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SELF-DETERMINATION AS A COLLECTIVE HUMAN RIGHT : AN APPRAISAL*

Introduction

The concept of self-determination originated as a political principle. It was identified with growth of nationalism in the nineteenth century, which led to the transformation of the doctrine of popular sovereignty into an objective right to nationhood.[1] The fourteen points of President Wilson entailed the epitomisation of the concept as a prescription for political action.[2] However, the state of understanding of the concept until the signing of the UN Charter was chaotic in the absence of a substantial and consistent body of practice ascribing meaning to the concept. The promoters of the concept as well as its critics tended to argue from what they sought to defend rather than making a case based on a common understanding of the concept. As a result, the polemics that erupted since the first appearance of the concept continues to a large extent.

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1. A. Rigo Sureda, *The Evolution of the Right of Self-Determination* (Leiden, 1973), p. 18. See also U.O. Umozurike, *Self-Determination in International Law* (Hamden, Connecticut) p. 3.
2. Umozurike, *ibid*, pp, 13-20.

Since the incorporation of the concept in the UN Charter in 1945, its claim as a legal concept began to gain ground, particularly when the subsequent declarations and resolutions of the UN purported to lend substance to the idea as a guiding principle. However, the legislative process remained incomplete with the various aspects of the concept still to be fully elaborated. It is, therefore, very much a matter of debate as to whether the concept has been matured into a full grown legal right. This paper attempts to make a tentative appraisal of the concept.

Self-Determination in Law

Although self-determination has been associated with the political reorganisation that took place on the international plane after the First World War, nowhere in tne Covenant of the League of Nations nor in any of the peace treaties did the term actually appear.[3] With the signing of the Charter of the United Nations, wherein at Articles 1(2) and 55 there appears a reference to self-determination, for the first time self-determination received formal acceptance as an international legal principle.

One of the purposes of the UN, according to Article 1(2) of the Charter, is "to develop friendly relations among nations based on respect for the principle of equal right and self-determination of people ....." While enumerating, in Article 55, the various measures that the UN is to promote in the field of international economic and social cooperation, the Charter provides a rationale, as it were, for these measures as creating "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". The promotion of self-government in all "non-self-governing territories", as envisaged in Chapter XI, and the idea of the trusteeship system, as elaborated in Chapter XII, stem

3. R.A. Friedlander, "Self-determination : A Legal Political Inquiry" in Y. Alexander and R. A. Friedlander (eds), *Self-determination : National, Regional and Global Dimensions* (Bonlder, Colorado, 1980), p. 308.

from an evidently elevated status ascribed to self-determination as being an overriding principle, which is to be understood as a pre-condition for international peace and security and not just as an expression of high ideals. This is particularly so as one considers the context of the use of the term in the Charter.

The Charter does not, however, provide a precise definition of the term self-determination. Subsequently, the UN General Assembly attempted to provide greater content to the provisions of the Charter on self-determination through its resolutions and declarations. The Assembly, in its several resolutions adopted in 1952, enjoined upon the Member States the obligation to "uphold the principles of self-determination of all peoples and nations" and to seek the "ways and means of ensuring international respect for the right of peoples to self-determination",[4] The Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the Asssembly in 1960, endorsed the right of "all peoples" to self-determination. It also asserts that "the subjugation of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights" and in so asserting the Assembly sought, as it were, to fill the gap one finds in the Universal Declaration of Human Rights, adopted by it in 1948, which, curiously enough, does not contain any explicit reference to self-determination.

The two international Covenants on human rights adopted by the General Assembly in 1966—the international Covenant on Civil and Political Rights and the international Covenant on Economic, Social and Cultural Rights, substantially elaborated and expanded the concept of self-determination as a legal right drawing primarily on earlier resolutions and declarations of the UN. The first article in both the Covenants contains identical language to define the right of self-determination with its various dimensions. From this, one

4. *Ibid*, p. 310.

could indeed infer the sense of self-determination being the precondition and even the basis of exercising all other human rights enshrined in these Covenants. The Article 1 (1) in both Covenants states that "all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development"; Article 1(2) speaks of peoples' right to "freely dispose of their natural wealth and resources"; and Article 1(3) obligates the States Parties to promote the realisation of the right of self-determination.

The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in 1970, proclaims self-determination as a basic principle of internationl law and as such it urges all states to promote the "self-determination of peoples". While reaffirming the right of all peoples to determine their own political, economic, social and cultural destiny, it also calls upon every state to refrain from any action that would deprive the said peoples of that right. The Declaration also provides a description of the process of self-determination by stating that "the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination".

Slow progress, if not altogether stagnation, in the economic development of the developing countries, together with the frustrations generated therefrom, led these countries to pursue, through the legislative framework provided by the General Assembly, what may be called economic self-determination, with the developing countries forming the majority in the Assembly. Thus, the legislative process pertaining to self-determination also tended to veer towards this theme ever since the adoption by the Assembly of the resolution on Permanent Sovereignty over Natural Resources in 1952. A series of subsequent UN resolutions sought to highlight the inequities in the

international economic system and to propose remedial measures. A significant expression of the expectation of the international community of a new order in the economic field can be found in the Declaration on the Establishment of a New International Economic Order and in the Charter of Economic Rights and Duties of States, both of which were adopted by the Assembly in 1974. A similar theme can be found in the Declaration on the Right to Development, which was adopted in 1986. Evident in these instruments is the conviction that redressing economic inequities paves the way for full realisation of the right of peoples to self-determination.

From the feregoing elaboration of the legislative process, one may draw several inferences. First, the right of self-determination is said to pertain only to peoples seen as human collectivities. In other words, it is a collective right. Second, while states are not made the beneficiaries of the right, an obligation is, however, enjoined upon them to promote the right. Third, given the disruptive potential of an unrestrained promotion of self-determination on the international plane, a caveat is in place, which makes any attempt to disrupt the national unity or territorial integrity of a state incompatible with the Charter.[5] A discussion on all these aspects may be worthwhile in this context.

Subject of the Right of Self-Determination

Nowhere in the Charter nor in any of the subsequent pronouncements of the UN is self-determination posed as a right of states; it has always been purported to be a right of peoples. No definition as to what constitutes a people is available either in these instruments. Apparently, the assumption is that the existence of a people becomes self-evident once such a people aspires for self-determination and lodges a claim to that effect. Indeed, the deputations of the various nationalities pleading their respective cases before the Paris Peace

5. *Ibid*, pp. 311 and 313.

Conference of 1919 appeared to give such an impression. This may be so, but the critical question of defining a people remains.

In the sense of a people being a homogeneous group, defined on the basis of such objective elements as common language, religion or ethnicity, there appears to be no distinction between a nation and a people. However, when we speak of a 'nation-state', that is, when a nation is identified with a state, as we most often do, it may not always be the case as such. The abode of a people may not happen always to be coterminus with the boundaries of a state, which is obvious from the occurances of minorities within a state. Some states may even be 'multi-national' in the sense of comprising of several peoples. On the other hand, a nation is conventionally understood to be consisting of the whole body of the citizens of a state and hence the question of nationality in international law. Thus, a nation ought to refer generally to a people, or even several peoples jointly, achieving statehood. It is in this sense that the Declaration on the Granting of Independence of 1960 refers to the "dependent peoples" languishing under colonial rule and aspiring for statehood.

The UN in its acts and pronouncements pertaining to the process of decolonisation evidently took a pragmatic stand by steering clear of making an attempt to define a people and simply limiting itself to responding to the various claims of self-determination of the peoples living under colonial rule within defined colonial boundaries, notwithstanding the fact that such colonial boundaries might have been the result of administrative expediency or any such consideration other than that of finding homelands for the various peoples. Such a pragmatic stand is said to be dictated by political expediency or necessity.[6] One cannot simply dismiss it at that, if one considers the following rationale.

6. R. Emerson, "Self-Determination" in *American Journal of International Law*, Vol. 65 (1971), p. 461, quotes L. Gross, "The Right of Self-Determination in International Law in M. Kilson (ed.), *New States in the Modern World (1972)*.

It is an acknowledged finding in social science that, apart from the various objective elements that explain the process of consociation of a people, there is also the subjective element that has much to do with the dynamism that the people in question acquires in its progress towards self-determination. In other words, it is not enough to have ethnic, tribal, linguistic or other link; the presence of a state of mind or the ethos of people has to be there[7]. It is the state of mind that explains the people's will to live together as a people and to continue the common way of life. It is, therefore, for the people to aspire for self-determination after having identified itself as a people. Indeed, the history of the various freedom movements and the process of decolonisation attest forcefully to this fact. Given this understanding and the prohibition in the UN Charter against any attempt of disruption of the territorial integrity of a state, the only logical approach the UN can adopt is to make a judgement on the merits of the individual cases of self-determination claims as they present themselves, and respond judiciously.

Characteristics of Self-Determination

Although there is a general agreement among the authors on the application of the right of self-determination in the colonial context, it is however, viewed by some to be essentially in the nature of a *lex specialis*[8]. Apparently, this is because it pertains to a particular phase in human history, which gave rise to a unique political pressure on the international plane against colonialism is a conceivable objective of state policy. However, from a human rights perspective, it appears to be intellectually necessary to apply the concept in a wider context so as to capture all of its characteristics and dimensions. Since, in the existing international system of states,

7. Y. Dinstein, "Self-Determination and the Middle-East Conflict" in Y. Alexander and R.A. Friedlander (eds.) *op. cit*, p. 247, quotes. E. Renan, "Qu'estle qu'une nation ?", in *Oeuvres Completes* (Paris, 1947), pp. 903-904.

8. R.C.A. White, "Self-Determination : Time for a Reassessment", *Netherlands International Law Review*, Vol. XXVII (1981), p. 148.

self-determination claims inevitably give rise to situations of intervention, one can carry out the aforesaid exercise in the context of the various situations of interventionary claim. Thus, to focus a discussion on the applicability of self-determination in a wider context, White refers[9], in addition to the colonial situation to four scenarios using Moore's typology of situations of interventionery claims.[10]

In the *first* scenario, the situation is of a government denying its population, or a large segment of it, the opportunity of participation in the government. While the South African racist government remains the most prominent example of such a case, one can also cite a wide spectrum of governments in this category measured in terms of their propensity to resort to repressive measures. The *second* scenario refers to a situation within a state where there is a demand of a particular type of political organisation to replace the existing one. Certain autocratic or totalitarian regimes thriving on widespread repression fall in this category. Invariably in most of these cases the demand is in terms of a political organisation that allows for a representative government with full popular participation. This being so, there is barely a distinction between the two scenarios. However, in the first the accent appears to be on people's right of participation, while in the second it is on changing the system. Be that as it may, what we have in both the scenarios is essentially the question of the legitimacy of a government.

The UN Declaration of 1970 proclaims free will and non-discrimination as the fundamental principles for the political organisation of states. Moreover, Article 21 of the Universal Declaration of Human Rights, which serves in this respect as a necessary referent, gives an elaboration of these principles as follows :

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9. *Ibid*, pp. 148-149.
10. *Ibid*, p. 149 quotes J. Moore, "Towards an Applied Theory for the Regulation of Intervention", in Moore (ed.), *Law and Civil War in Modern World* (1974), p. 19.

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representative.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authoritry of government : this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

It appears to be problematic to consider how an essentially internal political dispute of a state can come within the purview of the concern of the international community, particularly in view of the principle of non-intervention as acknowledged in the same 1970 Declaration. The answer appears to be in the fact that widespread repression within a state often becomes a human rights issue. Once it is so, a state cannot invoke the plea of domestic jurisdiction to exclude a discussion on human rights situation in the state in question. This is because the promotion of human rights has become matters of international concern".[11]

We have in the *third* scenario the situation where a people within a state or given territory seeks to join another people or a state because of certain ethnic, linguistic, religious or other links of the former with the latter. When such a situation refers to a non-self-governing territory, there has hardly been any problem in disposing of such cases as "colonial enclave" through their merger, where geographically feasible, with their respective mother country. The cession of the Spanish territory of Ifni to Morocco and the Indian annexation of Goa are two rather varied examples of such a form of disposal of colonial territories. But when this involves a part of a sovereign state, as in the case of Northern Ireland or Quebec, the need to view it from a wider perspective, aside from that of human rights, seems warranted

11. R. Bernhardt, "Domestic Jurisdiction of States and International Human Rights Organs", *Human Rights Law Journal*, Vol. 7 (1986), p. 216.

as it poses a whole range of complex issues, falling in the realm of politics and raising questions of international peace and stability. In fact, one can argue that the response, if at all, of the UN in such cases, outside the context of decolonisation, has been one of judicious circumspection.

A similar perspective is called for when one considers the *fourth* scenario, which relates to the cases of secession. The controversy over the limits to self-determination centres around the question as to whether there is a right to secession. The right of self-determination being an inherent right "of people" which is to be exercised freely, it ought logically to include the right to secession as well. Buchheit found that customary international law in fact recognised what he termed as "remedial secession".[12] It stemmed from a conceptual scheme by which a continuum of remedies was envisoned in international law ranging from protection of minority rights to the ultimate remedy of secession, each corresponding to the various degrees of denial of right and oppression inflicted upon a subject people by its governing state.

The critical elements to observe in both the third and fourth scenarios—both being variants of the same sort of self-determination-claim—are: (a) the aggrieved people's *own perception* as a distinct community setting it apart from the body politic of its governing entity; and (b) the nature of the proposed *response to the demands* of the aggrieved people in terms of the remedies stated above. Bearing in mind the various recognised modes of exercise of self-determination, a genuine resolution of such a conflictual situation ought to reflect a balance between the requirement of international peace and stability and that of affording a real sense of security to the aggrieved people.

It is evident from the foregoing discussion on the scenarios that there are two dimensions of the people's right to self-determination. First, it is a right of a people, as Friedlander puts it, "to establish

12. L. Buchheit, *Sacession : Legitimacy of Self-Determination* (New Haven, 1978 pp. 220-223.

on its own initiative a viable independent national entity".[13] To this, of course, one would also add the other accepted modes of exercising self-determination such as free association or integration with another states or any other form of political status. In other words, it entails a people's right to determine its external status, on the international plane, as an entity free from alien subjugation or dominance. Second, it is, as Emerson states, "the right of peoples to determine the internal structure and functioning of their society without interference".[14] The implication of this is twofold: (a) it means that the people has the freedom to chart its own course of political, cultural and economic development; and (b) that the governing entity of that people has the necessary legitimacy to carry through the programme of development.

While a distinction is thus made between external and internal self-determination, one can also explain it in terms of a continuum proceeding from one to the other. As to their priority, the recent colonial history suggests the tendency of the colonial powers to proceed from what is described as 'self-government', meaning limited internal self-determination, to the stage of 'self-rule', meaning the exercise of self-determination in the conventional sense. In fact, the mandate system of the League of Nations could be seen as the closest approximation to this idea.

The dimensions of self-determination as explained above recognises the all-encompassing character of self-determination as a fundamental human right. Chen gives a graphic sociological explanation of what this entails, when he states that "the essence of self-determination is human dignity and human rights. Underlying the concept of

13. C.C. Mojekwu, "Self-determination : The African Perspective", in Alexander and Friedlander (eds.), *ibid*, p. 227, quotes R. Friedlander, "Proposed Criteria for Testing the Validity of Self-Determination as it Applies to Disaffected Minorities", *Chitty's Law Journal*, Vol. 25, No. 10(1977), p. 1.

14. Mojekwu, *ibid*, p. 227, quotes R. Emerson, "The Fate of Human Rights in the Third World", *World Politics* (January, 1975), p. 205.

human dignity is the insistent demand of the individual to form groups and to identify with groups that can best promote and maximise his pursuit of values both in individual and aggregate terms.[15] Thus, the process of consociation for seeking common ends being the basis of all human organisation, self-determination as a right remains essentially to be a collective one in the sense of its beneficiaries, i.e. a people, its exercise, i.e. free will of the people, and its goal, i.e. free pursuit of political, social, cultural and economic development.

Self-Determination in Practice

The principle of self-determination was considered in the context of the territorial reorganisation in Eastern Europe and the disposal of the colonial possession of the defeated powers following the First World War. Its consideration at the Paris Peace Conference of 1919 centered around President Wilson's Fourteen Points and General Smuts' "League of Nations: a Practical Suggestion", both of which sought to apply the 'principle of nationality ; to specific territorial settlements.[16] As a result, the idea of self-determination, though not expressly incorporated in any of the instruments, found its application in the various settlements. It was utilised primarily as a justification for the newly formed states such as Czechoslovakia, Finland, Poland and Yugoslavia. The application of the mandate system to the colonial possessions of Germany and the Ottoman territories in the Middle-East provided another variant of the idea. The system was based on the understanding that those territories, which were not in a position to assume statehood at the time for their supposed "backwardness", were to be put under the tutelage of a few administering powers, who, by their experience and propinquity, were best

15. J.A. Paust, "Self-Determination : A Definitional Focus" in Alexander and Friedlander (eds), supra note 3, p. 12, quotes Lung-Chu Chen, "Self-Determination as a Human Right", in W.M. Reisman and B.H. Weston (eds), *Towards World Order and Human Dignity* (New York. 1976) p. 242.

16. Umozurike, op. cit, pp. 29-34.

suited to guide them towards their eventual exercise of self-government.[17] Accordingly, the mandated territories were to be administered purely for the benefit of the inhabitants of the territories. One glaring inconsistency in the application of the idea, however, was in the fact that it was not applied at all to the colonial possessions of the victorious Allied Powers.

The mandate system was essentially incorporated in the trusteeship system of the UN. Consequently, progress towards the independence of the trust territories had on the whole been more expeditious than in the case of the colonial territories.[18] As regards the latter, the UN kept up a consistent pressure on the colonial powers, primarily though its role under Chapter XI of the Charter, to grant independence to the colonial territories, with the other forms of exercise of self-determination being given less preference.[19] In doing so, the UN also accepted a purely territorial criterion of delimiting the subjects of self-determination, which was in effect the adoption of a political concept of nation rather than a cultural or ethnic one. Only in exceptional cases did it accept the latter form, when the contrary would have posed a serious threat to peace and security.[20] Evidently, the objective was to seek an expeditious decolonisation, which could have been frustrated, should the UN, instead of accepting the colonial boundaries as given, had been drawn into an uncertain and risky process of redrawing the map of the colonial territories on ethnic, linguistic, religious and other lines for the purpose of self-determination.

The process of decolonisation was also expedited once the UN, in its 1960 Declaration on the Granting of Independence, sought to demolish the idea of guidance by an "advanced" state in preparing

17. *Ibid*, pp. 34-40.
18. *Ibid*, p. 100.
19. White, *op. cit* pp. 149-155; See also S.M. Finger and G. Singh, "Self-Determination : A United Nations Perspective" in Alexander and Friedlander (eds.) supra note 3, pp. 333-344.
20. Rigo Sureda, *op. cit*, p. 355.

a "backward" territory for the exercise of self-determination by the declaration that lack of preparation could no longer serve as a pretext for delaying such an exercise. With this, the UN also rejected the colonialist thesis of a purported conflict between self-determination and the supposed levels of civilisation.[21] Also, by recognising the status of the colonial territories as being "seperate and distinct from the territory of the administering state", the UN sought to render the administering state's title over the colonial territories as void. It also effectively rejected any attempt to acquire a title over such territories by any means other than the exercise of the right of self-determination by the indigenous population of the territories. Thus, as a direct consequence of the involvement of the UN in the process of decolonisation, mostly in the 1950s and 1960s, a rapid increase in the membership of the Organisation with the emergence of a large number of new states from the colonial rule was possible.[22] However, in a relatively very few cases, the exercise of self-determination resulted in either integration or association of a few colonial territories with several metropolitan states as well.[23]

The apparent consensus in applying self-determination in the colonial context does not necessarily result from a consensus, at the academic level, on the existence of self-determination as a legal right. While considering the issue, one may focus one's attention on wheter the UN is competent to pronounce on such legal principles. Some view such a controversy to be futile, since the effective difference of opinion lies not necessarily in opposites but rather on making a judgement on the nature and extent of the evidences that

21. *Ibid*, p. 352.

22. From the original membership of the UN of 51 in 1945, the figure has now risen to 159.

23. The integration of Martini and Reunion into metropolitan France may be be cited as an example. Also, Britain maintains her sovereignty over Gibralter following a referendum held in Gibralter in 1967.

would establish whether a norm has attained the necessary consensus of the international community.[24]

Riggins is of the view that to insist upon the argument that the UN resolutions are not binding and thus self-determination remains a mere principle is to "fail to give any weight either to the doctrine of bonafides or to the practice of states as revealed by unanimous and consistent behaviour"[25]. Schachter gives constitutional argument stating that "when the practice of states in the United Nations has served by agreement to rest in the organs the competence to deal definitively with certain questions, then the decisions of the organs in regard to these questions acquire an authoritative juridical status even though these decisions had not been taken by unanimous decision or general agreement[26]. Similarly, Rigo Sureda spoke of an incremental manner in which the UN over the years built up its competence to deal with the questions of self-determination largely on the basis of an interpretation of its role in this regard as envisaged in the Charter[27].

From an empirical perspective, one can suggest that the colonial powers acceded to the decolonisation of their colonial possessions not in a sense of being under any legal obligation to do so. Gross contends in this connection that "the practice of decolonisation is a perfect illustration of a usage dictated by political expediency or sheer convenience. And, moreover, it is neither constant nor uniform[28]". In a similar vein, Green argues that "there is still no right of self-determination in positive international law, although since 1966 there may be one *in nascendi*. It is insufficient for a non-

24. Emerson, supra note to 6, p. 460, quotes W. Friedmann, *Changing Structure of International Law* (1964).
25. Emerson, *ibid*, p. 461, quotes R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) pp. 101-102.
26. Rigo Sureda, *op. cit*, p. 66, note 8.
27. *Ibid*, p. 65.
28. R. Emerson, *op. cit*, p. 461 (see note 6).

binding document to declare that the right is inherent, when practice shows that has never been regarded as the case".[29]

The UN response to the self-determination claims outside the context of decolonisation provides yet another test for the extent and scope of the right. Let us take the examples to which a reference has been made earlier. In the case of Katanga, the UN put its weight behind Congo in a bid to restore the latter's territorial integrity. The case of Biafra did not feature on the UN agenda as there was no Member state to bring it before the Organisation. Even if it did, the UN would in all probability have deferred the matter to the wisdom of the OAU, which had condemned the Biafran situation as a threat to Nigeria's territorial integrity[30]. In the case of Bangladesh, the UN stand had been less than assertive. While it favoured a politcal settlement, it did not take any categoric stand in respect of the claim of self-determination of Bangladesh. As it appears from these cases, the UN practice in this area has been less than emphatic and even at times inconsistent.

Is the practice so inconsistent as to fail to give an indication of the extent and scope of self-determination as a legal right? Not so. First, the colonial powers actually did on occasions acquiese in or even invoke self-determination. Britain, for instance, based its claim on the Falklands Island and Gibralter on self-determination. France integrated a few of her colonial possessions into her metropolitan territory purportedly as a consequence of the exercise of self-determination by the indigenous population of the territories in question. Second, the UN response to the self-determination claims outside the context of decolonisation was evidently based on a realistic assessment of the contextual factors of the cases and the effect of

29. Chen, supra note 15, p. 15, quotes L.C. Green, "Self-Determination and the Settlement of Arab-Israeli Conflict", *American Journal of International law* Vol. 68, p. 40.

30. Subsequently the UN actually did so in case of Western Sahara by passing resolutions endorsing the formula for the solution of the problem proposed by the OAU.

its response, either in endorsing or denying the right in a particular case, on its own primary objective, i.e. maintenance of international peace and security. That such a position could not emanate from an abdication of authority is obvious particularly bearing in mind the rationale for such a position of the UN as elaborated earlier in the paper.

From the foregoing, it appears that there is no escaping the fact that self-determination has been developed into an international legal right. However, as Higgins put it, "the extent and scope of the right is still open to some debate".[31]

A Couple of Conceptual Problems

It may be worthwhile to consider two instances of self-determination being in apparent conflict with certain other international legal principles. The first relates to the principle of non-use of force in international relations. There are many instances in recent history where an assertion of self-determination by a people under colonial rule culminated, in the face of an intransigent colonial power, in what is termed as "wars of national liberation", which is defined as "armed struggle waged by peoples in the exercise of their right of self-determination" "as enshrined in the Charter and elaborated in the UN Declaration of 1970.[32] Obviously the attempt here is to distinguish such an use of force from an ordinary belligerent situation. This leads us to the question as to whether the prohibition on use of force, as in Article 2(4) of the Charter, is to be seen as absolute. Rigo sureda, based on his review of the UN practice, concludes that the UN does not regard the provision to be so, since it appeared to concede the use of force when it is consistent with the UN primary objective in the sense of promoting self-determination.

It is noteworthy that, according to Article 1(2), promotion of self-determination is one of the purposes of the UN, while non-use

31. Higgins, supra note 25, p. 102.
32. see M. R. Islam, "Use in Self-Determination Claims", *Indian Journal of International Law*, Vol. 25, pp. 425-447.

of force has been included in Article 2 as one of the principles of state behaviour in the realisation of the purpose of the UN. Given this difference in context, the two principles need not be viewed in terms of an issue of priority *inter se*. Of relevance here is the obvious philosophical basis of adopting self-determination as one of the fundamental objectives of the UN. It is the idea that the promotion of self-determination is the *sine que non* for international peace and security. On the other hand, the principle of non-use of force may not necessarily be applicable in all situations in the attainment of self-determination. Stone argued that "situations may be so delayed, and prospects of success so fantastically remote, that a minimal regard for law and justice in inter-state relations might require the use of force in due time to vindicate these standards, and avoid even more catastrophic resort to force at a later stage"[33]. Therefore, as a viable course for the implementation of these principles, what appears to be intended is to seek an effective balance between the two without jeopardising the import of either.

The second conflict pertains to the relevance of the principle of territorrial integrity of states in self-determination claims. There are two ways in which such a conflict may arise. First, a colonial power, assuming title over its colonial possessions and thus claiming these to be a part of its metropolitan territory, may invoke the principle of territorial integrity in dealing with a struggle for self-determination within its colonial territories. As indicated earlier, the position of the UN in such cases has been to reject categorically any title of the colonial powers over their colonies. This was done through the ascription of a seperate status by the UN to the colonial territories, i.e. calling these to be "non-self-governing territories" and thus setting them apart from the metropolitan territories of the colonial powers. Consequently, a struggle for self-determination could no longer be shown to be directed against the "territorial integrity or political independence of any state". With that, the

33. Rigo Sureda, *op. cit.*, p. 346, quotes J. Stone, *Aggression and World Order* (1950), pp. 43.

UN also sought to deny the colonial powers the plea of acting in self-defence against an armed struggle for self-determination.

The other way of the principle of territorial integrity being relevent is the occasion when there is an attempt to secede from an independent state. While the process of decolonisation draws to a close, forces of seperation that exist in many of the states, both old and new, cannot just be "wished away" or "steamrolled" to non-existence.[34]. These claims will inevitably come into conflict with the territorial integrity of states. An attempt at reconciliation of the obvious contradiction appears to be implicit in the seemingly African view summarised in a memorandum on the Somali question by the Kenyan delegation to the Addis Ababa Conference of the OAU in 1963, which states that "the principle of self-determination has relevance where foreign domination is the issue. It has no relevance where the issue is territorial disintegration by dissident citizens".[35] Two notions are implicated here : First, while the principle of self-determination provides a standard for the acquisition of the right to statehood, the principle of territorial integrity is there to deter, as it were, the potential violators of that right.[36] Second, esssentially following from the first, self-determination as a right can be exercised by a people only once, precluding any possibility of a continuous regression to secondary groups within the constituent people aspiring for self-determination.[37]

Such an assumption of primacy of the principle of territorial integrity as indicated above leaves the possibility of states acting in a despotic manner in dealing with their dissident communities with serious human rights implications. Also there appears to be hardly any remedy for such a contingency except what one finds in the

34. Finger and Singh, *op. cit*, p. 343.
35. *Ibid*, p. 339.
36. K. A. Adar, "The Principles of Self-Determinatioon and Territorial Integrity Make Strange Litigants in International Law: A Recapitulation", *Indian Journal of* International law, Vol. 26. p. 440.
37. Friedlander, supra noted, p. 513.

doctrine to self-help[38] meaning, firstly, an oppressed "people" struggling for self-determination, and, secondly, the people competing for international recognition after having achieved a certain status by virture of a *fait accompli*, e.g. unilateral declaration of independence. Worse still, even in such an eventuality one is left with the disturbing question as to whether there ought to be in place a "sanguinary evidence of people's suffering greater than Biafrans and less than East Pakistanis" before the self-determination claim in question can command international support.[39] The responses of the UN in such situations, as we have seen, tend to tilt towards maintaining the status quo.[40] While this is understandable in view of the disruptive potential of acceding routinely to the secessionist claims, there is still the need to work out a *modus vivendi* to reconcile the scope of applicability of the two principles.

Conclusion

Based on the foregoing exposition, the following conclusions may be drawn:

(i) Self-determination has been generally recognised as a fundamental principle of international law, the evidence of which may be found in the incorporation of the concept in various international legal instruments and in the practice of the UN, particularly in its application of the principle in the decolonisation process, as well as that of states.

(ii) As a collective human right, self-determination has also been recognised as the primary condition, both in its *external* and *internal* dimension, for the exercise of all other human rights. In this sense, it may be admitted to be a peremtory norm of international law in the sense of *jus cogens*.[41]

38. White, *op. cit*, p. 213.
39. Buchheit, *op. cit*, p. 213.
40. Adar, *op. cit*. p. 434.
41. Rigo Sureda, *op. cit*, p. 359.

(iii) While the application of the principle in the context of decolonisation has been positive, its applicability in a wider context poses a number of problems in terms of clarity of its extent and scope, particularly in its relation to such competing principle as that of non-use of force in the international relations and territorial integrity of states. In this sense, the international legislative process in this area is yet to be conclusive.

(iv) Although there is a duty enjoined upon the states in the international system to promote self-determination, most of the cases of self-determination claims dealt at the international level have, in the final analysis, been in the nature of a remedy of a breach of self-determination. Therefore, as Emerson put, "the realistic issue is still not whether a people is qualified for and deserves the right to determine its own destiny but whether it has the political strength which may well mean the military force, to vindicate its claim."[42] This obviously calls for more attention to be focused on how to assert the right of self-determination rather than just defining and elaborating the right.

42. R. Emerson, *op. cit*, p. 475.