

## Self-determination: a consumed principle?

**Dr T.KADRI**

PhD International Law

University of Medea, ALGERIA

***“Only a Nation whose government was its servant and not its master could be trusted to preserve the peace of the world”.<sup>1</sup>***

*President Wilson Thomas Woodrow(1856-1924)*

The contemporary international law has seen a progressive development of most of its principles with the end of the wave of independences from colonialism. Indeed, international law has become more humanistic by the fact that it has made considerable progresses in the fields of human rights, humanitarian law, environment, democracy and rule of law. Another development in international law is the recognition (by the international community) of the concept of *jus cogens* as peremptory norms of international law. The concept of peremptory norms within international law is recognized by international and national courts and tribunals and in legal doctrine.

Thus, the provisions of articles 53<sup>2</sup> and 64<sup>3</sup> of the 1969 Vienna Convention on the Law of Treaties recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted under any circumstances even by treaty.

In the *East Timor* case, the Court stated that “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* character, is irreproachable”<sup>4</sup>.

Those peremptory norms that are accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and *the right to self-determination*.<sup>5</sup>

Therefore, the development of international law, as a logical consequence of the development of the international community, has affected also the principle of

self-determination. As a result of the development of the international law, self-determination has become not only a peremptory norm in international law but it has evolved in such a way that its traditional meaning, related only to the colonial context, has become an issue of discussion. The logical question raised after the end of the wave of colonialism is: Has the principle of self-determination been consumed after the (almost) end of colonialism<sup>6</sup>?

The evidence is that the independence from the colonial power would not be the end of the road of the principle of self-determination. As far as people continue to exist self-determination would continue to exist. It is an ongoing principle of international law. Moreover, it would be nonsense if people get their right to self-determination before a colonial power but after gaining independence, the same people are subjugated by dictatorship, tyranny and absolute power. Self-determination would not be a matter for colonialism only, it is an international law principle, a peremptory norm, available for people in different contexts under colonialism or in independence.

The new perception of self-determination overhead colonial context identified as *internal self-determination* is strongly related to the right to democratic rule, good governance, accountability, transparency and the right of people to elect their government and representatives through fair elections.

McCorquodale explains the longevity of self-determination:

*“The right of self-determination did not cease once colonies ceased. It does apply, and has been successfully applied and exercised, in non-colonial contexts. While the exercise of this right may be different according to the circumstances, it can apply to any situation where there is subjugation, domination and exploitation of peoples by a government, wherever located, as this right is part of the general international condemnation of the oppression of people”.*<sup>7</sup>

However, it is important to know, before making any conclusion, the historical background of the principle of the self-determination.

## **I- Historical background:**

The roots of Self-determination go back to the early Egyptian history as reported by Arthur Nussbaum “From the early Egyptian history one can trace the self-determination in the action of King Amasis (569-527 BC), who granted Greek cities in the Delta of the Nile a self-governing settlement called Naucratis, where their citizens were allowed to live under Greek religion and law”.<sup>8</sup>

Self-determination was throughout history a legitimate request made by people, that saw themselves different from others with regards to their ethnicity, religion, and culture, to decide about their future course and at the same time to preserve the differences. However, in ancient times, self-determination was not an international principle or right because the ‘international community’ was not constituted as it is at the present.

Similar to the Greek civilisation, the Roman civilisation saw the voice of citizens or Cives exercising constant control over administration and policy.<sup>9</sup> The control of the citizens over the administration and policy was a tool to enable Roman people to participate in any decision that could affect their future course, thus their self-determination.

During the Islamic civilisation, the holders of the holy books (Christians and Jews) were granted self-determination in the form of freedom of religion, and their rights as minorities were preserved.<sup>10</sup>

In the nineteenth century, and under the influence of political theorists of the 17th and 18th centuries such as Hugo Grotius, T.Hobbes, John Locke, Emmerich de Vattel and Jean Jacques Rousseau, the American revolution of the thirteen English colonies created, on 4 July 1776, a political entity independent from the British Crown, claiming the people’s right to self-determination as a necessary measure to the protection against a destructive government.<sup>11</sup> However, the American Revolution did not make any reference to self-determination of the indigenous and of the black people.

The 1789 French revolution declared popular sovereignty, equality before the law, and that a monarch is responsible to the people. Thus, the American and French revolutions had both declared and insisted that governments were responsible to their people.

The 19th century saw the development of self-determination under the banner of Nationalism.<sup>12</sup> Indeed, a unified Germany was created under the Reich William I on the 18 January 1871 in “Chateau de Versailles” from 300 states. Italian unification began in 1861 through a plebiscite held in all the Italian cities and kingdoms with the support of popular movements.<sup>13</sup> For A. Cassese, “the concept (of self-determination) first spread from France to neighbouring Italy, where in the nineteenth century Giuseppe Mazzini invoked it - in the form of a political postulate demanding that all nations be allowed freely to choose their status- in his push for unification of Italy.”

During the twentieth century, the 1917 Soviet revolution brought new concepts of international law and asked for the universality of the right of self-determination to reach the proletarian class including the colonies.<sup>14</sup>

“Victorious socialism must necessarily establish a full democracy and, consequently, not only introduce full equality of nations but also realise the right of the oppressed nations to self-determination, i.e., the right to free political separation.”<sup>15</sup>

President Wilson had an ambiguous conception of self-determination that is “On one hand, it implied the right of a population to select its own form of government, yet, on the other hand, it strongly suggested that self-government must be a continuing process and must therefore be synonymous with the democratic form of government.”<sup>16</sup>

Wilson’s ideas on self-determination were due to his concern for particular political issues, such as the future of national-minorities in Europe, and of the Bolshevik threat. The result was that under the Wilsonian concept of self-determination only the European minorities could constitute their own states.

The Covenant of the League of Nations made no express mention of the right of self-determination but pointed out “the right of disposing of national territory is essentially an attribute of sovereignty of every state.”<sup>17</sup> Under the League of Nations, the European states of Czechoslovakia, Hungary, Poland, Yugoslavia, Armenia, Finland, Estonia, Latvia, and Lithuania gained independence.

However, the League of Nations established its system of mandate that was for the non-European peoples (most of them were Arabs and Africans) and classified them into three categories of mandate “A”, “B” and “C”.<sup>18</sup>

The Atlantic Charter considered Self-determination as one of its principles. The representatives<sup>19</sup> of Great Britain and the United States pointed out their desire “to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; They respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;”<sup>20</sup>

Thus, the principle of self-determination, as stated in the Atlantic Charter, had two dimensions: one that meant an external self-determination (for people who had been forcibly deprived of sovereign rights and self-government) and another as an internal self-determination for people to choose the form of government under which they would like to live.

The San Francisco preliminary meetings, came, to some extent, with the idea of self-determination without the right of independence. This idea on self-determination was the belief of the colonial powers that lead the conference in considering the colonies relevant to the “*domaine reserve*” of their sovereignty (an internal matter).<sup>21</sup> Colonial powers were unwilling to have supervision from the United Nations over their colonies. W. Churchill, then Prime Minister of the United Kingdom, made a comment, published by the Times of 11 November 1942, saying that he had not become British Prime Minister “in order to preside over the liquidation of the British Empire”.<sup>22</sup>

The same apprehension of the consequences of the right of self-determination is perceptible in the 1980 statement of the former Prime Minister of Israel Menachem Begin “Self-determination is not mentioned in the Camp David agreement. That is not a coincidence. We don’t want to play with words”.<sup>23</sup>

The UN Charter considered self-determination as a principle of international law in articles 1(2)<sup>24</sup> and 55.<sup>25</sup> The UN resolutions 1514, 1541 and 2625 contained also within their provisions the necessity of the free choice of people.

The Conference on Security and Co-operation in Europe (CSCE) stated in its paragraph 6 “The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.”<sup>26</sup>

## II- Arab and African experience

With the wave of independences from colonial powers during the fifties and sixties, the Arab and African states have experienced, in numerous cases, self-determination from colonialism. Algeria is a blatant case where people were denied elementary human rights, and gained its independence through a bloody revolution against french occupation. Algerian people exercised their right to self-determination through a vote on July 1, 1962. The vote was nearly unanimous, with 5,992,115 votes for independence and 16,534 against.

Arab and African states have also experienced, in numerous cases, self-determination beyond colonialism. Tanzania was created in 1964 from the union of independent Tanganyika and Zanzibar; Senegal separated from the Federation of Mali after its independence in 1960; the Rwanda-Urundi into two separate states, in 1962, after free elections were held,<sup>27</sup> Eritrea led by the Eritrean People's Liberation Front separated from Ethiopia after the organization in April 1993 of an internationally supervised referendum on independence where the large majority of Eritrean voters opted for an independent republic, and recently Southern Sudan separated from the republic of Sudan in 2011.

These examples of cases where secession was effective and legitimate came as a result of hardship conditions faced by an oppressed part of the people. Jimenez Arechaga has predicted secession within a state where

“a state that does not represent the whole people, that oppresses a part of it, will expose itself to a legitimate secession, according to the right of people to self-determination”.<sup>28</sup>

Therefore, separation or secession (such as between north and south Sudan) are exceptional solutions to escape inevitable, durable and bloody internal conflicts with consequences on international peace and security.

However, the exercising of the right of self-determination would not mean only secession but the unification is also a result of the right of people to self-determination. South African black people struggle ended with the unity of South African people free from the apartheid regime and racial discrimination.

Another example of unity after exercising the right of self-determination, out of the Arab and African context, is the German unification. The 1990 treaty on “*the Final Settlement With Respect to Germany*”, stipulates that “German people,

freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a State”.

### **III- Self-determination as a democratic process**

The above historical background indicates that self-determination has not been merely a peremptory norm and a principle of international law granted to people to make a legitimate request to decide about their future course before colonialism. It is also a right for people to freely elect their government and representatives, and decide about their future course through a democratic process (*internal self-determination*).

This enlargement of the principle of self-determination has made Professor Thomas M. Franck to say that 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.”<sup>29</sup>

Thus, the colonialism and the dictatorship (as well as tyranny and absolute power) are identical systems because both deprive people from their utmost right that is to decide about their future course. The logical consequences, in both situations of colonialism and dictatorship, where people are negated their right of self-determination would be turmoil, disruptions of the social life and often violent conflicts. The recent events in the Arab world uprising is the best example of the consequences of the denial of people’s right of self-determination. Indeed, rulers understood (or misunderstood) that self-determination was a valid principle against colonial powers only and within the inherited borders to preserve the national unity and the territorial integrity.<sup>30</sup> Any application of the self-determination (the will of people to decide about their future) outside colonial situations was not recognised.

Arab people were not asked to express their will on issues related to their future economical, social and political course, and if they were, it was not in a free and fair way.

Consequently, people’s hope goes in the implementation of the international law and in the assistance of the international community to push towards free and fair elections in exercising self-determination.<sup>31</sup> However, a question raises: is the supervision of an election the end of the process of self-determination?

The practice has shown that elections are not a guarantee *per se* that a government will fulfil its obligations in conformity to international law. Thus, T.M.Franck construed the will of many regimes to set elections with the supervision of international organisations as a means to seek only their international legitimacy. “Many of these new regimes want indeed need, to be validated publicly, by being seen to comply with global standard for free and open elections. It is for this reason that, increasingly, they seek election monitoring by the United Nations and by regional and non-governmental organisations. They need the seal of systematic approval in order to legitimise their power to govern and to make that legitimacy apparent to their own, often suspicious, electorate.”<sup>32</sup>

#### **IV- Conclusion**

Certainly, the principle and right of self-determination has evolved with the evolution of the international community as indicated above. It is not a consumed principle. Indeed, self-determination has integrated peremptory norms as a right granted for people to freely elect their government and representatives, and decide about their future political, economical and social course (beyond colonialism).

Indeed, the people have the prerogative to decide about their future course through democratic processes, and the international community represented by United nations has an obligation on to realise it, as reported by , R Higgins: “The great majority of States in the United Nations believe that a legal right of self-determination exists, and that neither Article 2(7) nor indeed domestic constitutional issues in general, can impede the implementation of that right and United Nations jurisdiction for that purpose.”<sup>33</sup>

Therefore, the self-determination has extended to the post-colonial era as a principle of international law enabling people, under any political regime, to freely decide about their political, economical and social future course through democratic means and processes.

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## Endnotes

- 1 Pomerance, M., *The United States and Self-determination: Perspectives on the Wilsonian Conception*, 70, A.J.J.L, (1976), pp. 1-27.
- 2 Article 53 states that “..a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.
- 3 Article 64 states that “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”
- 4 See *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, at pp. 615–616, paras. 31–32.  
See also *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, General Assembly resolution 2625 (XXV), annex, fifth principle.
- 5 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p 85
- 6 In the African continent, *Western Sahara* remains the only case related to decolonisation.
- 7 McCorquodale, R., *Self-determination Beyond the Colonial Context and its Potential Impact in Africa*, 4(3), *Afr. J. I. C. L.*, (RADIC), (October- 1992), pp. 591-608.
- 8 In Nussbaum, A., *A Concise History of the Law of Nations*, (New York, 1954), p. 3, From Mallet, D., «Les Premiers Etablissements des Grecs en Egypte», *Mémoires publiés par les membres de la mission archéologique française au Caire*, (Vol : XII), (1897), especially p. 58 (regarding autonomy).
- 9 The citizens exercised their power mainly in the enacting and repealing of laws (*leges scribere*); the elections of magistrates (*magistratus creare*); the declaration of war (*bellum indicere*) and the conclusion of peace (*pacem facere*); and in deciding as a court of last appeal, all matters affecting the life, personal freedom, or, permanent political privileges of one of their own body (*de capite civis romani indicare*).
- 10 “Dr Said Ramadan (1961, p 135) points out that, ‘there is not a single text in Qur’an or the Sunnah that would prevent non-Muslim subjects from maintaining their languages, cultures and religions practices and traditions.’” See Weeramantry, C., *Islamic Jurisprudence an International Perspective*, (Basingstoke, 1988), p. 130.
- 11 “ That whenever any Form of Government becomes destructive of these ends, it is

the Right of the People to alter or to abolish it, and to institute new Government, having its foundation on such principles and organising its powers in such form, as to them shall seem most likely to effect their Safety and Happiness”.

From Internet, <http://www.nara.gov/exhall/Charters/declaration/declaration.html>

12 The principle of nationalism succeeded in realising the independence of Greece (1830) from the Ottoman Empire, of Belgium from Netherlands (1831) of Romania, Bulgaria and Serbia that was recognised in Berlin Conference (1870).

13 <sup>6</sup> See Cassese, A. (ed.), (1995), Op. Cit., no 13, p. 13.

14 See Lenin, V., *Collected Works (vol: 22)*, (Moscow, 1916), p. 164.

15 Lenin, V., (1916), Op. Cit., no. 7, p. 157.

16 Michla Pomerance, *Wilsonian Self-determination Revisited: In Search of the “Self” and the “Determination”* p. 272.

17 3, *League of Nations Official Journal*, (Oct., 1920), p. 5.

18 Harris, D., *Cases and Materials on International Law*, (4<sup>th</sup>. Ed.), (London, 1991), p. 125.

19 The representatives of Great Britain, Prime Minister W. Churchill, and of the United States of America, President Roosevelt, on the Prince of Wales’ ship, on 14<sup>th</sup> August 1941, signed and promulgated a declaration known as the Atlantic Charter.

20 From Internet, <http://www.internet-esq.com/ussaugusta/atlantic1.htm>

21 See Simma, B. (ed.), *The Charter of the United Nations*, (Oxford, 1994), p. 924.

22 In Simma, B. (ed.), (1994), *Ibid*, from footnotes p. 924.

23 From the *Times*, February 1980. In, Lewis, I., *Nationalism & Self-determination in the Horn of Africa*, (London, 1983).

24 Article 1(2) stated that: “To develop friendly relations among nations based on the respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”

25 Article 55 of the UN Charter states that: “with the view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

26 From internet <http://www.riga.lv/minelres/osce/cope90e.htm>

27 “In the case of Rwanda-Urundi (a Belgian administered territory) between 1959 and 1962 the United Nations overcame strong resistance to the splitting of the territory on

the part of many African States, which were convinced that the best future for the territory lay 'in the evolution of a single, united and composite State'. As United Nations visiting missions had found compelling evidence of a strong feeling among the population that the separate personalities of Rwanda and Burundi should be respected, the organisation set up and supervised free elections from which the will of the two peoples to separate became apparent. In 1962, the General Assembly, by Resolution 1746 (XVI) thus agreed to let Rwanda and Burundi 'emerge as two independent and sovereign states.'" Cassese, A. (ed.), (1995), *Op. Cit.*, no. 13, p. 78.

28 "Certains auteurs, dont Jimenez de Arechaga, pensent suite a la Déclaration relative aux relations amicales entre Etats, "qu'un Etat qui ne représente pas l'ensemble d'un peuple, qui en opprime une partie, s'exposerait a une sécession devenue légitime en vertu du droit des peuples a l'autodétermination". Cahier, P., *Cours Général de Droit International Public*, 195 (VI), Académie de Droit International, (1985), p. 50.

29 Franck, T., The Emerging Right to Democratic Governance, 83, *A. J. I. L.*, (1992), pp. 47-91.

30 Paragraph 6 of the 1514 UNGA resolution states "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity is incompatible with the purposes and principles of the Charter of the United Nations".

31 See UN G.A Resolutions entitled "Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections. G.A Res. 138, U.N.GAOR, 47th Sess., Supp. No 49, at 214 (1992); G.A.137, U.N. GAOR, 46th Sess. Supp. No 49, at 209 (1991).

32 Franck, T., General Course on Public International Law, 240(III), *Académie du droit International*, (1993 ), p. 101.

33 Higgins, R., *The Development of International Law Through the Political Organs of the United Nations*, (Oxford, 1963), p. 103.