

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

CASES, MATERIALS,
AND COMMENTARY

THIRD EDITION

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self-determination, was intertwined with the notion of decolonization.⁹ However, in the post-Cold War era, a number of non-colonial peoples have successfully seceded, including the peoples of the former USSR, the former Czechoslovakia, the former Yugoslavia, Eritrea, East Timor, and South Sudan. Furthermore, the text of article 1 does not expressly confine the right to colonial peoples. Indeed, the HRC has now confirmed that the principle of self-determination, and possibly the right of secession in some instances, 'applies to all peoples, and not merely to colonised peoples'.¹⁰

[7.11] The right of ESD is politically controversial, as it clearly threatens the territorial integrity of States.

CERD GENERAL RECOMMENDATION 21

[7.1] The Committee notes that ethnic or religious groups or minorities frequently refer to the right of self-determination as a basis for an alleged right to secession....

[7.6] The Committee emphasises that, in accordance with the Declaration of the General Assembly on Friendly Relations, none of the Committee's actions shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour. In view of the Committee international law has not recognised a general right of peoples to unilaterally declare secession from a state. In this respect, the Committee follows the views expressed in the Agenda for Peace (paras. 17 et seq.), namely that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.¹¹

[7.12] The HRC has largely avoided consensus comments on the territorial aspirations of secessionist groups within existing States Parties. Future potential candidates for secession include the Chechens, the Quebecois, and the Kosovars, though the existence of an international right of secession for such peoples would likely be opposed by, respectively, the Russian Federation, Canada, and the Federal Republic of Yugoslavia. The HRC has, however, criticized Morocco's policies regarding the Western Sahara.¹²

[7.9] The Committee remains concerned about the very slow pace of the preparations towards a referendum in Western Sahara on the question of self-determination, and at the lack of information on the implementation of human rights in that region. The State party should

⁹ *Western Sahara Advisory Opinion* [1975] ICJ Rep. 12, 37. See also G. Simpson, 'The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255, 265, and R. McCorquodale, 'South Africa and the Right of Self-Determination' (1994) 10 *South African Journal on Human Rights* 4, 6. See also CERD General Recommendation 21, para 4 [7.9].

¹⁰ Concluding Comments on Azerbaijan (1994) UN doc CCPR/C/79/Add.38, para 6.

¹¹ The 'Agenda for Peace' was issued in 1992 by Secretary General Boutros Boutros Ghali (1992) UN doc A/47/277-S/24111.

¹² (1999) UN doc CCPR/C/79/Add.113.

move expeditiously and cooperate fully in the completion of the necessary preparations for the referendum....

As the International Court of Justice has ruled that the peoples of the Western Sahara have a right of external self-determination,¹³ it is not surprising that the HRC has singled out their secessionist aspirations for explicit endorsement.¹⁴

INTERNAL SELF-DETERMINATION

[7.13] ISD refers to the right of peoples to choose their political status within a State,¹⁵ or to exercise a right of meaningful political participation. For example, the institution of democratic rule in South Africa constituted an exercise of ISD by the black majority in South Africa. The notion of ISD overlaps considerably with the rights guaranteed in articles 25 (right of political participation) and 27 (minority rights)¹⁶ of the ICCPR. Indeed, Cassese describes ISD as a 'manifestation of the totality of rights embodied in the Covenant'.¹⁷

[7.14] CERD GENERAL RECOMMENDATION 21

[7.1] ...The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, descent, national, or ethnic origins.

[7.5] In order to respect fully the rights of all peoples within a state, governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious, or other grounds must guide the policies of governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens. Also, governments should consider, within their respective constitutional frameworks, vesting persons of ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in such activities which are particularly relevant to the preservation of the identity of such persons or groups.

¹³ *Western Sahara Advisory Opinion* [1975] ICJ Rep. 12.

¹⁴ See also Concluding Observations on Morocco (2004) UN doc CCPR/CO/82/MAR, para 8; United States of America (2006) UN doc CCPR/C/USA/CO/3/Rev.1, para 37; Panama (2008) UN doc CCPR/C/PAN/CO/3, para 21.

¹⁵ McCorquodale, 'Self-Determination: A Human Rights Approach', 864.

¹⁶ See generally Ch 24.

¹⁷ A. Cassese, *Self-Determination of Peoples* (Cambridge University Press, 1995).

[7.15] Self-determination is therefore a complex right, embracing an 'internal' and an 'external' form. The right can be conceptualized as a sliding scale of different levels of entitlement to political emancipation, constituting various forms of ISD up to the apex of the right, the right of ESD, which vests only in exceptional circumstances.¹⁹ Different 'peoples' are entitled to different 'levels' of self-determination.

[7.16] It is contended that a people is entitled to ESD¹⁹ by way of secession, when it lives under colonial²⁰ or neo-colonial domination,²¹ or when it is so severely persecuted, and its human rights so systematically abused, that ESD is necessary to remedy such abuse, and preserve its long-term viability as a people.²² Alternatively, peoples may reach free agreements to secede from each other,²³ as occurred when Czechoslovakia peacefully split into the Czech and Slovak Republics in 1993. Finally, peoples which are not entitled to ESD are nevertheless entitled to ISD.

[7.17] The HRC has cited article 1 in raising concerns with Israel over the expansion of settlements in the Occupied Territories, and has recommended that it 'cease all construction of settlements in those territories'.²⁴

[7.18] Indigenous peoples are people entitled to internal self-determination. For example, the HRC has said with respect to Finland:²⁵

[17. The Committee regrets that it has not received a clear answer concerning the rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of article 1 of the Covenant. It reiterates its concern over the failure to settle the question of Sami rights to land ownership and the various public and private uses of land that affect the Sami's traditional means of subsistence—in particular reindeer breeding—thus endangering their traditional culture and way of life, and hence their identity.

¹⁹ F. Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era' (1994) 38 *American Journal of International Law* 304, 306, and B. Kingsbury, 'Claims by Non-State Groups in International Law' (1992) 25 *Cornell International Law Journal* 481, 503.

²⁰ See generally on situations where peoples should be recognized as having a right of ESD, S. Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part I', and S. Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 2' (1999) 3(2) *International Journal of Human Rights* 49.

²¹ See [7.10].

²² Post-Second World War invasions can be termed 'neo-colonial situations', and have rarely been recognized as valid by the international community. See eg regarding the Indonesian invasion of East Timor, GA Res 3445 (XXX) and SC Res 384 (1975). See, regarding the Chinese invasion of Tibet, GA Res 1723/16 (20 December 1961). See eg regarding the Israeli Occupied Territories: UN doc A/RES/3786-72, G.A. 37th Emergency Session, Supp. 1, 3 (1980). See, regarding the Turkish invasion of northern Cyprus, SC Res 353 (1974), SC Res 440 (1978), and SC Res 541, 18 November 1983. See also S. Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self-Determination, Part 2', 52-3.

²³ Numerous commentators have recognized a right of 'remedial ESD' such as I. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978), 220, and White, 'Self-Determination: Time for a Re-Assessment?', 161. Its existence is also implied by the Declaration on Friendly Relations, which guarantees territorial integrity only to States which are 'conducting themselves in compliance with the principles of equal rights and self-determination of people'. See also CERD General Recommendation 21, para 6 [7.11].

²⁴ See eg CERD General Recommendation 21, para 6 [7.11].

²⁵ See Concluding Observations on Israel (2010) UN doc CCPR/C/ISR/CO/3, para 16.

²⁶ (2004) UN doc CCPR/C/82/FIN; see also Concluding Observations on Chile (2007) UN doc CCPR/C/CHL/CO/5, para 19.

The State party should, in conjunction with the Sami people, swiftly take decisive action to arrive at an appropriate solution to the land dispute with due regard for the need to preserve the Sami identity in accordance with article 27 of the Covenant. Meanwhile it is requested to refrain from any action that might adversely prejudice settlement of the issues of Sami land rights.

This comment also highlights the strong connection between article 1 and article 27 rights.²⁶

Article 1(2)

[7.19] Article 1(2) sounds like a very important right. For example, its terms suggest that a government cannot permit mining on a people's land without its approval.²⁷ The right is tempered by the saving of certain 'international obligations arising out of international economic cooperation'. However, this tempering may be undone by article 47 of the Covenant,²⁸ which provides:

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully their natural wealth and resources.

[7.20] Unfortunately, the HRC has shed very little light on the terms of article 1(2). Its most significant statements have come in the context of the recognition of indigenous land rights. In Concluding Observations on Canada, the HRC stated:²⁹

[8. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains 'the most pressing human rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasises that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

Thus, the extinguishment and presumably the diminution of aboriginal native title rights breaches article 1(2).³⁰

²⁷ See [24.02] and [24.03].

²⁸ McGoldrick, *The Human Rights Committee*, 15 and 251.

²⁹ (1999) UN doc. CCPR/C/79/Add.105.

³⁰ The CERD Committee found the diminution of native title rights in breach of the CERD Convention, as they were racially discriminatory, in Concluding Comments on Australia (1989) UN doc CERD/C/34/Misc.4/Rev.2. As to the nature of self-determination and its relationship with economic and social aspects of subsistence, see S.J. Anaya, *Indigenous People and International Law* (Oxford University Press, 1996).