SELF-DETERMINATION OF PEOPLES IN THE CONTEXT OF SHIFT FROM STATE-CENTRIC WORLD ORDER TO THE SPECTRE OF GLOBALIZATION AND HUMANITARIAN INTERVENTIONIST WORLD ORDER *

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ABSTRACT

While since its inception, the concept of right to self-determination of peoples has revealed diverse nuances of late, the concept of state sovereignty has also been put to severe strain, particularly in the context of hegemonic globalization and so-called humanitarian intervention. The paper examines various declarations, conventions, and resolutions adopted by the UN and ancillary international agencies, as well as some of the empirical situations to face the changing character of and linkages between the people's rights, state sovereignty and humanitarian intervention.

PROLOGUE

In international legal parlance, the struggle for 'self-determination' is intertwined with the notion of sovereign absolutist state system (SSS), formalized in Europe through the Treaty of Westphalia in 1648. The struggle for self-determination represents a centrifugal tendency of the oppressed towards state absolutism. In fact, in 1920, the League of Nations held that oppression should be a factor in allowing secession from a state[1].

In view of the intertwining as mentioned above, a preliminary appraisal of the concept of state, sovereignty, people, and self-determination will be made at the outset.

Gettel defines state as a community of persons permanently inhabiting a definite territory, legally independent of external control and possessing an organized government, which creates and administers law over all persons and groups within the jurisdiction[2]. As defined by Jackson, sovereignty strictly is a legal institution and authenticates a political order based on independent states whose governments are the principal authorities, both domestically and internationally[3].

The concept of sovereignty has, however, been undergoing subtle changes over the centuries. In the 18th century, the dominant concept of sovereignty was that of supreme authority of the state over its citizens not restricted by law. In the 19th century, it was supreme absolute authority, which was not controlled or restricted by any external agency. In the 20th century, it meant the ability of the state to exercise its internal and external authority independently[4]. As will be discussed later, there are already indications that in the 21st century, state sovereignty is likely to suffer massive erosion.

The exact connotation of the term 'people' is a matter of unfinished debate. Article 1(2) of the Charter of the United Nations seems to equate 'people' with the state. The travaux preparatory of the charter, however, reveals that those who drafted Article 1(2) did not intend to equate the word 'people' with 'state'. This fact was confirmed in the UN Resolution 2625(XXV). During the drafting of the UN Charter, Belgian delegates maintained that the term 'people' in Article 1(2) referred to 'national groups, which do not identify themselves with the population of a state'. In the coordination committee, France argued that as international relations were conducted between states and not nations, inclusion of 'people' in Article 1(2) in conjunction with 'nation' appeared to include within the ambit of the term, the right to secession. The United States of America, however, felt that as there could be parties to the charter who would not be states in the strict sense of the term, the concept of 'people' should be considered to have a broader connotation[5]. The International Commission of Jurists set up in 1972 to investigate the events of the then East Pakistan defined 'peoples' as within the realm of ethnic category[6].

Like 'people', the conceptual regime of 'self-determination' is a slippery one. Some start with the meaning of 'self' itself. There are those who speak of 'self' in the metaphysical sense. For our present purpose it is, however, not necessary to go into the metaphysical discourse about the meaning of 'self'. But there are those who, rather than accepting the state-centric realist paradigm of approaching the self in self-determination, prefer to go in for an idealist or ideological paradigm in which state is not at the centre of the stage, but has only an incidental presence or is a contingent fact, which one can deal with as a 'need right' and

not as 'suigeneris' right. In this paradigm, "true self-determination is not expressed in the normal functioning of existing participating process and in the duty of other states not to interfere, but in the existence and free cultivation of an authentic communal feeling, a togetherness, a sense of being 'us' among the relevant groups. If in extreme cases, which may be possible only by leaving the state, then the necessity turns into a right National self-determination, then has an ambiguous relationship with statehood as the basis of international legal order. On the one hand, it supports statehood by providing a connecting explanation for why we should honour existing *de facto* boundaries and the acts of the state's power-holders as something other than gunmen's orders. On the other hand, it explains that statehood per se embodies no particular virtue and that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be over-ruled or its consequences modified in favor of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined[7]. It seems that the position taken here is a mix of companionate value orientation[8] and syndicalism. One should not miss two key concepts in the foregoing formulation. These are 'authentic communal feeling' and 'acts of state's power-holders as something other than gunmen's order'.

In the Ottoman Empire, non-Muslim minorities, for instance, the Jews, the followers of the Greek and the Armenian churches, had collective rights to observe their faiths and govern internal affairs at a time of Christian persecution of the Jews, Muslims and the Gypsies in the Iberian Peninsula following conquests. However, while under the Ottomans, the non-Muslims could practice their religions within self-governing communities (millet), there was non-individual right to religious autonomy. Non-conformist non-Muslims, like the Muslim subjects of the Ottoman Empire, were persecuted as heretics and apostates within their own communities[9]. Hence, millet was not an authentic companionate value oriented system; it was certainly a power-oriented system under state tutelage[10].

The caste system in India also represents self-governance under tutelage. In the Hindu caste system, once a component caste that recognized the superiority of the Brahmin, it was free to manage the affairs within the overarching norms set by the Brahmin lawgivers, or acquiesced to by Brahmin lawgivers. In case of violation of the norms by a caste as a collectivity, or by

individuals belonging to a caste by defying the norms laid down by the caste council, it was the king's duty to exercise his coercive power to make the caste of the individuals within the caste, as the case may be, to behave appropriately.

Certainly, the millet system or the caste system, seen as static structures, does not come within the ambit of self-proclaimed essence of its structure also in terms of the dynamic processes that take place within its ambit. Over a length of time, one wonders whether the almost continuous struggles that go on both within the millet system and the caste system for reforms, demolishing the dehumanizing edifices of the systems, and human dignity, for respect for socially concerned individuals within and outside the realm of the state do not qualify them to be recognized as struggles of self-determination. This line of thinking may be compared with Laski's pluralist theory of sovereignty[11], which recognizes the roles of other institutions along with that of the state in regulating human affairs in their respective spheres.

Article 1(2) of the Charter of the United Nations speaks of the 'principle of equal rights and self-determination of peoples'. The very first Article of the two Human Rights Covenants of 1966 states in identical words: "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."

STATE SYSTEM AND RIGHT TO SELF-DETERMINATION

All rights including right to self-determination are embedded in specific historical circumstances[12]. As already indicated, the right to self-determination is an anaclitic counter mirror of state absolutism.

But absolutist state established through the Westphalia Treaty has been changing all the time and/or synchronously in different parts of the world. Responding to the same, degrees and faces of self-determination take different forms.

Changing charters of state absolutism, not necessarily in a strictly non-linear chronological order, would be briefly discussed first.

The Treaty of Westphalia (1648) obliged all its signatories to defend and protect all and every Article of peace against any one and to join those injured and assist them with counsel and force to remove the injury. But in the post-Napoleonic Congress of Vienna in 1815, state absolutism was subjected to a mild trimming. Russia, Prussia, and Austria agreed to grant national representation to the Poles living within their boundaries, and the establishment of their national institutions. Thus, in a way the Vienna Congress of 1815 was the milestone in the roadmap towards national self-determination. Later, in 1830 when Greece attained its independence it promised in a protocol to guarantee civil and political liberties of all its subjects regardless of religious beliefs. At the Congress of Berlin in 1878, this was the principle established to admit any state to the community of European nations. As a result, in the Treaty of Berlin, the states of Pennsylvania, Montenegro, Romania, Serbia, and Turkey were required to guarantee the rights and freedom of all their subjects without discrimination. Growth of national consciousness in multiethnic Austro-Hungarian Empire was a contributing factor to such a development.

However, through these treaties and similar ancillary moves elsewhere (Sultan Abdul Mejid's Tanzimat or benevolent reform in Turkey, which recognized the social equality of the non-Muslims for instance), the harsh countenance of the state absolutism was relaxed to a considerable extent. Today, democracy at the level of ethos is flaunted by almost every state member of the United Nations, though skeletons of undemocratic practices, even in respect of their own citizens, not to speak of the citizens of other states, are also found in the cupboards of almost all the states.

DEGREES OF SELF-DETERMINATION[13]

Corresponding to the characters of the states, there are different degrees of self-determination claims among different people. An inventory of those is as follows:

1. Establishment of the right to be free from colonial domination (e.g., almost all countries formerly under colonial domination).

2. A right to remain dependent, if it represents the will of the dependent people who occupy a defined territory (e.g., Mayotte Island in the Comoro, Puerto Rico).

3. The right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one (e.g., Czechoslovakia, former USSR).

4. Disputed right to secede (e.g., Bangladesh, Eritrea).

5. The right of divided states to reunite (e.g., Germany).

6. The right of minority groups within a larger political entity recognized in Article 27 of the Covenant on Civil and Political Rights, and in the UN General Assembly's 1992 Declaration on the Right of Persons belonging to national or ethnic, religious and linguistic minorities.

7. The right of limited autonomy, short of secession, for groups defined territorially, or the common ethnic, religious or linguistic bonds (confederations like Canada).

8. Internal self-determination, i.e., Freedom to choose one's form of government or even more sharply, the right to democratic form of government (e.g., Haiti).

Though published in a prestigious journal, namely, the American Journal of International Law, it does not appear that all the items in the inventory merit to be called rights and also the right to self-determination. For instance, the wish on the part of Puerto Ricans to remain dependent on USA can hardly be called a right. Of course, some scholars differentiate between need right and power right. Even then it is difficult to categorize the wish to remain dependent as a need right. Again, reunification of Germany can be called a right of self-

determination only on one or both of two premises, namely (a) state can be equated with people, and (b) right claim, can be exercised not only in relation to a state but also in relation to the international community. The first premise has been discussed earlier and has been negated. The second premise seems to require the presence of a world government, which is not there.

The value of this paper is the observation that 'a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination, but a claim of right by the indigenous groups within the democracy to use their own languages and engage in their own non-coercive cultural practices is likely to be recognized, not always under the rubric of self-determination…' Conversely, a claim of a right to secede from a repressive dictatorship may be regarded as legitimate. That not all secessionist claims are, however, equally destabilizing will depend on such things as the plausibility of the historical claim of the secessionist group in the territory it seeks to slice off.

While the foregoing observation does not go much beyond a statement of political principle, the paper also raises the question of the legal status of each variant of the rights in the inventory in the international law regime. But this has not been systematically followed up.

It is now proposed to examine the status and the content of the right to self-determination in international law.

RACIST BIAS IN THE APPLICATION OF RIGHT TO SELF-DETERMINATION DURING AND IN THE AFTERMATH OF THE FIRST WORLD WAR

It was during the First World War that the issue of the right to self-determination got the real impetus. The Germans were the first to try to exploit the national sentiments of subject

nationalities of the opponents in Europe, like the Sinn Féin in Ireland and Flemish separatists in Belgium. They encouraged separatism from Russian Lithuania and other Baltic provinces. On the German initiative, a Congress of Nationalists was organized at Lauzanne on 16 June 1916. As the United Kingdom and France had forged an alliance with Russia (allies), and the subject nationalities of the latter in Central Europe were involved, they were constrained in their response. The British foreign office, however, made an inane declaration, which *inter alia* stated that "the principle of nationalities would be one of the governing factors in the consideration of territorial arrangement after the war... we are limited in the first place by the pledge already given to our allies which may be difficult to reconcile with the claim of nationalities".[14] In the meantime, the allies promised to Italy all those territories inhabited by an Italian lrridenta. Both sides were also seeking support of the Poles by promising some sort of a resurrected state in an ambiguous manner.

In March 1917, the Tsarist government in Russia was overthrown and a Provincial Government headed by Kerensky took over. On 29 March, the new Government declared its policy not to dominate or conquer any nation and sought 'a durable peace on the basis of the right of nations to decide their own destinies'[15]. At the same time, the Provisional Government did not pull out of the war and did not repudiate the secret treaties that Russia had made with the allies. It was, therefore, lukewarm in responding to independence claims of nationalities like the Finns, Ukrainians, etc. But when the Bolsheviks came to power in October 1917, in general they strictly supported self-determination claims even to the extent of secession. However, Rosa Luxemburg, one of the topmost communist ideologues, considered national independence as a bourgeois concern and rejected the Polish claim to independence as it contravened proletariat internationalism[16]. "But Lenin recognized that right to self-determination could be used to purge out the legacies of the Tsarist regime. While they moved out of the war, they recognized the independence of other national territories under their occupation.

With Russia out of the war, the British and French, freed from the requirement to respect the multinational charter of the Tsarist regime, began to make vigorous declarations in favour of self-determination of peoples in order to weaken the central powers and to counteract the

advantage that the Bolsheviks gained through espousing the political doctrine of self-determination of the peoples. It was at this stage that US President Wilson's idea of self-determination played a significant role in determining the course of events.

Before entering the war in favour of the allies in April 1917, Wilson obtained assurance from the latter, more or less in support of the principle he was espousing. In June 1917, Wilson declared the war aim of the USA - to the effect that it would fight for liberty, self-government and indicated development of all peoples[17].

Subject nationalities everywhere interpreted Wilson's declaration as a commitment to supporting each ethnic group to form its own nation-state. In Wilson's celebrated 'Fourteen-Points' speech to the United States Congress on 8 January 1918, the phrase 'self-determination' was conspicuous by its absence[18], even though the speech dealt with specific territorial settlements, including creation of independent states out of the remnants of the Austro-Hungarian and Ottoman Empires. Subsequent developments showed that neither Wilson nor other allied leaders believed that the principle was absolute or universal.

National territories outside Europe were out of bounds of the concept of self-determination of peoples. During the war, the allies occupied provinces of the former Ottoman Empire and German colonies outside Europe. They could neither return the same to their former masters nor annex them without repudiating their declarations during war. Rather than harping on self-determination, Wilson favoured some sort of trusteeship. After much haggling, the mandate system was imposed on the concerned peoples of Asia, Africa, and Oceania[19]. Racist bias was obvious in the sordid game. Even in respect of Europe, a Commission of Jurists appointed by the League of Nations held that the principle of self-determination was not in normal circumstances a part of international law[20].

RIGHT TO SELF-DETERMINATION UNDER THE UN REGIME

The Treaty of Versailles took into cognisance the political principle of the right to self-determination. As a result, sizeable minorities continued to exist within the new nation-states.

Moreover, wherever the principle was applied, it was in respect of the territories of defeated powers. All these contributed, not to a mean extent, to the outbreak and prolongation of the Second World War. The principle of self-determination had to be pulled out from the limbo and converted into right, though in a halting manner.

In 1944, at Dumbarton Oaks, the first conclave of the allies took place to draw up a charter for a post-war, international organization. There is no document to show that self-determination was discussed in the conclave. But in 1945, when the United Nations Charter was finalized, on the initiatives of the USSR, the self-determination of peoples was included in Articles 1(2) and 55. But even these two articles refer to self-determination only in subordinate clauses, and do not primarily address the issues of self-determination at all[21].

The sub-committee, which initially discussed self-determination, noted that among the sponsoring governments, there were two views. One was that the principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the charter only insofar as it implied the right of self-government of peoples and not right of secession. The full committee, which adopted the Articles, provided little clarification of the meaning or import of self-determination[22].

The Universal Declaration of Human Rights (UDHR), with the General Assembly of the United Nations proclaimed as a common standard of achievement for all peoples and all nations… to secure their universal and effective recognition and observance, both among the people of the Member States themselves and among the people of territories under their jurisdiction, was adopted on 10 December 1948. A Soviet proposal to include right to self-determination in the Declaration was rejected[23]. As a result there was no reference to self-determination in UDHR. One can draw two conclusions from this. First, at least at that point of time among the majority of the members of the UN the view that right to self-determination did not imply right to secession prevailed. Second, the spectre of secession by the exercise of the will of the people hovered over the power elites of most states, and that there was a nervousness among them that through a process of transmutation, the phrase

'right to self-determination' might serve as the medium for the expression of this will. Hence there was an allergy to the term.

But after passing through the dark tunnel of the war ending in the nuclear blast, there was a period of a new dawn of humanity. The thunder of humanist assertion could not be drowned through the blast of eerie silence.

On 4 December 1950, the UN General Assembly by Resolution 421(D) asked the Economic and Social Council (ECOSOC), United Nations to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination and to prepare recommendations for consideration by the General Assembly.

In 1952, it was decided that ancillary to UDHR, there would be two covenants on human rights: International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). It was also decided to open these two covenants for signature simultaneously. Again USSR proposed inclusion of an Article on self-determination. But as in the days of the League of Nations, states with colonial possessions, like the United Kingdom, France, and Belgium argued that self-determination was not a legal right, but rather a vague political principle, usually attained through extra-legal processes, often involving secession[24].

When the resistance of western countries failed, they made a move in the UN Human Rights Commission to widen the term of the proposed Article, so that not only the peoples in colonial situations but even peoples in sovereign countries were covered. At first, the USA did not oppose the inclusion of the Article on self-determination within the ambit of the human rights regime. But when Chile made a proposal of their natural resources according to their free choice, the USA backed out on the ground that it would inhibit foreign investment. In its perception, self-determination was to be tethered to the political space allowed by the capitalist market. However, in 1955, the Resolution on recognition of right to self-

determination as a fundamental human right was adopted with the overwhelming support of the communist and third world (better to say, historically disadvantaged) countries, with most of the western countries opposing it[25].

SELF-DETERMINATION LINKED TO DECOLONISATION AND PERHAPS MORE

On 14 December 1960, the UN General Assembly adopted Resolution 1514 (XV) entitled the Declaration on the Granting of Independence to Colonial Countries and Peoples. Para 2 of the Resolution declared: All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social or cultural development. Further, it stated that inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

A fundamental limiting principle had, however, been laid down in Para 6 of the Resolution: 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 United Nations.

One of the internationally recognized authorities[26] on the self-determination discourse, commenting on the resolution observes:

> "The thrust of the declaration is clear: all colonial territories have the right of independence. However, a closer reading reveals uncertainties arising from varying uses of the terms 'peoples', 'territories', and 'countries'. Although the title of the declaration refers only to 'colonial countries' and peoples, operative paragraph 2 refers expansively to the right of 'all peoples to self-determination'."

While Resolution 1514 of 1960 is generally acclaimed as a landmark in the self-determination discourse, to have a further insight, the UN Resolution 2625 (XXV) of October 24, 1970 (Declaration of Principles of International Law Concerning Friendly Relations and

Cooperation among States in Accordance with the Charter of the United Nations) requires to be examined. It covers a wide range of issues. Relevant paras from the section concerned with equal rights and self-determination of peoples are reproduced here[27]:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of this Charter.
>
> The territory of a colony or other non-self-governing territory, has under the charter, a status separate and distinct from the state administering it, and such separate and distinct status under the charter shall exist until the people of the colony or non-self-governing territory have exercised their right to self-determination in accordance with the charter, and particularly its purposes and principles.
>
> 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as the race, creed or colour".

The Declaration further stipulates that the territorial integrity and political independence of the state are inviolable and that each state has the right freely to choose and develop its political, social, economic, and cultural systems.

Expert opinion[28] in respect of the Declaration is that while no definition of peoples has been provided, neither of the two purposes it sets forth suggest that self-determination is intended to provide every ethnically distinct people with its own state. One observation made by the same expert is particularly important. While the Declaration on friendly relations places the goal of territorial integrity or political unity as a principle superior to that of self-determination, this:

> "Applies only to those states which conduct themselves in compliance with the principle of equal right and self-determination of peoples as described above and are thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. The only requirement of representativeness suggests internal democracy. However, such a requirement does not imply that the only government that can be deemed representative is one that explicitly recognizes all of the various ethnic, religious linguistic and other communities within a state".

Proceeding further, he observes, "A more persuasive interpretation… is that a state will not be considered to be representative if it formally excludes a particular group from participation in the political process on that group's race, creed or colour".

The disclaimer in the 1970 Declaration was reiterated in the Vienna Declaration emanating from the 1993 UN World Conference on Human Rights, with one significant change. The Vienna Declaration exempted only a government representing the whole people belonging to the territory without distinction of any kind.

SELF-DETERMINATION IN THE TWO COVENANTS OF 1966 ON HUMAN RIGHTS

Mention has been made earlier of the two covenants of 1966 as ancillary to the Universal Declaration on Human Rights. Article l of both the covenants speaks about the right to self-determination exactly in the same language as Para 2 of Resolution 1514 of 1960.

India expressed her reservation in respect of Article 1 in both the covenants:[29] 'With reference to Article 1 (of both Covenants), the Government of the Republic of India declares that the words 'the right of self-determination' appearing in those words do not apply to sovereign independent states or to a section of people or nation which is the essence of national integrity.

Three states, each a former colonial power, filed formal objections to India's reservation. The Federal Republic of Germany particularly reacted to India's reservation stating[30]: "The right of self-determination... the Federal Government cannot consider as valid an interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants."

It is, however, to be noted that at the preparatory state, though many countries were opposed to the inclusion of the right to self-determination in the covenants, India's representative is reported to have extended support to it and stated that "if the right meant the right of peoples to decide for themselves in political, social and cultural matters, such a right was recognized in every truly democratic state"[31]. The later allergy to the term in several quarters in India is to be understood in the context of the trend toward a hegemonic world order, where there is a feeling that there is need for collective self-determination of disadvantaged countries and peoples against manipulative intervention. But for the generation which was directly involved in the freedom struggle of the country, this lack of self-confidence is shocking. It seems that in the 1990s there was again a rethinking on this matter. On 18 October 1995, the External

Affairs Minister of India made a statement during a meeting of Non-Aligned countries that India would not have any difficulty with the term 'right to self-determination' as it did not imply right to secession[32].

SELF-DETERMINATION AND RIGHT TO SECESSION

As an authority[33] on international law, Hurst Hannun observed, although it is debatable whether right to self-determination has attained the status of a right in international law, at the same time he observed that examination of various texts and the travaux preparatories of the two Covenants of 1966 on human rights did not establish that the right to self-determination, defined as a unilateral right to independence, was intended to apply outside the context of decolonization. He also stated that despite the apparently absolute formulation in various UN resolutions and the two international Covenants on human rights, self-determination has never been considered an absolute right to be exercised irrespective of competing claims or rights, except in the limited context of classic colonialism. Here, the position taken by the Secretary General of UN in 1970 also needs to be noted, 'As an international organisation the United Nations has never accepted and does not accept and one does not believe it will accept the principle of secession of a part of a member state'[34].

The foregoing declaimers, however, do not relate to other aspects of self-determination. The right of a people organized as a state to a government that reflects their wishes are essential components of the right to self-determination. These rights have universal applicability, and the statement that no state has accepted the right of all peoples to self-determination is correct if one equates self-determination exclusively with secession or independence.[35]

In 1974, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated a study by Hector Gros Espiell, whose report affirms that right to self-determination in the sense of right of secession is 'confined to peoples under colonial and alien domination from an external source. A concern for preservation of territorial integrity is the countervailing and prevailing consideration. In the classical colonial context, the

colonized peoples right to self-determination permits (if not mandates) the opinion of secession to sovereign independence'[36].

The report of another study commissioned by the UN on the Developing content of the concept of self-determination was published in 1981. Its author Cristescu, 'anchored the concept of self-determination' around the fairly particular circumstances of the past decolonization of Asia, Africa, and Oceania. Claims to the assertion or reassertion of complete self-determination, the study suggested were by right available, and available only to those who were subject to alien subjugation, understood as subjugation by non-contiguous population[37].

It, however, seems that the disclaimer in Resolution 2625 of 1970 had been ignored both by Gros Espiell and Cristescu, when they had spoken in such absolute terms. A group of 20 social scientists issued a statement in Shimla (India) to the effect that 'in the emerging world moral order, if a state indulges in acts like genocide or liquidation of peoples, the right of secession cannot be denied to the affected peoples even though the UN system may not support it'[38].

From what has been claimed as the viewpoint of the liberals, four criteria have been enunciated as qualifications for secession from an existing modern state, which are as follows:[39]

1. Secession might well be thought justifiable if the region had originally been included in the state by force, and its people had displayed a continuing refusal to give full consent to the union. There must have been a history of reservation about the union, even if not one of active protest.

2. If the national government had failed, in a serious way, to protect the basic rights and security of the citizens of the region. This failure must either have been continuing, or, if not continuing, was so drastic that a reasonable person in the region could be expected to feel fearful for his future security and freedom.

3. If the political system of the country had failed to safeguard the legitimate political and economic interests of the region, because the executive authorities had contrived to ignore the results of that process. For this condition to apply, it would be necessary to show that the failure was prolonged and likely to continue; that it had resulted in relative deprivation of some kind for the region, and that politicians in power could be held responsible for the adverse consequences that had followed.

4. If the national government had ignored any explicit or implicit bargain between regions that was entered into, as a way of preserving the essential interests of a region that might find itself outvoted by a national majority.

In a state-centric realist paradigm, it is difficult not to agree to the aforesaid criteria for legitimate right to secession. But it would also be necessary to keep in view a rider advanced by a scholar. In his words, "It is fundamental to self-determination that the power demanded by a group must be equally shared. Hence, elites which determine power be supported by the claimant group as a whole."[40] One also wonders whether the geopolitical context of hegemonic globalization and the so-called humanitarian intervention-based emerging world order should be considered as a backdrop and in that case to what extent. One should not rule out the possibility of manipulative action by world power-holders to create a situation where armed actions by irredentists can be legitimized taking advantage of the UN Freedom and Independence Resolution 33/24 of 24 November 1978. Perhaps in this context, fresh affirmation by the Eijde Committee in mid-1990s that right to self-determination does not automatically imply secession, acquires special significance.

INTERNAL AND EXTERNAL SELF-DETERMINATION

A point of view seems to exist[41] that external self-determination and internal self-determination are mutually exclusive. The right of a people organized as a state to freedom from external domination is external self-determination. The right of the people of a state to a government that reflects their wishes is internal self-determination. As discussed, if para 2 of Resolution 1514 of 1960 is interpreted as right to self-determination of all peoples in non-self-governing territories, once this right is exercised by the concerned peoples there cannot

be any external self-determination for any of the minorities. But the indigenous peoples are not mere minorities; they have traditional jurisdictional rights in respect of specific territories and resources within sovereign states. In their case, external self-determination cannot be completely ruled out. UN Draft Declaration (UN Doc. E/CN.4/Sub.2/1994/Add. 1, 20 April, 1994) on the Rights of Indigenous People in Article 3 states that indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. This seems to include both internal and external self-determination[42]. Articles 4, 19 and 20 also seem to leave external and internal self-determination as matters of choice for the indigenous peoples[43]. But Article 31 of the Declaration fully enshrines the right of internal self-determination for the indigenous peoples. It states: 'Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy of self-government in matters relating to their internal and local affairs…' This leaves open a number of issues, to wit the pattern of articulation of self-governance institutions of the indigenous peoples with national institutions, and also whether conflict resolution in this matter would be under the purview of international law. However, the draft declaration itself and the issues raised seem to confirm that self-determination as right to secession is not an absolute right[44].

CONTEXTUALITY IN DETERMINING THE FORM OF SELF-DETERMINATION CLAIMS

North American indigenous movements tend to equate self-determination with sovereignty, taking the histories of treaties between the USA and indigenous peoples as a framework of reference. Some of the indigenous movements in Latin American countries by contrast propose self-governance within the structure of existing states, which would have to become multi-ethnic and 'plural-national'[45].

SELF-DETERMINATION AS A PROCESS

The transformation of self-determination claims from vague political aspirations to a right under international law. With the coming into force of the two Human Rights Covenants of

1966 is itself the outcome of a process. But the process takes diverse forms keeping to the geo-political imperatives and constraints.

In many countries, there are groups identified by ethnicity or religion, who acutely feel that there can be no solution to their plight unless they gain full autonomy or independence. During the Cold War, these potential sources of conflict tended to be managed by the superpowers or their allies so as to avoid the possibility of their leading to consequences disturbing the power equation between the two blocks[46].

On the whole, until the collapse of the Soviet Union, right to self-determination was mainly invoked and relied upon by peoples formerly under colonial rule to remove the legacies of colonialism in political, economic and other relations, and to gain full control of their destiny. With the fall of communist power centres, ethnic groups (a term used here to cover nationalists also) invoke the right to self-determination, claiming political rights, which range from internal autonomy to a right of secession[47].

Interestingly, one keen observer of the unfolding scenario points out that the development process of self-determination claim is not nonlinear. There has been a shift from the territoriality based right to self-determination developed by the UN in the context of decolonization, to the ethnic, linguistic principle of self-determination. This apparently means a reversal to the principle advocated by Wilson and others in 1919[48].

SHRINKING POLITICAL SPACE OF THE SELF-DETERMINATION CLAIM

If the focus of self-determination claims has shifted from territoriality to ethnicity, the sociological meaning of the same requires to be explored. Basically, territoriality is tied up with statehood; ethnicity in the long run is tied up with peoplehood. Under the UN regime with its decolonization thrust, state is the beating board of the protagonists of self-

determination but under impact of privatization and consolidation of free-floating international trade, and the explosion of information technology, state as an institution is in the process of decline. The estimated turnover of five top multinational corporations (MNCs) is equal to that of 132 states[49]. More frequently than not, the weaker states are to submit to the dictates of MNCs at tandem with the World Bank and IMF in their economic and social policies. For some powerful countries, erosion of state sovereignty in the global order is not only a process but a project[50]. In this context, the irredentists cannot fail to realize that carving out new states will make them more vulnerable to the supra-state domination. Shift of focus from power-right of classical state system and state security system to need-right of human security is surfacing as a natural outcome. In terms of values, human security encompassed a state of well-being, in which individuals or groups of individuals are assured of protection from physical and mental harm, and are freed from fear and cultural identities. Threats to the same are reckoned as direct and indirect from state or non-state actors and structural sources, arising from power equations at various levels. In this paradigm, the state is no longer the sole target of political action of the protagonists of self-determination claims[51]. But as neither psychologically nor in terms of strategic thinking they are prepared to cope with the challenge from the non-state sources, who either do back-seat driving or are seen to act on their own, the political space for action of the protagonists of self-determination claims go on shrinking.

HUMANITARIAN INTERVENTION AND NEMESIS OF RIGHT TO SELF-DETERMINATION

Article 39 of Chapter VII of the United Nation's Charter authorizes the Security Council to determine the existence of any threat to the peace, breach of peace or act of aggression, and decide what measures are to be taken to maintain or restore international peace and security. In the Articles that follow, it has been made very clear that military intervention should take place only after adequate non-military action has taken place. Chapter VIII of the Charter authorizes UN-recognized regional agencies to make every effort to achieve pacific settlement of local disputes. While the Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements, the Security Council shall where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional

arrangement or by regional agencies without authorization of the Security Council. Chapter VI of the Charter provides for pacific settlement of disputes, which may endanger the maintenance of international peace and security (Article 33). Article 36 requires the Security Council to recommend appropriate procedures or methods of adjustment at any stage of the nature referred to in Article 33 or of a situation of like nature[52]. In practice, the appropriate measures include maintenance of peacekeeping force.

It is to be noted that unilateral humanitarian intervention contravenes Article 2(4) of the UN Charter. It is on this ground that US intervention in Nicaragua was invalidated by the International Court of Justice[53]. After the end of the Cold War, in the contemporary virtually unilateral world order, unilateral intervention by big powers, particularly the three permanent members of the Security Council, namely the USA, the UK and France, is a growing phenomenon. In the case of Kosovo, even the US backed regional military alliance, the NATO undertook the so-called Humanitarian Intervention, without the authorization of the Security council (for fear of veto by Russia and China), on the plea of preventing ethnic cleansing of the Albanians by the Serbs. But there was ethnic cleansing in several other countries, particularly in Rwanda and Somalia. But after half-hearted peace-keeping operations, the genocide was allowed to continue. There is a criticism that there is an unfortunate tendency among commentators and political leaders to dismiss crises as unsolvable, once they have been branded ethnic or tribal. The USA, which had the capacity to halt the killings, declined to intervene as it viewed the conflict as internal[54], and more importantly because its national interest was not significantly affected. While unauthorized humanitarian intervention is legally invalid, selective resources to such intervention is patently immoral.

In the present discourse what is however most important, is that even though the minority groups supposed to be protected by intervening forces aspired after independence for their lands so as to avoid the repetition of persecution by the central government in future, the international community has no system to accommodate their desires, applying the principle of self-determination for them[55]. As the case of Kosovo brings out, it is not only the Serbs, but also the Albanians who have suffered and are suffering as a sequel to humanitarian

intervention. If the state of Yugoslavia is in shambles, self-determination aspirations of the Albanians of Kosovo are also in shambles.

Notes

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[4] Masalha, Md. (2001). 'State Sovereignty' contributed to seminar on 'State Sovereignty in 21st Century', IDSA and ICWA, 23-24 July 2001.

[5] Musgrave, Supra, p. 141 and p. 155.

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[14] Musgrave, T.D. (1997). 'Self-Determination and National Minorities'. Oxford: Clarendon Press, p.15.

[15] *ibid*. p.16.

[16] *ibid*. p.18.

[17] *ibid*. p.23.

[18] 'International Human Rights in Context' (ed.) Steiner and Alston (1996). Oxford: Clarendon Press.

[19] Musgrave, T.D. (1997). 'Self-Determination and National Minorities'. Oxford: Clarendon Press.

[20] *ibid*. p. 34.

[21] *ibid*. p. 66.

[22] *ibid*. p. 64.

[23] *ibid*. p. 67.

[24] *ibid*. p. 68.

[25] *ibid*. p. 68.

[26] 'International Human Rights in Context' (ed.) Steiner and Alston (1996). Oxford: Clarendon Press.

[27] *ibid*. pp. 974-975.

[28] *ibid*. p. 975.

[29] *ibid*. p. 976.

[30] *ibid*. p. 976.

[31] Quoted by A.R. Vajapur 1991 in 'Self-Determination, A Perennial and Preparatory Norm of International Law'. South Asia Publishers Ltd.

[32] The Hindustan Times Press Conference of Pranab Mukherjee, October 18, 1995.

[33] Hannun, Hurst, Supra, p. 977.

[34] Quoted by L.B. Macfarlane, 1985, The Theory and Practice of Human Rights. London: Maurice Temple Smith.

[35] Hannun, Hurst, Supra, p. 977.

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[55] Koboyashi, Sonji, Supra, p. 46.

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