The Jurisprudence of the Right to Self-Determination Under International Law: Interrogating Reality of the Right?

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Abstract
Self determination is a process by which a people determines its own statehood and forms its own government.[1] In most cases it is borne out of agitation of people who feel maltreated by the government or a set of indigenous people who want a State of theirs. Such group of persons cannot qualify as a state in the legal sense of it; not having a permanent population, defined territory, government and capacity to enter into relations with other states.[2] Self-determination is a right recognized by Article 1 of the International Covenant on Civil and Political Rights but hardly enforced by the Human Rights Committee and super powers that are always looked upon by the agitators for assistance in realizing this right. Applying the doctrinal methodology and the natural law theory, this work took a deep survey of the international community's attitude towards enforcement of the right and discovered that they view it as an internal and domestic affair of the affected State which does not require allied intervention; not even on the excuse of human rights violations and also found that there are no realistic benchmarks to achieving the said right, it therefore made some useful recommendations that would serve as benchmark for planning for responses to demand for self-determination or assuaging such agitations.

1.0 Introduction

The agitation of self-determination is currently one of the most important issues in twenty first century international law, especially in Nigeria. It poses great and serious challenges to the jurisprudence of international law both in its Human Rights Law (HRL) and Humanitarian Law (IHL) variants. In practice, it has become common practice and political *leitmotif* when a group within a sovereign state considers that their existence within the state is threatened by direct acts of misadventure by the government, weakness, unwillingness, loss or absence of capacity or shear indifference to a group's perceived grievance. Some of the reasons often adduced for agitations for self-determination are violation human rights, inequity in sharing of the common wealth, nepotism etc.

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[1] https/www.oxfordlanguages.com. Assessed on 15/5/2021.
[2] Montevideo Convention on Rights and Duties of States

Governments faced with such agitations have always treated the agitators as criminals. The neo-labels ascribed to those freedom fighters are terrorists, war lords, rebels, secessionist etc. thus, explaining the suppression of their activities by government.

What convokes self-determination is ubiquitously in a state of confusion, powered by political consideration and parochial dispositions of world leaders and their local allies. The legal regime of self-determination as reluctantly expressed in international law and treaties does not adequately capture or reflect the underlying theoretical and political contributory compelling antecedent situations that initiate and sustain the demand for self-determination. The reminiscence of international law as the regulator and constraint of self-determination and bearer of the burdens that emanate from all the exercises towards self-determination compels a re-evaluation of the legal doctrine of self-determination. This work serves as reconciliation of the international law on self-determination that can serve as benchmark for the response to demand for self-determination and inherent matters of human rights associated with such ventures.

1.2. Historical background

Self-determination has its foundation as a legal concept in the Universal Declaration of Human Rights ("UDHR") which was a reaction to the events of the Holocaust. People awed by the events of the holocaust acknowledging the grave atrocities committed by a regime against a segment of its society in the name of racial, ethnic, and other "purities"[3] dispositions, aggregated their strength within the space provided by international law to ensure that such atrocities of the holocaust would never repeat.

Self-determination developed on the somewhat artificial dichotomy of norm and exception, which endorses a bifurcated approach to balancing the interests of societal goals and individual rights. Self-determination is therefore a label that may provide instant legitimacy to efforts to found a new state from existing state(s) by a people who consider themselves to possess unique characteristics that qualify them to seek for a state and government of their own.

Self-determination as a legal concept was given an impetus when it was re-examined in the Barcelona Traction Case[4]**.** In his separate opinion,[5] Judge Ammoun had by his insistence

[3] Father Robert Araujo "Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law." Fordham International Law Journal, Volume 24, Issue 5 2001
[4] (1970) ICJ 1
[5] Which was not the popular opinion then as many states in the developed world were petrified that if such opinion was the law, they would no longer have unfettered access to natural resources deposits in foreign lands and would lose their flourishing investments in their colonial domains. See Antonio Cassese, self-determination of peoples: a legal reappraisal (Cambridge, 1995)

on solemn affirmation for the Self-determination ignited further discussion of the subject and laid better foundation for its assertion. He stated thus:

> *It thus seemed appropriate that those principles not excepting those deriving originally from the spirit of the American or French Revolutions-the religious inspiration of which is not unknown, should solemnly be affirmed.*[6]

Self-determination as a legal concept acquired further legality in contemporary international law by the recognition accorded it by the UN Charter. Self-determination ranks second in the purposes of the United Nations. The UN Charter recognizes self-determination of peoples as an essential base for development of friendly relations among nations aimed at strengthening universal peace.[7]

The African Charter on Human and Peoples' Rights took this development a step further by declaring that" All peoples shall have the right to existence. They shall have the unquestionable and inalienable and unquestionable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."[8] In the UN General Assembly Resolution 41/128 of 1986 it was acknowledged that self-determination is a "fundamental right of peoples."[9] Part of the decisions at the Helsinki Conference of … was the agreement that the security of Europe relied on the principle of self-determination for which it was resolved by the participating States to respect "the equal rights of peoples and their right to self-determination"[10] which entails freedom to determine, without external interference, their internal and external political status, development in the areas of politics, economy, social and cultural outlooks.

Other legal instruments of authority as per the legal origin and use of self-determination are the ICCPR and the ICESCR. In their Common Article 1are affirmations of the right to self-determination 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.[11]Serious violations of human rights often accompany demands for Self-determination. The central international human rights treaties envisage a regime of derogation allowing states parties to temporarily adjust their obligations under the treaties in exceptional circumstances.

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[6] Barcelona Traction (Belg. v. Spain) 1970 I.CJ. 3, 311-12 (Feb. 5)
[7] See Article 1(2) UN Charter
[8] Article 20 of the African Charter on Human and Peoples' Rights
[9]Article 5 of the UN General Assembly Resolution 41/128 of 1986
[10] Principle VIII of the Final Act of the Helsinki Conference
[11]ICCPR Article 1.1; International Covenant on Economic, Social, **and** Cultural Rights (ICESCR) Article 1.1

1.3 Clarification of Key Concepts

1.3.1 Self-determination

Although, General Assembly Resolutions are not per se binding, despite being instrumental in providing evidence of state practice and interpretation of the provisions of the charter, the fact remains that customary international law affirms the view that self determination is a binding legal right.[12]In her advisory opinion in the matter of the Region of the Western Sahara,[13] the International Court of Justice (ICJ) did leave an insight into the meaning of the term "self-determination." In that matter, ICJ held the view that by virtue of Article 1.2 of the Charter of the United Nations and GA Resolution 1514 (XV) self-determination is a right of "peoples." Pointing out that the right is applicable for the purpose of bringing all colonial situations to a speedy end, noting further, that the right of self-determination "requires a free and genuine expression of the will of the peoples concerned" with the exercise or attempted exercise of this right. Put concisely; the freely expressed will of peoples.[14] Self-determination as a right vests on a cohesive national groups ('peoples') enabling them to choose for themselves a form of political organization and their relation with other groups.[15] The purport of self-determination being a collective right is that plenty individual members of a community would be involved in the exercise of the right. The right is therefore for "peoples" not "governments."[16]

Self-determination as a principle of international law primarily became well known in the aftermath of the first and second World Wars.[17] It provided legal framework and impetus for the victorious allies in World War I to conveniently divide the parts of Europe[18] that were on the opposite side of the war. The idea was to perpetually weaken the parts of Europe (and the rest of the world) considered to possess the ability to impinge on world peace. Essentially, as could be gleaned from the declaration of the then US President; Woodrow Wilson, it was targeted at reducing the authority of powerful individuals to

[12]Javaid Rehman, International Human Rights Law,(2nd edition, Edinburgh, Pearson Education Limited, 2010) 476

[13] Advisory Opinion, Western Sahara, 1975 I.C.J. 12

[14]*Ibid* at 33.

[15]Ian Brownlie, Basic Documents on Human Rights**,** 113 (3d ed. 1992); *see also* IanBrownlie, Principles of International Law 574-75 (5th ed. 1998) a t 599.

[16] James Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'?, in* The Rights of Peoples 59 **J.** Crawford ed., 1998)

[17] Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120 (1995) ("There is no clear consensus . . . as to what the meaning and content of that right is, and it has gained the distinction of 'being one of the most confused expressions in the lexicon of international relations." (Quoting W. Ofuatey-Kodjoe, The Principle of Self Determination in International Law vii (1977).

[18] The remaining part of the Austro-Hungarian and Ottoman empires. *See* Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights 27 (rev. ed. 1996) at 27–28; see also Inge V. Porter, *Two Case Studies in Self-Determination: The Rock and the Bailiwick*, 4 San Diego INT'L L.J. 339, 343 (2003)

galvanize enough traction for wars. Consequently the move sort to give the people some authority in the affairs of the state.[19]

Self-determination as a principle of law was originally intended to be applied to the defeated Austro-Hungarian and Ottoman empires. It was never thought that it would ever be applied to overseas colonies.[20] This is the case because when the idea of expanding the principle of self-determination to overseas colonies began; the allies felt it would jeopardize the stability of world order. President Wilson for instance, was said to have been disturbed by his realization that world order would necessarily be disturbed if the right of self-determination were to be extended beyond the confines of Europe,[21] a view that met the approval of the other world leaders.

Self-determination acquired expanded meaning after the Second World War to become the legal basis for the justification of the process of decolonization.[22] Later in the 1960s Self-determination would be synonymous or another word for decolonization. [23] Self determination as a legal concept denotes the legal right of people to decide their own destiny in the international order.[24]

In the United Nations Charter[25], self-determination is given a very broad definition. Equal rights and self-determination of peoples are as well given general meaning. The "peoples" entitled to the right self-determination is not specified and can be said to be at best vague.[26]Self-determination of peoples as captured in articles 1 and 55 of the UN Charter is treated as vague principle, not necessarily as a right. Moreso Self-determination was

[19]In an address to the U.S. Senate, President Wilson declared that "[n]o peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property. Address by U.S. President Woodrow Wilson, 54 CONG. REC. 1741, 1742 (1917)

[20]See Hurst Hannum, Autonomy, Sovereignty, And Self-Determination: The Accommodation Of Conflicting Rights 27 (rev. ed. 1996) at 28;see also Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 50 n.26 (1998

[21]Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120 (1995), at 122

[22]*See* Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120 (1995), at 122

[23]Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South* Ossetia, 10 CHI. J. INT'L L. 1, 8 (2009)

[24] https//www.law.cornell.edu, accessed on 5/11/21

[25] Hereinafter referred to as UN.

[26] *See* Ames Summers, Peoples and international law: how nationalism andself-determination shape a contemporary law of nations 149 (2007), at 150; *see also* CsabaK.Zoltani& Frank Koszorus, Jr. *Group Rights Defuse Tensions*, 20 Fletcher F. World AFF. 133, 140 (1996)

created to apply to territories rather than to ethnic groups.[27] The high point was that the UN Charter left the matter of self-determination to the domestic jurisdiction. In article 2(7) it is stated that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction."[28] It is for this reason that many literature[29] hold that it is this interaction between articles 1(2), 55 and article 2(7) that the principle of self-determination most likely did not constitute a rule of international law; at least at the time the UN Charter was drafted.

Irrespective of the roles played by the principle of self-determination in ending colonialism during the twentieth century, self-determination as a legal principle has no precise scope and meaning in international law.[30] It is perhaps imagined that no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples. Yet self-determination has remained vague and imprecise in meaning and scope as it was even in the days of President Woodrow Wilson and others at Versailles.[31] But self-determination according to President Obama, remains a basic right that has to be addressed, no matter how difficult.[32]

Self-determination as a concept has three variants. The first is Self-determination of colonial peoples as captured by the UN Charter and seemingly acceptable to the larger part of the world. The second meaning is secession which is more of demand of minorities that intend to break away from the state they belong to; and it is the most popular of meanings of self-determination since the end of the cold war. The third is innovative. It represents the interests of certain ethnic or cultural groups, not intending to break away from the state they belong but are seeking to achieve certain collective rights for themselves[33] within their present state.

The Bolshevicks advocated for self-determination of peoples; believing that the principal factor of division among peoples was the dominion of autocratic governments and

[27]CsabaK.Zoltani& Frank Koszorus, Jr. *Group Rights Defuse Tensions*, 20 FLETCHER F. WORLD AFF.133, 140 (1996)
[28] U.N. Charter art. 2, para. 7.
[29] Hurst Hannum, Autonomy, sovereignty, and self-determination: the accommodation of conflicting rights 27 (rev. ed. 1996); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 12 (1993)
[30]*See* Hurst Hannum, *op cit* (rev. ed. 1996); *see also* Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120 (1995)
[31]Hurst Hannum, Ibid; see also Lani E. Medina "An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status," Fordham International Law Journal Volume 33, Issue 3 2009 Article 6

[32] Karen J. Carrillo, *New U.S. Policies Toward Puerto Rico and Cuba?*, N.Y. Amsterdam News, Jan. 15, 2009, at 2 at 2 (quoting a statement from Obama read by a representative).
[33] Daniele Archibugi "a critical analysis of the self-determination of peoples: a cosmopolitan perspective." Constellations Vol 10, November 4, 2003, Blackwell publishing ltd, oxford

minorities oppressing majorities. On the other hand, President Wilson's perception was the achievement of self-determination of peoples from outside by redrawing borders to create state communities that were as far as possible, culturally, ethnically, geographically, and linguistically homogeneous. The Bolshevick's conception of self-determination was not presented for consideration at the Paris Conference and as such it was not given any consideration at the international meeting. President Wilson's conception of self-determination that obtained a huge buy-in at the Paris Conference has proved unattainable but gave rise to the creation of new states that, contrary to Wilson's postulation on self-determination, saw forced amalgamation of different minority ethnic groups into artificial states in Europe such Czechoslovakia, Yugoslavia, Poland, and the Baltic republics.[34]

The contention here is that "peoples" as captured in the UN charters refers more to the 3rd world, which ought, in no distant future to become states.[35]It has become more difficult to identify as peoples the Biafrans, Basques, Palestinians, Kurds, Armenians, Quebecois, Serbs, Croats, Chechens, Aborigines, American Indians, Catholics, Protestants, Arabs, and Jews. The point is that any community of persons that arrogate a certain measure of identity to themselves may; based on sociological and cultural contexts designate itself as a people.

1.3.2 Categories of self-determination

In practice, self-determination is divided into three broad categories. (i) the right of ethnic minorities to benefit from certain collective rights. (ii) the right of minorities of a state (or more than one state) to become an autonomous (or join another) state (iii) the right of colonized people to become states. It must be noted that these categories are by no means mutually exclusive as each category is a derivative of the other. It could therefore, further be discussed from external and internal perspectives, with each being available for a people intending to assert their right to self-determination depending on their peculiarities. In fact a demand for self-determination may graduate from one to the other depending on the reaction of the state authority from which such demand is made.

(i) The right of ethnic minorities to benefit from certain collective rights: in this variant, a people are demanding respect for certain collective rights that are peculiar to their people from its parent state. The intention here is to remain within the state while pursing those collective rights that are peculiar to the people. The demand for restructuring by some ethnicities in Nigeria may be regarded as falling within this category. A further example of the exercise of this right is found in the activities of the Greenland. Greenland as a people is not demanding for a sovereign state from the Danish Crown. They appear to be satisfied

[34] See Hannah Arendt, the origin of totalitarianism (London: Trinity, 1950) section 1, cap 9
[35] Daniele Archibugi "a critical analysis of the self-determination of peoples: a cosmopolitan perspective." Constellations Vol 10, November 4, 2003, Blackwell publishing ltd, oxford

with the level of domestic self-determination allowed for them by the crown. The same could be said of Scotland's association with the United Kingdom.

(ii) The right of minorities of a state to become an autonomous sovereign state: in this variant, a people are demanding autonomy from its parent state with the view to forming a new independent state. The people (minorities) in this case may have existed in two or more states and are coming together to form a new state. In some cases the people (minorities) are seeking to join another state where a part of their people are in majority or have obtained assurances of better protection. These instances arise by the fact that many a people by political or other reasons find themselves ceded, and resident in different states of the world today; divided only by imaginary lines as is the case with the Kurds in Turkey, Iran, Iraq, and Syria, Biafrans in Nigeria, Niger, Chad, Cameroon, and Malik, the Bakasis in Nigerian and Cameroon, Yoruba Egus in Nigeria and Benin Republic, the Somalis in Somali, Djibouti, Seychelles, Kenya, and Ethiopia. The demand oftentimes is borne out of ill treatment being meted by the parent state on the indigenous people, which usually subject them to some forms of bias, favoritism, tribalism, inequity and debasing treatment.

It often results in armed conflicts except in few instances where it was achieved without wars. Following the end of the decolonization process, a peoples as a concept and the foundation for demands for the right of self-determination acquired new configuration and traction. The right of peoples becomes replaced by domestic laws that are designed to cater for equal rights for all citizens. Those international public opinions that helped galvanize public political sympathy that saw India, Algeria, Vietnam, and Cambodia achieve political independence have long dimed and are no longer available to peoples seeking self-determination from within. What is left of this variant of self-determination as a right is hypocrisies.[36] Ironically the greatest colonialists who became the greatest advocates for self-determination from outside do deny internal self-determination to the peoples they dominated and peoples' that benefited from acts of self-determination from outside, upon becoming sovereign states, are using force to prevent acts of demand for self-determination from within.

(iii) The right of colonized people to become states: this variant of the right to self-determination is the most developed and most successful of all ventures in this regard. The colonial authorities exerted authority on the colonies by force of arms. More so, the colonized territories seeking self-determination were not, in the true sense of it, a people. They were just locked up together by their hatred for the colonial masters and had a common desire to be liberated from colonialism.

[36] Daniele Archibugi "A Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective." Constellations Vol 10, November 4, 2003, Blackwell publishing ltd, oxford

Between the 50s and late 70s self-determination was interpreted as right to become states. In line with the proposition that the self-determination clauses in the UN Charter was for non-self governing territories of that time, about one hundred of such territories gained independence at little or no cost.[37]

Recent calls for self-determination are internal in nature and the inhibitions are so many from the international law; prohibiting further division of territories as decolonization process is over. The states that emerged from the decolonization by virtue of acts of self-determination are using force to forestall acts of self-determination from within.

1.4 Internal and external dimensions to self-determination

The fact of self-determination having dimensions was made more evident in the decision of the Canadian Supreme Court in *Reference re Secession of Quebec*.[38]The Canadian Supreme Court drew a distinction between internal and external dimensions of self-determination. It held that internal self-determination refers to "a peoples' pursuit of its political, economic, social and cultural development within the framework of an existing state." For external self-determination; as stated in Resolution 2625, the court held that it refers to "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."[39] The court explained that external self-determination is available to colonial peoples - peoples that are "subject to alien subjugation, domination or exploitation outside a colonial context"[40]and, as a last resort, in situations where "a people is blocked from the meaningful exercise of its right to self-determination internally."[41]

The international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external

[37] See James Crowford, "State Practice and International Law in relation to Secession," the British Yearbook of International Law 69 (1999) p 90
[38] [1998] 2 S.C.R. 217.
[39] ***Reference re Secession of Quebec*** [1998] 2 S.C.R. 217at 282
[40]*Ibid at 285*
[41]*Ibid*at 285–86. The court concluded that the people of Quebec did not fall into any of these circumstances simply because they failed to reach an agreement with the government on amendments to Canada's constitution so do not have an external right of self-determination to secede from Canada. The court further held that "the continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule."*Reference re Secession of Quebec*at 287.

self-determination because they have been denied the ability to exert internally their right to self-determination.[42]

1.5 Peoples

With the whole world currently divided into sovereign territories or at least with the abatement of colonialism the term *peoples* has suddenly lost its original appeal that made it a catch phrase and endeared it to people seeking self-determination for themselves. This loss of value is even more descriptive as calls for self-determination dims in the international spheres but resonates within states. The concept has become very vague in meaning, all manner of capricious definitions and description has been ascribed to it. It is becoming even more worrisome as states conscientiously re-label indigenous groups that used to be generally understood as a people; *terrorist, rebel* … with the singular intention of proscribing their activities within the state. The emergence of quasi-official spaces in international relations and international humanitarian law [43] for NGOs, individuals, organized groups, national liberation organizations and many more forms of non-state actors has engendered tension between sovereign states and people's rights.[44]

The current challenge with defining the term *peoples* is that there has never been an objective criterion for such a definition.[45] Academic, religious, linguistic, racial, faith and political opinions have never come to a consensus such that there has never been an agreement as to whether the Basques, Kurds, Armenians, Quebecois, Serbs, Hutus, Tutsis, Igbo's, Fulani's, Croats, Chechens, aborigines, Catholics, Protestants, Arabs, Jews, scoots, Chelsea and Arsenal fans are a people.[46]

The manner of consummation of the identity of "a people" is another significant challenge in the definition of that term in contemporary international law. Matters arising from Aryan Race exclusion of Jews in the state of Germany in the prelude to World War 11 continue to underscore discussions as to what "a peoples" mean and who should be so recognized as a people. More challenges emerge from communities identifying themselves as a people for the purpose of re-drawing the world map by creating homogenous states each for a people. The seeming impracticability of this venture is one major blow to having a serious global discussion aimed at defining criteria for declaration of a community as a people for the

[42] *Ibid* at 287.
[43] See for instance Geneva Calls getting of many non-state actors to sign on to respect humanitarian laws in their operations; the activities of medican san frontiers; Oxfam, Amnesty International whose voices resonate in defense of non-state actors at the international sphere
[44] CF. Richard Falk, "The Rights of Peoples (in Particular Indigenous Peoples)," in James Crawford, ed., *The Rights Peoples* (Oxford: Oxford University Press, 1988)
[45] Daniele Archibugi "A Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective." Constellations Vol. 10, November 4, 2003, Blackwell Publishing Ltd, Oxford
[46] Daniele Archibugi, *ibid*

purpose of asserting a right to self-determination or creating an institution or agency for that purpose.[47]

In its attempt to define for international law the meaning of the term *Peoples,* the Permanent Court of International Justice in the *Greco-Bulgarian Communities* case defined it as "a group of people living on a delimited territory, possessing distinct religious, racial, linguistic, or other cultural attributes and desiring to preserve its special characteristics."[48]As Prof. Wolfrum has pointed out, this definition may seem to be rather superficial, but a better one has not been found."[49]Another definition holds that "Peoples" in the UN Charter refers more to the 3rd world, which ought, in no distant future to become states.[50]

1.6 Secession

The end of the cold war brought about a period described as the age of secession.[51] The new international order that emerged at the end of the cold war was characterized by threats to international peace occasioned by frictions and power contests within sovereign states.[52] These frictions and power contests were primarily the result of nationalists agitating for the creation of new states by seceding from within their parent state at all cost[53] on the basis of their right to self-determination.[54] The consequential fragmentation of states became new but additional problems to international order and security[55] by the fact that it indeed challenged the old order that was premised on "state sovereignty, territorial integrity, the inviolability of international borders and non-intervention in the internal affairs of another state."[56]

[47]Archibugi has argued that an ideal way of settling the challenges surrounding the right of peoples to self-determination would be the transfer of competences concerning self-determination to cosmopolitan legal institutions that would represent the views of citizens of the world, states and single peoples equally. This would be achieved through the use of legal norms. His argument was based on the fact that relationships between states at present are founded on self-interest in which case independent states may never allow the emergence of a scheme that would not be to their favour. See Daniele Archibugi, *ibid*

[48] 1930 P.C.I.J. (ser. B) No. 17, at 21.

[49] *See* the charter of the united nations**:** a commentary 64 (Bruno Simma ed., 1995)

[50] Daniele Archibugi, *op cit*

[51] A. Buchanan, 'Self-Determination, Secession, and the Rule of Law', in R. McKim and J. McMahan (eds), *The Morality of Nationalism*, New York, Oxford University Press, 1997, p. 301

[52] G. A. Craig and A. L. George, *Force and Statecraft: Diplomatic Problems of Our Time*, 3rd edition, New York, Oxford University Press, 1995, p. 146.

[53] M. H. Halperin and D. J. Scheffer with P. L. Small, *Self-Determination in the New World Order*, Washington, DC, Carnegie Endowment for International Peace, 1992, pp. 123–60.

[54]Peter Radan, *The Break-up of Yugoslavia and International Law.* (London: Routledge, 2002)

[55] K. von Hippel, 'The Resurgence of Nationalism and its International Implications', *The Washington Quarterly*, 1995, vol. 17, no. 4, p. 185

[56] 7 K. S. Shehadi, *Ethnic Self-Determination and the Break-up of States*, London, Adelphi Paper 283,International Institute for Strategic Studies, 1993,Pp. 8.

The inordinate wave of ethnic claims to self-determination and resultant secessionist conflicts came to be described as international disorder.[57] The concern then was that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."[58]

In the post second world war era, the idea of "peoples" deserving self-determination was used to partition the defeated Europe; whereas "peoples" in the territories of the victorious allies, the Americas for instance, were denied the same right[59] as was the case with Puerto Rico[60] and many other non-self-governing territories in the Atlantic and Caribbean.[61]This is in spite of the fact that Article 73 of the UN Charter refers to the populations of non-self-governing territories as "peoples."

The breakup of Yugoslavia and the disintegration of the USSR are post cold war benchmarks in achieving statehood through the secession path of the right of self-determination. It offered the UN and the international community the opportunity to re-examine the meaning of the word "people" in the context of (secession path of) the right of self-determination. Even though the major innovation of these events was consummation of the right of self-determination by peaceful achievement of statehood through referendum, it however does have some significant implication as regards the interpretation of the term "peoples." Of the two possibilities in the interpretation of the term "peoples" as suggested by Higgins[62] i.e. that "peoples" may mean the entire people of a state, or distinctive groupings on the basis of race, ethnicity, and perhaps religion. Although, Higgins opined that emphasis; as could be gleaned from all the relevant instruments and in the state

[57] 7 K. S. Shehadi, *Ethnic Self-Determination and the Break-up of States*, London, Adelphi Paper 283,International Institute for Strategic Studies, 1993, P. 8.
[58] 8 B. Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, New York, United Nations, 1992, p.9. see also oed those of Hector GrosEspiell, Special Rapporteur to a sub-commission of the Commission on Human Rights, who noted that 'the proliferation of very small States might have the effect of destroying or seriously undermining the very foundations of the existing community of nations': quoted in J. Duursma, *Fragmentation and the International Relations of Micro-States, Self-determination and Statehood*, Cambridge, Cambridge University Press, 1996, p. 40.
[59] See the application of the Blue Water or Salt Water Thesis to the Belgian effort to demand self-determination for native Americans
[60]Lani E. Medina "An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status," Fordham International Law Journal Volume 33, Issue 3 2009 Article 6
[61] *See* Non-Self-Governing Territories Listed by the 2002 General Assembly, http://www.un.org/depts/ dpi/decolonization/trust3.htm (last visited Mar. 2, 2010) (listing American Samoa, Anguilla Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands (Malvinas), Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St. Helena, Tokelau, Turks and Caicos Islands, the United States Virgin Islands, and Western Sahara as non-self-governing territories).
[62] R. Higgins, *Problems and Process, International Law and How We Use It*, Oxford, Clarendon Press,1994, p. 124. J. Crawford, *op cit.*

practice was that "peoples" is to be understood in the sense of *all* the peoples of a given territory, excluding minorities.[63] The less popular option has been enthroned. Even, the understanding that the consequence of Higgins conclusion is that self-determination 'cannot be utilized as a legal tool for the dismantling of sovereign states. . . . Self-determination does not provide groups . . . with the legal right to secede from existing independent States and create a new State',[64] has been dispelled. The dismemberment of Yugoslavia and the Soviet Union has clearly established that the right of self-determination includes the right of secession.[65] Consequently the territorial interpretation of the word "peoples" has been jettisoned for a more accommodating interpretation that extends to cover minorities within sovereign states. More so the doctrine of *utipossidetis* has been put on trial.

1.7 Fundamental Human Freedoms

The whole of the positive thesis about self-determination has been external to demands for self-determination especially from sympathizers. Almost in all circumstances; perspectives on self-determination has been characterized by political considerations that are external to the right. It is for this reason that self-determination has been seen and dealt with more as a political principle than a legal right.

The classical theory of self-determination postulates that an individual's identity is tied to a state or territorial unit. To that extent self-determination under the classical theory happens when that individual joins the rest of the population of that state or territorial unit to choose its own government.[66] On the other hand, the romantic theory of self-determination's postulation is that an individual's identity and loyalty is to the nation[67] rather than to the state to which that individual is subject. To that extent therefore, self-determination under the romantic theory happens when that nation to which that individual identifies obtains her own statehood.[68] While the classical theory of self-determination supports the principles of territorial integrity and the inviolability of state borders against secession as a derivative or character of the right self-determination, the romantic theory of self-determination supports the alteration of existing state borders and consequently favours secession as well as

[63] R. Higgins, *Problems and Process, International Law and How We Use It*, Oxford, Clarendon Press,1994, p. 124. J. Crawford, *Ibid.*
[64] See M. N. Shaw, 'The Heritage of States: The Principle of *UtiPossidetis Juris* Today', *British Year Book of International Law*, 1996, vol. 67, p. 123. See also Peter Radan, The Break-up of Yugoslavia and International Law, (London: Routledge, 2002
[65] L-C. Chen, 'Problems and Process: International Law and How We Use It', *New York Law School Journal of International and Comparative Law*, 1996, vol. 16, P. 157.
[66] T. D. Musgrave, *Self-Determination and National Minorities*, Oxford, Clarendon Press, 1997, PP. 96–101.
[67] Here defined as a people
[68] T. D. Musgrave, *Self-Determination and National Minorities*, Oxford, Clarendon Press, 1997, pp. 96–101.

irredentism. It is important to note however that the factors determining the decision as to which theories to be applied in majority of the self-determination exercises are completely external and dependent, in practice, on the political power configurations and interests of the dominant and oppressed groups[69] and the identity of their external allies as well as the relative strategic value of the would be state. Examples of such external powers intervention is found in the creation of states like Djibouti while Somalia was embroiled in armed conflict, the creation of the state of Israel in 1947 (or Hitler's primary victims, the Jews[70]), etc. Some observers hold that in the 20th century Nazi Germany, Adolf Hitler's racist and genocidal policies; committed in the name of the German *Volk* (an example of the romantic theory of self-determination) was a significant example of such power configuration. And it endangered the secession part of the romantic theory of self-determination. In fact it became 'the main legal bulwark against secession.[71]

It is on the need for Fundamental human freedoms of peoples that the right of self-determination including its secession path is predicated. In very large states with significant number of peoples, demand for right of self-determination particularly its secession extreme, is not very visible as they often enjoy the control of the government.

The secession of Bangladesh from Pakistan in 1971 is very instructive in this regard and it represents "events that would occur, and are likely to continue to occur."[72] Bangladesh secession bid from Pakistan was as a result of the sense of oppression and victimization felt by the *Sanskrit* speaking Bengali Muslims of East Pakistan at the hands of the *Urdu* speaking non-Bengalis [73] Muslims of West Pakistan that dominated the Pakistani government. Similar, suppression of fundamental human freedoms are yielding similar agitations for the outer limits of the right to self-determination among peoples of Katanga, Biafra, the Tamil rebellion in Sri Lanka, the Bougainville rebellion in Papua-New Guinea and the claims to political domination of Fiji by its indigenous people, Quebec's attempt to secede from Canada etc. These acts of oppression and victimization of peoples was behind the successful secession of Eritrea from Ethiopia, the secession of Southern Sudan, the collapse of the Soviet Union, Yugoslavia and Czechoslovakia.[74]

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[69] See H. O. Schoenberg, 'The Concept of "People" in the Principle of Self-Determination', unpublished doctoral dissertation, Columbia University, 1972, pp. 38–60.
[70] Peter Radan, The Break-up of Yugoslavia and International Law, (London: Routledge, 2002), p 18
[71] A. Heraclides, *The Self-Determination of Minorities in International Politics*, London, Frank Cass & Co Ltd, 1991, p. 3. For a critique of Deutsch's views, see Connor, note 15, p. 21.
[72] Peter Radan, *Op cit.*
[73] See V. P. Nanda, 'Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect', in Y. Alexander and R. A. Friedlander (eds), *Self-Determination: National, Regional, and Global Dimensions*, Boulder, CO, Westview Press, 1980, pp. 205–6.
[74] Peter Radan, *The Break-up of Yugoslavia and International Law,* (London: Routledge, 2002), P.19

1.8 Recognition

The pursuit of self-determination that involves secession is an event whose foundation is more political than its legal; it is a "prima facie right."[75] The rationale for this assertion is that exercise of the right of self-determination that terminates in secession does not become absolute until the basic criteria for statehood is met. Besides the legal criteria listed in Montevideo Convention of 1933[76] which are permanent population, defined territory, functional government and a capacity to enter into relations with other States is recognition. Recognition is not a legal requirement for statehood, but it is a political requirement that has the capacity to authenticate the legal aspects of statehood or mar same. 4aIt was the ability of Bangladesh to achieve the recognition of India that sealed Bangladesh secession from Pakistan in 1971. Many secession exercises failed for lack of this political recognition of powerful states. They include the failed Katanga bid to secede from Congo in 1960, the failed attempt of Biafra to secede from Nigeria in 1967, and the *Quebec from Canada,*[77] *T*urkish Republic of Northern Cyprus from Cyprus.[78] The known types of recognition are: express or implied recognition, conditional recognition, individual or collective recognition and De facto and De Jure recognition. In recognition there must be clear indication of intention either to deal with a new State as such, or accept the new government and establish a relation with it. Express recognition is backed up by a formal declaration and where it is by conduct, it is regarded as implied recognition. It is only recognition that gives birth to statehood,[79] the first stage of which is the De facto recognition followed by the De jure recognition. The later is accorded when States are satisfied that the new State is capable of fulfilling international obligations.

1.9 Conclusion/Recommendations

From this discourse it is evident that the right of self-determination no longer exists in reality especially with the end of colonialism; if it all it could be tolerated; it has to be at the dictate and preference of World Powers, who may venture to support such agitation when beneficial to them. It also follows that the inequity, injustice, human rights violations, mis-governance and bias against an ethnic group cannot anchor the support of World Powers to ground the right of self-determination. Agitators for the right of self-determination stand to risk their lives in the vain hope that the international community would come to their aid. The host states; taking Nigeria as a case study, have never spared the slightest opportunity of slaughtering agitators who are mostly youths. The situation of things is abhorrent and the silence of international community in the face of such violation of human rights by States in the guise of maintaining law and order within State territory aggravates the evil and

[75] Peter Radan, *Ibid*
[76] Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States, 26 December 1933, (1936) 165 LTNS 21–31. Article 1
[77] *Reference re: Secession of Quebec* (1998) 161 DLR (4th) 385, at 443.
[78] *Loizidou -v- Turkey (Merits)* (1996) 108 ILR 445 at 471
[79] This is the principle of constitutive theory.

renders mere rhetoric the right of self-determination. It is suggested that since the right to self-determination is not easily achievable, the UN should come out with policies that would:

i. Foster unity in every multi-cultural States by ensuring the leaders are held accountable to ensure justice, equity and fair play.
ii. Ensure that minorities must be fairly treated
iii. Ensure devolution of power amongst component groups in a state; such as rotation of presidency and equitable sharing of political positions etc.
iv. Minorities or indigenous peoples must be protected against subjugation and violation of their fundamental rights.
v. There should be arrangements based on agreement of the component units of a State which should be arrived at after a National Conference.
vi. Each agitation must be considered and dealt with by the UN on the merit of its special circumstance, in which case the international community must take proactive measures to ensure the actualization of the right.
vii. Relevant international instruments have to be amended to ensure a veritable legal framework that would enable the UN act in the general interest of humanity.