

1022

INTERNATIONAL COMMISSION OF JURISTS

THE PEOPLES' RIGHT TO SELF-DETERMINATION - A NEW CHALLENGE FOR THE ICJ

The Peoples' Right to Self-Determination — A new challenge for the ICJ

By Michael Kirby, President, Court of Appeal, Supreme Court, Sydney, Australia. Chairman, Executive Committee, International Commission of Jurists. Chairman and Rapporteur, UNESCO Expert Groups on the Rights of Peoples; Member of the Permanent Tribunal of Peoples.

Nationalism, particularly in 19th century Europe, has been a destructive as well as a liberating ideology. Its effects seemed beneficial in the colonial freedom movements in the years after the Second World War, but in more recent years its negative aspects have become very noticeable. In this article Justice Kirby of New South Wales considers the question of self-determination in the context of the human rights movement and other issues that affect the present international order. He considers that new international institutions appear to be needed and makes suggestions in this regard.

The context

Re-birth of nationalism

There is no doubt that the issue of self-determination presents one of the key issues of our time. It is an issue of great importance to the International Commission of Jurists (ICJ). Lately, at a number of international conferences, I have found European participants profoundly discouraged and depressed about this subject. Not only by the unfolding horrors of the murderous conflicts between the communities of the former Yugoslavia, but also at the risk of the awakening giants of nationalism, chauvinism, populism, tribalism and authoritarianism evident in some parts of the former Soviet Union and its old satellites, reaching now even into Western Europe itself.

The sight of these developments has caused even some long campaigners in the struggle to uphold human rights and the peoples' right to self-determination to pause and to suggest that the international order should return to the strong pre-eminence of nation States. The way of self-determination of peoples seems fraught with the danger of instability and conflict. The way of the nation State may involve some

injustices. But at least there is stability and protection against the horrors of war and civil conflict. So goes the new argument of the cautious.

It should not be thought that the issues of self-determination are confined to the peoples of Europe. They are as much a concern of the Kurdish and Palestinian peoples; of the people of East Timor, Aceh and Hong Kong; of the Zulu, Afrikaner and other peoples of South Africa. And of the multitude of indigenous peoples of South and Central America. They preoccupy the Inuit in all the Polar lands of the Arctic. They are of concern to the indigenes and the people of Indian origin in the far-away Fiji Islands. This is an issue of global significance.

Advances of international law

International law will not provide a complete, or even substantial, response either to peoples' rights or individual human rights. But it does provide the framework which is increasingly bringing nation States and their leaders to account before the bar of humanity in respect of the complaints about individual and group right deprivations for which they are responsible. Both in the Human Rights Commission of the United Nations and in the Sub-

Commission established to hear and determine complaints under the International Covenant on Civil and Political Rights (as well as in other organs), the international legal order now calls nation States to answer. The international media has a role in publicising this process. Even autocratic nations seem sensitive today to the ignominy which attaches to condemnation of their records in respecting human and peoples' rights.

The ICJ is dedicated to defending the rule of law, upholding and furthering human and peoples' rights and protecting the independence of Judges and lawyers. There is no doubt that in the last forty years important achievements have been made in building a new world order which accepts the universality of basic human and peoples' rights. The process began in earnest with the Charter of the United Nations in 1945. It took inspiration from the Universal Declaration of Human Rights in 1948. It was reinforced by the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966. It has been elaborated by numerous other conventions and declarations to many of which the ICJ has made a notable contribution.

Most of these international

instruments have been made under the aegis of the United Nations Organisation. But many important regional statements of human rights have been adopted, including the European Convention on Human Rights, the Inter-American Convention and the African Charter of Human and Peoples' Rights. The machinery established by all of these instruments of international law may be imperfect. But at least humanity has commenced the long journey towards an effective international legal order to protect human and peoples' rights. This journey is continuing. The Security Council recently accepted in principle the establishment of an adhoc international tribunal to try war crimes committed by the combatants in the conflict in the former Yugoslavia. Bodies such as the ICJ are urging, for consideration at the forthcoming Vienna World Conference on Human Rights (June 1993), the establishment of a Permanent International Penal Court not confined to the human rights abuses in Yugoslavia to put the sanctions against abuses of basic rights on a permanent international footing.

The notion of self-determination

A number of bodies have become involved in the controversies which exist, relevant to the international order and to the urgent issues of cultural and national identities. For some years committees of UNESCO in which I have taken part have aimed at providing definitions, or at least compendious descriptions, of who are a "people" for the "peoples' right to self-determination" which is accepted in principle in the Charter of the United Nations and recognised in the opening articles of the two International Covenants of 1966.

This activity has led, in turn, to a number of other relevant developments. For example, in November 1992, the Permanent Tribunal of Peoples in Strasbourg was concerned with the claim on behalf of the peoples of Tibet for the exercise of their right to self-determination in relation to the People's Republic of China. More recently the implications and limits of the peoples' right to self-determination has been scrutinised in conferences in both London and Saskatoon, Canada in which I

participated. The Saskatoon conference was specially pertinent because of the claims in Canada made by the peoples of Quebec and by the indigenous peoples of Canada, including those living in Quebec. The need to reconcile the freedom concept of the peoples' rights to self-determination guaranteed by international law (on the one hand), with the need for stability, peace and security in the world, and in the States which make it up (on the other), was a major preoccupation of the Saskatoon conference.

Who are a "people"?

Historical origins

Classical international law has traditionally been based upon the relationships between Sovereigns — initially the personal sovereigns of Kingship but more recently of the nation States. Yet the claim for the self-determination of *peoples* is not something new. For example, it found a vivid manifestation in the claim of the American colonists for separation from Britain. The Declaration of Independence 1776 was voiced in terms which have a very modern sound about them. Similarly, President Wilson's Fourteen Points for the Allied war aims in the First World War included a reference to self-determination on the part of the colonies of the Central Powers. This was perhaps ironical, given that the United States had fought the Civil War to deny a claim to secession on the part of the Confederate States.

The notion of self-determination came to be adopted as a war aim of the Allies in the Second World War because of the insistence of President F D Roosevelt. It was in this way that it found a reflection in the Charter of the United Nations, adopted at San Francisco in 1945. It was unsurprising therefore that the same idea should have been recognised in the Universal Declaration of Human Rights drawn up by a committee chaired by Mrs Roosevelt and profoundly affected by Anglo-American ideas of individual human rights. In the work of that Committee some of the early leaders of the ICJ, such as John Humphrey of Canada, took a leading role. The ideas of the Declaration, in turn, affected the International Covenants.

Not limited to colonies

Accompanying these developments was the process of decolonisation by which the great world empires of the European powers were dismantled and replaced by various forms for self-government in the former colonies. But the question remained as to who were a "people" to whom was promised by international law the "peoples' right to self-determination"?

Many of the newly liberated ex-colonial powers insisted that a "people" for this purpose meant only a formerly colonised people across the seas. This was the "salt water" doctrine. It would have confined the right to self-determination most narrowly. Many of the formerly colonised States were themselves concerned to resist separatist threats — such as that of Katanga in the Congo and Biafra in Nigeria. The very artificiality of many of the colonial borders enlarged those threats of secession by dissident peoples. Sometimes formerly colonised States, by their actions, departed from respect even for the rights of colonised peoples to have self-determination. Goa in India, East Timor in Indonesia and Hong Kong in China are illustrations. The ICJ recently conducted a Mission to Hong Kong. It called attention to the right of the peoples of that colony to self-determination — a right denied by Britain and China.

The notion that cultural and national identity is limited, for the purposes of the peoples' rights to self-determination, to formerly colonial States cannot be accepted. It is conceptually and historically unsound. It also denies the generality of the language of the Charter, the Universal Declaration and the Covenants.

Four criteria

That is why the UNESCO committees in which I participated attempted to provide a more satisfactory definition or description of the characteristics of a "people" for this purpose. The suggested characteristics are four-fold. Although not universally accepted, they have been influential in the recent consideration of this topic. The four features are:

- 1 Commonality of history, ethnicity, language, religion, culture, geographical connection, commerce, philosophy or otherwise so as to provide a group identity for the "people" concerned;
- 2 Sufficiency of number to warrant being treated as a "people" for international law purposes — so as to exclude a group of tiny numbers of insignificance for the international community;
- 3 A will to be seen as a separate and distinct "people"; and
- 4 Institutions, having some degree of formality, which can give effect to that will.

These criteria are, I believe, useful touchstones for determining claims by particular "peoples" that they qualify for the guarantee now provided by international law of the peoples' right to self-determination. For example, at two recent meetings, in which I have taken part, the experts had no hesitation in determining that the Tibetan people constituted a "people" for the purpose of international law. They had the commonalities, the number, the will to separate identity and the institutions to justify their claim and to provide a basis for their asserted right to self-determination in relation to China.

Competing interests: Peace and security

Reconciling international order

The right to self-determination guaranteed to peoples by international law is not, however, an absolute one. It is certainly important as its position in the first article of the International Covenants demonstrates. In fact, the inclusion of this peoples' right in both of the Covenants gives emphasis to the fact that full implementation of the right to self-determination is a prerequisite to the guarantee of other civil, political, economic, social and cultural rights. Unless self-determination can be afforded to the "people", made up of individuals, it is unlikely that the other basic rights will be enjoyed, at least in full measure. By ensuring that a "people" have representative democratic institutions, the preconditions are

established for the protection of the people and of the individuals and cultural and national minorities who may make them up.

Nevertheless, the peoples' right to self-determination must be reconciled with other rights and duties provided by international law. In particular, it must be recognised that the international legal order is still fundamentally organised in terms of nation States, and more lately international organisations. There are few international institutions which respond to the demands made by peoples, minorities or other groups. Many of the nation States resist such demands. They are perceived by them as potentially divisive, distracting and even treasonous: with plots for secession, the loss of territory and resources, instability of their borders and ethnic divisions at home. The recent events in the former Yugoslavia, the former Soviet Union and elsewhere appear to have lent credence to this fear.

Secession is a last resort

International law does not forbid secession from a State. Secession may sometimes be the appropriate result of the exercise of a people's right to self-determination. But it is not the *only* way in which self-determination may be achieved. Thus, in the case of indigenous peoples — who are undoubtedly a "people" for international law purposes — it may be impossible to contemplate secession, given their scattered disposition throughout large territories now also occupied by settlers and migrant newcomers. For such "peoples" the right to self-determination must take other forms which are compatible with the continued existence, unchanged, of the nation State so long as it recognises the local autonomy of cultural and national minorities. This can be done in various forms of federation, self-government, devolution, de-centralisation and other governmental mechanisms for self-determination.

There is no simple mechanism for achieving peacefully the consideration and decision by a people on the form of self-determination which they themselves wish. It is for default of such mechanisms that the international legal order stands by,

largely helpless, and watches the kinds of conflicts which have occurred in Yugoslavia, as the claim for self-determination is fought with guns and bombs. There are many other such cases as we all know.

Towards a new culture

Re-drawing artificial borders

Clearly, important achievements have been made in the building of a new world legal order since 1945. Yet the present system is inadequate and unsatisfactory. Abuses of individual human rights and affronts to minority rights continue to be an important source of grievances. These lead to instability and, sometimes, to the violent demands for secession as the only "acceptable" means of achieving self-determination by a people.

This is why various suggestions are now being put forward to improve the international machinery which is available for dealing with such claims. In an ideal world, artificial boundaries which were drawn by colonial or other rulers with indifference (or insufficient attention) to cultural and national identity would be re-drawn. International mechanisms for consulting the people concerned, polling their wishes and, if appropriate, peacefully redrawing boundaries would be established to give effect to the liberation concept that peoples should ordinarily be allowed to live together in a group identity which is congenial to them, harmonious to their members and respectful of other national and cultural minorities in their borders.

Modern multiculturalism

But this is not an ideal world. On the one hand, the nation States which control the organs of the international legal order and the international organisation resist such proposals, seeing in them the risks of promoting secessionist movements. Even some observers who are generally sympathetic to human rights are cautious about such ideas. They believe that the future, after Hiroshima, should be built in multi-cultural and multi-lingual societies, not reverting to small, selfish, nationalistic communities resting on

often over-idealised and even false visions of cultural and national identity: depending on chauvinism and xenophobia and rekindling irrelevant historical antipathies.

Our problem is therefore one of reconciling the undoubted peoples' right to self-determination with the need to reduce areas of potential risk to peace and security in the world and the danger of instability which may arise from ongoing neglect of the claims of a distinct people to govern themselves. To respond to this problem proposals have been made. They include the establishment of new institutions both within and outside the United Nations system.

New international machinery

Thus, at the recent symposium on self-determination at Saskatoon in Canada, the participants unanimously recommended that the United Nations and its member States should give serious consideration to the progressive development of the concept of self-determination and to identifying or creating a mechanism which could consider self-determination claims where there is a risk of disturbance of the peace or violations of fundamental human rights. It was suggested that consideration be given to the establishment of a new United Nations Commission on Self-Determination, equivalent to the existing Commission on Human Rights.

Alternatively, it was suggested that the mandate of existing bodies such as the Trusteeship Council, the Committee of Twenty-four or the Fourth Committee of the General Assembly should be expanded to take on the challenges of this time. The machinery of the United Nations often continues to reflect the problems which were confronting the world in 1945. With the end of the European empires and of the Cold War, there are acute new problems. They sometimes require new institutional arrangements.

Another recommendation frequently voiced is for the appointment of a Special Rapporteur or High Commissioner with appropriate powers to monitor the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic Religious or Linguistic

Minorities. There is before the United Nations at this time a draft Declaration on the Rights of Indigenous Peoples. It has been drafted by a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Clearly, effective machinery is needed to turn brave words about indigenous and other peoples into practical protection for their cultures, national identities and living environments.

Another recommendation of the Saskatoon meeting was that the Secretary-General of the United Nations should have enhanced powers to investigate and act upon claims for self-determination where these are denied. Such powers should range from early warning to peace-keeping, peace-making and peace-enforcement.

New non-governmental organisations

Outside the United Nations, the participants at Saskatoon resolved to establish an independent non-governmental Commission on Self-Determination. This commission, if established, will be charged with examining the scope and content of the right to self-determination; identifying the criteria for determining claims; recommending specific mechanisms to decide such claims, to promote dialogue between parties in conflict and to afford rights against nation States which are unreasonably intransigent. I would hope that it would co-operate closely with the ICJ in its work relevant to peoples' rights.

In some ways, the need for new international machinery to give substance to the peoples' right to self-determination is more urgent even than providing machinery for individual human rights. Out of claims for self-determination, unreasonably denied, it is even more likely that armed conflict will grow than out of repeated abuses of individual human rights. The international machinery to redress abuses of human rights may be most imperfect. But the machinery for addressing unrealised claims for self-determination is even more imperfect — almost non-existent. This is so precisely because of the resistance of nation States.

Diminishing the agony

If the first fifty years of the United Nations saw concentrated attention upon the issues of universal human rights, the next fifty years will see attention given to perfecting the institutions for safeguarding individual human rights. There may even be progress in the development of effective institutions to evaluate and afford protection to cultural and national minorities, indigenous peoples and all those who have their right to self-determination denied.

It is important to realise that that right is itself an attribute of human liberty. It does not necessarily mean secession. But it does mean that a people, as an identifiable group of sufficient number with a will to assert their separateness and institutions to reflect that will, should have appropriate measures of self-control and self-government. Unless they do, we will see many more Yugoslavias. And the toll of human suffering, loss of life and deprivation of basic human rights will be a fearsome agony for humanity.

That is why I express the hope that the ICJ — which has played such a vital leading role in the building of the human rights environment which we now share — will work creatively and persistently on this very urgent problem. Truly it is a major issue of this time. If you are in doubt think of the death, pain and destruction of the Balkans at this time. And not only in the Balkans. We should resolve to do something to prevent, in a just way, the sad repetition of these catastrophes in the four corners of the world.

One way is by the establishment of a permanent International Penal Court — as proposed by the ICJ to the World Conference on Human Rights. This would sanction and redress abuses against human rights as provided by international law. But, in addition to this, as a preventive measure, new international institutions are needed to eliminate or reduce the causes of human rights abuses, racism and "ethnic cleansing". One such institution would surely address the unrequited demands of the peoples' right to self-determination. Promised by international law. Not yet delivered. □