SELF DETERMINATION IN INTERNATIONAL LAW

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The concept of self determination is amongst the most pertinent aspect of international law. It has been debated whether it is a justification to interventions and if so, of what nature. As article 1(2) of the United Nations charter states, one of the purposes of the United Nations is "***To develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace***" .The thought provoking part about this concept is that it acts like a double edged sword. Not only has it been used as a justification for intervention, but also as an entity that helps to safeguard state sovereignty. Self determination in practice is now not only a part of codifies law but also customary international law.

The first part of this article deals with the history of self determination, followed by legal texts and forms of self determination and finally the conclusion.

1. HISTORY

The view that people have a right to decide their own matters and thus have a right to self determination has probably existed since the dawn of mankind, but formally it can be traced back to the French revolution. 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.

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. Wilson used the term self determination. In spite of the vagueness of his views on self determination and despite the fact that his text was criticized, self determination started to gain in importance as a principle, and later as a right, in international law.

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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[3]. 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[4]. 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[5]. Finally, primarily due to Soviet pressure, self determination was included in the UN Charter[6].

Lenin and other Soviet leaders of the time took a quite broad view of the right to self determination. Apart from being applicable in the allocation of territory after international military conflicts, Lenin saw self determination as the guiding principle to the eventual abolishment of colonialism, and considered it evocable by national and ethnic minorities in freely determining their destinies. The communist view was thus that national minorities had the right either to autonomy while remaining part of a sovereign State or to outright secede and establish independence[7].However, Contrary to Lenin; Wilson never claimed that the principle of self determination implied a right of national or ethnic minorities to secede from their sovereign States. His definition of self determination was inspired by liberal ideals and included a right of the people to choose its own form of government. To Wilson, self determination was the force that was to guide the restructuring of Central Europe after the First World War[8].

2. LEGAL TEXTS

2.1 The UN charter

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[10]. 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[11]".

It can be deduced from the debate preceding the adopting of Article 1(2), that the right of self determination according to the Charter did not entail a right to secession, nor a right to political independence for colonial peoples, nor a general right to representative government, nor a right for two nations belonging to different sovereigns to merge into a new State[12].In other words, in the early days of the UN, the right to self determination was quite limited and seemed to imply simply the right of peoples to self-government.

To summarize, it is possible to state that 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.

2.2 The right to self determination in the ICCPR and ICESR

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[13].

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[14].

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 on 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[15]".

However, state practice is not sufficient to indicate what forms a people, and according to Jennings[16]; "... this is one of the biggest controversies surrounding the principle of self determination[17]". 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...[18]"

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[19]".Finally, the Covenants were adopted as they have the provision that proponents of the right of self determination wanted to 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.

2.3 The 1970 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 Cooperation among States in Accordance with the Charter of the UN" was meant to be a clarification of the purposes and principles of the United Nations[20].

Ove Bring states that in order for a GA Resolution to constitute customary international law two criteria must be fulfilled: firstly the Resolution must be adopted by consensus or "without a vote" and secondly the text must clearly affirm legal principles of a general scope and applicability[21]. With the adoption of this declaration the legal principles set forth in the Charter of the UN were, to an extent, elaborated either affirming or interpreting and clarifying them in a legally authoritative manner.

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. 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.

2.4 Other resolutions

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. Other GA Resolutions, that do not necessarily have the same strong legal status as the Friendly Relations Declaration or any legal status at all, include numerous resolutions on noninterference in the internal affairs of States like the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Resolution 36/103, 1981).

3. FORMS OF SELF DETERMINATION

An important characteristic of the right to self determination in the colonial context is its external manifestation, meaning 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.

3.1 Internal self determination

Correspondingly, self determination is an exercise in freedom, but that exercise must take into account the freedom of others.

As a starting point it is useful to consider existing international instruments. James Crawford explains that Article 25 of the International Covenant on Civil and Political Rights—which provides that citizens have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives—"suggests that self determination is a continuing matter, not a once-for-all constitution of the state[22]." Moreover: Article 1 of the Universal Declaration can be read as affirming the self-direction of each society by its people, and thus as affirming the principle of democracy at the collective level. This is certainly the view taken by the United Nations Human Rights Committee. The Committee identifies as the beneficiaries of self determination the people of existing states. It equates their right of self determination with the existence within the state of a continuing system of democratic government based on public participation[23].

The question, therefore, is what it means to have "a continuing system of democratic government based on public participation." Thomas Franck suggests that the right to self determination "now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state[24]." In this respect, much of his discussion on the emerging right to democratic governance focuses on electoral rights and election monitoring[25]. But this seems to be a rather narrow view of self determination and democracy, and does not appear to provide a rich conception of self determination beyond the suggestion that they may be achieved through majoritarian electoral "democracy" writ large. What is needed instead is a more textured view of self determination that accounts for societal institutions that may foster and maximize self determination within a democratic society at both the individual and group levels.

3.2 External self determination

Traditionally, the external right to self determination at international law has been equated with a right to unilateral secession under certain narrowly defined circumstances. In particular, self

determination has been limited at international law to apply only to groups that constitute "peoples" and whose territorial claims fit a particular colonial mold[26]. Though the legal right to self determination has remained underdeveloped at international law, there has been extensive debate on the scope of the right in the context of liberal democratic theory. The sometimes explicit hope underlying such endeavors is that a clear and comprehensive theory of self determination and secession may one day translate into more principled legal rules governing unilateral secession on the international plane[27].One argument is that: Individuals are morally justified in defending themselves against violations of their most basic human rights. When the only alternative to continuing to suffer these injustices is secession, the right of the victims to defend themselves voids the state's claim to the territory and this makes it morally permissible for them to join together to secede[28].

One must also take into account that a right to secession should at some stage trump existing state boundaries. As Buchanan proposes: International law should unambiguously hold that (i) when certain conditions for a unilateral right to secede are satisfied and a group exercises the right, all states are legally obligated to recognize the new entity as a legitimate state and (ii) all states are legally obligated not to recognize secessionist entities (in cases of unilateral secession) as legitimate states unless these conditions are satisfied. States are quite naturally averse to both of these propositions, as they would eliminate an area of vast diplomatic discretion. International law—made by states with an understandable if not always morally justifiable interest in protecting their territorial integrity— has proven resistant, in accordance with the territorial principle, to the acceptance of a unilateral secession right, regardless of how narrowly it is framed[29].

Aris Gounaris has suggested that any new interpretation of the right to self determination should be based on the presupposition that "it is unlikely that international law will ever permit an automatic right of unilateral secession[30]."

4. CONCLUSION

Self determination has been an integral part of forming custom in international law. The debate that self determination is not just a principle but a right is one with facts backing both sides.

The purpose of this article is not to prefer either option but to facilitate the facts of both.

Self determination has a broad scope and has arguably been treated as a fundamental right not only of an internal but also an external nature.

State practice of the concept itself and the fact that it matches the opinio juris criteria; it can be considered as a part of not only hard law but also customary international law.

Self determination has been used as an argument in many conflicts of an international nature such as that of Kosovo and Afghanistan. This leads to the fact that it is further a mechanism of conflict prevention.

At the end, we should consider just the simple idea that whether self determination as a concept has the validity to be used as a mechanism to trump the right of nations to govern themselves without interference of an international nature in accordance with the provisions of the UN charter that national law is above international law.