THE RIGHT OF EXTERNAL SELF-DETERMINATION AND THE VALIDITY OF KOSOVAR UNILATERAL DECLARATION OF INDEPENDENCE*

Yordan Nugraha***

Abstract

On 17th February 2008, the Republic of Kosovo unilaterally declared its independence from Serbia. This sparked the debate on whether the right of external self-determination can be invoked as a justification for Kosovar independence. Many scholars maintain that the right of external self-determination applies exclusively only to people under colonial domination and as a result cannot be granted to the people of Kosovo since it is outside the context of decolonization. On the other hand, many scholars argue that it can be extended to people subjected to continuous persecution. As the debate continues, conflicts related to the claim of the right of external self-determination lingers. Thus, it is the purpose of this paper to assess objectively the question on whether the right of external self-determination can be applied outside the setting of colonization, and consequently whether it can be applied to the Kosovar case.

Intisari

Pada 17 Februari 2008, Republik Kosovo secara sepihak menyatakan kemerdekaannya dari Serbia. Hal ini memicu perdebatan mengenai apakah hak untuk menentukan nasib sendiri (the right of self-determination) dapat digunakan untuk menjustifikasi kemerdekaan Kosovo. Banyak ahli yang menyatakan bahwa hak untuk menentukan nasib sendiri hanya dapat diterapkan untuk konteks penjajahan, sehingga tidak dapat diterapkan untuk kasus Kosovo karena kasus tersebut berada di luar konteks dekolonialisasi. Di sisi lain, banyak ahli berpendapat bahwa hak tersebut dapat diberikan untuk bangsa yang mengalami penekanan terus-menerus. Sementara perdebatan mengenai hal ini berlanjut, konflik yang terkait dengan hak untuk menentukan nasib sendiri juga tetap berlangsung. Tujuan tulisan ini adalah untuk melihat secara objektif apakah hak untuk menentukan nasib sendiri dapat diterapkan di luar konteks penjajahan, dan apakah hak tersebut dapat diterapkan untuk orang Kosovo.

Key words: Self-determination, Kosovo, independence, secession, decolonization.

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** 2011; International and European Law; Faculty of Law, University of Groningen;Groningen, the Netherlands.

A. Introduction

Historically, within the structure of the Socialist Federal Republic of Yugoslavia, Kosovo was an autonomous province of the Republic of Serbia. Slobodan Milošević abruptly terminated this special autonomy in 1989, and even initiated a cultural repression against the Kosovar-Albanian population (Rogel, 2003). The Kosovar-Albanian initially responded with a non-violent movement (Clark, 2000).This shortly changed. In 1992, Kosovo declared its independence and the armed resistance from the Kosovo Liberation Army started in 1996 (Rama, 1998). Ethnic tension lingered, which culminated with the start of Kosovo War in 1998. The war was characterized by human rights violations and massacres by the Serbian authority that triggered the intervention by the North Atlantic Treaty Organization (Kirgis, 1999). The Kosovo War ended in 9 June 1999 with the signing of the Kumanovo Treaty, and subsequently the Security Council adopted the Resolution 1244, which authorized the international civil and military presence in Kosovo, and established United Nations Interim Administration Mission in Kosovo (UNMIK), which would establish a general framework to resolve the final political status of Kosovo. Nine years passed, and the negotiations on the status were inconclusive; the Ahtisaari Plan, which conceived an independent Kosovo after international supervision, had failed in 2007 (Borgen, 2008).Ultimately, in 17 February 2008, members of the Assembly of Kosovo unanimously and unilaterally adopted the declaration of independence of the Republic of Kosovo from Serbia, which was followed by recognition from approximately 92 countries.

This declaration is highly controversial and stirs debate on its validity, in particular under the context of the right of external self-determination, which is often invoked as a justification for the Kosovar independence. The International Court of Justice on its non-binding advisory opinion in 2010 determined that the declaration is not in violation of international law. However, it has to be noted that the court did not analyze further the influence of the right of external self-determination on the validity since, as the Court has considered, the question brought to the court only relates to whether the unilateral declaration violates international law (International Court of Justice, 2010). Several scholars argue that the right of external self-determination cannot be vested to the people of Kosovo, as it originally only applies to people under colonial subjugation. Meanwhile, on the other side of the dichotomy, it is claimed that the right of external self-determination might also be granted in another special circumstances. The issue remains unclear, and therefore, in order to resolve the resounding debate on whether the right of external self-determination can be granted outside the context of decolonization, it is exigent to analyze the valid international set of rules objectively from the legal perspective.

B. The Right of Self-Determination

While the Merriam Webster dictionary defined the right of self-determination as "determination by the people of a territorial unit of their own future political status", Senese (1989) argued that according to current interpretation, the right can be defined as "the right of people to free themselves from foreign, colonial, or racist discrimination."This right can be traced back

to the Atlantic Charter signed in 1941, which mentions that "[...] they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them then became one of the eight cardinal principal points of the Charter all people had a right to self-determination." The right has also been enshrined in numerous treaties and international documents, such as Article 1(2), which reveals that one of the purpose of the United Nations is "to 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", and Article 55 of the United Nations Charter, whichStates that the UN shall promote goals "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Moreover, in 14 December 1960, the General Assembly adopted Resolution 1514 or the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which declares that "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 and cultural development". Article 1 of the International Covenant on Civil and Political Rights, Article 1 of the International Covenant on Economic, Social, and Cultural Rights, and Vienna Declaration and Program of Action also provide an identical clause. Furthermore, on the 24th of October 1970, the General Assembly adopted Resolution 2625 or the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which declares that, "[...] the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality [...]", and that "[b]y 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."

In essence, the right of self-determination is in conflict with the principle of the territorial integrity of States, which is well-established in the international legal sphere, such as in article 2(4) of the United Nations Charter, which elucidates that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." During the Nigerian Civil War, for example, Article 3(3) of the Charter of the Organization of African Unity, which declares the adherence of its Members to respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence, was invoked to reject the claim of Biafran self-determination (Ijalaye, 1971).The practices of the United Nations also indicate the

upholding these principles, such as demonstrated in the case of Katangan secession during the Congo crisis (Miller, 1967). Former UN Secretary General at that time, U Thant, maintained that "the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession as a part of its Member State" (UN Monthly Chronicle, 1970).Therefore, the right of self-determination is usually considered as an exception for these rules (Emerson, 1971).

A distinction is often drawn between internal and external self-determination. The principle of internal self-determination, such as enshrined in the 2007 United Nations Declaration on the Rights of Indigenous People, in essence protects the rights of minority within a State by allowing it to determine its own political, economic, and social system and not forced to assimilate (Senese, 1989).As a result, this internal right is irrelevant with the current analysis as it only applies within a State, and does not prescribe the right of secession, or the right to withdraw from a political entity. What is relevant is the right of external self-determination, which is defined by the 1970 Friendly Relations Declaration as a mode of implementation through "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people." The definition of the "State" refers to the definition laid down in the Montevideo Convention, which must have "a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."

The question that will be addressed is whether the right of external self-determination can be granted to the people of Kosovo. Many authors such as Emerson (1971) and Brownlie, Crawford, and Lowe (1998) interpret the right as referring only to the inhabitants of non-independent territories under the context of decolonization. Van Dyke (1970) also reasoned that the United Nations is reluctant to apply the right of external self-determination outside the colonial context as it would be, "in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members." However, it has been argued that under special circumstances, the right of external self-determination might be granted to a certain people, especially one involving gross human rights violation or persecution.

C. The Right of External Self-Determination Outside Colonial Context?

Various authors have argued that state practices indicate the applicability of the right of self-determination outside the setting of colonialism. In 1971, East Pakistan, or now referred to as Bangladesh, seceded from Pakistan. This is indeed outside the context of decolonization. The case of Bangladesh is even somewhat parallel to the case of Kosovo. There is a flagrant difference between ethnic Bengali and Pakistani. Most importantly, although East Pakistan has a larger population than West Pakistan, the Bengali people in Eastern Pakistan were neglected culturally, economically and politically, and the effort of Bengali people to claim more rights were met with brutal suppression (Choudhury, 1973).Professor Nanda observed several factors that make the right of self-determination applicable to East Pakistan, which are the presence of

"physical separation, deprivation of human rights, economic exploitation, a majority determination by vote of the political direction, and ethnic, linguistic, and cultural difference" that places the right of self-determination above territorial integrity (Nanda, 1972).

Additionally, the Canadian Supreme Court in the *Reference Re Secession of Quebec* case maintained that the right to unilateral secession is not only limited to decolonization and may arise under the most extreme cases, such as, *inter alia*, "being subject to extreme and unremitting persecution coupled with the lack of any reasonable prospect for reasonable challenge" (Supreme Court of Canada, 1998),while the League of Nations in the Aaland island case voiced the criteria of "a manifest and continued abuse of sovereign power to the detriment of a section of population" (League of Nations, 1920).

Meanwhile, Professor Jonathan Charney, based on state practice in East Timor, Chechnya, and Kosovo itself, argued that the criteria for a people to gain the right of external self-determination outside the decolonization context are:

> 1) A *bona fide* exhaustion of peaceful methods of resolving the dispute between the government and the minority group claiming an unjust denial of internal self-determination;
> 2) A demonstration that the person making the group's self-determination claim represent the will of the majority of that group; and
> 3) A resort to use the use of force and a claim to independence is taken only as a means of last resort (Charney, 2001).

The criteria laid down by Nanda, the Supreme Court of Canada, and the League of Nations mostly concur that the right of external self-determination can be applied if the people are being unjustly persecuted, or situated under gross and sustaining human rights abuse, as long as the strict criteria are achieved. While Charney's criteria requires an unjust denial of internal self-determination.

Based on Nanda's criteria, Kosovo fulfills almost all of the criteria. There has been an unremitting violation of human rights and persecution of the people of Kosovo by the Serbs, which led to the NATO intervention (Malcolm, 1999). Ethnic, linguistic, and cultural differences between the Albanian Kosovo and Serbians are also apparent, and there has been a referendum in which 99% of Kosovar supported independence in 1991 (Mertus, 1999). Unfortunately, the territory of Kosovo is not physically separated in the sense of Bangladesh being separated from Pakistan and the criteria of economic exploitation still requires further evidence.

On the other hand, under the Supreme Court of Canada and League of Nations criteria, as has been emphasized before, the Kosovar-Albanians are subject to extreme and unremitting persecution to the detriment of a section of population, and the effort to challenge peacefully has been met with brutal force (Borgen, 2008).

Moving on to Charney's criteria, Kosovo indeed satisfies its requirements. As has been explained in the introduction, Slobodan Milošević abruptly ended Kosovar autonomy, and the peaceful effort to regain it has been unjustly denied. A government which represents these people is present (Malcolm,

1999), with the 1991 referendum as a reinforcing evidence, and this government has tried negotiations until it finally resorted to the declaration of independence as its final solution (Malcolm, 1999).

D. Customary International Law

Kosovo has satisfied all the criteria for tests of self-determination except of the Nanda criteria. However, the problem with these criteria is that from the perspective of customary international law, they have not secured *diuturnus usus* or general and widespread practice. There are very few instances such as in East Timor where after a group of people is persecuted, and all diplomatic effort fails, the right of self-determination is granted (Charney, 2001).Furthermore, the application has not been consistent and widespread in many cases. As an illustration that these criteria do not constitute a customary international law, the Biafran case will be considered. Following the independence of Nigeria in 1960, the country was divided ethnically, with the ethnic Igbo residing mostly in the southeastern part of the nation. In January 1966, a group which consists mostly of people of eastern Igbo origin staged a c*oup d'etat*. Five month later, a counter coup was launched, and in retaliation approximately 30.000 Igbo people were killed in the north (Ijalaye, 1971). As a response, the Republic of Biafra was declared, citing the killing as a justification.This was followed by recognition from five States, such as Tanzania, which stated that the Biafran people has suffered the same fate as the Jews in Germany, and therefore felt obliged to recognize the country (Ijalaye, 1971). Gabon also recognized the state and the Gabon cabinet declared that,

> when one thinks that in an absolutely unequal fight, hundreds of thousands of innocent civilian, women, old men and children, are condemned to buy, with their lives, the right to existence to which all men are entitled, the Government and the people of Gabon could not without hypocrisy take refuge behind the principle of the so-called no-interference in the internal affairs of another country (Ijalaye, 1971).

With the presence of such unremitting violence, the Biafran case fulfills the criteria laid down by the Supreme Court of Canada and the League of Nations. Unfortunately, the United Nations did not even address the problem, and the Organization of African Unity strongly objected the secession of Biafra (Nanda, 1972).

Another example was the case of Iraqi Kurdistan. Since the era of the First World War, the Kurds had tried to achieve a greater autonomy from Iraq. In March 1970, after years of fighting, an autonomy agreement was reached between the Kurds and the Iraqi government. However, eventually, the Iraqi authorities suppressed Kurdish political rights, militarized Kurdish regions, banned nationalist political parties, destroyed Kurdish villages, and forcibly imposed resettlement (Short & McDermott, 1981). Ultimately, during the Iran-Iraq War and the Gulf War, a genocidal campaign was waged against the Kurd population. The Anfal campaign alone in 1988 killed approximately 182.000 Kurdish people(McDowall, 2004). The gas poison attack on the Kurdish city of Halabja caused the death of more than 15,000 people (Hiltermann, 2007). This case also fulfills the criteria laid down by the Supreme Court of

Canada and League of Nations. Nevertheless, state practice at that time did not indicate the presence of a *diuturnus usus* on the application of the right of self-determination outside decolonization. As a result, the criteria formulated by both institutions have not fulfilled the criteria of *diuturnus usus,* and consequently is not part of customary international law.

The Nanda and Charney criteria, on the other hand, are not only still far from securing widespread practice, since they are based only from a very few examples, but also, in the case of the Nanda criteria, the presence of *opinio juris* or the conviction that the practice amounts to a legal obligation can be questioned, especially considering the heavy Cold War political motives involved in the secession of Bangladesh.

Therefore, as general practice has not yet been secured, the rules above have not yet fulfilled the criteria of customary law, which means that the right of self-determination cannot be applied outside the context of decolonization, and the unilateral declaration of Kosovo cannot be justified under the light of the right of external self-determination.

E. Conclusion

In conclusion, there has not been a sufficient proof that the right of external self-determination can be applied outside the context of decolonization, or that Kosovo has been granted such right. Although several authors tried to derive some criteria from historical examples, these criteria are not yet customary international law since the criteria, especially since *diuturnus usus*, have not yet been fulfilled. As a result, the current rule is that the right of external self-determination cannot be awarded arbitrarily, as secession violates the principle of territorial integrity, with the granting of the right on the people subjugated under colonial oppression as the only exception which has amounted to customary international law. Since the case of Kosovo is outside the setting of colonialism, the right of external self-determination cannot be invoked as a rationalization for the declaration of independence of Kosovo.

It might be argued that Kosovo has fulfilled the definition of a State, and that 92 other nations have recognized it. However, hitherto, from the perspective of customary international law, secession is accepted only either through the justification of external self-determination or if it is accepted by the nation subject to territorial fragmentation such as in the case of South Sudan. As a result, strictly speaking, from the perspective of international law, since there is no justification applicable for Kosovo to secede, the consequence is that the effect of the declaration of Kosovar independence is invalid despite the fact that it fulfills the criteria of Montevideo Convention. In other words, under customary law, the right of external self-determination has become decisive criterion of a State, and, as has been shown, Kosovo has failed to fulfill this criterion.

One might be tempted to invoke the concept of Responsibility to Protect (R2P) as a justification. However, this concept is irrelevant to the current discourse on external self-determination, since its three pillars address the responsibility of the state and the international community to protect its citizens, and does not address the issue of secession. As a result, there is no link between the two concepts. Nevertheless, this does not imply that in the future such strict

rule might not change; an instant custom that extends the context of the right of external self-determination might materialize as long as the criteria of customary law are fulfilled (Langille, 2003). As the International Court of Justice has noted in the North Sea Continental Shelf case, "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary law" (International Court of Justice, 1969).In fact, a precise rule on the granting of the right of external self-determination to nations or people under continuous persecution is exigently required and should be drafted internationally, as the current vacuum of precise international rules on it has caused predicament over the legality of the declaration of independence in many new states, such as in the case of Abkhazia, South Ossetia, and Kosovo itself, and such drafting would reduce the potential conflict that might arise.

BIBLIOGRAPHY

A. BOOKS

Brownlie, I., Crawford, J., Lowe, V. (1998) *The British Year Book of International Law 1999Vol 70*. OUP UK.

Buchheit, L.C. (1978). Secession: The Legitimacy of Self-Determination. Yale University Press.

Clark, H. (2000). Civil Resistance in Kosovo. London: Pluto Press.

Dyke, Van. (1970). Human Rights, the United States, and World Community. New York: Oxford University Press.

Hiltermann, J.R. (2007). A Poisonous Affair: America, Iraq, and the Gassing of Halabja. New York: Cambridge University Press.

Malcolm, N. (1999). Kosovo: A Short History. United States of America: Harper Perennial.

McDowall, D. (2004). A Modern History of the Kurds. I.B. Tauris.

Mertus, J.A. (1999) Kosovo: How Myths and Truths Started a War. United States of America:University of California Press.

Miller, L. (1967) World Order and Local Disorder: The United Nations and Armed Conflict. Princeton University Press.

United Nations. (1970). 7 UN Monthly Chronicle. United Nations, Office of Public Information

B. CASES

International Court of Justice. (2010). Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports.

International Court of Justice. (1969). North Sea Continental Shelf Cases, I.C.J. Reports.

Supreme Court of Canada. (1998). Reference re Secession of Quebec.

C. DOCUMENTS

United Nations General Assembly. (1960). Declaration on the Granting of Independence to Colonial Countries and Peoples.

United Nations General Assembly. (1970). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

D. JOURNALS

Borgen, C.J. (2008). Kosovo's Declaration of Independence: Self-Determination, Secession, and Recognition. The American Society of International Law, 12.

Charney, J.I. (2001) Self-Determination: Chechnya, Kosovo, and East Timor. Vanderbilt Journal of Transnational Law, 34.

Choudhury, G.W. (1973). Bangladesh: Why It Happened. International Affairs, 48(2), 242-249.

Emerson, R. (1971). Self-Determination. The American Journal of International Law, 65(3), 459-475.

Ijalaye, D.A. (1971). Was Biafra at Any Time a State in International Law?. American Journal of International Law, 65, 553-554.

Kirgis, F.L. (1999). The Kosovo Situation and NATO Military Action. The American Society of International Law.

League of Nations. (1920). Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Questions. Official Journal of the League of Nations, 3, 5-10.

Nanda, v.P. (1972). Self Determination in International Law The Tragic Tale of Two Cities. The American Journal of International Law, 66, 321-336.

Orentlicher, D.F. (1998). Separation Anxiety: International Responses to Ethno-Separatist Claims. The Yale Journal of International Law, 23, 1-78.

Rama, Shinasi A. (1998). The Serb-Albanian War, and the International Community's Miscalculations. The International Journal of Albanian Studies, 1, 15–19

Rogel, C. (2003) Kosovo: Where It All Began. International Journal of Politics, Culture, and Society, 17(1), 167–182.

Senese, S. (1989) Human Rights & People's Rights: Views from North & South. Social Justice, 16, 19-25.