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Introduction

The significance of self-determination

Self-determination has been one of the most important driving forces in the new international community. It has set in motion a restructuring and redefinition of the world community's basic 'rules of the game'. At the same time, its ideological origins render it a multifaceted but also an extremely ambiguous concept. This concept is emblematic of international law in the twentieth century. *Historically*, it is associated with, and has been instrumental in, the principal tremors, even quakes, of contemporary international relations. Tracing the evolution of self-determination in theory and practice thus becomes a way of narrating an important part of our present world history. *Politically*, it is a concept which is, at one and the same time, both boldly radical and deeply subversive. This captures some of the deep ambivalence of States towards the international legal order. Self-determination is also significant *jurisprudentially*. From this vantage point, self-determination is a powerful expression of the underlying tensions and contradictions of international legal theory: it perfectly reflects the cyclical oscillation between positivism and natural law, between an emphasis on consent, that is, voluntarism, and an emphasis on binding 'objective' legal principles, between a 'statist' and a communitarian vision of world order.

To explore self-determination, as this book will do, is therefore a way of opening a window towards a multifaceted, hugely important phenomenon. It is also a way of opening a veritable Pandora's box. In every corner of the globe peoples are claiming the right to self-determination. Consider the most celebrated cases: Palestine, Western Sahara, South Africa, East Timor, Quebec. Add to these the Kurds; the Basques; the indigenous

populations of Australia, Guatemala, the United States and Canada; the Armenians; the inhabitants of Gibraltar and the Falkland/Malvinas Islands. Which of these peoples actually have a *right* to self-determination under international law? Moreover, what is the scope of the right possessed? More generally, to what extent have international law-makers accepted the political postulate of self-determination in the realm of legal rules? To put it differently, to what extent have they permitted the principle to reshape international relations? If it is undisputed that the principle has by now gained a foothold in the international community, does it have a major impact on traditional international institutions, or does it only have an effect at the margin? These are the major questions I shall set out to answer.

The approach chosen

There has been no dearth of writings on self-determination in its variety of dimensions. This is not surprising. What is, perhaps, surprising, as we approach the end of the century, is the strange absence of a comprehensive legal account of the concept. It is suggested that such an account is badly needed, especially in an area as sensitive as this, where we are faced with confusing State practice, deceptively complex or contradictory resolutions from international organizations and scant and reticent views of courts, not to mention publicists. The core of my research is, thus, unashamedly doctrinal: its by-word is *lex lata*. In other words, this book is about the right to self-determination as it exists in international law. After carefully reading the immense literature on self-determination I have come to these three conclusions. First, there is still some need for a sober legal assessment of the matter. Second, this assessment must be based on a close scrutiny of State practice (to the extent that it can be gleaned from national digests or UN proceedings). Third, there is need for a reappraisal of self-determination against the background of the whole body of international law, with a view to pinpointing the bearing, if any, of the principle on the various segments of traditional international law. In this book I shall therefore endeavour, as much as possible, to look at the whole range of problems from a strictly legal viewpoint, on the assumption that such an approach can bear more fruit in this so highly politicized area.

In keeping with my general outlook as a lawyer, I shall, however, also try to go *beyond* the realm of law. Indeed, a modern doctrinal account should not closet itself in the lawyer's hermetically sealed chamber.

This study is therefore committed to a *contextual approach* to law in which history, politics, and jurisprudence are all employed in the service of legal elucidation.

The case for a historical approach is easily made. A still photograph of the current state of law would be incomprehensible – how could one understand the way the law is today if one does not study its evolution into its current state? Can we understand a human being without delving into his or her biography? Can we understand a polity without exploring its history? How, then, can we hope to understand the legal parameters of self-determination at the end of the century if we do not trace its antecedents at the beginning? Equally important, how can one conceive of the law of tomorrow without understanding how it was yesterday? The reader will thus be invited to arrive at the current state of law via a comprehensive historical survey.

Likewise, to discuss self-determination without extensive reference to the political context in which the law has developed is to perpetrate, or revive, a fiction which should once and for all be interred. I do not adopt the position that law is politics. But it seems obvious, indeed trite, that the two are intimately connected.

Finally, although my orientation is positivist – a commitment to the 'is' – it would be foolhardy, especially in the area of self-determination, to mask the deep challenges that emerge from time to time – and more forcefully in recent years – to the positivist approach to international law, to the very ability of lawyers to define rules that constrain behaviour. Consequently, besides inquiring into the present parameters of the right, I shall also discuss its failings and the direction in which the international community's conception of the right seems to be moving: where does self-determination, in both theory and practice, fall short? In which ways is the international community prepared to 'reinvent' the right and ensure it a wider applicability?

The principal postulates of this inquiry

It may be useful, in this brief introduction, to set out some of my key premises, since they will inform the discussion in the text – though normally as a backdrop and rarely taking front stage.

First, the *historical perspective*. Arguably, in this century decisive turning-points have occurred in the wake of the First World War, the Second World War and the Cold War. Self-determination was a key concept in articulating these changes. The First World War brought to an end a

long period in the history of the law of nations which was dominated by a Eurocentric, largely homogeneous, small club of the old Powers and which continued to equate national sovereignty excessively with political rulers, more particularly the Head of State. This old order was forever shattered both with the emergence of the Soviet Union and a radical and new willingness to undermine the 'dogma' of State sovereignty and cater internationally for peoples – although in the 'fall-back formula' of 'protection of minorities'. It is not yet possible to talk of self-determination as positive international law in this period, but it clearly was the animating *political ideal*, which encapsulated the new post-war order. The debate about self-determination in that period is fundamental to an understanding of its key ideological and political components. The period immediately after the First World War will thus provide the context for understanding the *idea* itself.

The First World War may, in some respects, be seen as a general rehearsal of the Second World War, but this second conflagration was a far more devastating and traumatic event in its impact and, consequently, far more vigorous in the ensuing legal transformations. The First World War ushered in a turn towards fledgling institutions (e.g. the League of Nations), fledgling norms (e.g. the Kellogg–Briand Pact of 1928 designed to outlaw resort to war 'as an instrument of national policy' and a means 'for the solution of international controversies') and, in the present context, the *idea* of self-determination. The Second World War, on the other hand, brought about the far more ambitious and robust United Nations Organization, the unequivocal outlawing of the use of force, and the relentless drive to transform self-determination from an idea into a legally binding principle (it was also accompanied by the enfranchisement of the Third World, brought about by vociferous insistence on self-determination as an anticolonial standard). The period immediately after the First World War, and the Charter framework, will provide the context for understanding the maturing of self-determination from a political concept to an international legal norm.

The end of the Cold War – a period in which violence was conducted by satellites of the Superpowers all over the world and which saw a cumulative death toll in the millions and a military expenditure higher than any previous conflict – saw another revival of self-determination, but again with a new twist. If, in the past, self-determination used the coin of 'progress', in its third apparition it has come to be seen increasingly as fuelling the currency of ethno-national intolerance, rivalry, tribalism, xenophobia, and worse: a Golem turned on its Creators. The post-Cold

War period and the subsequent New International Order will be the context for understanding the limits and dangers of the concept.

A note of warning must, however, be sounded. The three historical epochs – reflected respectively in Chapters 2, 3, and 10–11 – are as explained a context in which to understand the respective cluster of ideas, legal concepts, and their political ramifications. I will provide this context but it is for the reader to construct his or her own understanding.

This very same invitation to the involved reader applies to the second contextual element concerning the *politics of self-determination*. The key idea in this respect is the Janus-like nature of self-determination. The concept of self-determination is both radical, progressive, alluring and, at the same time, subversive and threatening. This 'Janus quality' has brought about a deep ambivalence towards self-determination which, in turn, may explain the difficulties the international community experiences in trying to articulate the idea in a palatable way, in transforming it – in an acceptable manner – into a set of legally binding standards, and dealing with its limits and dangers in a consistent fashion.

Let us consider, for a moment, the contradictory nature of self-determination. *Internally*, self-determination could be used and has been used as a vehicle for enfranchisement, for ever expanding circles of citizens against all manner of *ancien régimes*. On this score, the 'self' of the nation has shifted: it is no longer embodied in a Monarch ruling over a State but in the citizens of the State. Self-determination is thus the reflection in international law of a movement that began with the American and French Revolutions and reached its climax in twentieth-century notions of universal suffrage.

Externally, self-determination has been no less of a challenge to established authority – that of the small circle of 'civilized nations' which constituted the international legal order. As I have already noted, self-determination was the vehicle through which this international *ancien régime* could be challenged by the admittance of new members. One of the major developments of twentieth-century international law has been the expansion of the family of nations to include, sometimes after bloody conflict, States of the so-called Third World – a development in which the notion of self-determination was at the conceptual centre.

But it is in this very allure – which has been employed, using different terminology, by the American and French Revolutions and by countless other States ever since – that the subversion lurks. The dynamic is simple: self-determination is attractive so long as it has not been attained; alternatively, it is attractive so long as it is applied to others. Once realized,

enthusiasm dies fast, since henceforth it can only be used to undermine perceived internal and external stability. In the hands of would-be States, self-determination is the key to opening the door and entering into that coveted club of statehood. For existing States, self-determination is the key for locking the door against the undesirable from within and outside the realm.

This *in-built ambivalence* will constitute one, if not the, principal explanatory 'golden thread' running through the historical–doctrinal narrative of this book. At the level of political ideas in the epoch after the First World War, we will find, to give but one example, the strange alliance of Wilson and Lenin, both espousing self-determination – except as applied to themselves. In the Charter after the Second World War, we will continually confront in such documents as the 1970 UN Declaration on Friendly Relations, formulations which characterize self-determination with the flowery and loose rhetoric of freedom and liberation and yet couch its operative terms in the dry and tight language of legal disclaimers, substantially excluding any secession from existing States. Here too we find strange bedfellows: with First, Second, and Third Worlds transcending their ideological differences and uniting around texts which are carefully drafted so as not to rattle any skeletons in their respective cupboards.

The same in-built ambivalence towards self-determination also offers some explanation of the pathologies of the post-Cold War epoch. On the one hand, both internal democracy and external liberation have, arguably, matured – or, at least, are in the process of maturing – into universal standards: the transition in South Africa, the reaction of the world community to the situation in Haiti, and the startling transformation in the former Soviet Union and its erstwhile empire can be seen as examples. However, at the same time, one can observe in the old First World an indecisive vacillation between endorsing independence or instead favouring a revival of minority regimes; of preaching to the new Eastern European States a gospel of tolerance and multi-culturalism, while practising the opposite – as in France or Germany – in one's own back yard. In the Third World we see an increasing number of States, notably in Africa, to whom self-determination acted as midwife at their birth into the international community, which are now engaged in the wholesale destruction of any semblance of either internal or external commitment to that concept.

To be sure, this in-built ambivalence, this combination of radicalness and subversion, is not the only explanatory principle. But as the reader proceeds through the vicissitudes of doctrinal development, he or she will

surely find in the endless variations of this ambivalence a powerful tool of analysis.

Finally, let me hint at the *jurisprudential dimension*. As I explained above, this book is not about legal theory: it does not try to construct a 'theory' of self-determination. But the approach adopted – the eye to history and politics and, at the same time, a commitment to the somewhat traditional habits of tracing State practice, interpreting case-law and resolutions and comparing one with the other – will expose the elements which in turn highlight several of the deep jurisprudential conundrums surrounding this concept. Let me set forth some of the questions which the reader should keep in mind in this regard: Has international law really come up with a workable formula of how to define the 'self' entitled to 'determination'? Are the rules on self-determination which have gained international acceptance and consent more than a mere consecration of decolonization? Are they operational in the new era of post-colonialism and post-Cold War? Can it be said that the practice of States – in, say, recognizing Bangladesh and not recognizing the Turkish Republic of Northern Cyprus – followed the law, or has law, in this area, always followed practice? How does the story of self-determination, as told in this book, contribute to the perennial argument on the extent to which international law actually constrains State behaviour or, instead, simply provides a 'structure of justification' for that behaviour? These questions are not the focus of the book, but they hover over almost every page. I shall consequently return to them in the conclusion.

PART I

The historical background

2

Self-determination as an international political postulate

The French Revolution

The origin of the principle of self-determination can be traced back to the American Declaration of Independence (1776) and the French Revolution (1789), which marked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance with the interests of the monarch. The core of the principle lies in the American and French insistence that the government be responsible to the people.

In France, self-determination was first propounded as a standard concerning the *transfer of territory*. Although it was proclaimed as early as 1790, it was formally enshrined in Article 2 of Title XIII of the Draft Constitution presented by Condorcet to the National Convention on 15 February 1793:

> [La République française] renonce solennellement à réunir à son territoire des contrées étrangères, sinon d'après le voeu librement émis de la majorité des habitants, et dans le cas seulement où les contrées qui solliciteront cette réunion ne seront pas incorporées et unies à une autre nation, en vertu d'un pacte social, exprimé dans une constitution antérieure et librement consentie.[1]

[1] Text in R. Redslob, 'Völkerrechtliche Ideen der französischen Revolution', in *Festgabe für Otto Mayer*, Tübingen 1916, 293. Article 53(3) of the French Constitution of 1958 crystallizes the rule which formed Title XIII of the 1793 draft constitution: 'Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.' See the bibliography cited in A. Cassese, 'La diffusion des idées révolutionnaires et l'evolution du droit international', in Société française de droit international, *Révolution et droit international*, Paris 1990, 299, n. 2. See also R. J. Dupuy, 'La Révolution française et le droit international actuel', 214 HR, 1989-II, 25–6. See generally, F. Ermacora, 'Ursprung und Wesen des Selbstbestimmungsrechts der Völker

However, although the French leaders, in drafting Article 2, proclaimed a lofty principle, they misapplied it in actual practice. More specifically, they used the text to justify the annexation of lands belonging to other sovereigns. As long as the results of a plebiscite tilted in France's favour, annexation was 'legal'. For example, on 28 October 1790, Merlin de Douai, citing the Alsatian population's desire to be joined with France, asserted that Alsace was French and ought no longer to be ruled by the German princes who claimed sovereignty over the region under the Treaty of Westphalia. According to him, the desires of the Alsatians prevailed over the Treaty. Commenting on Merlin de Douai's claim, the historian Droz rightly notes:

'Aux engagements de souverain à souverain, l'Assemblée substituait ainsi un nouveau droit international public en vertu duquel il était possible d'annexer pacifiquement les pays révoltés contre leur souverain légitime.[2]

Revolutionary France's alleged adherence to the principle of self-determination paved the way for the 1791 annexation of the territory of Avignon and the 1793 annexation of Belgium and the Palatinate. Plebiscites were held and the territories were annexed in accordance with the populations' express desire to unite with France. The right to self-determination was not, however, uniformly applied. Plebiscites were only valid if the vote was pro-French.[3]

The discriminatory implementation of the principle was not the only problem. There was an 'internal' limitation on the principle as well. The principle embodied in Title XIII of the 1793 Draft was significantly limited in scope. It was to be applied only to changes in States' borders. Colonial peoples were not deemed to have a right to self-determination; neither were minorities or ethnic, religious or cultural groups. Moreover, the principle did not explicitly refer to the peoples' right freely to choose their own rulers, what we today call the right to 'internal' self-determination (self-determination as a criterion for the democratic legitimation of a State).

und seine Entwicklung bis zum zweiten Weltkrieg', in K. Rabl (ed.), *Inhalt, Wesen und gegenwärtige praktische Bedeutung des Selbstbestimmungsrechts der Völker*, Munich 1964, 50–75.

[2] J. Droz, *Histoire diplomatique de 1648 à 1919*, 3rd edn, Paris 1972, 178–9.

[3] On these plebiscites, see S. Wambaugh, *A Monograph on Plebiscites*, New York 1920, 4–10 and 33–57. See generally, W. von Blittersdorff, *Das Internationale Plebiszit. Praktische Fragen der Verwirklichung des Selbstbestimmungsrechts*, Hamburg and Frankfurt/Main 1965.