

THE TERRITORIAL INTEGRITY OF A STATE VERSUS SECESSIONIST SELF-DETERMINATION OF ITS PEOPLE : THE BANGLADESH EXPERIENCE

Introduction

The assertion of secessionist self-determination by the people of East Pakistan in 1971 left two options for the international community—support for the territorial integrity of Pakistan or for the disintegration of that territory. The outcome of the crisis was hailed as a triumph for equal rights and self-determination of the people of East Pakistan which emerged as the Republic of Bangladesh at the cost of the territorial integrity of Pakistan. It is evident that two important and widely recognised principles of international law, that of equal rights and self-determination of peoples and that of the territorial integrity of state, came into conflict in the crisis. The crux of such a conflict in a wider sense is the antinomy between two principal objectives of international law—the preservation of world order in terms of maintaining international peace and security and the administration of justice to the people through the protection and promotion of human rights.¹ Now the questions arise: In

1. The four purposes of the UN Charter enumerated in Art. 1 can broadly be reduced to two purposes : the maintenance of international peace and security in terms of world order and the promotion of, and respect for, human rights in providing justice to the people. The fundamental ideal of self-determination is justice for the people, S. Sinha, 'Is Self-Determination Passe ?' 12 *Col. J. Transnational L.* 272 (1973). 'Justice of international law is inseparably linked with humanism, with its concern for peoples and mankind'. I. Lukashuk, 'Morality and International law' 14 *Indian J. J. L.* 327 (1974). What order and justice are in international law and how they are related to one another, see H. Bul 'Order vs. Justice in International Society' 19 *Pol. Stud.* 269 (1971). On the maintenance of order through human rights, see N. Onuf, 'International Legal Order As an Idea, 73 *AJIL* 244 (1979); E. Suzuki, 'Extra-Constitutional Change and World Public Order : A Prologue to Decision-Marking' 15 *Houston L. Rev.* 23 (1977-78).

the event of such a conflict between the territorial integrity of a state and equal rights and self-determination of its people, which one should be accorded priority? Could these two principles be transformed from confrontation to conciliation?

The article argues that this problem of discord cannot be resolved by giving unqualified priority to one principle/objective over the other. Both principles/objectives are equally important and responsible for the maintenance of world peace and security. Order cannot be sustained permanently if justice is denied; and justice cannot be administered unless order is restored. It is indeed imperative to attain a balance between them in such a way that both principles/objectives are observed by mutual respect and protection. The territorial integrity of a state should be respected provided that state complies with its obligations to respect and promote self-determination and human rights of its nationals.

The central argument is that not all secessionist demands necessarily disrupt world order nor does the territorial integrity of state under all circumstances ensure world order. Each case needs to be assessed on its own merits. The recognition of legitimacy of limited secession as the ultimate remedy in extreme cases of the abuse and misuse of territorial integrity, as was the case of Pakistan, may be undeniable.

Secession and Territorial Integrity in a State-Oriented Order

Territorial separation from an existing state is a form of self-determination. It has been contended that the post-First World War peace settlement on the strength of which the principle of self-determination became operative seems clearly to have involved secession, and that 'it is nonsense to concede the right to "all peoples" if secession is excluded'.² Eagleton has described the principle of self-determination 'a two-edged concept which can disintegrate

2. R. Emerson, 'Self-Determination' 65 *AJIL* 464 (1971)

as well as unify.³ The 1970 declaration on friendly relations also prescribes secession, either to establish an independent state or to join a neighbour, as a mode of implementing self-determination.⁴ Despite these assertions and prescriptions, it is widely presumed that there is no room left in the decolonised era for a dissident group within a state to break away from that state. The territorial inviolability of the existing state is at the root of this assumption. The exercise of self-determination by territorial separation undermines the recognised and established boundary of a state.⁵ As a result, no state will allow some of its constituent people to secede at their own choice. Similarly, no organisation of states will advocate any such principle to be followed by its members in the event of an internal demand for self-determination. In fact, the assertion that a separatist claim is untenable because it entails the fragmentation of existing states is readily and invariably echoed by the present state-based order and its forum—the UN.

During the decolonisation the extant elites, particularly of Afro-Asian states, were the espousers and beneficiaries of the right to self-determination. They castigated colonial domination as a violation of that right. These elites are now the defenders of multi-racialism. They feel the need to preserve the entire political unit, no matter however arbitrarily demarcated by the colonial powers.⁶

3. C. Eagleton, 'Excesses of Self-Determination' 31 *For. Aff.* 593 (1952-53)
4. Para. 4 of the Principle of Equal Rights and Self-Determination of peoples in Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UNGA Resolution 2625 (XXV) of 24 Oct. 1970, 9 *I. Leg. Mat.* 1296 (1970).
5. 'In general, when two countries establish a frontier between them, one of the of primary objects is to achieve stability and finality'. *Temple of Preah Vihear Case*, [1962] *ICJ Rep.* 34.
6. African borders are more arbitrary than European ones. S. Touval, *The Boundary Politics of Independent Africa*, 3-17 (1972). Nigeria, for example, is 'perhaps the most artificial of the many administrative units created in the course of the European occupation of Africa'. L. Hailey, *An Africa Survey Revised*, 307 (1957).

This state-centric solidarity is spontaneously realised and consensually expressed in contemporary international relations. It is rooted in

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extensive apprehension that the right to self-determination, if once conceded to be legitimate in existing states, would be destructive of territorial unity. Colonially delineated boundaries reflect neither ethnography nor topography. Consequently, almost every such state has a discontented, secession minded group living in a compact area. The incumbent governments of these states consider these groups as a potential threat to their political unity and territorial integrity. Such a fear, though appears exaggerated, may not be gainsaid in view of the nature of Afro-Asian plural societies.

However, an intermingling of factors could be traced as the origin of this apprehension. The most important one is the desire to perpetuate their position in power. Despite great variations in the form and effectiveness of these regimes, the fact remains that the majority of them are unrepresentative. They are well aware of their legitimacy. This explains why a threat to one is a threat to nearly all. They are cautiously worried about demands for the realisation of democratic rights in their territories. Viewing self-determination as a threat to survival in power or parting with power, the incumbent governments of these states react violently to any such claims. These claims, regardless of how reasonable they may be, are branded as treason to be subdued by all means. This is reminiscent of colonial attitudes which never conceded any right of colonial peoples to

self-determination. All such attempts by the dependent peoples were stamped as rebellion and quelled by necessary repressive measures.

UN members are invariably charged with specific violation of human rights and fundamental freedoms of their peoples. They conceal from international concern the plight of these people under the cloak of territorial integrity. In fact many, if not all, of these undemocratic regimes survive by using force even against their own peoples.

The UN also accords priority to the territorial integrity of states. The overwhelming majority of UN members have come from newly born states. They prefer the existing state-centric status quo which ensures their vested interest. Being an organisation of states, the UN cannot be expected to act differently. Knowing fully well that its power base is the support of its members, the UN is extremely discreet so as not to make a decision inimical to its power source. It has rightly been asserted that 'the UN would be in extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members'.⁷ This explains why the UN is reluctant to support post-colonial self-determination.

The Katangese separatist attempt from the Republic of Congo was fiercely challenged by the African elites. An organised opposition by them through the UN effectively crushed the attempt. Despite a protracted civil war perpetrating untold human torment, the Biafrans' claim to secede from the Federation of Nigeria was suppressed. The Republic of Biafra, recognised by five states,⁸ was reabsorbed into Nigeria. Neither the UN nor the OAU supported the Biafran claim.

7. Van Dyke, 'Self-Determination and Minority Rights' in Van Dyke ed., *Human Rights, the US and World Community*, 102 (1970)

8. Tanzania, Gabon, the Ivory Coast, Zambia and Haiti; France called for a resolution of the conflict 'on the basis of the right of peoples to self-determination' and noted that the suffering of the Biafrans had shown 'their will to affirm themselves as a people'. D. Ijalaye, 'Was "Biafra" At Any Time a State in International Law?' 65 *AJIL* 551-54 (1971).

Their effectiveness as an instrument to reconcile the situation was prejudiced by their dogmatic adherence to the territorial integrity of Nigeria. In a number of resolutions on the Nigerian crisis, the OAU condemned secession in any member state.⁹ Secretary-General U Thant was asked whether there was a deep discord between the Biafrans' right to secession and Nigeria's right to territorial integrity. He replied, "as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State."¹⁰ He specifically emphasised the priority of territorial integrity of a state and denied any right of peoples to self-determination in an independent state.¹¹

Both the UN and its members find it imperative for their survival to limit the meaning and scope of self-determination in such a manner as to exclude their peoples and territories. They confine this right to overseas colonial contexts only. This notion of 'selective self-determination' is absolutely artificial. The internal domination and exploitation of people within a state is as illegal and immoral as overseas. Acting on an artificially drawn distinction, both the UN and its members are reiterating the attitude of the League of Nations and its contracting parties. Colonialism was legal because the contracting parties controlled the League of Nations. Now the idea of 'selective self-determination' is widespread because member states, particularly newly independent states, dominate the UN. Self-determin-

9. M. Nayar, 'Self-Determination Beyond the Colonial Context: Biafra in Retrospect' 10 *Texas I.L.J.* 326 (1975)

10. At a press conference in Dakar on 4 Jan. 1970. 7(2) *UN Monthly Chron.* 36 (1970).

11. At the Accra press conference on 9 Jan. 1970, he said: When a state applies to be a member of the UN, and when the UN accepts that member, then the implication is that the rest of the membership of the UN recognizes the territorial integrity, independence and sovereignty of this particular member state. *Ibid.* 39.

ation should be accorded either to all or to none. The arbitrary selection of beneficiaries of the right would generate more problems than it solves. There are still deprived and discriminated peoples

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within independent states.¹² These peoples must be allowed to exercise their right to 'internal' self-determination.¹³ If an identified group of peoples in an existing state is deliberately discriminated against by the government in power, it is difficult to explain why that group must remain in that state without any right to redress. In the event of an

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12. Peoples in independent states are still discriminated against because of their race, sex, language, religion and other attributes. R. Hauser, 'International Protection of Minorities and the Right of Self-Determination' 1 *Israeli Y.H.R.* 102 (1971); J. Humphrey, 'The International Law of Human rights in the Middle Twentieth Century' in M. Bos ed., *The Present State of International Law*, 105 (1973); J. Novogrod, 'Indirect Aggression' in M. Bassiouni and V. Nanda ed., *A Treatise on International Criminal Law*, 210 (vol. 1, 1973); C. Johnson, 'Toward Self-Determination—A Re-appraisal as Reflected in the Declaration on Friendly Relations' 3 *Georgia J.I.C.L.* 160 (1973).
13. Self-determination has two aspects: external and internal. 'External' self-determination refers to the ability of a people to choose freely in the field of international relations, opting for independence or union with other states. 'Internal' self-determination means that a people in an independent state can elect and keep the government of its choice and has the right not to be oppressed and discriminated against by any other group or by the government. P. Cassese, 'Political Self-Determination, Old Concepts and New Developments' in Cassese ed., *UN Law/Fundamental Rights* 146 (1979); Z. Mustafa, 'The Principle of Self-Determination in International Law' 5 *I. Lawyer* 479 (1971); K. Menon, 'The Right to Self-Determination: A Historical Appraisal' 53 *Rev. Droit Int'l* 187 (1975).

inability to realise 'internal' self-determination within that state, secession by the aggrieved people as an ultimate remedy seems easier to support than to deny.

Juxtaposed to the imperious emphasis on territorial integrity is the expansionist aspirations of UN members. That all peoples do not necessarily have the right to self-determination has been asserted to absorb neighbouring small territories. Both Morocco and Mauritania claimed the Spanish Sahara on the basis of historical ties. The ICJ and the UN Visiting Missions found little such ties, at least, insufficient to establish territorial sovereignty or to affect the application of self-determination.¹⁴ Yet the Spanish Sahara was apportioned by force and by a secret agreement between Spain, Morocco and Mauritania.¹⁵ Equipped with similar claims of strong links of blood, identity, ethnic and cultural ties, Indonesia demanded and invaded East Timor.¹⁶ Uganda claimed a portion of Kenya and Sudan on the ground that these areas were once administered as a part of Uganda.¹⁷ The Indonesian claim to west Irian and Malaysia may be cited to the same effect.¹⁸ These annexations and assertions are deep inroads on the inviolability of existing boundaries, as they inevitably involve the revision of established territories.

The expansionist ambitions of the comparatively stronger who can act as judge in their own cause are fulfilled by coercive means. Internally suppressive measures are adopted to prevent any dissident group from breaking away. Externally force is used to annex

14. *Western Sahara Case* (Advisory Opinion) (1975) *ICJ Rep.* 68.

15. T. Franck and P. Hoffman, 'The Right of Self-Determination in Very Small Places' 8 *New York U.J.I.L.P.* 340-42 (1975-76); M. Shaw, 'Western Sahara Case' 49 *BYJIL* 119 (1978); T. Franck, 'The Stealing of the Sahara' 70 *AJIL* 694 (1976); A. Byman, 'The March on the Spanish Sahara: A Test of International Law' 6 *Denver J.I.L.P.* 95 (1976).

16. Franck and Hoffman, *op.cit.* 348; P. Elliott, 'The East Timor Dispute' 27 *Int'l & Comp. L.Q.* 240 (1978).

17. Franck and Hoffman, *op. cit.* 351.

18. R. Emerson, *Self-Determination Revisited in the Era of Decolonisation*, 23-24 (1964)

territories on the basis of kinship. While the plea of territorial integrity is voiced in the former, it is not raised in the latter. Whilst frontiers identified by the colonial powers are sacred and strictly maintained in the case of secession, these are condemned and re-demarcated in the case of annexation. Thus a 'double standard' is followed by the UN and its members concerning the territorial integrity of state and secessionist self-determination of peoples. If a geo-historical and ethnic common bond is the legitimate basis for the annexation of existing frontiers, it is difficult to find any reason why a divergent geo-historical and ethnic relation should not be a legitimate basis for breaking off of existing boundaries. If 'alike-ness' can be an integrating force, 'diversity' can also be a disintegrating force. In fact, the maintenance of territorial integrity is more appropriate and logical in the case of expansion than in the case of secession.¹⁹

Acting on the presumption that states have a sacred and inalienable right to territorial integrity, both the UN and its members find any break-away attempt as *ipso facto* illegal. The protection of territorial integrity is undoubtedly essential for establishing peace, security and stable world order. But it may not be taken for granted that its primacy is unassailable and conducive to world order under all circumstances.²⁰ The maintenance of territorial integrity of a state

19. In this regard, it may be noted that Biafra's Ojukwu maintained that the principle of territorial integrity can legitimately be invoked if one member state attempts to enlarge its territory at the expense of another member state but certainly not in respect of the *emergence* of new states arising from the disintegration of a member state. O.Ojukwu, *Biafra: Selected Speeches and Random Thoughts*. 238 (1969), emphasis added.
20. The principle of territorial integrity is not absolute. A state's unilateral competence over its territory and right to non-interference may be moderated due to positions and concern of other states. International actors have contravened these principles for the sake of human rights and self-determination in the case of the Central African Empire (now a Republic) and Uganda. French and friendly African nations aided in a coup deposing Central African Empire ruler, *N.Y. Times*, 23 Sept. 1979. p.1, col.1. Despite Amin's calls for counter-attack against Tanzanian invasion, many African nations supported attack against the brutal Amin regime in Uganda, *N. Y. Times*, 6 March 1979, p.3. col. 1; 'The Logic of Secesion' 89 *Yale J. J.* 803, 810-12 (1980).

is also contingent upon the achievement of UN purposes. If the UN and its members emphasise too heavily the exclusive interests of existing state-oriented order and lose sight of the fundamental rights of 'We, the people of the UN',²¹ the aggrieved people may have recourse to unilateral action in an attempt to redress their situation,

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thereby mounting costs against world order. The UN and its members ought to take into account their commitment to protect and promote human rights and fundamental freedoms for all, one of the purposes of the UN, in dealing with problem of secession and territorial integrity in the decolonised era. The successive emphasis on the importance of the observance of human rights in the UN Charter distinctly demonstrates that it was this very basic desire that indeed guided and inspired the formation of the UN.²²

The international community response to the Bangladesh crisis had indeed challenged the wisdom of the assumption of 'no secession at any price anywhere'.²³ Many members of the world community supported instead of opposing, the Bengalees' bid for separation which contributed significantly to the birth of Bangladesh. Such international support tends to indicate that the world community is not totally unwilling to acknowledge self-determination as a continuing remedy in post-colonial situations ranging from internal freedom

21. Preamble of the UN Charter.

22. Including the preamble, the Charter embraces seven specific references to human rights: Arts. 1(3), 13(Ib), 55(c) 62(2) 68 and 76(c).

23. C.O Brien, 'The Right to Secede' *N.Y.Times*, 30 Dec. 1971, p. 25, col 3.

and equal rights of peoples to secession of groups as the ultimate remedy in extreme cases of abuse and misuse of the right to territorial integrity. This shift in the world community attitude towards secession has been reflected even in the statements of Secretary-General U Thant in the post—Bangladesh period. This is in marked contrast to his previous views on secession in the context of Biafra's break-away attempt.²⁴ In his 1971 Annual Report to the General Assembly, he said "a... problem which often confronts us and to which as yet no acceptable answer has been found in the provisions of the charter, is the conflict between the principles of territorial integrity of sovereign states and the assertion of the right to self-determination, and even secession by a large group within a sovereign state. Here again, as in the case of human rights, a dangerous deadlock can paralyse the ability of the United Nations to help those involved."²⁵

The Temporal Nature of State/Territory

The notion of 'territorial integrity' presupposes the existence of a territorial association composed of people in particular delineated areas. A landmass alone cannot create territorial unity. A territorial association is, therefore, engendered by a group or groups of peoples who share common values and expectations. They consider that such a social institution is imperative for establishing and securing a stable pattern of social interaction. To guard these activities, peace and security, they generate the protective garb of 'territorial integrity'. Hence, both 'state' and 'territorial integrity' are the creation of the peoples who live in it. Both are contemplated for shaping and sharing of peoples' self-perceived perspectives that they are desirous of pursuing. In other words, both are meant for the constituent peoples.

24. *Supra* note 10 and its accompanying text.

25. 26 GAOR sup. (no.1A) 1, p. 18, UN Doc.A/8401/Add. 1 (1971).

A state and its territorial integrity are the product of a social process which is not static.²⁶ Frequent change keeps the social process dynamic. This in effect results in the formation, development and destruction of a state. Lasswell states, "The state has duration. It is a time-space frame of reference for individual events. Particular individuals may pass on, but if the overwhelming majority of those who occupy a certain geographical area continue to experience the subjective events of the type chosen as critical for the state, the state endures. The state is thus independent of any one individual, but it ceases to exist when enough individuals change their minds or die without procreation."²⁷

A state is thus the dependent variable of its constituent peoples. Its existence is contingent upon its capacity to promote the interests of constituent peoples. Quite often a state consists of multi-racial groups. In such a plural society, various groups co-exist, harmonising and accommodating each others' interests and values.²⁸ Any interruption in this equilibrium by the creation of a superior-inferior group system is fraught with potential danger to the territorial association. A considerable negative change in shared expectations of a group that is arbitrarily placed in a subservient position may lead it to believe that their present and future interests and values are not secured in the existing state. This consciousness of group security often induces them to demand territorial separation in favour of either forming a new state or merging with another existing one with the end in view to protecting and promoting their preferred value oriented goals.²⁹ This is why the history of the nation-state is a conti-

26. Generally see H.Lasswell, *The Analysis of Political Behaviour: An Empirical Approach*, (1966).

27. H.Lasswell, *Psychopathology and Politics*, 242(1962), emphasis added.

28. de Visscher, *Theory and Reality in Public International Law*, 99 (translated by P.Corbett, 1957).

29. On the question how the consciousness of group security develops separatist claims in independent states, see T. Possony, 'Nationalism and the Ethnic Factor' 10 *ORBIS* 1221, 1229 (1966-67); E. Nafziger and W.Richter, 'Biafra and Bangladesh: The Political Economy of Secessionist Conflict' 13 *J. Peace Research* 91, 93 (1976); E. Nafziger, 'The Political Economy of disintegration in Nigeria' 11 *J. Modern African Stud.* 508 (1973); D. Ronen, *The Quest for Self-Determination*, 13, 22, 39 (1979).

nuous process of the making of nations and the breaking of states as well as the breaking of nations and the remaking of states.³⁰

The human being is the most fundamental element in the community.³¹ It is its basic right to form its own socio-political associations.³² If sovereign right in dependent territories belongs to the peoples then they are entitled to determine their own destiny, such right in independent territories also presumably lies with the peoples. In fact, sovereignty always rests with the peoples.³³ They delegate this right to their preferred elites and show allegiance to them. This act of delegation and allegiance presupposes some consensual obligations or undertakings which may not be articulated but assumed by those elites, notably, that they will act supportive of the peoples, interests and expectations.³⁴ So long as expectations of various groups within a multi-racial state remain stable, the territorial elites can exercise effective control and authority over them. If an identified group's expectations are consistently frustrated, that group will

30. A. Cobban, *The Nation State and National Self-Determination*, 42-43 (1969); *National Self-Determination*, 61 (1945).

31. E. Lauterpacht, 'Some Concepts of Human Rights' 11 *Howard L.J.* 267 (1965)

32. The individual's right to choose the community he regards as optimal for his development is a fundamental social value. M. McDougal, H. Lasswell and L. Chen, 'Nationality and Human Rights: The Protection of the Individual in External Areas' 83 *Yale L. J.* 903 (1974); 'One hardly knows what any division of the human race should be free to do if not to determine with which of the various collective bodies of human beings they choose to associate themselves.' J.S. Mill, 'Considerations on Representative Government' in J. Robson ed. *Collected Works of John Stuart Mill*, 547 (vol. 19, 1977).

33. H. Johnson, *Self-Determination Within the Community of Nations*, 8 (1967).

34. When a particular political group constitutes the power apparatus by which a given state controls its territory and peoples, its authority is derived from community's expectations regarding its appropriateness as a decision maker, see M. McDougal, H. Lasswell and M. Reisman, 'Theories About International Law: Prologue to a Configurative Jurisprudence' 8 *Virginia J.I.L.* 188 (1967-68).

assert a separate new identity and seek to constitute or choose its own sovereign under which they desire to live.

The territorial integrity of a state is therefore a temporal socio-political phenomenon. It may be dismembered or modified by those who originally created it. It is a process of subjective events that continually evolve and change over time and space. This is what the process of creation and extinction of state is all about. And the territorial integrity of a state is the external protection for the enjoyment of human rights and fundamental freedoms—the primary concern for a dignified human existence.³⁵

The very notion of Pakistan in united India was rooted in subjective expectations shared by the Muslims of the subcontinent that their conditions would be improved in a separate homeland for them. The associational desire of the Muslims of East Bengal (now Bangladesh) was to insulate their interests and values from Hindu interference. They thought that their preferred values and expectations would flourish in Pakistan.³⁶ However, reality was found to differ from expectations. They were arbitrarily pushed to a subservient position ever since the inception of Pakistan.³⁷ The gap

35. E. Suzuki, 'Self-determination and World Public Order; Community Response to Territorial Separation' 16 *Virginia J.I.L.* 785-89 (1975-76).
36. In 1947, when United India was divided into India and Pakistan, the Muslims of the Eastern zone (now Bangladesh) were asked to join either of the states. Their decision to opt for Pakistan was motivated not so much by religion but by political and economic frustration and considerations. T. Ling, 'Creating A New State: The Bengalis of Bangladesh' 5(3) *South Asian Rev.* 221 (Oct. 1971-July 1972).
37. The relationship between East Pakistan and the central government has been explored in numerous ways. A synthesis of them includes: the subjection of the East to the subjugation of the West, political domination, economic exploitation, racial discrimination, persistent denial of human rights and military oppression. See K. Sayeed, 'The Breakdown of Pakistan's Political System' 27 *Int'l J.* 381 (1971-72); M. Rahman, 'East Pakistan: The Roots of Estrangement' 3 *South Asian Rev.* 335 (1970); S. Plastrik, 'Behind the Revolt in East Pakistan' 18 *Dissent* 321 (1971); W. Barnds, 'Pakistan's Disintegration' 27 *World Today* 319 (1971); R. Jahan, *Pakistan: Failure in National Integration*, (1972); R. Nations, 'The Economic Structure of Pakistan: Class and Colony' 68 *New Left Rev.* 15 (1971); K. Misra, 'Intra-State Imperialism: The Case of Pakistan', 9 *J. Peace Research* 33 (1972); Morris-Jones, 'Pakistan Post-Mortem and the Roots of Bangladesh' 43 *Pol. Q.* 199 (1972).

between their aspirations and actual condition was very large. Gross atrocities and deprivation of human rights were systematically inflicted upon them.³⁸ Such treatment convinced them that they could not remain in Pakistan as then constituted without risking their property, livelihood and very lives, and that the only safeguard for their present and future security was to create a separate state of their own, just as the Muslims of pre-partition India had been convinced when creating Pakistan. The territorial integrity of Pakistan was justifiable and sustainable insofar it was supportive of the interests and values of its constituent peoples. When it failed to do so for the majority of the people and especially when it became oppressive of the majority people's demand for equal rights and fundamental freedoms, its dismemberment was in order and indeed imperative.

Secession and Territorial Integrity Under the 1960 Decolonisation Declaration

Paragraph 6 of the 1960 Decolonisation Declaration³⁹ has so far been invoked to guard the territorial integrity of a state against secession. The paragraph reads: Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the UN.

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38. For an account of human rights violation in East Pakistan see L. Nicksch, 'The Violation of Human Rights in East Pakistan in 1971 and the US and UN Response' in *Int'l Protection of H. Rights*, L. Hearing Before the Subcommittee on Int'l Organisations and Movements of The House Comm. on the Judiciary, 93rd Congress, 1st Session, 1973, at 913; J. Szalberg, 'UN Prevention of Human Rights Violation: The Bangladesh Case' 27 *Int'l Org*, 115 (1973); V. Nanda, 'A Critique of the UN Inaction in the Bangladesh Crisis' 49 *Denver L-J*. 56 (1972); N. MacDermot, 'Crimes Against Humanity in Bangladesh' 7 *I. Lawyer* 476 (1973).
39. Declaration on the Granting of independence to Colonial Countries and Peoples, GA Res. 1514 (X) 1960, (1960) UN 44-50.

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uniform understanding. Quite consistently with many other legal statements, paragraph 6 is also open to subjective construction. The end in view of member states and their forum, the UN, has greatly influenced the exposition of the paragraph. The impartiality of their interpretation is prejudiced by their unqualified conviction that the territorial integrity of member states are not negotiable. This construction, however, does not reflect the expectations shared by the participants in the declaration.

In understanding the true sentiment and attitude of the sponsors and supporters of the paragraph, a brief legislative history of paragraph 6 is called for. During the deliberation on the draft of the declaration, the Swedish delegate asked whether paragraph 2, dealing with the principle of self-determination, would justify a Katangese demand for separation from the Congo or paragraph 6, dealing with the principle of territorial integrity, would be applicable to protect the territorial integrity of the Congo.⁴⁰ The Libyan representative replied that paragraph 6 was 'essential in order to counter the consequences of the policy of "divide and rule", which often is the sad legacy of colonialism and carries its evil effects further into the future'⁴¹ The Indonesian delegation sponsored the paragraph because

40. 15 GAOR 1266, para. 14 (1960).

41. *Ibid.* 1255, para. 93.

they considered the continuation of Dutch colonialism in West Irian as a partial disruption of the territorial unity of Indonesia.⁴² The Somalian delegate also supported paragraph 6 and expounded his position in the General Assembly in the following statement: We

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should like to emphasize that phrases such as "territorial integrity" and "non-interference in the internal affairs of states, should not be used as a disguise for the continued domination of dependent peoples and the denial of them of the right of self-determination. When we speak of dependent peoples, we do not mean merely those who live under the domination of overseas Metropolitan Powers but also peoples who live under the domination of overland Colonial Powers.⁴³

The 1960 declaration was aimed at facilitating the process of decolonisation. Paragraph 6 was designed to be one of the instruments to achieve that end. In spite of the extraordinary depth of legal and ideological consequences of colonialism, the process of transition had not been smooth or uncontested. When colonialism was totally outlawed by the UN, some colonial powers and their allies were desperate to hold their colonies. As a last resort, some of them, Portuguese for instance, conferred upon their colonies constitutional status as 'overseas provinces' to legalise their possession.⁴⁴ A concerted effort was exerted to circumvent the tranquil process of decolonisation. In certain cases, the colonial powers interfered which

42. *Ibid.* 1271, para. 9.

43. *Ibid.* 1249, para. 20.

44. I. Blishehenko and M. Solntseva, 'The Struggle Against Portuguese Colonialism in the Light of International Law' 8 *Int'l Aff.* 61 (1971, Moscow).

resulted in partitions.⁴⁵ As a result, those who formulated the declaration found it essential to prevent the colonial powers from intervening in the peaceful decolonisation. To that end, they incorporated the provision that when independence is granted to colonial countries and peoples, any attempt to disrupt the national unity of these newly born states is incompatible with the UN Charter. The end in view was to facilitate the smooth progress of nation-building.

Hence, the prohibition of interference in the territorial unity and political independence of newly born states by outside powers, especially by the colonial powers, was the primary concern of paragraph 6. Many views expressed in the General Assembly debate on paragraph 6 corroborate this interpretation, for example, according to the Nepalese delegate paragraph 6 cautions, in the light of the living experience of the colonial territories, against any attempt on the part of the Colonial Powers at the partial or total disruption of the national unity and territorial integrity of the *colonial country* by stating that such attempts would be incompatible with the charter of the UN.⁴⁶

In claiming the Western Sahara, the Moroccan government contended in a similar vein.⁴⁷ The 1969 Security Council resolution on the 'Continued presence of South Africa in Namibia' declared 'that the actions of the Government of South Africa designed to destroy the national unity and territorial integrity of Namibia through the establishment of Bantustans are contrary to the provisions of the Charter of the UN'.⁴⁸

45. Such as the Ewe separation, the Somali separation, 'Mauritization' and 'Katanganization', Suzuki, *supra* note 35 at 842-43.

46. 15 GAOR (935th plen. mtg.) 1136, UN Doc. A/PV. 935 (1960), emphasis added. The Irish representative's statement may be cited to the same effect, *Id.* 1139.

47. *Western Sahara Case*, (Advisory Opinion), (1975) ICJ Rep. 29.

48. SC Res. 264; 24 GAOR, Resolns and Decisions, 2, UN Doc. S/INF/25/Rev 1 (1969).

In view of this legislative history of paragraph 6, it would be unreasonable to take it for granted that this paragraph militates against the right of self-determination by territorial separation. A correct reading of the paragraph appears to be that a state which attempts, inspired by its expansionist aspiration, to extend its territory at the expense of a sister state or neighbouring territories and peoples is prohibited from doing so by the paragraph. Such a prohibition may not be applicable in respect of a break-away attempt within an existing state by a disgruntled group. There was no proposal or argument to that effect in the Fourth Emergency Special Session and Fifteenth Regular Session of the General Assembly debate.⁴⁹

Even if it is accepted that paragraph 6 was designed flatly to protect the territorial integrity of existing states, it cannot be understood and applied quite independently of subsequent events and existing community's needs. The ICJ in its Advisory Opinion on the *Namibia case* held, "The court must take into consideration the changes which have occurred in the supervening (period), and its interpretation cannot remain unaffected by the subsequent development of law, through the charter of the UN and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."⁵⁰

Today there is a growing awareness all over the world of the need to protect and promote human rights. The 1960 Decolonisation Declaration itself was an outcome of humanitarian consideration by the international community of the plight of colonial peoples. As such, paragraph 6 must be construed in a manner that best serves the protection and promotion of human rights, one of the purposes of the UN. The violation of human rights is contradictory to UN

49. Debate on item no.87, (1960). *UN* 38-49; also Suzuki, *supra* note 35 at 843.

50. (1971) *ICJ Rep.* 31.

purposes. A state which does not comply with UN purposes may not, as a matter of right, be entitled to UN remedies.

Presently the world community is frequently experiencing massive human rights infringement by many UN members within their territories. The UN is incapable, in most cases if not all, of functioning as a protector and enforcer of human rights in those territories because of the diverse political interests of its members.

Presently the world community is frequently experiencing massive human rights infringement by many UN members within their territories. The UN is incapable, in most cases if not all, of functioning as a protector and enforcer of human rights in those territories because of the diverse political interests of its members. The Security Council has invariably been paralysed by the stultifying effect of the veto power. This passive role of the UN is likely to be continued until it establishes effective machinery for the enforcement of human rights within its member states.⁵¹ Viewed in these perspectives, a plain and literal reading of paragraph 6 protecting territorial integrity is tenable whenever member states ensure the realisation of human rights within their territories or whenever the UN acts as an enforcer and protector of those rights in the event of violation. When, however a member state infringes human rights within its territory and the UN cannot or does not respond to prevent transgression of human rights 'wherever they may occur'⁵² the deprived people may not be barred by paragraph 6 from resorting to any self-help remedy to realise their rights even if that action infringes the territorial

51. M.McDougal and G. Bebr, 'Human Rights in the UN' 58 *AJIL* 629 (1964); *ILA, Interim Rep. of the Committee on H. Rights, Rep. of the 52nd Conf., Helsinki, 1966* at 754; the Tehran Proclamation, 13 May 1968, Art. 4, Int' 1 Conf. on H.Rights, Final Act, UN Doc. A/CONF.32/41 (1968).

52. GA Res. 2144 (XXII) of 26 Oct. 1966.

integrity and political unity of their existing state. The illegality of abrogation of human rights in turn serves as a basis to justify any such action.

The territorial integrity of Pakistan where the most minimal of human rights were in jeopardy was not safeguarded by paragraph 6. The dismemberment of its territorial unity was engendered from its non-compliance with UN purposes and from the fundamental community expectations to protect and promote human rights.

Secession and Territorial Integrity Under the 1970 Declaration on Friendly Relations

The 1970 Declaration on Friendly Relations⁵³ has been described as 'the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity'.⁵⁴ Paragraph 7 of the declaration deals with the maintenance of territorial integrity of a state. A circumspect dissection of the paragraph may, therefore, be most rewarding.

The paragraph may conveniently be segmented into three interrelated parts. The first part deals with the territorial integrity of a state. It reads : Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

This protection, however, has not been extended to all states. The ensuing parts have singled out states that are entitled to the inviolability of their territorial integrity. According to the second part, only those states that are 'conducting themselves in compliance with the principle of equal rights and self-determination of peoples.....' enjoy this protection. The paragraph does not end here. In its concluding part, it explains what it means by the 'compliance' provision in the second part. To be complied with the

53. *Supra* note 4 at 1292.

54. *The Events in East Pakistan, 1971* . 67, Int, 1 Com. Jurists, (1972).

principle of equal rights and self-determination of peoples, a state must possess 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. So the right of a state to territorial integrity under the first part is no longer unqualified. It is clearly tempered by corresponding duties under succeeding parts which require a state to comply with the principle of equal rights and self-determination of peoples and to provide representative government.

Although international law does not require any particular form of government, there has been a consistently increasing tendency in the international community favouring forms of government based on popular support.⁵⁵ The world community's concern of the realisation of human rights and majority rule is not embodied for the first time in the paragraph. Deeply rooted in the community expectations and

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the UN Charter, the protection and promotion of human rights and the implementation of majority rule through appropriate constitutional process is no more indefinite and elastic but has become a part of international obligations.⁵⁶ After all, the Wilsonian idea of self-determination owes its origin to the 'consent of the governed' principle.⁵⁷ The Universal Declaration of Human Rights emphasises that the legitimacy of governmental authority is to be judged only on the

55. K.Marek, *Identity and Continuity of States in Public International Law*, 53(1954); B.Bot, *Nonrecognition and Treaty Relations*, 24(1967) T. Chen, *International Law of Recognition*, 107(1951).

56. H.Lauterpacht, *The International Law*. 172-73(1947); *International Law and Human Rights*. 178(1973).

57. Hackworth, 1 *Dig. I. L.* 181; M. Pomerance, *The UN and Self-Determination Perspective on wilsonian Conception*. 70 *AJIL* 1 (1976).

basis of the will of the people expressed in free and periodic general elections.⁵⁸

The correlation between self-determination and democracy is that both prescribe that a government should rest on the consent of the governed. The entire anti-colonial movement was founded on this prescription. Once a colonial people achieves independence, it is deemed to have realised its 'external' self-determination in the form of freedom from foreign interference. They are now entitled to 'internal' self-determination in the form of electing and keeping the government of their own choice and of having the right not to be oppressed by the government. The realisation of 'external' self-determination will be meaningless if they are denied 'internal, self-determination.⁵⁹ In a multi-racial state if the Charter objectives of human rights and fundamental freedoms for all are to be achieved, the majority rule with adequate constitutional safeguards for the minority has to be implemented. The UN has indeed adhered to this principle in many of its resolutions, particularly resolutions condemning the minority rule of the former Smith regime of Rhodesia⁶⁰ and the existing South African regime.⁶¹

Hence the most elementary authoritative expectation of the world community has been embodied in paragraph 7 as a compliance clause. In order to invoke the paragraph, the government of a state must derive its legitimacy from the will of the people. Such a popular approval of the government can only be acquired properly through the enfranchisement of all segments of the people within its territory. The paragraph is indeed intended to provide all groups of people in a

58. Art. 21(3).

59. Van Dyke, *supra* note 7 at 79.

60. For these resolutions, see 60 *AJIL* 921-26(1966); J. Cefkin, 'The Rhodesian Question at the UN' 22 *Int'l Org*, 649(1968); C. Okolie, 'Southern Rhodesia in International Law After the UDI' 1 *Glendale L. Rev.* 309 (1976).

61. For these resolutions see H. Cruz, *Racial Discrimination* 202-13 (1971); M. Vorster and N. Botha, Security Council Resolution 418 (1977) 4 *South Af. Yr. I. L.* 130(1978); M. Muller, 'Discussions and Resolutions on South African in the UN' 186.

plural state with a high degree of self-government. The end in view is to develop their own cultural, social and economic institutions. This is precisely, in other words, the basic tenets of the principle of equal rights and self-determination of peoples. The paragraph tends to support the view that there is unlikely to be any equal rights and self-determination in an unrepresentative regime, that is, a regime ruled by a dictator or a military oligarchy. So formulated, it neither recognises the titles of these regimes over the majority by brute force nor protects their territorial integrity. These governments are in violation of the principle of equal rights and self-determination of peoples and, as such, cannot legitimately invoke paragraph 7 to protect their territorial integrity. Peoples within these states are not barred from adopting action to realise their equal rights and self-determination even if that action infringes the territorial integrity of those states. The validity of any such action seems to flow from the non-compliance with the principle of equal rights and self-determination of peoples by the regime concerned. In other words, the right of a state to territorial integrity under paragraph 7 is subject to its duty to provide a representative government and protection for human rights of its nationals.

The constitutional history of Pakistan provides a classic example of the persistent breach of implementing a representative government. Under a majority rule East Pakistan would have a decisive voice in shaping the political, economic, social, foreign and military policy of Pakistan. Far from that, it was reduced to a status of a dependent territory. In 1970, instead of following normal democratic procedure the military oligarchy of Pakistan attempted to reverse by bullets what East Pakistan had achieved through ballots in the first ever held general election in Pakistan. When a majority is denied by force its equal and democratic rights of constituting a representative government, the majority peoples' right to self-determination is undeniable.⁶²

62. V. Nanda, 'Self-Determination in International Law: The Tragic Tale of Two Cities, Islamabad (West Pakistan) and Dacca (East Pakistan)' 66 *AJIL* 336(1972); M.Nayar, 'Self-Determination: The Bangladesh Experience' 7 *Human Rights J.* 260 (1974)

The military oligarchy of Pakistan had no popular base whatsoever.⁶³ Consequently, the regime was not conducting itself in accordance with the principle of equal rights and self-determination. As such, it was not entitled to the insulation of its territorial integrity under paragraph 7. Since it became impossible to realise equal rights and self-determination in a constitutional manner within Pakistan, the majority of the people of Pakistan opted for the exercise of their right by territorial separation. This act was not in violation of paragraph 7. Rather the unrepresentative character of the Yahya regime of Pakistan made it illegal as far as its right to territorial integrity under paragraph 7 was concerned. This illegality in turn furnished some degree of strength and sanction that might be relied on to justify the action which impaired its territorial integrity.

Claims to Secession Due to Massive Violation of Human Rights and Lack of Physical Security

The fundamental legal principles based on justice by which people can realise their human rights have been conceived as an important task of international law. The minimum conditions for survival as human beings is the basic shared concern of all communities.⁶⁴ This concern is unequivocally reflected through the continuous authoritative prescriptions of the UN for the protection and promotion of human rights. A denial of such rights is not only contrary to the UN Charter but also nearly to all contemporary international instruments.⁶⁵

63. Ayub stepped down handing over power to Yahya who soon appointed himself as the President. He admitted: 'The people did not bring me to power. I came myself.', *Time*, 2 Aug. 1971, p.26.

64- M.McDougal and M.Reisman, 'Rhodesia and the UN: The Lawfulness of International Concern', 62 *AJIL* 15(1968); M. Reisman, 'Humanitarian Intervention to Protect the Ibos, in R.Lillich ed., *Humanitarian Intervention and the UN*, 168(1973).

65. Notably, the 1948 Universal Declaration of Human Rights; the 1909 decolonisation declaration; the 1963 Declaration on the Elimination of All Forms of Racial Discrimination; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 Human Rights Covenants; the 1970 declaration on friendly relations. To these may be added at least 16 multilateral treaties relating human rights which had been prepared and adopted by the UN, Valera-Quisumbing, 'The Right to Self-Determination and the Promotion of International Legal Protections of Human Rights: Some Problems and Strategies' 53 *Philippine L.J.* 74 (1978).

The problem of physical security had been a central consideration in East Pakistan. The proclamation of independence of Bangladesh reflected a number of convictions held by the leaders of Bangladesh.⁶⁶ The humanitarian deprivations within Pakistan are known in detail to the world. At the time of separation, numerous

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violations of human rights were being committed by the Pakistan army in East Pakistan.⁶⁷ The Bengalees became their principal target of a planned mass killing. Confronted with this genocidal operation the Bengalees passionately asserted secession as a last resort of restoring security. They fostered the disintegration of Pakistan in response to conditions that had long been deteriorating. The Bengalees convinced that the security of their livelihood, properties and very lives could not be safeguarded if they were subject to the control of the Pakistan government as then constituted.

Pakistan was obviously entitled to preserve its territorial integrity. Every state needs greater unity and integration, not disintegration. Such unity and integrity must be based on a foundation of strict respect for human rights and not on a denial of them. Pakistan's right to territorial integrity was bound up with its duty to respect human rights of its citizens. The basic issue was gross

66. These include that the Yahya regime launched 'an unjust and treacherous war', committed numerous acts of genocide and unprecedented tortures on the civilian and unarmed people, and that these repressive measures made it impossible for the elected representatives of the people to meet and frame a constitution and to form a representative government. For the text: 11 *Intl Leg. Mat.* 119 (1972).

67. *Supra* note 38.

abrogation of human rights in East Pakistan to a point that triggered a threat to international peace and security. Pakistan had no unfettered right to eliminate its own people. Nor did it have any right to drive them out of the country by terroristic activities. By denying them these rights and committing various international crimes against its own nationals under a veil of territorial integrity, Pakistan clearly had forfeited the majority peoples' respect for its political unity and territorial integrity. And without the allegiance of the majority people, its political unity and territorial integrity became hollow and self-defeating.

Separation on the basis of incompatibility as a means of restoring security has been followed as an effective remedy to situations where two groups of people have shown there is little likelihood of their ever living together in peace.⁶⁸ The united India was partitioned on the basis of this presumption. With a constant Hindu majority outnumbering Muslims, any democratic process could only perpetuate Hindu dominated central government. In this situation the Muslims of the Subcontinent inevitably surmised that their interests and aspirations would not be protected in a united India and, therefore, demanded and achieved Pakistan, a separate homeland of their own. If the minority Muslims of India were allowed to secede on the basis of incompatibility and insecurity, there was no palpable reason why for the identical, if not more appropriate, ground the majority people of Pakistan should not be permitted to do so. The reasons and forces behind the secession of East Pakistan were the desire of a subordinate group to step out of the domination of an influential minority—a force somewhat parallel to that which made Pakistan possible. Under these circumstances it was difficult

68. T. Hachey ed. *The Problem of Partition: Peril to World Peace*, (1973).

It deals with the various aspects of partitions of Ireland, Korea, Germany India, Palestine and Vietnam. Of course, Vietnam is now reunited. Separation may be the ultimate rationale to restore security of a group which confronts with an irretrievable discrepancy between itself and the dominant group. T. Gurr, *Why Men Rebel*, 22-58 (1970); Suzuki, *supra* note 35 at 798.

to deny the Bengalees' right to determine their own destiny by favouring the ruthless suppression of just grievances in the name of Pakistan's territorial unity. As Pakistan mistreated its own citizens in a way falling so far below the 'general standards recognised by civilized peoples' as to 'shock the conscience of mankind',⁶⁹ the sacrosanct right of Pakistan to territorial integrity was overridden by the 'elementary consideration of humanity.'⁷⁰

Secession, Territorial Integrity and the Maintenance of World Order

The exercise of secessionist self-determination carries with it a disruptive element that generates some impacts on the maintenance of stable and organised world order. Respect for and sustenance of minimum world order is conceived to be one of the pre-eminent tasks of international law. The world community is inclined to

An objective judgment can support neither a secession that is politically and economically destructive nor the ruthless suppression of just grievances of people in the name of territorial unity.

accept only those changes to the *status quo* that least threaten world order. The separation of East Pakistan was not merely a new delimitation of existing territorial boundaries. It inflicted a radical impact on the *status quo* by disintegrating the recognised and established territorial boundaries of Pakistan. The reasonableness of East Pakistan's claim to secession and of Pakistan's right to

69. Oppenheim *International Law — A Treatise* 312 (8th ed. 1955). Principles for the International Law of the Future provides: Each state has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or *Shock the conscience of mankind*.

38 *AJIL* suppl. 55 principle 2 (1944) emphasis added.

70. *The Corfu Channel Case*. (1949) *ICJ Rep.* 22.

territorial unity must be viewed in terms of basic community policy of the maximisation of values of human dignity and the minimisation of disruption. In other words, an objective judgment can support neither a secession that is politically and economically destructive nor the ruthless suppression of just grievances of people in the name of territorial unity. So which one—the unity of Pakistan or the separation of East Pakistan—was comparatively more promising for the sustaining of optimum world order?

The Viability of the Seceding Entity: The process of decolonisation has resulted in the emergence of a number of mini and micro states. The viability of these states has been the concern of the world community. The post-colonial self-determination is, therefore, opposed because it would lead to further fragmentation of existing states. It has been argued that self-determination would seem to give each individual human being a right to be an independent state.⁷¹ Such an assertion appears to be greatly overstated. By its very nature self-determination has a collective character. A distinct cluster of people, not each and every individual of a cluster has been recognised as the beneficiary of the right.⁷² This poses the question: Is there a minimum size below which no group of people can hope to achieve independent statehood in any meaningful sense?

An absolute answer cannot be given to this question. For opinions are so varied that they often lead to confusion concerning the limit of smallness of 'self-hood' for the purpose of self-determination. Yet it may be reasonable to say that no one would assert a claim of independence of a landmass having no economic and political prospect. It is misleading to assume that every nationalist group would be willing or would have the capacity to establish its own state by breaking

71. Eagleton, *supra* note 3 at 596.

72. U. Umzurike, *Self-Determination in International Law*, 52 (1972); S. Chowdhury, 'The Status and Norms of Self-Determination in Contemporary International Law' 24 *Neth. I. L. Rev.* 74 (1977); L. Chen, 'Self-Determination As a Human Right' in M. Reisman and B. Weston ed., *Toward World Order and Human Dignity*, 214 (1976).

away from its parent state. Not even the most numerous ethnic groups could convert their traditional areas into an economic and politically viable state. The people of the Mariana islands of the Pacific, for example, opted for closer political and economic ties with the US through plebiscite and covenant.⁷³ The important consideration is that the group of people claiming independence must possess a reasonable economic and political prospect of a viable entity so that it can manage its own affairs.⁷⁴ It must also be desirous of acting as a responsible member of the international community.

Quite often it is presumed that secession would lead to the proliferation of many separate entities too small to be politically stable, economically sound and militarily secured. Accordingly, East Pakistan as an independent state, being a fragment part of Pakistan, could be politically unstable and militarily vulnerable. Constrained by small national income and markets, it would be economically in a disadvantageous position to function effectively. This underlying assumption that is used to counter secession, although intuitively appealing and not without merits in some cases, may not be taken for granted in general, especially in the case of East Pakistan. Opposition to the secession of East Pakistan on this presumption seems to be ill-conceived and factually incorrect.

Ironically in most cases of developing states, bigness is not necessarily advantageous for their political stability and economic prosperity. The political stability of a state depends upon its internal

73. G. Dempsey, 'Self-Determination and Security in the Pacific: A Study of the Covenant Between the US and the Northern Mariana Islands' 9 *New York U.J.I.L.* P. 277 (1976-77).

74. Global interdependence has vitiated traditional criteria of sovereign self-sufficiency and independence and facilitated the survival of very small nations. *Yale L. J.*, supra note 20 at 811, 819; M. Reisman *Puerto Rico and the International Process*, 60 (1975); W. Hanrieder, 'Dissolving International Politics: Reflections on the Nation-State' 72 *Am. Pol. Sc. Rev.* 1279 (1978); J. Herz, *The Nation-State and the Crisis of World Politics*, 118, 252 (1976).

political system. From the very beginning of Pakistan, there was a tendency towards a high degree of bureaucratisation whereby the minority ruling elites took on a life of their own. The gulf that detached rulers from the ruled deprived mass participation in shaping and sharing of political power. The internal agitation of East Pakistan for sharing central political power and provincial autonomy led to constant political unrest in Pakistan. The disintegration of Pakistan might have an easing impact on the internal political unrest. In an independent East Pakistan with a homogenous community, the common people had a better prospect of participation in the national political process. The 75 million population with its 55,000 square miles situated in a compact territory in East Pakistan was large and viable enough for the establishment of a separate state when compared with that of many existing UN members.⁷⁵

Similarly, the unity of Pakistan did not necessarily furnish all the solutions to economic problem. If a large population and area were assets for economic stability, the most populous and vast states

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would have been the richest countries in the world. The existing record neither justifies that the big states have done economically better than small states nor suggests that the former have a greater development advantage over the latter. In fact, some of the world's most populous and large states are among the world's poorest

75. Fourteen existing UN members contain only five millions of population each. Gambia, for example, is a state with a population of 300,000 in an area of 4,000 square miles. N. Leff, 'Bengal, Biafra and the Bigness Bias' 3-4 *For. Policy* 129 (1971),

states.⁷⁶ In contrast, many small states have a gross national product at an amount equal to, or even more than, those of big states.⁷⁷ The separation of East Pakistan put an end to the lopsided concentration of wealth in few hands. It helped the effective mobilisation and allocation of capital and other scarce resources for development. The economy of East Pakistan was a distinct unit with all reasonable features.⁷⁸

In this nuclear age when it is exceedingly difficult even for the 'Super Powers' to ensure their own security and when a state's physical security from external aggression does not lie in its own self-sufficient military strength, the poor defence strength of East Pakistan might reasonably be ignored in determining its viability as an independent state.

The Effects of Separation of East Pakistan on West Pakistan: One of the factors that the world community presumably took into account in opposing the secessionist claims of Katanga and Biafra was the fear that their separation would inflict disastrous effects on the remainder of the Congo and Nigeria respectively.⁷⁹ Such an apprehension was less apparent in the case of separation of East Pakistan. Both politically and economically, East and West Pakistan were distinct units with diverse features. Neither of them was dependent on the other for political stability and economic prosperity. East Pakistan was subordinate and West Pakistan was superior in the political and wealth process of Pakistan. Consequently the economic and political viability of West Pakistan as an independent entity was by no means undermined by the separation of East Pakistan.

The International Community Response: Despite the Indian intervention in support of the emergence of Bangladesh, the new state was rapidly and widely recognised by many members of the world

76. For example, India, Indonesia, Egypt. See *Ibid.* 130.

77. For instance, Taiwan, Hongkong, Malaysia, Singapore, Panama. *Ibid.* 130.

78. Nanda, *supra* note 62 at 333-34.

79. Suzuki, *supra* note 35 at 824-26; L. Buchheit, *Secession: The Legitimacy of Self-Determination*, 174-75 (1978).

community.⁸⁰ This indicates that the separation of East Pakistan appeared to be the only alternative left to deal with the crisis. The plight of East Pakistan earned international sympathy and support in favour of its cause. The international response for Bangladesh was on the whole noticeably warmer than that given to Katanga and Biafra. This response significantly contributed to the birth of Bangladesh. In contrast to the developments in Katanga and Biafra, the particular, indeed the extraordinary, circumstances of East Pakistan in 1971 were undoubtedly important factors in the decisions of many members of the world community to support and recognise the independence of East Pakistan. These facts tend to corroborate that the world community had accepted the disintegration of Pakistan in order to alleviate the ongoing disruption to global and regional peace and security that was flowing from the situations in East Pakistan. It was necessary not only to put an end to the intensity and multiplicity of ongoing mass killing in East Pakistan and the loss of lives in the Indian refugee camps but also to ease regional tension and insecurity.

The separation of East Pakistan would unsettle the 1947 settlement. In view of the circumstances at that point of time, a re-settlement of the 1947 settlement appeared to be the only palatable option left for the world community to minimise, if not eradicate altogether, the continuing political unrest and insecurity in the subcontinent ever since the 1947 partition. Although it inflicted some adverse impacts on regional order at that juncture, the prospect were promising that an independent East Pakistan would be friendly towards other nations of the region,⁸¹ thereby promoting lasting peace and security.⁸²

80. Within four months Bangladesh was recognised by over fifty states. The US was the 55th state to recognise Bangladesh on 4 April 1972. *N.Y. Times*, 5 April 1972, p. 1, col. 3; *Economist*, 8 April 1972, p. 47, col. 3.

81. Nanda, *supra* note 62 at 334.

82. Secessionist claims do not 'automatically justify buttressing the existing order for it may indicate a genuine associational desire and help transform an unstable situation into a more equitable new order'. *Yale L. J.*, *supra* note 20 at 820.

Hence a compact and viable independent East Pakistan was more promising for the maintenance of regional order than a sprawling Pakistan with irreconcilable heterogeneous population that was incapable of orderly government and vulnerable to protracted civil strife with international repercussions. There is no gain to any one in suggesting to disrupt the peace and unity of a state by breaking it up into weak units. No one will deny the advantage of a strong and united state. In the case of Pakistan the situation was somewhat different. No one would have undermined the peace and unity in Pakistan, had there been any actual peace and unity ever existant since the birth of Pakistan. A state cannot exist and maintain peace and unity on the basis of questionable loyalties of its nationals. Greater political integration, however desirable it may be, calls for specific measures that promote it. The ruling elites of Pakistan failed to promote Pakistani nationalism in East Pakistan both by what they did and by what they failed to do. The large scale deflection of loyalty and allegiance of the people of East Pakistan from Pakistani nationalism caused an extraordinary crisis in Pakistan's nation-building.

A state cannot exist and maintain peace and unity on the basis of questionable loyalties of its nationals. Greater political integration, however desirable it may be, calls for specific measures that promote it. The ruling elites of Pakistan failed to promote Pakistani nationalism in East Pakistan both by what they did and by what they failed to do.

Given the nature of Pakistan as a plural society, the probable impossibility for the central government of running such a complex society and the emotional heritage of civil war, there was no viable preference to the separation of East Pakistan that could ensure peace and security of the region. The dogmatic adherence to the territorial integrity of Pakistan would have perpetuated violation of human

rights and aggravated the ongoing untold human misery. Therefore, the secession of East Pakistan would be more appropriately subsumed under international law for the maintenance of regional and global order; as it favoured neither secession which was not economically and politically viable nor the ruthless suppression of just cause in the name of territorial integrity.

Secession vs. Territorial Integrity: From Confrontation to Conciliation

The conflict between the right of a state to territorial integrity and the right of its people to self-determination is not new. It was discerned by Wilson long before. He strived to resolve this dilemma by attributing orderly international sanction for secessionist claims. His first draft of the covenant explicitly stated: The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial adjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationship, pursuant to the principle of self-determination, and also such territorial adjustments as may in the judgment of the three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples ... ⁸³

The principle of equal rights and self-determination of peoples has been accepted as one of the UN purposes in Article 1. Whereas the principle of territorial integrity of state finds its expression in Article 2 of the Charter which deals with the governing principles of the UN. The technical committee that drafted the Charter explained the purpose and importance of Articles 1 and 2 in the 1945 San Francisco Conference in the following terms: The 'Purposes constitute the raison d'être of the Organization. They are the aggregation of the common ends on which our minds met; hence the cause and object of the charter to which member states collectively and severally subscribe. The Chapter on 'Principles' sets, in

83. D. Miller, *The Drafting of the Covenant*, 12-13 (vol. 2, 1928).

the same order of ideas, the methods and regulating norms according to which the Organization and its members shall do their duty and endeavour to achieve the common ends. Their understandings should serve as actual standards of international conduct.⁸⁴

Notwithstanding this clarification the conflict between these two cardinal principles remains and calls for a harmonious conciliation. It has been asserted that in the event of conflict between the purposes (self-determination) and 'principles' (territorial integrity) of the UN, the former ought to be accorded priority over the latter.⁸⁵ It is, however, submitted that the problem of conflict between them cannot be solved by giving priority to one over the other. It cannot be claimed either that drafters of the Charter intended to give priority to the 'purposes' over the 'principles'. They simply drew a distinction between them. A correct appreciation of their explanation in the 1945 San Francisco Conference tends to impart that both the 'purpose's and the 'principles' of the UN were equally emphasised. One is as important as the other. Moreover, no international legal principle or right is absolute. All are subject to the principle: 'right implies duty'.

Nation-states are not something apart from constituent peoples. While the former cannot exist without the latter, the preferred pattern of values and dignity of the latter may not be secured without the former.

Admittedly, the maintenance of territorial integrity of a state is not a goal to be pursued. The cardinal purpose is to create atmosphere for dignified human existence. The principle of equal rights and self-determination of peoples, being a fundamental human right⁸⁶

84. Doc. 944, I / 1 / 34 (1), 6 UNCIO Docs. 446-47 (1945).

85. Nayar, supra note 9 at 342; Suzuki, supra note 35 at 841; Umzurike, supra note 72 at 197.

86. Umzurike, supra note 72 at 46; Chen, supra note 72 at 198; Buchheit, supra note 79 at 76.

must be given priority. Nevertheless, as the present international legal order stands, the sustenance of territorial integrity is one of the conditions for establishing and securing stable and permanent institutions under which the minimum requirements of survival for all humanity can be secured. Nation-states are not something apart from constituent peoples. While the former cannot exist without the latter, the preferred pattern of values and dignity of the latter may not be secured without the former. Viewed from this perspective, there need not be any conflict between these two principles. Neither of them is irrefutable, but implies corresponding duties. Both rights ought to be asserted and considered strictly in terms of duties that accompany them.

A compromise between them has been accomplished in paragraph 7 of the 1970 Declaration on Friendly Relations⁸⁷. It is embodied in a somewhat remote manner in the form of a saving clause. Both rights have been made contingent upon the discharge of their respective duties. A state's right to territorial integrity is limited by its duty to protect and promote human rights of its people. If a state does so, its people's right to self-determination is not to be construed so as to sanction any action that would impair its territorial unity. In other words, if people within a state have a representative government and enjoy protection for human rights and fundamental freedoms, that people are deemed to have been realising their right to self-determination. As such, they are debarred from any attempt aimed at total or partial dismemberment of the territorial integrity of the state to which they belong. If a state violates its duty owed to its people, that people may not be prevented from adopting action to realise their equal rights and self-determination even if that action undermines the territorial integrity of that state.

There is no overemphasis on secession. Although for the first time the legitimacy of secession has been recognised in an international instrument of this nature, the scope of secession is circumscribed by conditions and circumstances. It may be permissible as a

87. *Supra* note 4.

last resort only in situations where that choice become unavoidable due to the practical impossibility of other means of realising a peoples' right to self-determination.

Hence, a 'check and balance' between both rights could be attained in practice. Disregard for duty may preclude right. The formulation acts a release mechanism in preventing abuses and misuses of rights. It constitutes a threat to the territorial integrity of a state that has scant regard for the aggregate wishes of its people and their rights. Concomitantly, it is also a threat to people within a state who wish to contravene the political unity of that state without having adequate reasons for doing so. Neither of these two cases may be able to convince the international community to support their cause.

The preservation of territorial unity of a multi-racial state depends on the degree of racial integration that yields common nationality feeling. The former endures if the latter strengthens. Subgroups' identity and values should be allowed to retain, while accommodating them in an inclusive identification with the state. Realisation of 'internal' self-determination in the form of autonomous status to the constituent groups appears to be the viable and stable means of sustaining the territorial integrity and political unity of a multi-racial state. The complete separation of a group from an existing state may perhaps be unavoidable in situations involving unilateral imposition of unrepresentative regimes and persistent denial of 'internal' self-determination. The territorial integrity of a state, standing alone without the allegiance of the people who live in it, has no inherent merit.

Under a constitutional representative regime, the people concerned can exercise more comprehensive control over, and participate in, the internal power structure of the state. Consequently, they become whole-hearted citizens by showing unqualified allegiance to the state. This is not to claim that such a measure would eradicate altogether the problem of assertions to secession. Nonetheless, an internal constitutional safety-valve could effectively be regulated to

minimise the danger of overt secession. Maximisation of internal equal rights and self-determination would avert, or at least minimise,

The complete separation of a group from an existing state may perhaps be unavoidable in situations involving unilateral imposition of unrepresentative regimes and persistent denial of 'internal' self-determination.

the desire to revolt for outright separation in many instances. This in turn maximises the territorial integrity of a state and reaffirms *prima facie* respect for the existing state-centric order.

Conclusion:

The existing world order is often disturbed by secessionist claims. The present state-oriented solidarity for 'territorial integrity under all circumstances at any cost' has not succeeded in solving the problem. The Bangladesh experience shows that at present secession is recognised only if it turns out to be successful. The Biafrans fought in vain for a cause almost identical with that of the Bengalees. The Biafrans could not employ sufficient counter-force against the Nigerian army, whereas the Bengalees' claim found widespread recognition presumably because they succeeded in their resistance movement. While Nigeria succeeded in sustaining its territorial integrity, Pakistan failed to do so. Under such an uncertain international legal order where the legitimacy of a secessionist claim is determined in terms of military victory, not only the principles of self-determination and territorial integrity are placed in a vulnerable position but also other principles notably, the principles of non-use of force and non-intervention are likely to suffer. This is what precisely has happened in the Bangladesh crisis.

Given this position, it seems better to recognise a limited and orderly right to secession under certain circumstances. The Bangladesh experience tends to indicate that the international community is not

unwilling to acknowledge such a right as the ultimate remedy in extreme cases of the abuse and misuse of territorial integrity. No legal

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right or principle has been given unqualified application. The international community ought to protect the justifiable exercise of all rights, while preventing their denial, abuses and misuses. In view of the world community response to the Bangladesh situation, the following factors, *inter alia*, may be considered as common and influential determinants which the world community would increasingly seek in according support to a secessionist claim:

1. Circumstances within a state under which an identified group or groups of people suffer consistent and gross violation of their rights, resulting in political unrest in that state affecting regional and global order;
2. A situation so aggravated by the conditions in 1 above that it cannot be remedied by constitutional or any other alternative means short of separation;
3. A prospect of minimum political and economic viability of the seceding part so that it can become a responsible and viable entity in the world community; and
4. Separation may not be supported where it would place too grievous an economic burden upon the area remaining. The viability of the remainder should always be taken into account.

Two important points relating to the principles of self-determination and territorial integrity emerge from this experience. First,

there is still room for the creation of new states in this decolonised era by exercising secessionist self-determination under certain circumstances. And second, the dogmatic adherence to the territorial integrity of a state is no wisdom, but is rather counter-productive without the allegiance of the people who live within that state. Being the first ever successful exercise of post-colonial self-determination, the influence of the Bangladesh experience on the international community's posture concerning secession cannot be resisted. Indeed such an influence has already been reflected, as mentioned earlier, through Secretary-General U Thant's statement in his 1971 Annual Report.⁸⁸ The legal status of secession now deserves the most searching reappraisal following the Bangladesh incident. To this end, the Bangladesh experience may assist the international community in its concern for the establishment of a legal order to deal with post-colonial self-determination claims.

88. *Supra* note 25 and its accompanying text.