

Annexure I to Reply of 27 Jan, 2009-01-27

Note Feb. 2, 1995, authored by Professor Maurice Mendelson Q.C

Self-Determination in General

The authorities are agreed that it is one of the most (or perhaps the most) controversial and uncertain topics in international law in modern times. After a period of considerable indeterminacy, it is now accepted that self-determination is a legal right, but its lineaments remain uncertain. These uncertainties include the content of the right, the identity of the "people" who possess it, and the nature of the "self" in question. So far as concerns the content of the right, as a concept it can have both "internal" and "external" aspects. Internal aspects are said to include the right of a people to choose their own form of government, and the (more controversial) right of sovereign equality of States, and the right to self-government, i.e. the right of a group subjects of a State to opt for independence, union with the "parent" State or another country, or some form of self-rule short of independence. This right to self-government is enjoyed by colonial people but, as we shall see, it is much more doubtful in other cases. The identity of the "people" who possess the right, and of the "self" which is supposed to exercise it, is also problematic and varies according to the substantive content of the right. In its internal aspect the bearer of the right seems to be the people of the whole State. So far as concerns the external aspect, in as much as this means sovereign equality it can only be the people of the State as a whole, acting through their government, who can enjoy the right. But in the case of the right to independence etc., it must logically mean a *fraction* of the inhabitants. On the other hand, it is clear that not every fraction possesses this right, most States today comprise more than one ethnic group, and if any such fraction had the right to secede, the international community as we know it would disintegrate. As we shall see, the system has set its face against this; it has accepted the right of colonies to external self-determination, but not other ethnic (or religious or linguistic) groups.

2. External self-determination was not a right under general international law before the conclusion of the UN Charter in 1945. Articles 1 (2) and 55 thereof refer to "equal rights and self determination of peoples", but the language is vague and inspirational, and for a long time many doubted whether it imposed any concrete legal obligations. In any case, the phrase in question must refer at least in part, and perhaps exclusively, to the sovereign equality of States, which certainly does not involve any right of secession. Article 73 is also concluded in somewhat imprecise and aspirational language; moreover, although it does not say so in terms, it seems that only the inhabitants of colonies (and trust

territories) were thought to be entitled to the right of "self-government" it proclaims. It is noteworthy that, when the General Assembly called for reports under Art. 73 (e), neither the Indian princely States nor other countries of a comparable status were listed by the administering powers or the Assembly in 1946-1947. This practice continued even after the Assembly arrogated to itself the right to decide whether or not a territory was self-governing. The Universal Declaration of Human Rights of 1948 made no mention of self-determination of peoples, though Art. 21 does deal with what might today be described as internal self-determination. However the General Assembly became increasingly active in the field of decolonization, and in 1960 passed two resolutions, nos. 1514 and 1541 (XV). Since General Assembly resolutions are not normally law-making, for some time doubts were expressed, particularly in Western quarters, as to the legal effect of these two instruments. But in any case, they are concerned essentially with colonies, and specially with what have been called "salt-water colonies"; that is, overseas possessions and not adjacent peoples, such as the Soviet "Republics geographically continuous to Russia. (Normally - or even invariably - the majority of the inhabitants of a colony would be of a different "race" from that of the "colonisers).. Resolution 1541 specifically states that "the authors of the Charter --- had in mind that (Art. 73) should be applicable to territories which were *then known to be the colonial type.*" Moreover, Resolution 1514 expressly declares that "any attempt at the partial or total disruption of the national unity and the territorial integrity of a country incompatible with --- the Charter." In 1966 the U.N. adopted the International Covenants on, respectively Civil and Political Rights and Economic, Social and Cultural Rights. Although the language of their common Art. 1 may possibly include the right of internal self-determination, so far as external self-determination is concerned the context, background and (in general) the drafting history support the view that it was colonies (and trust territories) that were envisaged, not other peoples. This view is reinforced by Art. 27 of the Civil and Political Rights Covenant which, by guaranteeing minority rights, meets many or all legitimate demands of ethnic and religious groups within a state. In 1970 the General Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Res. 2625 (XXV)). Once again, as far as concerns external self-determination the target is plainly colonies (as will as similar cases like South Africa and Southern Rhodesia, where a white minority oppressed a black majority). And there is yet another strong statement that the principle does not justify the dismemberment in whole or part of independent states.

3. The right of colonial peoples (and those of mandated territories) to self-determination was affirmed by the International Court of Justice in the 1870s, and by the end of the 1980s even the colonial powers had accepted it. However, the international community as a whole has continued to affirm that the right of external self determination ((particularly secession) does not extend to

component parts or groups within independent sovereign States. A possible exception exists where the State is carrying out extreme persecution of the inhabitants of a part of its territory (sometimes described as *carence de souverainete*); but this exception is disputed. IN any case the only possible precedent is that of Bangladesh, where the level of persecution was very extreme and amounted either to genocide or something very close to it. Other cases, such as Biafra, Northern Cyprus, and the Bosnian Serb and Croat entities, make it clear that the international community and international law are strongly opposed to secession, except perhaps in the most extreme cases. (*Human Rights in Kashmir: Report of a Mission*, International Commission of Jurists, Geneva, 1995 p. 142 -145)

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