

A CRITICAL APPRAISAL OF THE RIGHT TO SELF DETERMINATION UNDER INTERNATIONAL LAW */**

Abstract

International law recognizes the rights of people to self-determination as well as the rights of States to territorial integrity and territorial sovereignty. This situation created uncertainty on whether or not self-determination permits ethnic groups in existing States to break away from their parent State, at least where doing so is the only means of maintaining peace. This study therefore, using qualitative research method, critically examined whether ethnic groups in existing States can exercise self-determination to form a new State from their parent State in view of States' rights to territorial integrity and sovereignty under international law. It was discovered that international law does not only uphold the right to self-determination of people but it has widened beyond decolonization and is still evolving amidst challenges. International law has made provisions for ethnic groups in existing States who can exercise self-determination by forming a new state under international law in certain strict circumstances.

Keywords: *Self-Determination, Territorial Integrity, Territorial Sovereignty*

1. Introduction

Right to self-determination has been used for different purposes at different times. During decolonization, former colonial territories used it as a central strategy for seeking independence.¹ Since the end of colonialism, some ethnic groups in existing States have constantly relied on it for the advancement of their statehood agitations from their parent State. This is probably because those ethnic groups usually assume that right to self-determination gives rise to secession.² The past year has been heralded by self-determination agitations of some ethnic groups like the Igbo ethnic group of Nigeria. States, however, challenge attempts to use right to self-determination for statehood agitations. This has led to pounding debates on the nature of right to self-determination. In particular, this has elicited questions on whether international law permits ethnic groups in existing States to exercise right to self-determination. States usually stress that right to self-determination is an affront to their right to Territorial Integrity. This is because States desire to control and protect their territory since it is the essence of their statehood.³ Although international law asserts that peoples have right to self-determination: to determine their socio-political and cultural affairs, however, it has

* **SOMTO DAVID OJUKWU**; LLM, LL.B, B.L; Lecturer, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria. Email: somtoojukwu@gmail.com.

* **Osita Dominic Okoli**; LLB,B.L

¹A B Lorca, 'Petitioning the International: A "Pre-History" of Self-determination' (2014) 25 (2) *European Journal of International Law* 497.

² Z A Velasco, 'Self-determination and Secession: Human Rights-Based Conflict Resolution' [2014] *International Community Law Review* 75, 75

³ P Malanczuk, *Akerhurst's Modern Introduction to International Law* 7th edn (London: Routledge 1997) 164

been argued that using right to self-determination as a basis for creating new States whenever demanded by peoples (especially by ethnic groups in existing State) may lead to the creation of unviable States.⁴

Another challenge is that international law highly esteems political stability, territorial sovereignty and territorial integrity of States as important values.⁵The crux of this paper is to examine the position of right to self-determination under International Law. In view of exfoliating the niceties of this paper, this paper will particularly examine the development of Right to Self-determination under International Law. It will also examine its meaning, nature as well as recognition under International Law. Again, this paper will make it more scrutable the varieties of right to self-determination under International Law as well as its legal scope.

2. The Development of Right to Self-determination in International Law

Self-determination developed in the 18th and 19th centuries as a natural corollary of evolving nationalism.⁶ It was propounded by the French revolution and was intended to replace the old State-oriented approach which prevailed in international relationships.⁷ At that time, international dealings hardly recognise the interests of the people in a territory. It primarily protected the interests of the ruling elites.⁸ Subsequently, self-determination developed and advocated for the consent of the people.⁹

Moreover, the disintegration/defeat of the Austro-Hungarian and Ottoman empires during the first world war also aided the development of self-determination. With their disintegration, there arose a need to partition their territories for a new sovereign to govern them.¹⁰ Because of this, self-determination played a great role in the re-division of those territories and Europe by the victorious powers.¹¹ Then, however, self-determination was considered only for “nations” which were within the territory of the defeated empires; it was never thought to apply to oversee colonies.¹² President Wilson of the USA was very prominent in its development during the creation of independent States out of the remnants of the Austro-Hungarian and Ottoman empires.¹³ He was prominent in enunciating the principle that peoples and provinces must not be bartered about from sovereignty to sovereignty like chattels or pawns in a game.¹⁴ Again, he was prominent in enunciating that territorial questions should be settled ‘in the interests of the populations concerned.’¹⁵

⁴ A Cassese, *International Law* (2nd edn, Oxford University Press 2005) 63

⁵ *Ibid*; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ 437 p38 para 80. <<http://www.icj-cij.org/docket/files/141/15987.pdf>> accessed 24 March 2020

⁶ H Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (2nd edn, University of Pennsylvania Press 1990) 27

⁷ Cassese (n 4) 60

⁸ *ibid*

⁹ *ibid*

¹⁰ Hannum (n 6) 27

¹¹ *Ibid*, pgs 27 -28

¹² *Ibid*

¹³ *Ibid* 28; Daniel Thurer and Thomas Burri, ‘Self-Determination’ [2008] <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>> accessed 30 March 2020

¹⁴ Hannum (n 6) 28

¹⁵ *ibid*

Furthermore, self-determination assumed a greater degree of importance after the 2nd World War as pressure grew to grant independence to people subjected to colonial rule.¹⁶ Thus, the UN declared in its Articles 1 and 55 of the United Nations Charter, 1945 (UNC) and by a United Nations General Assembly's Resolution (UNGAR) on the Right of People and Nations to Self-Determination 1952,¹⁷ that member States should uphold the principle of self-determination of all peoples and nations.

Moreover, self-determination quickly evolved from a principle to a right especially after the 1960 UN Declaration on the Granting of Independence to Colonial Peoples.¹⁸ This is because States were imposed a duty to promote the realization of self-determination of peoples and not to use forcible action which deprives people from elaborating/expressing their right to self-determination.¹⁹ The objective then, however, appears to be to stress self-determination from colonial rule but not to fertilize post-independence secessionist movements in existing States.²⁰ Since then self-determination denotes the right of people to decolonization.²¹ Self-determination was not intended to be relied on by ethnic groups seeking to form new States from existing/parent States.

At the end of colonial rule, secessionist movements became rampant. Groups involved in such movements probably threatened the continuous evolution of self-determination by claiming that it is a right available to all peoples and nations. Most of those secessionist movements comprise of ethnic groups: The Kurds in Turkey, Iraq, Syria, Iran and Armenia; the Igbos and other ethnic groups in the old Eastern Region of Nigeria ("Biafrans") etc. To them, self-determination is the international law principle justifying secession and the ideology underpinning the birth of new states.²² Because of this, self-determination was and is still considered as an anathema to the notions of states' territorial integrity and territorial sovereignty.²³

In response, parent States rejected such movements. They view secessionist movements as unpardonable attacks on their right to territorial integrity and Sovereignty. Also, they usually insist that managing such movements is within their domestic affairs; thus, the international community should not interfere. Specifically, States generally insist that right to self-determination should be contained as not to permit the dismemberment of their territories, especially by their ethnic groups.

¹⁶ J O'Brien, *International Law* (1st edn, Cavendish Publishing Ltd 2001) 163

¹⁷ GAR 637 A (VII)

¹⁸ E M Whinney, 'Declaration on the Granting of Independence to Colonial Countries and Peoples' [2008] *United Nations Audio-visual Library of International Law* 1, 3. <http://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf> accessed 15th May 2020; Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960) (adopted by 89 votes to none; 9 abstentions)

¹⁹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (adopted 24 October 1970), GA Res 2625 (XXV) art 1 (on the Principle of Equal Rights and Self-determination of Peoples)

²⁰ J O'Brien, *International Law* (1st edn, Cavendish Publishing Ltd 2001) 163

²¹ P Carley, 'Sovereignty, Territorial Integrity, and the Right to Secession' [2003] *United States Institute of Peace*, pg v. <<http://www.usip.org/sites/default/files/pwks7.pdf>> accessed 15th May 2020

²² Z A Velasco, 'Self-determination and Secession: Human Rights-based Conflict Resolution' [2014] *International Community Law Review* 75, 76

²³ *Ibid*

The result was that in some cases, such self-determination agitations led to civil war between the ethnic group and the parent State. A vivid example can be found in the Biafra's 1967 self-determination which led to a 30-month civil war between Nigeria and "Biafra" which comprised of ethnic nationalities in the old Eastern Region of Nigeria. About one to three million people died in that war.²⁴

Probably in response to the demand of States to curtail self-determination, the General Assembly (GA), in Paragraph 4 of the Declaration on Granting Independence to Colonial Countries and Peoples (1960)²⁵ emphasized the need to respect the integrity of national territories.²⁶ As if such declaration was not enough, the UNGA in 1970 adopted the Declaration on the Principles of International Law Concerning Friendly Relations.²⁷ In this latter declaration, the GA also emphasized that nothing should be done to dismember or impair the territorial integrity or political unity of a sovereign and independent State.²⁸

With these declarations in mind, the place of self-determination under international law seems unclear generally. Particularly, it can be argued that those declarations restricted the exercise of self-determination by ethnic groups like the Igbo people in Nigeria and the Kurds in whichever country they live. Whether the above declarations by the General Assembly- which seem to elevate right to territorial integrity over right to self-determination - are in absolute form without permitting any exception is still subject to verification. This is because recent developments seem to challenge those declarations. For instance, in accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,²⁹ (*Kosovo*) Kosovo unilaterally declared independence from Serbia in 2008. The ICJ held in 2010 that Kosovo's unilateral declaration of independence is not contrary to international law. Thus, *Kosovo* seems to have raised right to self-determination "from the dead" especially that of ethnic groups like the Igbos and the Kurds.

Notwithstanding this, the necessary questions that puzzle quizzical mind remains: how potent is this "new hope" to the self-determination struggles of ethnic groups like the Igbos and the Kurds when placed against the importance attached to States' Right to Territorial Integrity (RTI) and Right to Territorial Sovereignty (RTS) under international law? Can right to Self-determination permit ethnic groups in existing States to exercise self-determination under international law? The above questions do not however represent the domains of this paper. Nevertheless, a perfunctory reference to them will be made in the course of this work.

2.1 Meaning and Nature of Right to Self-determination:

Right to self-determination has not been easy to define. Although it is widely known and vigorously promoted, its meaning remains vague and imprecise.³⁰ Defining it has been one of the thorniest issues for the international community.³¹ Considerable confusion and conflicts

²⁴ L Heerten and A D Moses, 'The Nigeria-Biafra War: Postcolonial Conflict and the Question of Genocide' (2014) 16 (2 and 3) *Journal of Genocide Research* 169, 169. <<http://www.tandfonline.com/doi/pdf/10.1080/14623528.2014.936700>> accessed 4 April 2020

²⁵ GAR 1514 (XV)

²⁶ O'Brien (n 20) pgs 163 to 164

²⁷ GAR 2625 (XXV) (1970)

²⁸ O'Brien (n 20) 164

²⁹ *Kosovo*, (Advisory Opinion) [2010] ICJ Reports, p 403. <<http://www.icj-cij.org/docket/files/141/15987.pdf>> accessed 6 April 2020

³⁰ Hannum (n 6) 27

³¹ Carley (n 21) 1

have resulted over what self-determination really entails.³² What exactly does it entail: autonomy or statehood?³³

James Crawford insisted that right to self-determination has no generally accepted definition.³⁴ Thus, its definition appears to be like water which takes the shape of its container. No wonder it became a subject of multiple misconceptions! Attempts to define right to self-determination are numerous as well. To Antonio Cassese:

Self-determination meant that peoples and nations were to have a say in international dealings: sovereign powers could no longer freely dispose of them, for example by ceding or annexing territories without paying any regard to the wishes of the populations concerned, through plebiscites or referendums.³⁵ Antonio's observation above, though laudable, failed to observe that right to self-determination also advocates that peoples' interests should be represented in the internal affairs of their State, not just in their states' international affairs. Among the demands of right to self-determination is that peoples should be represented in the institutions under which they live, domestically and internationally.³⁶

The International Covenant on Civil and Political Rights 1966,³⁷ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966,³⁸ (ICESCR) observed that right to self-determination enables all peoples to freely determine their political status and freely pursue their economic, social and cultural development. This can be understood to mean that right to self-determination permits peoples' interest to be reflected in the internal and external affairs of their State. Even Antonio later conceded that right to self-determination touches the inner structure of a State.³⁹ By this "inner structure", it must be understood that he meant that right to self-determination equally demands that peoples' interests should be reflected in the domestic affairs/policies/institutions of their States; not just in their international relations. Because of the above, Antonio's first observation on right to self-determination may be faulted for being too "pro-international" without considering the "inner-structure" aspect of right to self-determination.

James Crawford has also offered a definition of right to self-determination. In his effort, he asserted that right to self-determination is the right of a community which has a distinct character to have this character reflected in the institutions under which it lives.⁴⁰ Regrettably, his definition of right to self-determination above may not go unchallenged. This is because he apparently over-concentrated on the "inner structure" aspect of right to self-determination.

³² *Ibid*

³³ *Ibid*

³⁴ J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 647

³⁵ Cassese (n 4) 60

³⁶ J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 647

³⁷ the ICCPR, art 1

³⁸ ICESCR, art 1

³⁹ Cassese (n 4) 61

⁴⁰ Crawford (n 36) 647

He disregarded the “external structure” aspect of right to self-determination. The “inner structure” and the “external structure” aspects of right to self-determination jointly mean that the interest of the people of a state should predominate on issues concerning them both in the domestic and international affairs of their state.

There has also been a judicial attempt to define right to self-determination. In *Western Sahara*,⁴¹ the ICJ adopted a more comprehensive position on the meaning of right to self-determination. Here, the General Assembly of the UN requested the ICJ’s advisory opinion on two questions. The first one is whether Western Sahara (WS) was a *terra nullius* at the time of its colonisation by Spain. The second question is the nature of the legal ties between WS and the Kingdom of Morocco and Mauritania who both claimed WS.

The court replied the first question in the negative: that WS was not a *terra nullius* at the time of colonisation by Spain. On the second question, the court opined that although there were legal ties between WS and each of the claimants (Morocco and Mauritania), however, such legal ties are insufficient to establish any tie of territorial sovereignty between the WS and any of them. Furthermore, the court held that such legal tie was insignificant to affect the decolonization of WS, as advocated by the GA’s Declaration on the Granting of Independence to Colonial Countries and Peoples 1960.⁴² Particularly, the court held that such legal tie could not affect the people of WS’ exercise of their right to self-determination. Thus, the ICJ insisted that self-determination entails the need to pay regard to the freely expressed will of peoples.⁴³ Finally, the court insisted that it is for the people to determine the destiny of a territory and not the other way round.⁴⁴

The case of *Western Sahara* induced some critical observations worthy to be noted. Firstly, it suggests that right to self-determination may not be available to a people who have a strong territorial link to a sovereign State. It apparently sounded a warning that right to self-determination cannot be extended to accommodate secession from existing States apart from decolonization. Thus, the Igbos and the Kurds may not be entitled to exercise their right to self-determination to form new States since they already have a strong tie to a sovereign/existing State(s).

Secondly, it buttressed the glaring need for peoples’ right to self-determination to be respected. This is because the realization/respect of right to self-determination is an essential condition for the effective guarantee, observance, strengthening and promotion of the “individual-centred” human rights.⁴⁵ Thirdly, *Western Sahara* presents right to self-determination as a “people-centred” right as opposed to “individual-centred” rights like the right to personal liberty, freedom of expression etc. Fourthly, *Western Sahara* demands that the will of the people for self-determination must be freely expressed. This can be understood to mean that the people should not be intimidated from expressing such will nor should they be induced to doing so.

⁴¹ *Western Sahara*, ICJ Reports 1975 pgs 12 and 33. <<http://www.icj-cij.org/docket/files/61/6195.pdf>> accessed 15 March 2020

⁴² GAR 1514 (XV) of 1960

⁴³ *Western Sahara* (n 41) 32

⁴⁴ *Ibid*,12; Martin Dixon, *Textbook on International Law* (6th edn, Oxford University Press 2007) 218

⁴⁵ Human Rights Committee, *General Comment No 12* (Cmnd HRI/GEN/1/Rev 9, 1984), art 1 (1) (on the Right to Self-determination of Peoples)

3 Recognitions of Right to Self Determination under International Law

Be that as it may, right to self-determination is among the principles guiding Member States of the UN. This is confirmed in the GA's Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁴⁶ Antonio further confirmed this by including self-determination among the fundamental principles of international law in the likes of principles like sovereign equality, the prohibition on the threat or use of force and respect for human rights.⁴⁷ By including right to self-determination among such principles, Antonio duly recognised its due pre-eminence. It must be noted that principles constitute the apex of the whole body of international legislations which represents fundamental sets of standards unanimously adopted by States and thus allowing a modicum of smooth international dealings.⁴⁸ Indeed, Antonio did a great job for including right to self-determination among the principles of international law.

It is observed, however, that right to self-determination was not included among the principles of the UN as set out in Article 2 of the UNC. It was rather included among the purposes of the UN set out in Article 1 of the UNC. Nevertheless, it is submitted that this situation does not enthrone any fundamental defect on the effect and the importance attached to right to self-determination in international law and relations, whether as a principle of international law or as one of the purposes of the UN.

Unlike the UN that expressly recognized self-determination, the African Union, appears not to expressly recognize it. The AU seemingly did not recognize it among its objectives nor its principles even as recent as 2007.⁴⁹ This may be because one of the AU's principle is to respect the borders of member states existing during their independence.⁵⁰ It is submitted that this represents an over prioritization of AU's Member States' RTI and RTS over the self-determination of Africans.

In all, right to self-determination can conveniently be seen as one of the fundamental principles of international law which demands that peoples' political, cultural and social wishes should be respected by States and the international community in both internal and international affairs affecting them. It equally insists that peoples of a territory should be accorded due consideration in national/municipal and international dealings on issues concerning them.⁵¹ Furthermore, Right to Self-determination is the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural

⁴⁶ See GAR 2625 (XXV), preamble, particularly at para (e)

⁴⁷ Cassese (n 4) pgs 46 to 67 particularly at 66

⁴⁸ *Ibid*, 48

⁴⁹ See The African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) arts 2 and 3

⁵⁰ Constitutive Acts of the AU (adopted 11 July 2000, entered into force 26 May 2001), art 4

⁵¹ A Pavković and P Radan, 'In Pursuit of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order' (2003) 3 *Macquarie Law Journal* 1, 2

development.⁵² This is more so as right to self-determination is both a principle and a legal right, at least, under International Law.⁵³

4 Varieties of Right to Self-determination:

Right to self-determination has internal and external elements.⁵⁴ This is confirmed by the Conference on Security and Cooperation in Europe Final Act Helsinki 1975 (Helsinki Final Act) particularly in its Declaration on Principles Guiding Relations between the Participating States, which states that:

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.⁵⁵

In the above declaration, the reference to “internal and external political status” must be understood to mean that there is internal right to self-determination and external right to self-determination. This position is further reinforced by Javais Rehman who equally noted that right to self-determination has both internal and external connotations and can be so exercised by peoples.⁵⁶

Internal right to self-determination avails peoples with the right to have their interest represented in their domestic government. Thus, peoples can participate in the democratic processes of their State as well as demand for local autonomy in the exercise of their self-determination. Internal right to self-determination does not (usually) lead to statehood for the peoples concerned. It merely recognizes the full and unhindered political participation of the people concerned in the internal governance of their State. It further reasserts that all peoples in a State must have equal access to the organs of government under which they are governed as well as receiving, as appropriate, equal development and dividends from their government. In its extensive sense, it further connotes that laws operating in a State must be enforced and seen to be enforced equally on all the peoples and ethnic nationalities that make up the State.

Where the above is not strictly extended to a people in a State, such people can exercise their right to self-determination internally, by seeking their due rights from the State. In this vein, it is arguable that the Igbos and the Kurds can exercise internal self-determination within their existing States. For example, they can insist, on the basis of self-determination, that they must be represented in the government of their respective States.

On the other hand, external right to self-determination insists that peoples in a State can form a new State or join an existing State in the exercise of their right to self-determination, especially where the exercise of their internal right to self-determination has been structurally frustrated politically. This is right to self-determination in its extreme sense! In this sense,

⁵² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1;

⁵³ Crawford (n 65) 646

⁵⁴ J Rehman, *International Human Rights Law* (2nd edn, Longman Pub Group 2010) 478

⁵⁵ Helsinki Final Act 1975, art VII

⁵⁶ J. Rehman, *‘International Human Rights Law’* (2nd edn, Longman Pub Group) 476

right to self-determination seems to fertilize secession and unilateral declaration of independence of peoples in existing States. Here, the peoples concerned can seek separate statehood from the parent State on the basis of exercising their external right to self-determination. Thus, if ethnic groups like the Kurds and the Igbo people are said to have this right, it means that they can seek a separate statehood from their respective parent states, and will not be precluded by their parent States' RTI and RTS.

5 The Legal Scope of Right to Self-determination:

Admittedly, right to self-determination is still an evolving ideology in international law.⁵⁷ It is, however, strongly entrenched in international law in three areas: as an anti-colonial standard, as a ban on foreign military occupation, and as a requirement that all racial groups be given full access to government.⁵⁸ Thus in *Re Reference by Governor in Council concerning certain questions relating to the secession of Quebec from Canada*,⁵⁹ (Quebec) the Canadian Supreme Court was required to rule on whether any right to self-determination arising in international law gave Quebec the right unilaterally to secede from Canada. In rejecting the existence of any such right, the court, *inter alia* ruled that any such right could only arise in the colonial context, where there has been alien subjugation or where the right of internal self-determination is denied. Below is the examination of the above instances generally recognized as circumstances that may warrant peoples to exercise their right to self-determination:

a. As an Anti-Colonial Standard:

As an anti-colonial standard, self-determination encouraged the decolonization of former colonies. This is because right to self-determination insists that people under colonialism are entitled to advocate for the establishment of a sovereign State or the emergence into any other political status freely determined by them.⁶⁰ This was the basis on which waves of independence swept away colonialism in Africa and other countries dominated by colonial powers. This is also because self-determination was framed to apply only in the classical and narrowly defined circumstances of colonialism.⁶¹ However, limiting right to self-determination to decolonization has been criticized to be arbitrary since it was originally developed for universal consumption, not just for decolonization.⁶² Thus, the Helsinki Final Act recognized that self-determination is applicable beyond the colonial context.⁶³

Moreover, where colonialism exists, right to self-determination is not absolute. It seems not to entitle the colonized peoples to automatic independence. Thus, Marc Weller observed that even in colonies, the right to self-determination can be exercised only within the boundaries established by the colonial power.⁶⁴ Thus, the colonial power may withhold it absolutely especially as the international law seems incapable of enforcing its principles/dictates

⁵⁷ Cassese (n 4) 61

⁵⁸ *Ibid*

⁵⁹ *Quebec* (1998) 161 DLR (4th) 385

⁶⁰ Cassese (n 4) 61

⁶¹ M Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20(1) *European Journal of International Law* 111, 113

⁶² M Koskeniemi, 'National Self-determination Today: Problems of Legal Theory and Practice' (1994) 43(2)

International & Comparative Law Quarterly 241, 242

⁶³ Helsinki Final Act, principle VIII

⁶⁴ M Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20(1) *European Journal of International Law* 111, 113

(sometimes). In such situation, colonialism determines the scope of right to self-determination; not *vice versa*.

b. As a Ban on Foreign Military Occupation:

People subjected to foreign military occupation both before or after independence have the right to opt for the establishment of a sovereign State, or free association or integration with an independent State, or merge into any other political status they may freely determine.⁶⁵ The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations) enjoins States to respect the right to self-determination of peoples.⁶⁶ Articles 1 and 2 thereof jointly imposed a duty on States not to subject peoples to alien subjugation, domination and exploitation as same constitutes a violation of the principle, as well as a denial of fundamental human rights contrary to the UNC.

Ipsa facto, peoples so subdued (militarily) are entitled to right to self-determination. In their actions against, and resistance to, such forcible subjugation in pursuit of their right to self-determination, such peoples are entitled to seek and to receive relevant supports from the international community.⁶⁷ The essence of this, may be argued, is not to allow states to use force to intimidate peoples in a None Self-Governing Territory (NST) from exercising their Right to Self-determination. That is probably why such NST has a status separate and distinct from the territory of the State administering it, and such distinction exists until the people therein exercise their right to self-determination.⁶⁸

Subjecting peoples to alien subjugation especially by use of threat or force is no longer permissible in international law. This is because the prohibition on threat or use of force to win territories is now a *jus cogens* permitting no derogation.⁶⁹ Thus in *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁷⁰ where Israel built a wall in the West Bank (along the 1949 Armistice Line known as the "Green Line") which separates Palestinians along the bulk of the territory, the court held that customary international law rendered inadmissible the acquisition of territory by threat or use of force,

c. As a Requirement that All Racial Groups Be Given Full Access to Government:

Racial groups- unlike ethnic groups- are generally recognized as “peoples” that can exercise right to self-determination in existing States as to form a new state. Antonio Cassese insisted that any racial group denied access to government in a sovereign State can exercise right to self-determination by integrating into an existing State, forming its own State or pursue its social, cultural and economic development within an existing State.⁷¹ It is observed that Antonio’s statement above failed to define the meaning of “racial group”. It may be because doing so was not his preoccupation when writing his book. However, it is submitted that no

⁶⁵ Declarations on Friendly Relations (adopted by the UNGA on 14 December 1960), art 5; Cassese (n 8) 61

⁶⁶ Declarations on Friendly Relations, arts 1 and 2

⁶⁷ *Ibid*, art 1

⁶⁸ *Ibid*

⁶⁹ United Nations Charter 1945, art 2(4); *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*, Merits, Judgement (1986) ICJ Reports 14 @ 92; Convention on the Rights and Duties of States in the Event of Civil Strife (adopted by the General Assembly of the Organisation of American States on 21 April 1972), art 1(1)

⁷⁰ *Legal Consequences (Advisory Opinion)* (2004) ICJ Reports, p136

⁷¹ Cassese (n 4) pgs 61 to 62

matter the reason for not doing so, he should not be excused for failing to provide the reason(s) he insisted that in existing states, only racial groups- and not ethnic groups like the Kurds and the Igbos- can exercise self-determination.

Furthermore, Benjamin Pirlet argued that apart from the above three scopes/areas where right to self-determination has been recognized as being available to “peoples”, it is more uncertain to determine in which other cases it applies.⁷² To him, it is uncertain whether right to self-determination will aid ethnic groups like the Kurds and the Igbos in their self-determination drive to secede from their parent states. No doubt, his view constrained the expression of self-determination by peoples not qualified as racial groups. More so, like Antonio Cassese, he failed to provide any reason ethnic groups should not be entitled to self-determination.

In all, it can be argued that most of the confusions surrounding right to self-determination emanate from the diverse and occasionally conflicting interpretations it has received from existing literature, states and peoples like ethnic groups using it as the basis for seeking separate statehood. The extent to which writers, states and ethnic groups recognize that the meaning attributed to self-determination has evolved over time, reflects on their perception of right to self-determination.⁷³ Indeed, right to self-determination has evolved beyond colonial context or merely as a principle dividing the remnants of Austro-Hungarian and Ottoman empires. The wave of change has been blowing it constantly as world events unfold. This change has been recognized in some international documents. For instance, *the Vienna Declaration and Programme of Action* balanced right to self-determination against RTS and RTI by insisting that right to self-determination does not encourage the dismemberment of states as to affect their territorial integrity or political unity in so far as the states conduct themselves in compliance with the principle of equal rights and self-determination of peoples with a government representing all its people without distinction of any kind.⁷⁴

6. Conclusion

Right to Self-determination has endeared itself as a major principle that unshackled the yokes of colonialism. In some cases like in Kosovo, it helped to free ethnic groups from the sovereignty and territorial integrity of their parent state. It has equally licensed itself as a principle that ensures that peoples must be allowed to receive the dividends of governance equally from their parent state and further participate politically in its governance without any structural/political hindrance.

There is no gainsaying that right to self-determination has developed tremendously in recent times. It has evolved beyond colonial context or merely as a principle dividing the remnants of Austro-Hungarian and Ottoman empires. However, its exact meaning has not been free from multiple and sometimes limited interpretations. Nevertheless, there is a general agreement that it is the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development which must be respected by states in their domestic and international relationships/affairs.

⁷² B Pirlet, ‘Is it for the People to Determine the Destiny of the Territory?’ (2013) 18(2) *Coventry Law Journal* 25, 25

⁷³ H Quane, ‘The United Nations and the Evolving Right to Self-determination’ (1998) 47(3) *International & Comparative Law Quarterly* 537, 538

⁷⁴ Vienna Declaration and Programme of Action (Adopted at the World Conference on Human Rights 14-25 June 1993), art I (2). <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> accessed 15 April 2020

It was discovered that international law, in similar measure, upholds both the right to self-determination of peoples and the rights of states to territorial integrity and territorial sovereignty. It was also discovered that the scope of right to self-determination has widened beyond decolonization and is still evolving amidst challenges.