal Materials 1292 (1975). [22] This language was repeated in Principle 4 of the Concluding Document of the 1989 Vienna Follow-Up Meeting, reprinted in 28 Int'l Legal Materials 527 (1989). [23] O.A.U. Assembly of Heads of State and Government, AGH/Res. 16(1) (1964). [24] Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986, p. 554, at 567. [25] African Charter on Human and People's Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

Theoretical Implications

United Nations and state practice up to the 1990s provides evidence that the international community thus far has recognized only a very limited right to self-determination which includes 1) freedom from a former colonial power, and, once independence has been achieved, 2) freedom of the whole state's population from foreign intervention or undue influence. Although the latter proposition is sometimes phrased as freedom from colonial, alien, or foreign domination, in practice it has been invoked successfully only in cases of actual invasion by foreign military forces. Whether in the context of decolonization (e.g., Katanga, Biafra) or subsequent to independence, there is no legal support for the proposition that the right to self-determination encompasses a right of a region of a state to secede from that state. This conclusion was affirmed by the 1996 General Comment by the Committee on the Elimination of All Forms of Racial Discrimination[1] and was reiterated in 1998, when the Supreme Court of Canada (in the context of an erudite advisory opinion regarding the possible existence of a right of Quebec to secede unilaterally from Canada) stated:

The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law....

The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states....

.... [T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign

military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.[2]

The mention by the court of the possibility of secession "where a definable group is denied meaningful access to government" remains untested. None of the post-Cold-War divisions of the Soviet Union, the Socialist Federal Republic of Yugoslavia, and Czechoslovakia were deemed by the international community to involve secession. The divisions of Czechoslovakia and the Soviet Union were by agreement, and the Yugoslav federation was said to have dissolved, with new states emerging from that dissolution. The primary challenge to defining self-determination as excluding secession is perhaps the situation of Kosovo, which was governed by a UN-authorized force since the end of the NATO bombing campaign in 1999 until Kosovo's unilateral declaration of independence in February 2008. Kosovo's independence had been recognized by almost 100 states as of mid-2010, but not by Serbia, which adopted a constitutional amendment in 2006 reasserting the fact that Kosovo remained an integral part of Serbia. In part based on the level of human rights violations that occurred in Kosovo between 1989 and 1999 and during the NATO campaign, most Western observers are sympathetic to Kosovo's claimed independence; for example, 22 EU member states, the United States, Australia, and Canada are among the countries that have recognized the new state. However, none has specifically linked Kosovo's secession to the level of human rights violations, and the declaration of independence itself observes that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation." In October 2008, the General Assembly adopted a resolution submitted by Serbia that requested an Advisory Opinion from the International Court of Justice on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government in Kosovo in accordance with international law?" In its 2010 Opinion, the Court specifically notes the 'radically different views' expressed to it on the question of whether either a contemporary form of 'self-determination' or a right of 'remedial secession' exists that might grant part of an existing state a right to separate from that state.[3] However, the Court concludes simply that 'it is not necessary to resolve these questions in the present case . . . [which] is beyond the scope of the question posed by the General Assembly',[4] thus offering no guidance as to how the substantive right to self-determination should be understood. The other major contemporary debate is whether self-determination should be interpreted as incorporating a right to democratic governance and/or certain rights of self-governance by minorities and indigenous peoples, short of a right to independence. This position has been strengthened by inclusion of a right of effective political participation in a number of documents dealing with these two groups,[5] and there is no logical reason why similar considerations should not apply to geographic regions as well as to ethnically distinct groups. As yet, however, neither the principle nor its application has been widely accepted in practice, although there are indications that a number of governments and/or international human rights bodies in Latin America and Africa are sympathetic to the claims of indigenous peoples for self-government and control over their traditional territories. Self-determination remains a rhetorical tool utilized by groups within states seeking independence, autonomy, or simply a greater degree of control over issues that directly affect them. Many of these groups share ethnic, linguistic, or other characteristics, but the international law of self-determination -- as opposed to a few non-binding declarations and recommendations -- has never accorded to such groups any special right of self-governance. Given the widely divergent situations within states, it is unlikely that self-determination will

acquire a sufficiently determinate definition to enable it to be used as a legal tool for adjudicating disputes, even if it continues to be interpreted as excluding unilateral secession. However, the political appeal of the term is unlikely to fade, and it is possible that its use will lead to an expansive interpretation of human rights norms concerning identity and effective participation and thus offer new opportunities for accommodating conflicting principles of diversity and unity. [1] See note 17 [2] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at 66, 71, 67 [3] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence* in *Respect of Kosovo* (Advisory Opinion), 22 July 2010, para. 82. [4] Id., para. 82. [5] See the UN Declaration on Minorities, note 14; European Framework Convention, note 14. The UN Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly in 2007 in resolution 61/295, does state explicitly that "[i]ndigenous peoples have the right to self-determination." (Article 3) However, concern over this language delayed adoption of the declaration for nearly a year after it had been adopted by the Human Rights Council in 2006. The compromise was to retain the original language but to add a new paragraph as Article 46, in which the oft-repeated phrase regarding territorial integrity is repeated: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.” A preambular paragraph also was added, recognizing that “the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.” Article 4 of the declaration does provide that indigenous peoples, “in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”