

PEOPLE'S ACADEMY OF INTERNATIONAL LAW

“INTERNATIONAL LAW PROTECTS STRUGGLES FOR LIBERATION AND EMANCIPATION”

The Right of Peoples to Self-Determination

Emeritus professor Bill Bowring, Birkbeck College, University of London; Barrister; International Secretary Haldane Society of Socialist Lawyers; Founder and Honorary President, European Lawyers for Democracy and Human Rights (ELDH); Founder and Executive Committee member, Bar Human Rights Committee of England and Wales; Trustee, Lawyers for Palestinian Human Rights

At this moment, peoples all over the world are fighting for their right to self-determination. The Palestinian and Kurdish peoples are still locked in mortal combat with their oppressors. Very close to my own home, the Irish people look forward to exercising the right to self-determination through unification, wrung from the British oppressors in the Good Friday Agreement of 1998.

Birth of the concept – as a political demand

1860s

Karl Marx (1818 – 1883)

In a letter of 20 November 1865, Marx referred to ‘[t]he need to eliminate Muscovite influence in Europe by applying the right of self-determination of nations, and the re-establishment of Poland upon a democratic and social basis’.

On 22 February 1866, the Belgian newspaper L'Echo de Verviers published a letter Marx had helped to write, containing the following language: ‘The Central Council ... has founded three newspapers ... one in Britain, The Workman’s Advocate, the only English newspaper which, proceeding from the right of the peoples to self-determination, recognises that the Irish have the right to throw off the English yoke.’

In a speech on Poland delivered on 22 January 1863, Marx once again referred to self-determination in strong terms:

What are the reasons for this special interest of the Working Men’s Party in the fate of Poland? First of all, of course, sympathy for a subjugated people which, by continuous heroic struggle against its oppressors, has proven its historic right to national independence and self-determination. It is by no means a contradiction that the international Working Men’s Party should strive for the restoration of the Polish nation.

1914

Vladimir Lenin – The Right of Nations to Self-Determination

“Therefore, the tendency of every national movement is towards the formation of *national states*, under which these requirements of modern capitalism are best satisfied. The most profound economic factors drive towards this goal, and, therefore, for the whole of Western Europe, nay, for the entire civilised world, the national state is *typical* and normal for the capitalist period. Consequently, if we want to grasp the meaning of self-determination of nations, not by juggling with legal definitions, or “inventing” abstract definitions, but by examining the historico-economic conditions of the national movements, we must inevitably reach the conclusion that the self-determination of nations means the political separation of these nations from alien national bodies, and the formation of an independent national state.”

1917

Vladimir Lenin - Decree of Peace – following the Bolshevik Revolution

"If any nation whatsoever is retained within the boundaries of a given state by coercion, and despite its expressed desire it is not granted the right by a free vote ... with the complete withdrawal of the forces of the annexing or generally more powerful nation, to decide without the slightest coercion the question of the form of state existence of this nation, then it is an annexation..."

Woodrow Wilson - Fourteen Points -

"... peoples and provinces must not be bartered about from sovereignty to sovereignty as if they were chattels or pawns in a game" ... territorial questions must be decided "in the interest of the population concerned".

But for Wilson this only applied in Central Europe, and absolutely not to the colonial empires, including that of the USA.

UN Charter

The USSR and its allies wanted the Charter to contain a full legal "right of peoples to self-determination", but this was successfully opposed by the colonial powers – USA, UK, France, Spain, Portugal

Article 1(2) -

"develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"

Article 55 -

... with a view to "... the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

Self-determination as a *right*

1960

This UN General Assembly Resolution, one of the most important in international law, came at the peak of the anti-colonial struggles – see Gillo Pontecorvo's classic film "The Battle of Algiers" (1965) – look at the voting, below

1960 - UNGA Resolution 1514(XV) - the *Declaration on the Granting of Independence to Colonial Countries and Peoples*

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.
2. 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.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. 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.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Adopted by 89 votes to 0, with 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, UK, US)

See also Resolution 1541(XV), which sets out the options for a people exercising the right
Mainly a territorial concept of "peoples" - exceptions

- 1) reunification of a pre-colonial entity - Morocco (French, Spanish and Tangier)
- 2) opposition of inhabitants to maintaining colonial entity (India, Palestine, Ruanda-Urundi, British Cameroons)
- 3) voluntary union of two separate colonies (British Togoland and Ghana, French Sudan with Senegal to form Mali - Senegal later seceded)

The right did not become a *legal* right until 1976 when the two International Covenants on human rights came into force. The Covenants were opened for signature on 16 December 1966.

International Covenant on Civil and Political Rights (ICCPR) - now 173 states parties (the USA ratified in 1992, with many reservations), four states have signed but not ratified

International Covenant on Economic, Social and Cultural Rights (ICESCR) - now 173 states parties (the USA has not yet ratified)

The UN comprises 193 states

Common Article 1 – both the Covenants, in identical terms

1. 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.
2. 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 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 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.

Note that this right is not confined to colonial peoples - but many States insisted that there is no right to secede

See the UN Human Rights Committee's *General Comment 12* of 1984:

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

1970

UNGA Resolution 2625(XXV) - the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*

This Resolution was adopted without dissent on the 25th anniversary of the UN Charter – it recognises the rights of “all peoples” to SD; **but** - Paragraph 7 - affirms territorial integrity of

“... States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour..”

The International Court of Justice

The Court has decided a number of key cases on self-determination

Namibia Advisory Opinion (1971)

“...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter, made the principle of self-determination applicable to all of them”

Western Sahara Advisory Opinion (1975)

“... the principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end”. Judge Hardy Dillard - “It is for the people to determine the destiny of the territory, and not the territory the destiny of the people.”

The principle of *uti possidetis juris* – means that existing boundaries should not be disturbed – it was developed during the Latin American wars of independence against Spain and Portugal

1964 OAU Cairo Resolution - status quo to be preserved on African boundaries

Burkina Faso v Mali (1986) -

“while at first sight there is a conflict between s-d and *uti possidetis*, the latter does not detract from the former. Judge Abi-Saab - without the stability of frontiers, s-d is but a mirage.”

Guinea-Bissau v Senegal (1990)

East Timor Case (Portugal v Australia) (1995)

“Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* (binding on all states) character, is irreproachable.” Also - “For the two parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.”

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), Para 88

The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

Para 155

The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*... The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

Legal consequences of the separation of the Chagos Archipelago from Mauritius by the United Kingdom in 1965 (2019)

The ICJ re-stated that 'since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right'. The ICJ held that the United Kingdom violated this right when it separated the Chagos Islands from Mauritius prior to the latter's independence in March 1968.

State of the art

1991: Aftermath of the break-up of former Yugoslavia, led by Slovenia in June 1991

On the 27 August 1991, the European Community and its Member States, at the same time as convening a peace conference on Yugoslavia, created an Arbitration Committee. The Committee was chaired by Robert Badinter, President of the French Constitutional Council, and also the Presidents of the German and Italian Constitutional Courts, the Belgian Court of Arbitration and the Spanish Constitutional Tribunal (the UK has no constitutional court)

Four opinions were delivered on 14 January 1991.

They were concerned with the question of whether the Republics of Croatia, Macedonia and Slovenia, which had formally requested recognition by the Community and its Member States, had satisfied the conditions laid down by the Council of Ministers of the European Community on the 16 December 1991: respect the UN Charter, guarantee rights for minorities, accept all existing frontiers that could only be changed by peaceful means.

The UN Charter extends the right of self-determination to all peoples. However, it neither defines what is to be understood by the word 'peoples', nor does it lay down rules as to how this right is to be exercised; a right which so far has been successfully invoked by colonial peoples only.

The Badinter Committee was thus correct to assert that 'in its present state of development, international law does not make clear all the consequences which flow from this principle'. Nevertheless, through its Opinions it contributed to a more precise definition of its attributes.

The Committee, without an express statement to that effect, linked the rights of minorities to the rights of peoples. Within one State, various ethnic, religious or linguistic communities might exist. These communities would have the right to see their identity recognized and to benefit from 'all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their national identity'.

These are 'imperative norms' binding all subjects of international law, and, which could one day be applied to protect, for example, the rights of Gagauz or Chechens without entailing the break-up of Moldova or Russia. One dare not even consider Corsicans or even Basques...

More importantly, the Committee noted that Article 1 of the two 1966 International Covenants on human rights establishes that 'the principle of the right to self-determination serves to safeguard human rights'. This signifies that 'by virtue of this right, each human entity might indicate his or her belonging to the community (...) of his or her choice*.

1998: the "state of the art"

20 August 1998 Canadian Supreme Court *Reference re Secession of Quebec*
http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html

The court ruled that a simple vote in Quebec is not enough to allow the French-speaking province to legally separate from the rest of Canada. However, the unanimous opinion by nine justices did not go so far as to declare Canada indivisible. If a clear majority of the people in Quebec want to secede, the justices said, the rest of Canada would be obliged to negotiate the terms of secession as though it were an amendment to the constitution.

The Supreme Court also found that there is no right to unilateral secession in international law except for colonies and oppressed people, which it said does not apply to Quebec. If the province tried to secede outside Canada's constitutional framework, the court warned, the international community would be likely to reject the action as illegitimate.