

"Self-Determination; international perspectives"

*Epilogue*

University of Saskatchewan

Nov. 1994.

001173

# SELF-DETERMINATION: INTERNATIONAL PERSPECTIVES

## EPILOGUE

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### END OF EMPIRE

I was perhaps the first, at a United Nations meeting, to predict the dissolution of the Soviet Union.

It came about this way. In 1984, under the chairmanship of Judge Keba Mbaye of the International Court of Justice, I was participating in a committee of counsellors of the Director-General of UNESCO. We were considering the content of the rights of peoples in international law. Many of the experts, -from formerly colonised countries, seemed to be blindly embracing the right of peoples to self-determination without acknowledging the problems which the assertion of the right presented to the international legal order, to the nation states which made it up, to the stability and inviolability of borders and to the peace and security of the world.

I was not opposed to the notion. I knew my history. I knew how the assertion of the peoples' right to self-determination long pre-dated its usually given starting points: Woodrow Wilson's Fourteen Points for the Allied cause in the Great War or the Treaty of Versailles. There was a nice irony in the fact that the most adamant opponent of this "peoples' right" in UNESCO had been the United States of America. Yet the *Declaration of Independence*<sup>1</sup> of that country began with as bold an assertion of a people's right to self-determination as one could find:

*"When in the course of Human Events it becomes necessary for one people to dissolve the political bonds which have connected them with another ..."*

The Civil War in the United States had been another instance which we would view today as an attempted secession and a purported exercise of the right of a people to self-determination. If it was good enough for the colonists and settlers in the Americas and suitable for the peoples of Central Europe in 1916, why was it such a taboo in UNESCO in the 1980's?

I knew of the references to the peoples' right to self-determination in the *Charter* of the United Nations. There, in the very first article, amongst the stated purposes of the new world organisation are:

*"[t]o maintain international peace and security, and*

*[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."*

The trusteeship system in article 76 was established to promote the progressive advancement of trust territories towards self-government or independence according to:

*"[t]he freely expressed wishes of the peoples concerned ....."*

As a lawyer, I was aware of the developments of international law. I knew of the passage into the first articles of the *International Covenants* of the identical assertion promising:

*"All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

I knew also of the "tremendous step forward"<sup>2</sup> taken in 1960 by the adoption of a resolution of the General Assembly proclaiming the right of self-determination of "all peoples" in a way that denied the limitation of the self-determination principle to ex-colonial peoples or those ruled by foreigners. I knew that important decisions of the International Court of Justice had given their blessing to self-determination as a legal right, both in the opinion on Namibia<sup>3</sup> and the later opinion on West Sahara.<sup>4</sup>

Yet I was aware of the ambivalence of international law, and of the nation states that play such a part in fashioning its content, concerning the right of secession which would require the re-drawing of borders, including those artificially imposed upon peoples of the same ethnicity by the recently ousted colonial masters. When Biafra declared its independence from British-created Nigeria as a homeland for the Ibo people, only five of the member states of the United Nations gave it recognition<sup>5</sup>. Similarly Bangladesh was ushered into this world without enthusiasm. Only when the severance of East Pakistan was an accomplished fact did realism attract supporters to the new state which had effectively created itself out of the Bengali people by revolution, turmoil, war and bloodshed.

As I looked around the room of the UNESCO experts in Paris, so enthusiastic for the right of peoples to self-determination, my eyes fell upon the Assistant Director-General who had just entered to take his seat on the platform. He was a distinguished and scholarly Soviet official, born in the Armenian Soviet Socialist Republic. When my time to speak came, I acknowledged the "liberationist" and "emancipatory" notion which lay behind the established legal right to self-determination of peoples. But I felt duty bound to point out that the idea carried in its train serious problems which had a legal dimension. Looking at the African experts, I reminded them of Biafra. Looking at the Indian expert, I reminded him of the potent force of the idea in Kashmir. Then, turning to the Soviet expert and the Assistant Director-General

behind him, I suggested that the assertion by the peoples gathered together in the Soviet Union, of their right to self-determination would one day, perhaps soon, break up that Union and restore the nation states of the separate peoples and nationalities who made it up.

My suggestion was greeted with laughter. Somewhat condescendingly, I thought, I was told that the Soviet peoples were one big happy family of peoples. Their union was indissoluble. The Assistant Director-General from the Armenian SSSR was as much *homo sovieticus* as was the expert from Russia. The Soviets had triumphed over divisive, historical nationalism.

I sometimes wonder where the Armenian official is today. And whether he has ever thought of this sharp exchange amongst the experts in 1984. The dissolution of the Soviet Union, the re-creation of so many nation states and the on-going process of reasserting separate group identities in that disintegrated empire demonstrate the abiding power of the idea which lies behind the notion that, in international politics and in international law, peoples have a right to self-determination. If there is will enough, that right will ultimately manifest itself in action.

At the meeting in Saskatoon, and in many events before and since, we have seen this reality acted out upon the world's stage.

### THE AMBIVALENCE OF EXPERTS

This book, reflecting the debates of the Saskatoon conference on self-determination, demonstrates the acute ambivalence which exists amongst those who study and comment upon the people's right to self-determination. It is a notion full of paradoxes.<sup>6</sup> Yet clearly it is one of the most important ideological principles of the 1990's.<sup>7</sup> To an extent it is recognised in, and sustained by, current doctrines of international law. It is an idea, or group of ideas, which cannot be ignored by international legal scholars. In the ninth edition of *Oppenheim's International Law* the authors admit that:

*"the injection of a legal principle of self-determination into the law about acquisition and loss of territorial sovereignty amounts to a fundamental change"*<sup>8</sup>

The right of self-determination of peoples is a kind of universal principle. Seeing it in the *Charter* and in the *International Bill of Rights*, many are willing to endorse it *in abstracto* until it comes knocking on the door of their own state or the perceived national interests or peoples' interests of their community.<sup>9</sup> The very indeterminacy of the notion allowed it to gather supporters who might have had serious reservations if its contours and perimeters had been clearly spelled out. The idea had been a welcome banner for the cause of decolonisation. It also set the objectives of the international community for the mandated, and later trust, territories. In truth, the notion was simply the other side of the coin of "internal self-determination", i.e. the notion of democracy with its complex intermixture of acceptance of majoritarian will and respect for the human and other rights of minorities.<sup>10</sup>

Yet part of the ambivalence about the idea of self-determination of peoples derives from simple observation of the way in which assertions of that right have worked out in practice. There were many instances collected in this book. The battles in the former Yugoslavia were hotting up as we gathered in Saskatoon. The catastrophe in Rwanda lay ahead.

Richard Falk<sup>11</sup> has acknowledged this ambivalence in a paper which he presented to an earlier conference on the position in international law of Tibet and its peoples.

*"... [t]he ... impact of recent history, which for better and worse seems to be illuminating both the emancipatory role of self-determination, as well as its potentially destructive impact. On the one side, the end of the Cold War and the breakup of the Soviet empire constitutes one of the great*

*triumphal moments for those who champion the morality, politics and lawfulness of self-determination of peoples. On the other side, the continuing strife in the former Yugoslavia, with the prospect of widening and deepening war in the Balkan region, dramatizes a far broader potential for strife and bloodshed associated with what might be called "indiscriminate self-determination", including arguably premature recognition of the right in inflammatory multi-ethnic settings previously stabilised by means of historic compromises.... Thus, arguably, the premature affirmation of self-determination by way of diplomatic recognition of a new political entity may be dangerously interventionary (arguably, in the recent cases of Croatia, Slovenia and Bosnia), but so may its denial in circumstances of severe subjugation and oppression (arguably, in relation to Tibet, East Timor and Inner Mongolia). Such geopolitically motivated State practice creates precedents that can either nurture respect for or discredit the legal conception of self-determination."*<sup>12</sup>

It is therefore important to depart from this book with a full appreciation that ideas about self-determination of peoples are by no means set in stone - neither in international politics or international law. They are, in Richard Falk's description:

*"variable in content, resistant to generalisation, dependent on context and intensely contested."*<sup>13</sup>

This is why the notion has been described as inherently paradoxical. To a large extent the self-determination of peoples is an idea supporting the modern nation state. Historically, as power shifted from the individual sovereign (king) to the people, it became necessary to define precisely who that people were, to be the recipient of such power.<sup>14</sup> When people lived in feudal circumstances and knew little more than their neighbourhood, the local baron or chief, notions of a

distinct "people", and of nationalism, may have been of less importance than notions of neighbourhood. The ideas of democratic self-government which accompanied the break-up of this feudal society, stimulated by the growth of large anonymous cities and harnessed by the modern means of communicating ideas, presented a challenge to the state, to its government and even to its borders.

We are still in the midst of working out where the notion of self-determination of peoples will take the international community. Indeed we are still in the midst of the debate (reflected in these pages) as to whether the idea is beneficial for humanity or an ugly reversion to its primitive past of ethnic hatreds and xenophobic fears. For every champion of self-determination of peoples there is a critic. Amitai Entzioni has declared:

*"... with rare exceptions self-determination movements now undermine the potential for democratic development in nondemocratic states and threaten the foundations of democracy in democratic states. ... [I]t is time to withdraw moral approval from most of the movements and see them for what they mainly are - destructive."*<sup>15</sup>

### **THE GOOD AND BAD NEWS**

In these pages, as in the debates at Saskatoon, are gathered the good and bad news about the peoples' right to self-determination. There is, I am afraid to say, much bad news. It lends support to Etzioni's melancholy verdict.

The return to the "sacred soil" notion of the state, as a reflection of the rights of some only of the peoples within it, has revived to accompany the debates about the self-determination of peoples. It can be seen in the Indian government's reservation to the first article of the *International Covenants*.<sup>16</sup> It can be seen in the claims of the People's Republic of China to sovereignty over Tibet, based not on the will of Tibet's people but on the ancient deference paid



by the Dalai Lama to its predecessor in title, the Chinese Emperor. As Kashmir, Croatia and Northern Ireland demonstrate, the notion of self-determination is inherently indeterminate. Alter the territory for the definition of the "self" and you have produced a different outcome. <sup>17</sup>

The colonialisation of the mind is sometimes harder to eradicate than colonial governments. The liberation of Africa was achieved. Yet peoples remain artificially divided by the linguistic, legal and cultural legacies of the departed metropolitan powers.

There is a great deal of emotionalism in the talk about self-determination. It can result in phoney ethno-history. Moreover, it can invoke highly artificial definitions of who constitute a "people" for the purpose of enjoying the right to self-determination. The notion can also be destructive, as secessionist movements sometimes demonstrate in territories which have hitherto been quietly and peaceably governed, allowing different ethnic groups to live harmoniously with each other.<sup>18</sup> The self-determination of peoples is unfortunately vulnerable to populist politics. It can be swept up by religious intolerance. It can find a place for military mercenaries, who are now made potentially more dangerous by the proliferation of the nuclear weaponry of the former Soviet Union. It is prone to manipulation by the media which can now so easily jump national boundaries. The technology can as readily bring messages of division and racial hatred as messages of liberty and tolerance.<sup>19</sup>

Thus, there are some who assert that the demands of peoples for self-determination amount to an attempt to turn back the clock upon the realities of a world increasingly bound together by global technology and the necessities of solving global problems. For these commentators a more relevant message, as we enter the next millenium, is that of internationalism or, at least, regionalism. Marxist supernationalism may have faded. But Islam's fundamentalist cause reaches beyond the nation state or a particular people. Viewed from this

perspective the self-determination debate is sometimes seen as a reversion to primitivism.

Yet just as the mind is giving way to these thoughts, it is tugged in the opposite direction by the positive, or at least inevitable, manifestations of the peoples' right to self-determination. Even Entzoni was prepared to allow two exceptions to his "evils" of self-determination, namely Tibet and Mongolia.<sup>20</sup> If he had known more about East Timor, perhaps it would be added to the list.<sup>21</sup> And if he had studied the broken promises to the Kurds, denied self-government and scattered among three states, he might have added them. And many more besides.

Peoples should not be confined to the prison of a nationality which they do not wish to have.<sup>22</sup> They should not needlessly be locked into the falsehoods and potential oppression of living together with other peoples in a political organisation which they find uncongenial and even intolerable. At least where there are enough of them to constitute a "people" for international law purposes, and they otherwise qualify, they should be assisted to enjoy the right to self-determination which international law accords to them.<sup>23</sup> It is not a right which belongs to governments or states. It belongs to them as a "people": just as surely as human rights inhere in the individual and cannot be denied by any state, however powerful.

The forces which bind groups of "people" together include history tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and common economic life. One recent manifestation of the debate about the self-determination of peoples which has been highly beneficial has been the assertion of the rights of indigenous peoples living in settler societies.<sup>24</sup> The horrible stories of forced name changes amongst indigenous peoples, and of the attempted expungement of their group identity, riveted the Saskatoon meeting. They are re-visited in these pages. Now, the demands of indigenous peoples are providing inspiration

to other clearly identified groups who are not indigenous. Thus even the claims of African American "people" to self-determination have now come under serious study.<sup>25</sup>

Whilst it is true that some manifestations of the demand to the peoples' right to self-determination have led to savagery and conflict, this may be a fault not of the notion itself but of the failure of the international community of nation states to provide a peaceful means of resolving unrequited claims to the peoples' right to self-determination. Certainly, the importance of the issue cannot be denied. It requires us all to ask fundamental questions about the purpose of the state and the other actors in international law.<sup>26</sup> When it is suggested that any departure from the simple rule that international law rests upon the will of the nation states (and that any retreat from that rule will lead to chaos and uncertainty), we can take comfort from similar predictions in the 17th century. Then, the calls for religious tolerance were condemned as likely, if granted, to spread pandemonium. Instead, it gradually enlarged human freedom.

#### A NEED FOR INTERNATIONAL INITIATIVES

This much at least can be said in conclusion. The self-determination issue will not go away. The real battlefield will remain in the hearts and minds of ordinary people, which is just where international law has placed this right. It is a "peoples'" right. It belongs to them.

But it is not an absolute right. It does not exist in a vacuum. It appears in international instruments. It exists in international law. But that law has other competing objectives. These include the assurance of international peace and security and the recognition of the crucial part played, in that regard, by nation states and by the United Nations itself.

Many, if not most, of the statements about the peoples' right to self-determination, which have emanated from the organs of the United Nations,

have accompanied the emancipatory rhetoric with the re-affirmation that the right can only be achieved consistently with respect to the territorial integrity of states.<sup>27</sup> This apparent contradiction is reconciled in the minds of some only by the reference to the third element of this modern trinity, viz minority protection. Clearly, the comfortable world of large nation states, embracing various minority peoples, has certain advantages for the international community. The Secretary-General of the United Nations himself has warned of the dangers to peace and security which could accompany the fragmentation of states that would result if every religious, linguistic or other minority of peoples could claim state-hood.<sup>28</sup>

Yet, that conclusion must surely require better protection of minority peoples at home and improved international machinery to ensure that the peoples' right to self-determination, which is enjoyed under international law, is truly protected and, where necessary, secured.

Numerous institutions within the United Nations have been established to defend and further the self-determination of peoples. The Trusteeship Council is the most obvious, although terminally limited, example. There are many others, such as the Sub-commission on Prevention, Discrimination and Protection of Minorities and the Working Group on Indigenous Populations.<sup>29</sup> Something more is needed.

Democratic government in nation states must be willing to devolve significant powers to distinct "peoples" within their borders - as Belgium and Spain have done to ethnic minorities.<sup>30</sup> As Canada and Australia are belatedly doing for indigenous minorities. Democratic states must even be willing to contemplate the possibility of secession of a people and to conduct referenda for that purpose. This will occur in Quebec in 1995.<sup>31</sup> Yugoslavia may have come apart with bloodshed. But Czechoslovakia divided in a peaceful way.<sup>32</sup> The notion that a largely distinctive "people", particularly living in an identifiable territory and sharing linguistic, historical, religious, economic or

other commonalities, can be ruled indefinitely against their will by governments comprising a majority of other peoples is as offensive to liberty as colonialism was. The task is to bring all peoples, and their leaders, and the states in which they live and are organised, to that realisation. It is to provide national and international machinery which will permit the peaceful and orderly accomplishment of the self-determination of peoples in a world where there are countervailing tendencies to fusion, as well as explosive pressures for fission.<sup>33</sup> The exercise of the peoples' right to self-determination may not necessarily require secession. Novel solutions and novel policies may be created which permit a high measure of autonomy or association whilst at the same time fulfilling the right to self-determination guaranteed by international law. Several contributions in this book have explored these possibilities.

Within the United Nations, various possibilities by way of institutional means to promote these ends, have been put forward. They tend always to become shipwrecked on the rocks which represent the nation states that make up the organisation. Christian Tomuschat has suggested that only the Security Council can ultimately take the responsibility of asserting its powers:

*"If indeed the Security Council wishes to steer a course of dealing preventively with international disputes ..... it cannot turn a blind eye to virtually explosive situations arising from claims to self-determination anywhere in the world, including, in particular, within the borders of new States. By elaborating criteria for the legitimacy of such claims, the United Nations could help de-emphasise ensuing conflicts and thereby make an essential contribution to the solution of an-ever growing source of tension in this post-colonial era."*<sup>34</sup>

The conventional and extra-conventional machinery of the United Nations continues to do its work. The specialised sub-commissions meet. Non-governmental organisations, such as the Unrepresented Nations and People's

Organisation, provide a voice for the governments of "peoples in exile". Constructive international bodies such as the International Commission of Jurists, Amnesty International, and International Alert can contribute to bridging the gulf between peoples and their representatives and to providing insights into the means of peaceful resolution. Meanwhile, the sufferings of peoples from East Timor to Kurdistan and from Rwanda to Guatemala assail us daily from our television screen.

One day, humanity will devise a better system for resolving conflicts about the peoples' right to self-determination and its denial. This book collects many of the instances of the denial and not a few of the problems. It is my hope that the book will also contribute to the ultimate provision of the solution which will convert the paradoxical notion of the self-determination of peoples from being part of a problem for the international community to part of the solution for a better world.

## FOOTNOTES

- \* Hon Justice Michael Kirby AC CMG, Chairman, Executive Committee, International Commission of Jurists; Special Representative of the Secretary-General for Human Rights in Cambodia; President of the New South Wales Court of Appeal, Australia
1. Declaration of Independence of the United States of America. See also by the author "Peoples' Rights and Self-Determination" in in A.E.S Tay (ed) *Rights, Human Rights and the Rights of Peoples* - a special issue of the *Bulletin of the Australian Society of Legal Philosophy*, vol 18 No 61, 1993, 25 at 27.
  2. See C. Tomuschat, "Self-Determination in a Post-Colonial World" in C. Tomuschat (Ed) *Modern Law of Self-Determination*, 1993, Kluwer, 1. The resolution is 1524(XV).
  3. *International Court of Justice Reports*, 1971, 16, 31.
  4. *International Court of Justice Reports*, 1975, 12, 31 ff.
  5. H. Hannum, "Rethinking Self-Determination" 34 *Virginia J Int Law* 1, (1993) 5.
  6. M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 *ICLQ* 241, 245.
  7. *Ibid*, 246.
  8. (9th Ed, ed. R.Y Jennings and A. Watts, London, Longman 1992), vol 1, 715. This point is made by J. Crawford *Democracy in International Law*, Inaugural Lecture, Cambridge, 1993, 10.
  9. Koskenniemi, above n6, 264.
  10. See Crawford, above n8.
  11. R. Falk "The Content of Self-Determination", R. McCorquodale and N. Orosz, (eds) *Tibet: The Position in International Law*, 1994, Serindia, London, 81.

12. *Ibid*, 82.
13. *Ibid*, 82.
14. Koskenniemi, above n6, 252.
15. A. Etzioni, "The Evils of Self-Determination", *Foreign Policy* 89: 21-35 at 21 (1992-3).
16. H. Hannum, above n5 at 25, where the reservation by the Government of India is noted as are the formal objections thereto of the Netherlands and of Germany. See also Tomuschat, above n2, at 3.
17. Koskenniemi, above n6, 260.
18. *Ibid*, 250.
19. R.S. White, "Self-Determination, Time for a Re-assessment?" (1981) 28 *Netherlands Int L Rev* 147.
20. Etzioni, above n 15.
21. See, e.g. Amnesty International: *Indonesia and East Timor - Power and Impunity*, 1994, London, esp 110 ff.
22. Koskenniemi, above n6, 258.
23. UNESCO, Meeting of Experts on Further Study of the Rights of Peoples, Paris, February 1990, *Report*. The description of a "people" provided by the Experts is found in McCorquodale and Orosz (above n11) at 145f. Cf *Mandla (Sewa Singh) v Dowell Lee & Ors* [1983] 2 AC 548 (HL), 562.
24. See, e.g. P. Macklem "Indigenous Peoples and the Canadian Constitution: Lessons for Australia?" (1994) 5 *Public Law Rev* 11. See also *Mabo v Queensland [No.2]* (1992) 175 *Cth Law Repts* 1(High Ct. of Aust.).
25. See Davis et al, "Proceedings of the Conference on African-Americans and the Right to Self-Determination" in (1993) 17 *Hamline L Rev* 1.
26. Koskenniemi, above n6, 246.
27. *Ibid*, 256.



28. Boutros Boutros Ghali, *An Agenda for Peace*, U.N. doc. A/47/277; S/24111 (17 June 1994), 5 (Paris 17-19). See also Koskenniemi, above n6, 256 f.
29. See International League for the Rights and Liberation of Peoples, *Report on LIDLIP's activities at the 46th session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Working Group on Indigenous Populations*, Geneva, July-August 1994. See also C.Meindersma, "Legal Issues Surrounding Population Transfers in Conflict Situations" (1994) 41 *Netherlands Int L Rev* 31.
30. Hannum, above n16, at 69.
31. The new Premier of Quebec, Mr J. Parzeau, in his first conference after the recent Provincial elections, announced the intention to conduct a referendum on separation of Quebec in 1995. See *The Age* (Melbourne) 16 September 1994, 9.
32. Tomuschat, above n2.
33. Hannum, above n16, at 67.
34. Tomuschat, above n2, at 20.