

# The Rights of Self Determination: One of the Principles of International Settlement Dispute

Dr. Marthen Napang, S.H.,M.H., MSi

Senior Lecturer at International Law Department , Faculty of Law - Hasanuddin University. Jl. Perintis  
Kemerdekaan Km. 10 Tamalanrea, Makassar, South Sulawesi, Indonesia 90245

## Abstract

The dispute concerning territorial matters have long existed since the Westphalia Treaty 1948 which ended the Napoleon wars for 30 years; the France Treaty 1919 had already ended the World War I and the establishment of the League of Nation; and the San Francisco Peace Treaty 1945 which ended the World War II and the establishment of the United Nations... Since the end of World War II and followed by the birth of new independent states mainly caused by the successful of revolution struggle to escape from the confines of the colonizers, the rights of self determination is put in the rights of the state to determine the form of its government and the rights of a group of people or nations to create an independent state. The countries nowadays are able to maintain the integrity of the territory without depending on the strengthening of the foreign countries. The rights of Self determination can be analysed from the angle of the Covenant of League of Nations and the the United Nations Charter.

**Keywords:** the Right of Self-determination, International Settlement Dispute

## 1. Introduction

The dispute concerning territorial matters have long existed since the Westphalia Treaty 1948 which ended the Napoleon wars for 30 years; the France Treaty 1919 had already ended the World War I and the establishment of the League of Nation (hereinafter called LN); and the San Francisco Peace Treaty 1945 which ended the World War II and the establishment of the United Nations (hereinafter called UN). The effect of those ended wars were plenty of new states formed by the will of the people who inhabited in that region. Generally, those states declared that their independence was from the states which made their region as a colony. After the end of the Cold War on 1990 then marked as the dissolution of the Soviet Union and followed by Yugoslavia, there were a new state from a fraction of the old territory. This phenomena was still evolving where some groups actually wanted to be independent and created their own state from the exist territory. They even claimed several neighbour states as their territory which they wanted to create. The new development becomes the fundamental reason to understand how international law creates a new state through the Right of Self Determination of a nation.

The right of self-determination after the end of first World War I became more serious in the international community, particular to determine the status of the enemy's territories which was seized and occupied by the the parties who won the war. The establishment of LN was spearheaded by the parties who won the war especially the United States of America (hereinafter called USA) also looked for the solutions of it. Further development indicated that the territories problem became more and more serious to determine the creation of future international life. This situation as mentioned was mainly influenced by the increasing of number of birth of the newly independent states which escaped from the nation/ the colonized states. Those newly states then joined the UN, which was established after the World War II.

One of the ways to resolve the disputes concerning the states territory, especially the territories which occupied by the victory states when the end of World War I, is a settlement dispute through the right of self determination of the population and region. The right of self determination was purposed by Woodrow Wilson, the President of the USA which a parts of his speech was presented before the US congress on January 18, 1918, but most countries had not been willing to accept the idea for placing the right of self determination in the LN convention. When the UN was established, the nations realized how important the idea of having the right of self determination. They then agreed to include the right of self determination in the UN's Charter as one of the principles in the relationship of peace and cooperation among nations. The right of self determination practically has not been enacted effectively and commonly in most state practices. This is the reason why the principle has not become the international law's rules.

Some barriers become their causes. Therefore, the focus of this article is what, why, and how to create the rights of self determination, as one of the principles to dispute the territorial settlements in international law as elaborated above.

## 2. Definition of the Right of Self-Determination

In general, the rights of self determination can be explained in two (2) meanings:

1. As the rights of the state to determine the form of its government.

## 2. As the rights of a group of people or nations to create an independent state.

Since the end of World War II and followed by the birth of new independent states mainly caused by the successful of revolution struggle to escape from the confines of the colonizers, the rights of self determination as first (point 1) definition above did not become a serious problem anymore. Moreover, the countries nowadays are able to maintain the integrity of the territory without depending on the strengthening of the foreign countries. So, the upheaval raising in the country either a turmoil or a changing process, the right to determine its government can be controlled properly. In contrast, in the second definition as stated above, the rights of self determination still becomes the serious world's problem and threatens the world peace and order.

From both definitions as stipulated, the author's focused discussion will be the first definition of the rights of self determination. In terms of it, it ought to be questioned Starke's presumably to the definition of "self determination" and "who is the nation which enjoy the rights of presumed". Starke<sup>1</sup> does not elaborate the definition of self determination further; he asserts that it is sorely needed a certain definition of restriction and qualifications of the self determination.

The rights of self determination consist of the meaning of their own free willingness of an entity to choose and decide the pattern and the presence of life of the nation, a government, or a state. Therefore, the main element in the realization of the rights is situated on the will of the people. While the people who are enjoying the rights are:

1. A nation or group/ a unity of the people who has not gotten their independent (freedom) to control their own territory as one state;
2. A nation or group/ a unity of people who become a formal part of an independent state but not yet fully subjected to a state.

Indeed, it is difficult to define who is actually the nation is or a group/ a unity of the people.

Pragmatically, it can be understood that international disputes on Arab – Israel case show that Palestine always claims its rights of self determination in its territory which occupied by Israel. In this case, it can be defined that "the term of a nation" is both Palestine and Israel.

In terms of definition of a group/ a unity of the people itself, it can be seen from various cases took place around the world. *First case* is the dispute between Sweden and Finland regarding the Aaland Island. This case shows that Swedish population have wanted to release/ separate themselves from Finland since Finland was born as a country which claimed that the island become Finland's territory. However, the majority of the Aaland Island population wants to integrate to Sweden. *Second case* is the dispute between United Kingdom (hereinafter called UK) and Argentine on Malvinas/ Falkland island. In this case, the population of the Falkland island has the rights to determine their own fate on their own island. Third case obviously is the dispute between Indonesia and Netherland over the West Irian, which the people of West Irian had been given the opportunity to actualize their willingness/ their rights to determine their own fate. It has been recorded historically that West Irian choose to integrate to Indonesia, and then in Indonesian territory, West Irian renamed as Irian Jaya.

## 3. The Rights Self-Determination in the Convention of League of Nation (after First World War)

The President of the USA, Woodrow Wilson, stated the idea of the right of self determination in his speech before the US Congress, on January 18<sup>th</sup> 1918. His idea was repropounded in the LN's manuscript. The basic thought of Wilson was about the minority groups in the Europe which existed in the end of the World War I. These groups of people were given to determine their rights of self determination based on the democracy principles by forming an independent states and not included the territories of the country which won the war. At that time, the victory wars tended to claim and to share their occupied territory to become a part of their territory. It was also that there were a very vigorous demand to assist the right of self determination for the minority groups or some groups of Armenians, Azerbaijan, Korean, Ukrainian, Ruthenia, Kurdish and Montenegro. During the Peace Conference in Paris, the USA President, Woodrow Wilson, found the difficulties to explain his idea.

As it turns out, the rights of self determination is difficult to be defined. It is like a chameleon which could change the color and have a lot of political consequences. According to Starke<sup>2</sup>, the process of the nation has not been free to become a unitary state. It is determined by the political consideration rather than the principles of law. The victory countries have their own interests on idea of occupied territory after war. So at the time, if any the group of people or a single entity based of cultural or racial equality are possible to secede from a state and create their own states even to combine with other countries. If the rights of self determination (by plebiscite) held or allowed, there would be a mess which can undermine the existing of international relations.

The reason as stated before becomes the argumentation of some countries or opponent country to reject the idea of rights of self-determination. Therefore, the Idea of Wilson did not find in the Covenant of LN. It

<sup>1</sup> See Starke, *An Introduction to International law*, 8th edition, London, Butterwoths, 1977.

<sup>2</sup> Ibid.

means that, at that time, the idea of rights of self-determination did not accept as one of the rule of international law. In the connection with the dispute between Sweden and Finland on the Aaland island in the end of 1917 could be an interesting case to explain it.

After Finland got its status as an independent state on December 4<sup>th</sup> 1917, there was a separatist movement in Aaland island to merge with Sweden. Aaland island and Finland was actually the part of Sweden since 1157 – 1809, after Russia defeated Sweden, Sweden was forced to hand over these two regions to Russia. When Finland got their independence, Aaland island was actually incorporated into Finland's territory. This separatist movement was masterminded by an expeditionary force of Sweden which entered the island and caused an international conflict. Therefore, British Foreign Minister, Lord Curzon, on June 19<sup>th</sup> 1920, suggested that the disputes should be settled down by the Council of the League of Nations based on the Article 11 on the League of Nations' Convention. Sweden responded by saying that the residents of the island were having the rights to express their opinions through a plebiscite, whether they wanted to be under the sovereignty of Finland or Sweden. At the moment, Finland had not become the member of League of Nations, so it could not agree the conditions along of the disputes settlement procedures and argued the issue was their own issues. In the connection between the disputes, the council created a legal committee which was consisting of three (3) famous legal person (Larnaude, Struyken and Huber) to provide a legal advice to the League of Nations' council. Based on the recommendation of the committee, the council rejected Finnish's objection which declared themselves to have an authority to examine the island. For the purposes of giving the verdict, the council recreated the committee which consisted of the famous diplomats (Beyens Colondes and Elkus) which had to create the final solutions. After the local researches held, the committee made the report's details on April 16<sup>th</sup> 1921, which purposed that Finnish' sovereignty to admit Aaland island, with the provision that the residents of the island should be treated well to create peace.

The suggestions of the committee were accepted by the council and both parties could admit it. It was the end of the disputes between two countries over the Aaland island. From the cases above, it seemed that to determine the rights of self determination still could not be run as an idea of the international law. The League of Nations' council might allow the minority of groups in the specific region (the islanders of Aaland island) to secede from the territory of the country which had claimed (Finland) and merged the territory to the other country (Sweden) and it would be considered as an internal issues of the country (Finland).

#### **4. The Rights to Self Determination in the United Nations Charter (After The World War II)**

It was different with the League of Nations after the World War I, after the end of the World War II and the establishment of United Nations, the rights of self determination had been accepted as a principle of the international law to create peace, security cooperation, and maintainance the world order. In order to create the peaceful of international settlement disputes without violence, Article 1 (2) of the UN Charter explicitly mentions that principle of the rights self determination is accepted. Article 1 (2) states further "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".

The principle of "...self-determination of peoples" reaffirms in Article 55 of the UN Charter, which states "With 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, the United Nations shall promote..." It is Implied that the rights of self determination is also put in Article 73 of the UN Charter on Chapter XI of Declaration regarding non-governing territories. Article 73 stipulates that "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories..."

The further development shows that the principle is supported by the international communities almost entirely the UN member states. This is reflected in the resolution of the UN General Assembly, as followings:

- a. Resolution of the United Nations General Assembly – 1514 (XV) on December 14<sup>th</sup> 1960, on "The Declaration on Granting of Independence to Colonial Countries and People" which in Article 2, mentioned " All the peoples have the right of self determination ..."
- b. Resolution of the United Nation General Assembly – 2200 (XXI) on December 16<sup>th</sup> 1966, on " Human Rights" which mentioned in Article 1, " The International Covenant on Civil and Political Rights".
- c. Resolution of the United Nation General Assembly – 2625 (XXV), on October 24<sup>th</sup> 1970, on "The Principles of the relations and cooperation among countries".
- d. Even the committee which formed by the UN General Assembly in 1963, for formulating a declaration on the relations and cooperation among countries, provide a broader view to determine the rights of self determination, which in the realization must emphasize in the will of the people.

Eventhough the rights of self determination has been accepted and listed in the UN Charter and reaffirmed in the resolutions of the UN General Assembly, the principle is still limited to be used as the principles of the international law and can not be seen as the rules of the international law.

Some experts gave their point of views about the rights of self determination, as follows:

- D. P. O’Connel<sup>1</sup> and Ian Brownlie<sup>2</sup> emphasizes that the rights of self determination in the UN Charter is not a right in legal perspective, but only as a principle. A principle of law which not include in the provisions of the law mean can not be applied operationally. Article 11 and 13 of the Charter concerning maintenance, security, and international cooperation do not refer it. Therefore, it can be operated it.
- Leo Gross<sup>3</sup> expresses the same opinion with Connel and Brownlie. He explains that the rights of self determination in Article 1 (2) UN Charter as the “Principle”. The rights also then reaffirms in Article 55 which has the purpose for creating peace and cooperation among countries. In Paragraph C, it’ is simply mentioned as “Human Rights and the Fundamental Freedom”, is not mentioned as one of its task to implement the rights of self determination. Article 73 (b) of the UN Charter stated, “Promote and develop the self-government” but the implementation referred to Article 76 (b) in the terms of the trusteeship system. Article 73 itself does not require as a goal.
- Another opinion also confirm that although the right of self determination has repeated in the several the UN General Assembly, but it does not mean that it can be ascertained that the rights has become the rule of the international law. It is because the UN General Assembly resolution is not legally binding. It is only recommendation. Bowet<sup>4</sup> found that in terms of the UN General Assembly resolution are issued repeatedly concerning the rights of self determination, it has normative character rather than the political doctrine. Therefore, the General Assembly serves as an “Legislative Quasi”.
- Rupert Emerson<sup>5</sup> stipulates that for the colonized nations which wanted to be independent, the rights of self determination is considered as the doctrine of the natural law and used to be as the rights to create the revolutions if the colonialist are not interested in giving the independence to the colonies. There are many countries in Asia – Africa, Latin America, and some countries in the other parts of the world are finally taking the violence to get and define their rights of self determination from the colonial. These countries give the enormous influence on the resolution – especially in the UN General Assembly on the rights of self determination.
- In response to the committee’s opinion to create the declaration on the principles of the relationship and cooperation among countries (1983). Robert Rosenstock<sup>6</sup> commented that the rights of self determination could become “Workable Text”. So the position of the rights of self determination is that between the recommendation and some legal binding provisions.

Some of the experts point of views as stated above clearly that the rights of self determination still has not been accepted as the rules of international law. The attempts to make the rights of self determination as the rules of international law had been done by the Italian delegation when there was the discussion about International Manuscript Agreement in the Winadi Convention in Austria in 1969, which was proposing to create the list of rules and could be categorized as the *Ius Cogens* to maintain the human rights. It was purposed also that the entire Article 1 of the UN Charter which the rights of self determination could be regarded as *Ius Cogens* or peremptory norms. However, this effort had not yet reached the target as listed. The other way could be taken to allow it status as the rule of international law was its exercise to be a general practice as stated in Article 38 (1 b) of the International Court of Justice.

According to Strage, the general criteria to determine a customary law are:

- a. There is repeated action materially that caused a customary law;
- b. There is beliefs arise psychologically that repeated action takes place due to the result of enforcing the laws.

The *Opinio Juris* has become an examination (test) to show that a custom become a customary. In the community which is made of customs, there is no the *Opinio Juris*. It is not the essential element of the customary and even in some cases, it does not appear. It is called psychologically as – *Juris Sive Necessitates*.

Mochtar Kusumaatmadja<sup>7</sup> also states that international customary can be said as one of the source of law as long as it fullfills some elements, as follows:

1. There must be the general habit of action; and
2. The habits must be accepted as the rules of law.

<sup>1</sup> See O’Connell, *International Law in Historical Perspective*, Vol I, Leiden, 1968.

<sup>2</sup> See Ian Brownlie, *Principle of Public International Law*, Oxford, 1973.

<sup>3</sup> See Leo Gross, *The Rights of Self – Determination Law, in New State in Modern World*, edited by Martin Kelson Cambridge, London 1975.

<sup>4</sup> See Bowett, DW, *The Law of International Institution*, London, 1970.

<sup>5</sup> See Rupert Emerson, *From Empire to Nation*, Cambridge, 1962.

<sup>6</sup> See Robert Rosenstock, *The Declaration of Principle on Internasional Law*, Concer.

<sup>7</sup> See Mochtar Kusumaatmadja, *an Introduction of International Law*, Binacipa, Bandung, 1976.

Each element is explained, furthermore, as follows:

- The first element of point number (1) is explained that it needs an habitual activity which will become the series of an actions that similar to the circumstance. The second element is that the customary which is similar to the circumstance above must be in general and having a connection with the international relation. Only if the elements as mentioned above can fulfill, it then can be said as the international customary in general.
- The point number (2) is explained that the psychological element is required to be existed in the international customary - called *Juris Sive Necessitates*.

Mochtar Kusumaatmadja<sup>1</sup> explains further that practically the international customary can be accepted as the law if the countries accept it.

## 5. Conclusion

In line with all discussion as mentioned previously, there is no any proven about the existence of a state practices in order to determine their rights of self determination which have been accepted as the customary of international law. It is a fact that many countries take an extreme path of the revolution to get their rights of self determination and to fight for their freedom to create the independence state (based on the law of the nature).

However, those state practices which become the international custom have not been accepted as the rules of law. This is because it is very difficult to define the struggle of the rights of self determination conducted by the countries. There should be an awareness either in a legal sense or sociological-political senses.

The realization of the rights of self determination through plebiscite is still limited which even already has been practiced by the countries. It has not been qualified enough to be fulfilled as the international customary. It can be seen some case of exercise of the rights of self-determination such as the international settlement of dispute between Indonesia and Netherland in the case of West Irian. The result shows that West Irian become Irian Jaya. Although the rights of self determination is still limited as the principles of law or has not become the rule of international law, but it's certainly shown the effectiveness and the hold the important role between international states.

## References

- Bowett, DW, *The Law of International Institution*, London, 1970.  
Ian Brownlie, *Principle of Public International Law*, Oxford, 1973.  
Leo Gross, *The Rights of Self – Determination Law*, in *New State in Modern World*, edited by Martin Kelson  
Cambridge, London 1975.  
Mochtar Kusumaatmadja, *An Introduction of International Law*, Binacipa, Bandung, 1976.  
O'Connell, *International Law in Historical Perspective*, Vol I, Leiden, 1968.  
Robert Rosenstrock, *The Declaration of Principle on Internasional Law*, Concer.  
Rupert Emerson, *From Empire to Nation*, Cambridge, 1962.  
Starke, *An Introduction to International law*, 8th edition, London, Butterwoths, 1977.

---

<sup>1</sup> Ibid.