



Lauri Mälksoo*

LL.M. Georgetown University Law Center (with distinction) 1999,

LL.B. University of Tartu (with distinction) 1998

Justice, Order and Anarchy: The Right of Peoples to Self-Determination and the Conflicting Values in International Law

Introduction. The Importance of the Right of Peoples to Self- Determination

Since 1991, the Republic of Estonia is again a full member of the family of free and independent nations. It has vigorously started to rediscover its rights and duties under international law. However, it seems that most Estonians have dubious and uneasy feelings about the credibility of the law of nations. On the one hand, they have to admit that international law was unable to prevent the illegal annexation of their country for fifty years. On the other hand, most people acknowledge that international law was an extremely useful tool when the country succeeded in restoring its democracy and statehood peacefully.

In the 19th century when the awakened Estonian nation broke its way towards statehood, Jakob Hurt formulated the national imperative for Estonians: we cannot become strong in numbers, but we can become strong in spirit. For our independent nation at the end of 20th century, the modified version of this imperative might sound:

our State cannot become strong in might, but it can stand for its rights. Or, as President Lennart Meri has put it: the nuclear bomb of Estonia is international law. While this expressive saying may at first glance look like a well-sounding (although certainly well-meant) overstatement, it has a deeper meaning. For a small country, it is essential to know that its full membership in the family of nations is not merely a caprice of Fortuna but is rooted in universally recognised rights and principles of international law.

The right that has paved the Estonian way to independence, has been the right of its people to self-determination. The reliance on this right is solemnly proclaimed in the preamble of the constitution of the Republic of Estonia. The right of peoples to self-determination is the touchstone of Estonia's independence. Because of that, it would be important to find out what international legal implications does the principle of self-determination have.

Some decades ago, several prominent scholars doubted whether the principle of self-determination has become a part of international law, or is still just an important moral (political) principle. Today, the existence of such a legal

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right is indisputable. It is contained in the UN Charter and in both United Nations human rights covenants of 1966. There is a strong argument put forward that the right to self-determination has reached the status of the rule of customary international law. However, to say in advance — the exact meaning of this right in international law, whether of treaty or customary origin, is much more disputed.¹ A natural lawyer, Fernando R. Tesón has even submitted that “no area of international law is more confused, incoherent, and unsatisfactory than the law of self-determination.”²

If it is true, why is it so? The purpose of this essay is to take a philosophical-contextual look at the status of the right of peoples to self-determination, as it is crystallised in modern international law. I will try to demonstrate how the fulfilment of the right of peoples to self-determination fits together with the achievement of two fundamental goals of international society — order and justice. The conceptual problems that are connected with the right of peoples to self-determination may be reduced to the controversy of how to reconcile order with justice.³ It becomes apparent that different philosophical approaches to international law value order and justice (and, consequently, the importance of the right to self-determination) differently. The construction and analysis of naturalist, positivist and realist views to self-determination may help us to understand the controversial status that this right plays in the international legal system.

Natural Law *Versus* Positivism

Self-determination is a principle of justice. It means ultimately the right to determine one’s fate freely. As such, the whole concept of self-determination may be said to be a concept of natural law, since the major concern for natural law tradition is justice. There was something very characteristic to natural law thinking in the idealistic way, how the U.S.-president Woodrow Wilson first eloquently articulated the concept of self-determination in his “Fourteen Points”.⁴ Natural lawyers seem to indicate: self-determination is a fair principle and people will recognise it instinctively when it is violated. It is easily recognisable when a people is suppressed, even if the positivists are disputing — as they always do — about the exact meaning and consequences of the right of self-determination in particular circumstances. As an example may serve the NATO intervention in Kosovo which was in the first case support for the cause of self-determination (for the autonomy of Kosovars). Whatever other principles of international law (e.g. these relating to the use of force) may say, the Western intervention was necessary and legal, since it ultimately served the cause of justice. A radical natural lawyer would probably even argue that an intervention for a just cause (like self-determination) would be justified legally and not only morally, even if it would have been — from a formalistic point of view — in violation with (unjust) norms of

international law (as interpreted by positivists).

The inherent difficulty for a natural law approach is, of course, that there is no universal consensus about the question of what (in)justice is. Most Serbs, Russians and maybe some others would probably argue that not the situation of Albanians in Kosovo but rather the bombing of Yugoslavia has been unjust and illegal.

A natural lawyer would also find it difficult to prove that self-determination as a principle of justice is something that has transcended time and space. The right to self-determination as a concept of the 20th century is a good example to demonstrate how the understanding of justice has changed during the course of time. The international law of former centuries, *ius publicum Europeanum*, as it was dictated by European powers with colonial interests, did not make any reference to the will of peoples. If a people, looking for separation, was powerful enough to secede from its motherland, and to create a state with effective government that was recognised by the governments of already existing states, international law acknowledged the birth of such a new state. But in no way were the sentiments for separation encouraged by supportive concepts like self-determination.

Moreover, international law even recognised the right of conquest, without taking into account the will of the respective population.⁵ There are reasons to believe that according to the State-centric worldview of the 18th and 19th centuries (that was particularly influenced by the philosophy of Georg Friedrich Wilhelm Hegel), such an order of things corresponded to the perception of justice of its time and should not be “stigmatised” from the point of view of today’s prevailing understandings.

An escape for natural lawyers from such a relativist critique against the “universal applicability” of the self-determination principle would be to give up certain elements of the radical theory and to contend, for example, that while there may be no justice that transcends time, there is a just solution for every particular situation in concrete time.⁶

According to Hegel, a thesis needs an antithesis. The antithesis for a natural law approach is positivism. While natural law is concerned with justice, positivism definitely prefers order. The project of positivism is to interpret international law as it is currently in force. The reason why positivism is determined to give preference to the prevailing order is due to the fact that existing international law is made by States. There is a limit, to what degree it is in the interest of the “legislators of international law” to recognise the right of peoples to self-determination. States are by nature mostly interested in self-preservation (if not in the increase of their power and jurisdiction). They prefer preserving the *status quo* to a change in their detriment. While order as a goal seeks to preserve the *status quo*, justice — as far as it encourages the right to self-determination —,

stands for change. The needs for justice have given rise to the principle of self-determination. The needs for order have so far preserved the priority to the counter-principle — the right of States “to territorial integrity and political unity” — a right that derives from the principle of sovereignty.

The co-existence of the principles of self-determination and territorial integrity reveals a characteristic phenomenon of international law, namely that frequently legal norms in classical tradition travel in complementary opposites. This has correctly been considered as a source of ambiguity by the international legal scholars of Yale Law School.⁷ It is worth mentioning though that this phenomenon is not only specific to modern international law. Already in Roman law, the famous maxim “*ex injuria ius non oritur*” was balanced by another principle “*ex facto ius oritur*”.

However, it is clear that complementary opposites do not add legal clarity to the complex issues of self-determination.⁸ The UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 acknowledges the right of self-determination, but adds quickly that “any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”.⁹ The principle of justice is “balanced” with the principle of order. Positivists have made many attempts to explain such a complicated state of law. Colonial and non-colonial situations of self-determination have been distinguished, by giving the right to secede in colonial, and denying it in non-colonial situations. In order to somehow support such a distinction theoretically, it has been argued that self-determination does not *eo ipso* mean the right to create an independent state. The concepts of “internal” (autonomy, no independence) and “external” (right to secede) self-determination have been developed.¹⁰ National minorities have been distinguished from peoples. Differently from peoples, they are said not to be entitled to (external) self-determination, but only to the respect of their minority rights, and maybe to autonomy. The unsolvable problem is, of course, how to distinguish peoples and minorities “scientifically”.

For a natural lawyer, such distinctions may be necessary from a realistic point of view, yet they are inconsistent. The distinguishing line that positivist lawyers have to draw, is arbitrary. To argue that self-determination does not have to mean the right to statehood, is as inconsistent as to submit that the right to be free from slavery sometimes just means the right to autonomy for the slave.

On the other hand, some of the concerns for order that positivism sets forth, seem to be legitimate. For example, there should be a certain minimum number of people who would be entitled to independent statehood. International law should not support the creation of atomic units that would make the international system uncontrollable.

Preserving the order must remain an important factor in the search for just solutions in international law.

The Realist Attack

The most challenging attack against the relevance of the right of self-determination comes from the realist camp. Classical realism is a theory of international relations that emerged in the post-World War II U.S.A. Influential scholars such as Hans Morgenthau, E. H. Carr, George F. Kennan and Stanley Hoffman questioned or even denied the relevance of international law in world power politics.¹¹ It is important not to mix classical realists up with the school of legal realism in international law (the so called Yale or McDougal-Lasswell approach). For current purposes, I will discuss only the views of classical realism, since its theory differs most fundamentally from the opposing, but still legalistic views of natural law and positivism.

While natural law lays emphasis on the achievement of justice and positivist tradition gives priority to order, classical realists characterise the decentralised international system as “anarchic”. Realists would question the relevance of the right to self-determination in the Hobbesian world of self-interest. Order and justice in international relations are achieved by means of international politics, and not by international law. After all, as States are by nature egoistic creatures, international justice is a very doubtful concept in international politics. Just as Pontius Pilate confronted Jesus with the sceptical question, “What is truth?”, classical realists are sceptical about the rhetoric of justice in international relations. States act in ways that are useful to them, and are willing to make some concessions to the cause of universal “justice” only when failing to do so would threaten their own position and interests.

Realists argue that ultimately, the basis for any change in the legal underpinnings of international society remains (the change in) power. People can hardly achieve independence by virtue of some sort of legal principle only. Usually, the victory for self-determination has been the result of a successful secessionist war (e.g. USA in 1775-1783, Estonia 1918-1920). Even the collapse of the British and French colonial empires was rather the result of the understanding achieved by the *élites* in London and Paris that it had practically become impossible to maintain the empire,¹² rather than the sincere support to a new principle in international law. Algeria did not win independence by virtue of principles, but because the Algerian people managed “convincingly” to express their will to become independent.

Power relations determined that the principle of self-determination — then not a legal principle *stricto sensu* — was applied selectively at the end of the First World War. Power relations determined that the leaders of the Western world issued the Atlantic Charter in August 1941¹³ — and

at the same time agreed with Soviet dominance in Central and Eastern Europe at the Yalta Conference (in February 1945).¹⁴ Power relations are the reason why China has been criticised because of its continued violation of the right to self-determination in Tibet by non-state (private) actors rather than States. Power relations, and not international law determine that peoples in similar situations are treated differently. If one wants, one may call such distinctions “legal”, but then law is merely apologetic. On the other hand, if one wants to take a very idealistic view about the content of the “right” to self-determination, this “international law” becomes “utopian” — a law that does not have a relevance with the real world.¹⁵

To sum up, self-determination is one of these controversial issues in international law, that realists can easily use in order to submit that “international law does not matter”. However, even if they rightly point out the controversies connected with this right, they fail to understand the importance that the right to self-determination has played in the 20th century. The complete reorganisation of the community of states during this century cannot be just the result of power relations only. If one attempts to ignore the importance of self-determination for development and change in world politics this century, one is not able to explain the increase of the number of independent states from some dozens to almost two hundred. Changed power relations have given rise to a new legitimising right.¹⁶ The recent decision of Indonesia to respect the free choice of the people of East Timor may be one more piece of evidence for the crystallisation of such a right in international life.

Conclusion

The question, whether the right to self-determination does “matter” is also a question of attitude, not only of academic proof. It is true that the real world is not identical with the world of law — and the world of normative order is not always identical with the world of justice. However, it may make a fundamental difference how one intends to handle this reality, whether (s)he considers a glass to be “half-empty” or “half-full”.

The analysis of international law and relations ultimately leads to the conclusion that there can be no stable order without justice in the long term. The demise of the Soviet Union marked the end of the relatively stable bipolar world order, and is an excellent example in this context. The Soviet Union was capable of securing peace and security within its borders but it failed to secure justice for its peoples. It was powerful enough “to freeze” the demands of justice so that the independence of Estonia only “found its last refuge in international law” (to use again the words of president Meri), but in the longer perspective it was determined to fail. Justice and the right of self-determination appeared to be stronger than the mighty but unjust order.

The collision between the values of order and justice in international law is not insurmountable. It resembles the tension between the slogans of the French revolution “*Liberté! Egalité! Fraternité!*”. Although there was and is an inherent tension between liberty and equality, both goals were deemed to belong together as inseparable reverse sides of one coin. Similarly, order and justice are inseparable, complementary rather than contradictory elements in the very idea of law.¹⁷ In the struggle for the rule of law as opposed to anarchy, both the values of order and justice must be taken into account when the right of peoples to self-determination is implemented in international community. It should not terrify critical minds when the implementation of law in international affairs is not free of contradictions. As a lawyer opposed to contradictions and weaknesses in the law, one can always find support from the words of Gustav Radbruch who, trying to solve the puzzle with order and justice, finally recognized that some contradictions are inherent to the problems: *wie überflüssig wäre ein Dasein, wenn nicht die Welt letzten Endes Widerspruch und das Leben Entscheidung wäre!*¹⁸

Notes:

¹ The literature on the issues of self-determination is extensive. Q.v. e.g. Aurelia Cristescu, *The Right of Self-Determination. Historical and Current Development on the Basis of United Nations Instruments* (New York: United Nations, 1981); Hurst Hannum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990); Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993).

² Fernando R. Tesón, *A Philosophy of International Law* 130 (Westview Press, 1998).

³ On the dichotomy of order and justice in international affairs Q.v. Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (New York: Columbia University Press, 1977).

⁴ Q.v. Umozurike Oji Umozurike, *Self-Determination in International Law* 18 (Archon Book: 1972).

⁵ Q.v. Sharon Korman, *The Right of Conquest. The Acquisition of Territory By Force in International Law and Politics* (Oxford: Clarendon Press, 1996).

⁶ Indeed, this has been the position taken by Professor Franck: “What the deep contextuality of all notions of fairness does tell us is that fairness is subjective; not as St Thomas Aquinas hoped, a “given” inculcated into the nature of things to be discovered or intuited by right-thinking humans.” Thomas M. Franck, *Fairness in International Law and Institutions* 14 (Oxford: Clarendon Press, 1995).

⁷ Q.v. John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 *Virginia Law Review* 678 (1968).

⁸ Q.v. also the discussion in Michla Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations* 43 (The Hague: Martinus Nijhoff Publishers, 1982).

⁹ UN General Assembly Res. 1514 (XV).

¹⁰ Antonio Cassese, *Self-Determination of Peoples. A Legal Appraisal* 67 etc (Cambridge: Cambridge University Press, 1995).

¹¹ Robert J. Beck, Anthony Clark Arend, Robert D. Vander Lugt, *International Rules. Approaches from International Law and International Relations* 94 (Oxford: Oxford University Press, 1996).

¹² Cf. with the Grotius-lecture “In the Wake of the Empire”, held by Professor Nathaniel Berman at the annual meeting of American Society of International Law in April 1999.

¹³ ...where Presidents Roosevelt and Churchill expressed their “desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned.” Korman sums up the controversy between ideals and reality in international relations at the end of the World War II: “But while these principles had a neat simplicity about them on paper, they would obviously prove difficult to apply in practice when after the war the interests of order would have to be balanced against the requirements of justice.” Korman, *supra* note 5 at 162.

¹⁴ Q.v. Krzysztof Skubiszewski, *The End of Yalta*, in *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Karel Wellens ed. 107 (The Hague: Martinus Nijhoff Publishers, 1998).

¹⁵ The distinction “apologetic-utopian” has been eloquently introduced by a leading New Stream scholar in international law, Martti Koskenniemi. Q.v. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 170-178 (Helsinki: Finnish Lawyers’ Publishing Company, 1988). While the critique of New Stream scholars has come from the “legal camp”, the ultimate consequences of the adoption of their theory — especially for the eyes of the “wider public” are quite similar to the accepting of the views of classical realists — international law “does not matter”.

¹⁶ In respect to order-justice controversy, Professor Crawford explains the new implications of this right that demonstrate the breakthrough of the right to self-determination: “Modern practice establishes a distinct connection between [the principle of self-determination and the rules relating to the illegal use of force], such that, even where a particular use of force is illegal, its effects may be treated as valid provided that they are inconsistent with the principle of self-determination in its application to the territory in question.” James Crawford, *The Creation of States in International Law* 364-365 (Oxford: Clarendon Press, 1979). Q.v. also Anthony Clark Arend, Robert J. Beck, *International Law and the Use of Force. Beyond the UN Charter Paradigm* 40-45 (London: Routledge, 1993).

¹⁷ Cf. the influential concept of the idea of law of Gustav Radbruch in: Gustav Radbruch, *Rechtsphilosophie* 168 etc (Stuttgart: K.F. Koehler Verlag, fünfte Auflage, nach dem Tode des Verfassers besorgt und biographisch eingeleitet von D. Dr. Erik Wolf, 1956).

¹⁸ *Ibid.* at 173. The translation to English: how superfluous would be an existence, when the world would not at the very end be a contradiction and the life a decision!