

The Right to Self-Determination of Peoples in International Documents

I. The concept of the right to self-determination

The concept of the right to self-determination of peoples is more complicated than it would seem. The origins of the right to self-determination of peoples are as old as mankind, since the history of mankind is characterized by continuous wars and fights for territorial gains. Initially tribes, then emerging states fought wars against each other and occupied the territories of one another.

It would be difficult, however, to find a principle that could morally or philosophically underpin why a group of people or the peoples has the right or has more right to live on a particular territory than others. It could be established that there is not one natural order to distribute the territories on Earth. For this reason the discourse about the right to self-determination² of peoples appears throughout the history of all mankind.

Nevertheless, the discourse of the right to self-determination of peoples has been brought into the political discussion by the French Revolution. The idea of nation-state, where the state represents the personification of the nation, was born in the French Revolution and it was realized in practice via demanding the unification of those belonging to a homogenous nation. (This provided political and legal justification for the creation of the Italian Unification.)

The principle originates from the *principe des nationalités* (principle of nationality) which was behind the ideological basis of the restoration of German and Italian Unification. One of the most significant document of those in which the right to self-determination appears for the first time is the Declaration of Independence of the thirteen American colonies of 4 July 1776, the founding document of the United States of America, in which it is regarded an important right of the people to elect a new authority provided that the current regime is not appropriate. 'But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.'³ The right to self-determination also appeared as a principle in Wilson's Points⁴ during the peace negotiations concluding the World War I in the twentieth century. IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality. X. The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity to autonomous development. XI. the relations of the several Balkan states to one another should be determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into. XII. The Turkish portion of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule

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² Stefania Bodi: The interpretation of the Central-Eastern European conflict on the basis of the theory of Istvan Bibó [Bódi Stefánia: A közép-kelet-európai konfliktus értelmezése Bibó István elmélete alapján,] Kard és Toll, 2005:(3) pp. 88-96. and The Democracy and Central Europe: István Bibó's Ideas, Bibó István gondolatai a régió és a demokrácia kapcsolatáról, Polgári Szemle: Gazdasági és Társadalmi Folyóirat 8:(3-6) pp. 100-122. (2012)

³ Declaration of Independence of the people of the United States of America, accessed at <http://mek.oszk.hu/02200/02256/02256.htm> on 2018.04.10

⁴ http://multunk-portal.hu/html/egy_tort_kronol/1918.januar8.html accessed on 10.04.2018

should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development.⁵

The Treaties of Paris, which relied on Wilson's Points, brought unexpected outcomes. Central and Eastern Europe have entered into turmoil and developed conflicts which has impacts even these days. The Treaties of Paris inherently entailed the outbreak of a second, major war. The League of Nations was formed in 1919 in order to enforce the treaties concluding the World War I. The Covenant of the League of Nations also relied on Wilson's Points, therefore Article XIX of the Covenant of the League of Nations deals with the right to self-determination of people, sovereignty and independence.⁶ In spite of Wilson's Points, the peace treaties and the League of Nations could not prevent the World War II.

Obviously, it was not only the 'western world' which was concerned about the right to self-determination of peoples, but Lenin as well. However, Lenin related the right to self-determination of peoples to the colonial empires, semi-colonies (such as China, Persia) and the states of Central Europe. In his view the right to self-determination of peoples was a mere tool for the victory of the world revolution.⁷

In all, the western and the Bolshevik model were similar in terms of never having been consistently implemented in practice, since the victorious states deployed the principle as required by their political interests. This principle interrupted the legitimacy of the monarchies since the monarchies were slowly replaced by other forms.

Following the horrors of the World War II, the victorious states agreed that they should prevent another world war. As one step to this end, they founded the United Nations in 1949. Article 1 of the UN Charter declared that one of the main goals of the UN is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Although the UN Charter declared the principle, it was not vested with content and definition. Nevertheless, the articulation of the principle in the UN Charter was already a large step.

It was clarified one or two decades after the foundation of the UN later that in practice the right to self-determination was only applicable to the peoples living under colonial rule. After ending the World War II, the so-called 'decolonization process' has been started and, as a result, peoples of various colonial territories gained their independence. In the first two decades following the war 66 independent state has been formed on former colonial territories, whereas by the end of the '60s the whole de-colonisation has been accomplished.

The 1960 Declaration⁸ on the Granting of Independence to Colonial Countries and Peoples states that 'all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory' and that 'All armed action or repressive measures of all kinds directed against dependent peoples shall cease'. Although on the basis of the text of this declaration, the right to self-determination is granted to all peoples, the resolution of the UN General Assembly of the same year interpreted it differently. *The Resolution 1541 of 1960 adopted by UN General Assembly provides for three methods to exercise the right to self-determination.* Under this resolution trust territories or non-self-governing territories are entitled to emerge as a sovereign independent state, to freely associate with an independent state or to integrate with an independent state. On grounds of the two above mentioned resolutions the right to self-determination of peoples of colonial territories are undeniably recognized.

The year 1966 has brought about brand new developments for the self-determination,

⁵ <http://www.huszadikszazad.hu/1917-december/nagyito/wilson-elnok-14-pontja> (18.03.2018.)

⁶ <https://babel.hathitrust.org/cgi/pt?id=hvd.32044073188187;view=lup;seq=3> (17.03.2018)

⁷ Laszlo Rehak: Lenin and the status of national minorities [Rehák László: Lenin és a nemzeti kisebbségek helyzete] http://adattar.vmmi.org/cikkek/9815/hid_1970_04_10_rehak.pdf 10.04.2018

⁸ <http://www.menszt.hu/hu/egyeb/egyvezsegokmany> - 10.04.2018.

as fundamental human right. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights declare the right to self-determination to be fundamental right of all peoples: '*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.*' It was an unequivocal progress for the right to self-determination that the right has been extended from peoples of colonial territories to all peoples. On the other hand, the covenants, again, neither provide definition nor content for the right. The related issues (such as, how 'peoples' should be defined) has not been settled, and, more importantly, the covenants nor provide for uniform procedures or agreements to ensure the enforcement of the right.

UN General Assembly Resolution 2625 of 1970 reiterates the above provision and complements it with the right to resistance against any forcible action which deprives peoples of their right to self-determination. Furthermore, the peoples are entitled to seek and to receive support in accordance with the purposes and principles of the UN Charter. The resolution also declares that '*subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the fundamental human rights.*' On grounds of the mentioned documents we may arrive to important conclusions. Firstly, the right to self-determination of peoples is a general right: it does not apply solely to peoples of colonial territories but *to all peoples*. Secondly, the right to self-determination of peoples has a human right character. Thirdly, the right to self-determination is a *perpetual* right because its exercise does not cease at the time of gaining independence. These characteristics, however, has spurred many debates in international politics. It was already stated in UN Resolution 1514 that the exercise of the right to self-determination may not impair the territorial integrity and the political unity of states. The Declaration of 1970 reiterated this limitation. Moreover, following the de-colonization the newly emerged states recognized the right to self-determination as an anti-colonial postulate and they did not consider it applicable to the various groups of peoples living on their territory. Hence, a still ongoing debate was formed regarding the reconciliation of the exercise of the right to self-determination and the protection of the territorial integrity of the states.

On the 1975 Conference on Security and Co-Operation in Europe (CSCE)⁹ the Participating States elaborated political standards in the field of human and minority rights to ensure the security of Europe, whereas significant progress has been made concerning the non-proliferation system. The Final Act of the Conference incorporates the political commitments of the Participating States. The Final Act consists of three parts, the first being relevant for the purposes of this paper. This part concerns issues relating to the security of Europe, and also deals with the relations between the Participating States and with the so-called Helsinki Decalogue, the ten principles¹⁰ regulating the relationship between the Participating States and its citizens. The eighth principle of the Decalogue is 'Equal rights and self-determination of peoples'. Thus the Final Act of the CSCE is another instrument incorporating this right. Nevertheless, the Final Act does not regulate the application of this right. At the same time, the Decalogue encompasses certain rights besides the right to self-determination which could pose limitations to the right to self-determination, such as the third principle of the Decalogue which endorses the "inviolability of frontiers". This entails that the right to self-determination of peoples may be applied as long as it does not impair the

⁹ From 1994 Organization for Security and Co-operation in Europe (OSCE)

¹⁰ I. Sovereign equality, respect for the rights inherent in sovereignty II. Refraining from the threat or use of force III. Inviolability of frontiers IV. Territorial integrity of States V. Peaceful settlement of disputes VI. Non-intervention in internal affairs VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief VIII. Equal rights and self-determination of peoples IX. Co-operation among States X. Fulfilment in good faith of obligations under international law

integrity of territories and frontiers of existing states. It is clear from the above that the Decalogue endorses that the peoples enjoy the most autonomy possible within the state.

II. Right to self-determination in the judgments of the International Court of Justice

II.1. The Western Sahara case

Spain, who administered the Western Sahara region, indicated from 1970's that it is ready to renounce from the territory. Both neighbouring countries, Morocco and Mauritania endeavoured to gain this territory. The UN General Assembly requested an advisory opinion from the International Court of Justice. During the procedure both states highlighted that there had not been real statehood in this territory prior to the Spanish colonization. In reality there was nomad statehood in the territory. Those with momentary military superiority ruled the territory. The International Court of Justice found that this territory did clearly not belong either to Morocco or to Mauritania, in spite of the fact that they could exercise their influence there. According to the International Court of Justice the international law does not provide for specific ways that can be regarded as exercising authority but various circumstances could be taken into account to decide this issue. It is certain that Spanish Sahara never had the status of terra nullius, political organisations were always present, thus none of the states could rightfully acquire it through "occupation".¹¹

II.2. The East Timor case

Portugal claimed that Australia should have agreed with Portugal and not with Indonesia concerning the exploitation of the resources of the continental shelf of East Timor, the former colony of Portugal, furthermore, the people of East Timor has the right to self-determination.

Indonesia did not recognize the jurisdiction of the court in this proceeding, consequently, the court could not adjudicate upon the merits of the case. The court affirmed that the people of East Timor have the right to self-determination.¹²

The International Court of Justice also found that the right to self-determination as it evolved from the Charter and from United Nations practice, has an erga omnes character, thus it is irreproachable. The principle of self-determination of peoples has been recognized by the UN Charter and in the jurisprudence of the Court thus it is one of the essential principles of contemporary international law.

The International Court of Justice reiterated the erga omnes character of the right to self-determination in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory.¹³ It was a major step forward in the development of the right of self-determination of peoples that the International Court of Justice confirmed its erga omnes character on two independent occasions.

¹¹ CIJ. Western Sahara case Rec. 1975 33.o <http://www.icj-cij.org/en/case/61> 17.01.2017

¹² CIJ. East Timor case Recueil 1995 <http://www.icj-cij.org/en/case/84> 17.01.2018

¹³ CIJ. Advisory Opinion on the case of the Palestinian wall case <http://www.icj-cij.org/fr/affaire/131> 17.01.2018

III. Arbitration¹⁴

In his works Istvan Bibo investigated several times the issues of international dispute resolutions, in particular, the alternative dispute resolution of conflicts of peoples. Bibo claimed that an optimal procedure should unite the elements of diplomatic and judicial dispute resolution. He envisaged the arbitration as implementation of such system.¹⁵

The International Court of Arbitration, which was established in 1989 to adjudicate the dispute concerning the delimitation of maritime territories of Bissau-Guinea and Senegal¹⁶, confirmed implicitly that the right to self-determination of peoples is of peremptory nature. The international law has limited number of peremptory norms (*ius cogens*) which only highlights their significance. Peremptory or *ius cogens* norms enjoy higher rank in the international hierarchy of norms, compared to norms of customary law or the law of treaties.

IV. Conclusions

As demonstrated above, the international organisations and the international law have considered the right to self-determination to be a significant principle since the World War I and recognized it as right since 1945. In spite of the endeavours to vest the concept with content during this time, there is still no uniform interpretation of the right to self-determination. There is neither a uniform code of procedure governing the application and the enforcement of the right. I believe that the adequate regulation of the right to self-determination of peoples would prevent mankind to suffer from various armed conflicts and consequent casualties.

Adequate regulations of the right to self-determination of peoples should entail, in my view, the elaboration of a uniform interpretation for the concept and, furthermore, a uniform code of procedure. The UN should be assigned a major role in the enforcement of the right, although, in order this could properly function, it would be also necessary to make the international organisations, including the UN, *less politicised*. The permanent membership of the UN Security Council should be abolished or, at least, its necessity should be reconsidered. Nevertheless, the veto right of the Permanent Members should definitely be revoked. This step would be necessary to ensure that the resolutions of the UN Security Council reflect less the current political interest of the great powers.

Minorities should be supported in exercising and enforcing their rights to prevent them from being victims of genocides or oppression. The international community should better facilitate the dialogue between the original state and the people. A preliminary report should be prepared concerning the prospective consequences that the independence of the people may entail. This seems necessary especially regarding the cases of emerging states in the last twenty years where they proved to be incapable of administering their functions on their own. In such situations, gaining extensive autonomy within the original state would be a much better solution than independence, whereas the territorial integrity of the original state would remain intact. When peoples are intending to gain independence, more account should be taken of their economic potential, since it is essential to foresee whether the peoples could actually sustain themselves.

Many thought that in the twenty-first century, in the light of globalisation, the right to self-determination of peoples will become less prominent. This assumption proves to be

¹⁴ Arbitration is a method of alternative dispute resolution in international law. The parties agree to be bound by the decision of a third party, who they appoint jointly.

¹⁵ http://epa.oszk.hu/01200/01273/00060/pdf/EPA01273_vilagossag_tavaszy-nyar_303-310.pdf 10.04.2018

¹⁶ Arbitral Award of 31 July 1989 GUINEA-BISSAU V. SENEGAL (1989 – 1991)

wrong, since even here, in Europe, where the building of the united Europe is in progress since World War II, independence movements are still not stifled. Even within the European Union, two independence referenda have taken place in the past years in Catalonia and Scotland - in member states which joined the European Union decades ago. The Scottish referendum ended with the pro-independence citizens being the minority, nevertheless, with BREXIT there is an ever-emerging discussion that maybe a new referendum would be necessary. The Catalan issue is going to be on the agenda for some time as well. Since states are not static entities as their territory is subject to continuous change in the course of history, it would be necessary to re-think the right to self-determination and remedy the fallacies of its regulation as soon as possible.

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