

## SELF – DETERMINATION: A CONFLICT BETWEEN TERRITORIAL INTEGRITY AND SECESSION

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*This article discusses the controversial issue of secession as a mode of exercising the right to self-determination in the context of territorial integrity. This article also examines many aspects of self - determination like its history and evolution, current status under different international treaties and conventions and the different types of self - determination. The principle of self-determination is a jus cogens and has an erga omnes character. This right can be exercised in two ways – internal or external. Internal self-determination focuses on intra-state relations and giving autonomy to the people to pursue their economic, social and cultural development. External self-determination (ESD) gives the right to determine one's political status. Secession is the most controversial mode of exercising ESD. A claim to ESD equates a claim to a territory. Therefore the concept of territorial integrity comes into picture. The principle of territorial integrity appears to be in conflict with the principle of self-determination. This can be witnessed through State practice. However, after doing a close examination of the landmark case of Kosovo in the realm of international law and self - determination we come to a conclusion that the way the world community viewed the principle of self of determination has been changed.*

*Keywords: Self-determination, autonomy, secession, territorial integrity, Kosovo.*

### INTRODUCTION

Self - determination is one of the most contested issues in international affairs. It is fast becoming one of the thorniest issues for the international community. Significant confusion and conflict have resulted not so much over the notion of the right to self - determination, as promulgated by the various covenants and the Helsinki Final Act, but over the definition of self - determination. The United Nations has unwaveringly defended and supported the right of people to self - determination as adumbrated in the UN Charter. However, the self - determination principle has been interpreted differently at various times and has been applied very inconsistently.

More than the right of people to decide their political and social status within the parent nation, the emphasis and all the discussion in the world community is about the people determining their status by breaking away from the parent state.

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As a result of rapid political, social and technological changes in the world, distinct national groups have started demanding separate states for themselves. These nationalist groups have used self - determination as a shield and a spring to boost their claims. But as this issue is very complex and a potentially explosive one, the frequent and common response of the international community has been to sidestep it.

People who are abnegated basic cultural, linguistic, and political rights by their rulers are more likely to resort to violence. Encouraging democracy and respect for human rights and granting local autonomy might be the answer to the self - determination struggles leading to separatists' demands.

## **EVOLUTION OF THE PRINCIPLE**

### **Origin**

The concept of self-determination finds its origin in the Declaration of Independence of the United States of America of 4 July 1776. During the 19th century and the beginning of the 20th century the principle of self-determination was constructed by nationalist movements as implying that each nation had the right to constitute an independent State and that only nationally homogeneous States were legit. Further, this principle provided the basis for the dismemberment of the Austro - Hungarian, Russian, and Ottoman Empires, at the end of WW I.

### **Incorporation into the Charter of the United Nations**

Self-determination found its way into the Atlantic Charter, 1941. The principles of the Atlantic Charter were then ingeminated in the Declaration by United Nations 1942, in the Moscow Declaration of 1943.

The San Francisco Conference of 1945 was substantially molded by the Atlantic Charter of 1941, where the concept and principle of self - determination took shape and was incorporated into the UN Charter. The UN aims to develop friendly relations among nations based on the principle of self-determination.<sup>1</sup> The UN Charter also manifestly refers to the principle of self - determination in the part apropos colonies and other dependent territories.

Evaluating the legal implication of self – determination, it was realized that it did not become a legally binding principle of conventional international law by the mere fact of its incorporation into the UN Charter. Though the commissariat concerning non - self governing and trust territories entail binding international obligations, the general principle of self - determination is too wispy and too complex to entail specific rights and obligations. The UN Charter neither furnishes an answer to the question as to what constitutes a 'peoples' nor does it lay down the

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<sup>1</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 1(2) available at: <http://www.refworld.org/docid/3ae6b3930.html> (hereinafter as UN Charter).

circumstances in which self - determination can be attained. Thus due to all these shortcomings, it only holds a moral standing in the UN organs and international community.

### Development through Implementation and Practice

The UN Charter adverts to self - determination in the context of international security and stability in Article 1 of the Charter and in the context of human rights in Article 55 and Article 56 of the Charter. The interpretation of the principle in the light of these Articles and other basic principles of international law unveils the purpose of self - determination to maintain and promote stability and justice in international relations.

The first substantial contribution made by the UN in developing self - determination was the UNGA Resolution 1514.<sup>2</sup> It proclaimed that “*all peoples have the rights to self – determination*”. This Declaration has been regarded by some as constituting a binding interpretation of the Charter.<sup>3</sup> However, under this declaration, “all peoples” only meant colonized people.

The various conventions, most notably the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Civil Rights (ICESCR), manifestly state the right of self - determination.

“All peoples have a right of self - determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>4</sup>

“The state parties to the present covenant, including those having responsibility for the administration of Non - Self - Governing and Trust Countries, shall promote the realization of the right of self - determination, and shall respect that right, in conformity with the provisions of the UN Charter”.<sup>5</sup>

In the Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations, 1970, better known as Friendly Relations Declaration (1970), adopted by the UN General Assembly by Resolution 2625 (XXV) of 24th October 1970, the UN General Assembly ciphered the most

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<sup>2</sup> General Assembly resolution 1514, *Declaration in the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514 (14 December 1960), available from [undocs.org/A/RES/1514](http://undocs.org/A/RES/1514)

<sup>3</sup> O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (Martinus Nijhoff, 1966), in IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW(2008) 16.

<sup>4</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 999, Article 1 Para. 1 and UN General Assembly *International Covenant of Economic, Social and Cultural Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 993, Article 1 Para. 1

<sup>5</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 999, Article 1 Para. 3 and *International Covenant of Economic, Social and Cultural Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 993, Article 1 Para. 3

definitive and comprehensive formulation so far of the principle of self - determination. It further added 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”<sup>6</sup>, thus accentuating, as the climacteric issue, the methods of reaching the decision and not the result.

This declaration also points to the right of self determination in its Preamble. As this declaration was passed with no vote against it and therefore it was adopted with a wide consensus, it encompasses the norms of jus cogens.

### Judicial Practice

Judicial discussion of the principle of self-determination has been relatively rare and is mainly based on the *Namibia*<sup>7</sup> and *Western Sahara*<sup>8</sup> advisory opinions by the International Court of Justice. In the *Namibia* case, the Court emphasized that the principle of self-determination is applicable to all non-self governing territories as enshrined in the UN Charter. This was reaffirmed in the *Western Sahara* case. Thus, it is clear that the Court regarded the principle of self-determination as a legal one in the context of such territories.

The Court moved one step further in the *East Timor (Portugal v. Australia)* case<sup>9</sup>. In this case, the Court emphasized that the right of peoples to self determination was ‘one of the essential principles of contemporary international law’<sup>10</sup> and has an *erga omnes* character<sup>11</sup>.

The issue of self-determination came before the Supreme Court of Canada in 1998 in the case *Reference Re secession of Quebec*,<sup>12</sup> where the Court decided whether there existed in international law a right to self-determination. The Court declared that the principle of self determination ‘has acquired a status beyond “convention” and is considered a general principle of international law’.<sup>13</sup>

### TYPES OF SELF - DETERMINATION

As the concept of self - determination evolved through the years, there was a realization that there were two different types of self - determination, i.e. internal and external.

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<sup>6</sup> UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), Principle 5.

<sup>7</sup> ICJ Reports, 1971, 16; at 49

<sup>8</sup> ICJ Reports, 1975, 12; at 59

<sup>9</sup> ICJ Reports, 1995, 90 - 102.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> 1998) 161 DLR (4<sup>th</sup>) 385

<sup>13</sup> (1998) 161 DLR (4<sup>th</sup>) 434-5

## **Internal Self - determination**

The right to self-determination has an internal aspect, i.e. the rights of peoples to pursue freely their economic, social and cultural development without outside interference. Governments are to represent the whole population without distinction as to race, colour and decent, national, or ethnic origins.<sup>14</sup> In the domain of self - determination, more emphasis is given to intra - state relations and on the internal vistas of this principle.

External Self-determination (hereinafter referred to as ESD) provides that the peoples in question may freely determine their own political status. Such determination may result in independence (by way of secession), integration with a neighbouring state, free association with an independent state or any other political status freely decided upon by the people concerned.

## **Secession**

Secession is the most controversial mode of exercising ESD. Secession is a withdrawal of a territory and its inhabitants from the existing political system and the jurisdiction of the existing governmental institutions.<sup>15</sup> Secession comes in conflict with territorial integrity. Some scholars argue that territorial integrity merely safeguards the inviolability of international borders but does not regulate an internal affair such as secession.<sup>16</sup> Others claim that territorial integrity prohibits secession because secession dismembers the territory of the state.<sup>17</sup> Many scholars insist that a right to “remedial secession” exists, wherein international law provides a right to secession for peoples subject to extreme persecution or unable to internally realize their right to self-determination.<sup>18</sup> This theory postulates that if groups fall victim to “serious breaches of fundamental human and civil rights” through the “abuse of sovereign power,” then international law recognizes the right of the afflicted group to secede from the offending state.<sup>19</sup>

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<sup>14</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 999, Article 27, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, Article 5 (c)

<sup>15</sup> Aleksandar Pavković, *Secession, Majority Rule And Equal Rights: A Few Questions*, Vol 3 Macquarie Law Journal (2003) 73 at 75.

<sup>16</sup> GEORGES ABI-SAAB, IN *SECESSION: INTERNATIONAL LAW PERSPECTIVES*, (Marcelo Kohen ed. Cambridge: Cambridge University Press, 2006), 473.

<sup>17</sup> JAMES CRAWFORD, “STATE PRACTICE AND INTERNATIONAL LAW IN RELATION TO UNILATERAL SECESSION,” in *Self-Determination in International Law: Quebec and Lessons Learned*, ed. Anne Bayefsky (Cambridge: Kluwer Law International, 2000), 60

<sup>18</sup> LEE BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (New Haven: Yale University Press, 1978), 220–223.

<sup>19</sup> ANTONELLO TANCREDI, A NORMATIVE ‘DUE PROCESS’ IN THE CREATION OF STATES THROUGH SECESSION, *Secession: International Law Perspectives* (Marcelo Kohen ed. Cambridge: Cambridge University Press, 2006) 171-207, at 176. (hereinafter as TANCREDI)

## Territorial Integrity: The Concept

A claim of ESD equates to a claim to a territory.<sup>20</sup> Therefore it is important to deal with the topic of territorial integrity in the context of exercising external self-determination.

According to Oppenheim, “the exclusive dominion of a State within its territory is basic to the international system.”<sup>21</sup> Oppenheim has also noted that, “a State without a territory is not possible”.<sup>22</sup> Thus, territory is one of the most important elements of a state.

One of the core principles of international system is the need for stability and finality in boundary questions. The principle of territorial integrity is a mere reflection of this concept. In other words, territorial integrity provides stability to a state to exercise its sovereign control over its territory independently. This principle prohibits the interference within the domestic jurisdiction of states. The UN Charter embodies this principle of sovereignty and territorial integrity in Article 2(4).<sup>23</sup> This Article reflects the customary international law principle of the prohibition of the use of force and the territorial integrity of States.<sup>24</sup>

Principle IV of the Declaration on Principles Guiding Relations between Participating States contained in the 1975 Helsinki Final Act states that:

*“The participating States will respect the territorial integrity of each of the participating States.”*

General Assembly resolution 2625 (XXV) of 24 October 1970 embodies the obligation to respect the territorial integrity of a State. The territorial integrity and political independence of the State are inviolable. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country”

The International Court of Justice clearly underlined in the *Corfu Channel* case, that, “*between independent States, respect for territorial sovereignty is an essential foundation of international relations*”<sup>25</sup> In the *Asylum* case, the ICJ noted that, “*derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.*”<sup>26</sup> Therefore the juridical requirement placed upon States is to respect the territorial integrity of other States. This was emphasized in the *Nicaragua* case reaffirming “*the duty of every State to respect the*

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<sup>20</sup> L. Brilmayer, *Secession and Self-Determination: A Territorial Interpretation* 16, Yale Journal of International Law, 177, at 201 (1991).

<sup>21</sup> L. OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW, VOL. 1 PEACE (R.Y. Jennings and A.D. Watts eds., 9<sup>th</sup> ed., Longman, 1996) at 564.

<sup>22</sup> Ibid at 563.

<sup>23</sup> UN Charter *supra* note 1.

<sup>24</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (Merits), I.C.J. Reports 1986, 99-101, ¶188-190 (27<sup>th</sup> June 1986) (hereinafter as Nicaragua Case).

<sup>25</sup> The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Reports 1949, at 35 (9<sup>th</sup> April 1949).

<sup>26</sup> Asylum Case (Columbia v. Peru), ICJ Reports 1950, 275 (20<sup>th</sup> November 1950).



*territorial sovereignty of others.*”<sup>27</sup> Thus, the importance of this concept is that it serves to underline the principle that territorial change must be brought about by consent.

The principle of territorial integrity appears to be in conflict with the principle of self-determination. The principle of self-determination has usually been interpreted as referring to only the inhabitants of non-independent territories. The right to secede has not been supported by State practice.<sup>28</sup>

### **The Situation in Somalia:**

The issue of territorial integrity of Somalia has been a constant issue with the continuing civil war in Somalia, despite the secessionist pressures from “Somaliland” and “Puntland”. The Security Council resolution 1766 (2007) reaffirmed “the importance of the sovereignty, territorial integrity, political independence and unity of Somalia”. This was repeated in the Security Council Resolution 1772 (2007).

### **The Situation in the Democratic Republic of the Congo:**

With regard to the continuing civil war in the Democratic Republic of the Congo, which has also seen numerous secessionist trends, the United Nations has been meticulous in reaffirming “its commitment to respect the sovereignty, territorial integrity and political independence” of that State. Security Council Resolution 1756 (2007) reaffirmed its commitment to respect the “sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo”. Further, Security Council resolution 1771 (2007) repeated its reaffirmation.

International practice thus indicates that as a general rule the principle of self-determination does not legitimize secession from independent States nor does it confer rights of secession upon groups, entities or peoples within such independent States.

Since 1945 no State which has been created by unilateral secession has been admitted to the UN against the declared wishes of the predecessor state.”<sup>29</sup> It may, therefore, be concluded that international law does not recognize a right of secession from independent States.

### **THE KOSOVO CASE:**

Kosovo is a province in southern Serbia that was granted partial autonomy in a Yugoslavian constitution in 1974, but was divested of that autonomy in September 1990. In 1999, when Serbian President Slobodan Milosevic suppressed the rebel of Kosovo Liberation Army with force, the UN Security Council intervened.

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<sup>27</sup> Nicaragua Case, *supra* note 24, at 111, 213 and 128 ¶ 251-252

<sup>28</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* at 85, (2<sup>nd</sup> ed., 2013).

<sup>29</sup> *Ibid* at 390.

On June 10, 1999, the Security Council adopted Security Council Resolution 1244. SCR 1244 authorized the UN Secretary-General to establish an interim civil administration in Kosovo (UNMIK) that will transition into provisional democratic self-governing institutions.

On May 15, 2001, the UNMIK issued a Constitutional Framework for Provisional Self-Government, under which it was declared that, “the Provisional Institutions of Self-Government and their officials shall exercise their authorities consistent with the provisions of UNSCR 1244 and the terms set forth in this Constitutional Framework.”

Between February 20, 2006 and September 8, 2006, negotiations were held between Serbia and Kosovo. By March 2007, “the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status was exhausted. The conclusion was that the only viable option for Kosovo was independence, to be supervised by the international community.”

On November 17, 2007, elections were held for several democratic governing organizations in Kosovo. On February 17, 2008, the Assembly of Kosovo approved the Declaration of Independence, issued by “the democratically-elected leaders of the Kosovan people.”

On July 22, 2010, the ICJ issued its advisory opinion on the Kosovo UDI.

In its advisory opinion on Kosovo the ICJ stated that,

*The Court observes, however, that while the Security Council has condemned particular declarations of independence, in all of those instances it was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; it states that “the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)”<sup>30</sup> and held that general international law contains no applicable prohibition of declarations of independence.<sup>31</sup>*

### **Territorial Integrity, for people of for states? – The Kosovo Findings**

Secessionists argue that the principle of territorial integrity applies only to States and not to secessionist groups.

The correlative principle of stability of international borders, like the basic principle of sovereignty and territorial integrity, only applies as against forcible modification by other States. It does not protect a State against dissolution, but constitutes a useful means, under international

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<sup>30</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 403 (22<sup>nd</sup> July 2010) at 437 ¶ 38.

<sup>31</sup> Ibid, at 438 ¶84.



law, to limit the breakup of a State to its own territory, without modifications of borders of neighbouring States.

Furthermore, whereas a State can complain to another State about the violation of its external frontiers, it cannot do so, under international law, against its own citizens. As long as no other State is injured, international law does not preclude the redistribution of the external borders between the preexisting State and the newly created State. Even if the principle of stability of international borders were binding upon the authors of the Declaration of Independence, which is not the case, it is clear that this principle has not been infringed in any way.

Rather, the principle protects States against the coercive action and interference of other States. It does not preclude the issuance of a declaration of independence.

## **CONCLUSION**

Exercising the right to self-determination through unilateral declaration of independence will be illegal only when the declaration is associated with the violation of any norm of international law such as racial discrimination, genocide etc. or if there is unlawful use of force. Territorial integrity properly understood accommodates the principle of self-determination.

Even after all the debate, there is no easy solution to the quandaries posed by self - determination movements in today's world. In the face of growing number of such movements, there is a need to establish a more concise and feasible definition of the term self - determination. Such a definition will not be easy to arrive at and even then, it would practically still be ambiguous. The urge to seek self - determination has multiple origins, including the denial of minority rights and other forms of government repression, territorial dispute, national ambitions and perceptions of economic and political viability.