

PARTICIPANTS AND THEIR ROLE IN THE DEVELOPMENT OF INTERNATIONAL DEVELOPMENT LAW

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Contents

1. Introduction
 2. The role of the human being
 3. The role of peoples
 - 3.1. Identification of peoples
 - 3.2. Right to self-determination
 - 3.3. Right to development
 4. The role of States
 - 4.1. The concept of sovereignty
 5. The role of international organizations
 - 5.1. Identification of States
 - 5.2. United Nations
 - 5.3. Human development IGOs
 - 5.4. Economic growth IGOs
 - 5.5. Trade IGOs
 6. The role of non-governmental organizations
 - 6.1. Civil society
 - 6.2. Business community
 - 6.3. Religion and belief bodies
 7. Concluding remarks
- Glossary
Bibliography
Biographical Sketch

Summary

The international law of development includes not only states and their organizations—IGOs—but also human beings, individually and collectively, i.e. peoples, transnational corporations, religious bodies and their organizations: NGOs. International law employs a sliding scale of legal personality depending on the role in which that personality appears. As of the 1960s the international concern increased with regard to the role of peoples and foreign investors.

Since the fall of the Berlin Wall, the capitalist world system is solely responsible for the fair distribution of income and wealth through the international market. For that reason the quality of life became the common goal of the international post Berlin Wall

international conferences. In order to enhance the human rights of individuals the concept of collective human rights was introduced, particularly the rights of peoples to self-determination and to development. The United Nations turned out to be the center for harmonizing the actions of nations in the attainment of the common ends of maintaining international peace and security, developing friendly relations among nations based on equal rights and self-determination of peoples and the achievement of international-co-operation in solving international problems of an economic, social, cultural and humanitarian character. In so doing, it became the spider in the web of human development IGOs, economic growth IGOs and trade IGOs as well of NGOs representing civil society at the national and international levels. The 1990s became the age of a civil society, which links democracy, development and peaceful global and regional conflict management. Since the end of the Cold War citizens show an increasing preference to associate themselves with other human collectivities than States as the traditional embodiment.

1. Introduction

According to the late André Philip, former president of the OECD Development Centre, developing countries would call for special legal measures in respect of reducing the material inequality of levels of development. For that reason the studies of Flory and Pellet reputed him as the spiritual father of the concept of the law of international development or international development law. These authors took the view that international development law is international law dealing with the new sector of development activities in international relations. A consensus emerged that anyhow the international law of development includes other actors than only States and IGO's, i.e. peoples, NGO's—particularly multinational entities or transnational corporations—and also human beings, individually and collectively, i.e. peoples, transnational corporations, religious bodies and their organizations. This development implies the rebirth of Grotius' concept of international law, according to which States should be instrumental to the well-being of human beings instead of Vattel's other way round.

According to the ICJ, the subjects of any legal system are not necessary identical in their nature or in the extent of their rights (ICJ Reports, 1949, 178). This conclusion implies a sliding scale of international legal personality depending on the role in which that personality appears, be it an addressee, a creator or an upholder of international law; a person against whom that law is upheld, or a member of international organizations.

As of the 1960s the international concern increased with regard to the role of peoples and foreign investors or (other) human beings as participants in international development law but without breaking the horizontal structure of the international legal community. Peoples still have no access to the ICJ for claiming their right of self-determination. Many States still oppose the concept of a functional international legal personality for non-State entities other than IGO's, particularly foreign investors. Only for individuals a hierarchical structure of international law is taking shape in international criminal jurisdiction, albeit solely with regard to war crimes, crimes against humanity and genocide. After all, the jurisdiction of the ICC does not extend to serious violations of economic, social and cultural rights which are the core of

international development law.

It was the eighteenth century Swiss jurist Emery de Vattel (1714-1765) who proclaimed the sovereign equality of States as the core principle of his natural law of States. In doing so, he dethroned the then prevailing natural law of Hugo Grotius, which was based on equality of men before national and international law. Vattel attributed to States the right of recognition as the original persons before international law to the exclusion of human beings. The removal of human beings from the ambit of international law enveloped them in national law. They thus became, as it were instrumental to States. Since the publication of Vattel's *Le droit des gens ou principes de la loi naturelle appliqués à la conduite & aux affaires des Nations et des Souverains* in 1758, modern international law extended or limited, if one prefers, itself first and foremost to the definition of the jurisdiction of sovereign States in order to prevent conflicts between them as to that. The underlying idea was that absolute sovereignty should not imply an unlimited effect of national legislative, judiciary and executive powers of a State because of its inherent violation of the equal sovereignty of all States. This defining function gave international law a static character for quite some time. The demanding task of balancing the sovereign spheres of influence of States discouraged international law to become an active instrument.

The UN Charter heralded a new dynamic approach by the determination of 'We, the Peoples of the UN' to establish conditions 'under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom' (UN Charter of 26 June 1945, Preamble). Moreover, its main purposes included the achievement of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and that on the basis of respect for the principle of equal rights and self-determination of peoples. As of the 1960s, the struggle of the poor South with the rich North for economic sovereignty dominated the UN efforts to establish an international economic, social and cultural order for development.

Since the fall of the Berlin Wall, the capitalistic world system is solely responsible for the fair distribution of income and wealth through the international market. This situation provoked a growing awareness of the validity of the claim of the market economy that it has a surplus value over and above the command economy that depends on its capability to improve the quality of life of everyone everywhere in the world. This may explain that the quality of life figured highly as the common leitmotiv of the international post Berlin Wall conferences on environment and development (Rio 1992), human rights (Vienna 1993), population and development (Cairo 1994), social development (Copenhagen 1995), women (Beijing 1995) food (Rome, 1996), Habitat (Istanbul 1996),), financing for development (Monterrey, 2002), the World Summit on Sustainable Development (Johannesburg, 2002), and the UN Millennium Summits (New York, 2000 and 2005). All these conferences rightly put people at the centre of development. They contained implicit references to good governance by stressing the interdependency of development, democracy and human rights. The Cairo Declaration mentioned good governance also explicitly, for instance when it discussed the causes of massive exoduses. According to the Millennium Declaration the success of

development and poverty eradication depends, inter alia, on good governance within each country and at the international level as well as on transparency in the financial, monetary and trading systems. It clearly related human rights, democracy and good governance (A/RES/55/2 of 18 September 2000, paragraph section V). The 2005 World Summit Outcome acknowledged that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger (A/RES/A60/1 of 24 October 2005, paragraph 11). It is telling that NGOs seized these Summits of Heads of State and Government each time to convene their own conferences on similar topics as mouthpieces of the civil society in order to give food for thought to the representatives of States.

2. The role of the human being

The 1986 United Nations Declaration on the Right to Development (UNDRD) considered the human person as the central subject of development. People, particularly vulnerable and disadvantaged groups are now increasingly considered as the active participants and beneficiaries of the right to development. (van Genugten et al, 2006, 71 – 89). In one and the same breath the Declaration also put the responsibility for development on all human beings, individually and collectively. To that end it underlined ‘the right and the duty of States to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom’ (Article 2).

The 1993 Vienna World Conference on Human Rights ended a hot debate on the relevance and significance of the third generation or collective human rights in general and the peoples’ rights to self-determination and to development in particular. For it reaffirmed once and for all that both rights are universal and inalienable and form an integral part of all fundamental human rights (A/CONF. 157/24 (Part 1), chapter III). Moreover it called for the establishment of a follow-up mechanism for the right to development. As such operated successively the Working Group of Experts on the Right to Development (1993 – 1995), the Intergovernmental Group of Experts (1996 – 1997) and the OEWG as of 1998 (CHR/RES 1993/22 and 1996/15; E/RES 1998/72 of 22 April 1998). The latter’s mandate is to monitor and review progress made in the promotion and implementation of the right to development, to review reports and other information submitted by States, UN agencies, other relevant IGO’s and NGO’s on the relationship between their activities and the right to development (E/CN.4/2000 WG.18/CRP.5/Rev 1 of 18 December 2000, 3).

The former UN Commission on Human Rights (CHR) recognized on the eve of the present century the right to democracy as a human right (E/CN.4/RES/1999/57 of 28 April 1999). In doing so, it listed as rights of democratic governance the following rights: the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; the right to freedom to seek, receive and impart information and ideas through any media; the rule of law, including legal protection of citizen’s rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; the rights to universal and

equal suffrage, as well as free voting procedures and periodic and free elections; the right of political participation, including equal opportunity for all citizens to become candidates; transparent and accountable government institutions; the right of citizens to choose their governmental system through constitutional or other democratic means; and the right to equal access to public service in one's own country. In the first year of the present millennium, the CHR affirmed that everyone is entitled to a democratic and equitable international order (E/CN/RES/2000/65 of 26 April 2000). The United Nations General Assembly (UNGA) endorsed the resolution on the promotion of such an order (A/RES/55/107 of 14 March 2001). As for human persons such an order requires the right of every human person and all peoples to development; the entitlement of every person and all peoples to a healthy environment and the enjoyment by everyone of ownership of the common heritage of mankind. The Millennium Declaration considered, in addition to the classic triad of freedom, equality and solidarity, as fundamental values essential to international relations in the twenty-first century, tolerance, respect for nature and shared responsibility (*ibid.*, section I; A/59/565 of 29 November 2004, *A more secure World: Our shared responsibility*).

3. The role of peoples

The Decolonisation Declaration stated that all peoples have the right of self-determination but solely as a basis for the UN decolonisation policy. This appeared from its categorical rejection of any attempt at the partial or total disruption of the national unity and the territorial integrity of a country as incompatible with the purposes and principles of the UN. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) respectively posed the right of self-determination of all peoples solely for the States parties to those Covenants. The Proclamation of Teheran, adopted in 1968 by the first International Conference on Human Rights did not mention the right of self-determination. It only urged all UN members to co-operate with the UN so that effective measures could be taken to ensure that the Decolonisation Declaration would be fully implemented.

3.1. Identification of peoples

International law does not define its subjects, be it States or human beings and their collectivities: family, tribe, minority or people. These concepts are, as it were, *metalegal*. The absence of a legal definition, however, does not alter the legal fact that a people distinguishes itself from any other collectivity of human beings, including minorities, in that it may reshuffle the constitution of the community of States through its claim to statehood. This distinction holds particularly true since peoples have been generally recognized in international law in general and human rights law in particular as bearers of collective human rights such as the right to development and the right to self-determination. The latter right implies a historic relationship of a people with a certain territory.

Critescu stated in his UN report on *The Right to Self-Determination: Historical and Current Developments* on the basis of United Nations Instruments that relationship with a specific territory has emerged in UN parlance as an element of a definition of peoples

(UN doc. E/CN.4/ Sub.2/404/Rev. 1, 1981; Dinstein et al, 1992, 6). This view prevailed anyhow in the League of Nations mandate system and the UN trusteeship system. The most striking example, which still stirs up feelings, is the 1922 Palestine Mandate in which the Council of the League of Nations confirmed the recognition of the historical connexion of the Jewish people with Palestine by the 1917 Balfour Declaration. The UN Plan of Partition stemmed therefrom (A/RES/181(II) of 29 November 1947).

Under the Covenant of the League of Nations the Council explicitly defined in each case the degree of authority, control, or administration to be exercised by the Mandatory, if not previously agreed upon by the members of the League. A permanent commission was constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates (Covenant of the League of Nations, Article 22). The permanent Mandates Commission successfully prevented the continuous efforts of Mandatories to enhance their grip on the mandated territories through annexation or 'closer union'. In doing so it gave shape to the identification of the peoples in those territories as bearers of the right to self-determination by virtue of the 'sacred trust of civilisation' laid down in the Covenant of the League of Nations (Bernhardt, 1997, 280-287). The international trusteeship system of the UN pursued the same course (Bernhardt, 2000, 1193-1200). The peoples opting for self-government or independence were identified as those inhabiting territories held under mandate, detached from enemy States under the Second World War or voluntarily placed under the system by States responsible for their administration (UN Charter, Article 77).

The ups and downs of the Jewish and Palestinian peoples were exemplary for the weakness of both systems of identification, albeit for different reasons. After all, the ease with which the Jewish population of the world was identified as a bearer of the right to self-determination in the Palestine Mandate contrasted sharply with the difficulties which the 'non Jewish communities in Palestine' had to overcome in that respect. The ICJ only recently could affirm that under current international law also the existence of a "Palestinian people" is no longer in issue (Advisory Opinion No. 131 of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 118). Outside the League of Nations mandate system and UN trusteeship system the identification of populations as bearers of the right to self-determination is a more complex process. To some extent, the qualification of a group of persons as a people is then a random identification (Brolmann et al, 1993, 40). According to the ICJ, not all populations constitute a people (Western Sahara, ICJ Rep. 33, 1975). The Court did not answer the key question of when a population does not constitute a people entitled to self-determination.

Whether or not a certain population has a territorial claim by virtue of the right to self-determination of peoples should be decided by an international organ. The recognition of Jews as a people by the Council of the League of Nations may serve as an example. Taking into account that the right to self-determination also includes the establishment of a State, the UN now presents itself as the most appropriate forum to that end. After all, the admission of a new State to UN membership and the suspension or expulsion from membership will be effected by a decision of the General Assembly upon the recommendation of the Security Council (UN Charter, Articles 4, 5 and 6). The UN

should develop criteria for self-determination and international protection of peoples as a matter of high priority so as to prevent arbitrariness affecting its moral and legal authority (de Waart, 2000, 355-357). The Kurds in Iraq and the Palestinians in the Occupied Territories know all about the serious consequences of arbitrariness in that respect!

3.2. Right to self-determination

The right to self-determination intends to protect peoples by granting them the right freely to determine their political status and to pursue their economic, social and cultural development by means of the free disposal of their natural wealth and resources. If a people form an oppressed minority within its State, it may secede as a new State or merge into another state. Other national minorities lack such an opportunity. The UN Charter does not speak about minorities at all. Neither does the Universal Declaration of Human Rights. The ICCPR only refers to ethnic, religious and linguistic minorities (ICCPR, Article 27). National minorities were disregarded. They came into the picture recently albeit through the protection of persons only (A/RES/47/135 of 18 December 1992).

The 1970 Declaration on Principles of International Law (DPIL) was a twofold breakthrough. Firstly, it clearly distinguished the substance of self-determination from the modes of implementation. Secondly, it integrated the prohibition of secession in its definition of self-determination as a principle of international law concerning friendly relations and cooperation among States. It successfully paved the way for the inclusion of self-determination of peoples in the list of universal human rights (Paragraph 4).

As for the first breakthrough, following the Decolonisation Declaration the DPIL defined the substance of self-determination as the right of a people freely to determine, without external interference, its political status and to pursue its economic, social and cultural development. In so doing, it mentioned the establishment of a sovereign and independent State, the free association or integration with another State or the emergence into any other political status freely determined by a people as modes of implementing the right of self-determination by that people. The distinction between the substance of self-determination and its modes of implementation should avert the danger that self-determination will be automatically construed as ‘authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’. The second breakthrough was the proviso of subjecting the enforcement of the prohibition of secession to the condition that a State should conduct itself in compliance with the substance of the principle of equal rights and self-determination. As long as a State conducts itself in conformity with the substance of self-determination, the modes of implementation may not result in secession, for a State then possesses a government ‘representing the whole people belonging to the territory without distinction as to race, creed or colour.’ It meets, in other words, the requirements of a democratic society, which imply that peoples have had the opportunity to freely determine their political status and to pursue their economic, social and cultural development. In such a situation it is self-evident that foreign States, IGOs, NGOs and individuals should not incite peoples to secede from their State.

The Vienna World Conference considered the denial of the right of self-determination as a serious violation of all human rights. For that reason it recognized the right of peoples to take any legitimate action, in accordance with the UN Charter, to realize their self-determination effectively. In so doing, it took into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation. The >particular position= was underlined in the call for effective international measures to guarantee and monitor the implementation of human rights standards in respect of peoples under foreign occupation (A/CONF/.157/23 of 12 July 1993, Paragraph 2). It did not intend to change the general scope of the recognition of the right of self-determination. This appears from the fact that, analogous to the DPIL in respect of self-determination as a principle of international law, the effective realization of the right of self-determination as a human right is subject to the prohibition of secession. After all, the prohibition of secession does not extend to peoples under colonial or other forms of alien domination or foreign occupation.

The jurisprudence of the ICJ states crystal-clear that the right to self-determination is an erga omnes obligation (ICJ Reports, 2004, 172). Being thus recognized as a full-fledged human right, the right of self-determination is now fully integrated in the International Bill of Human Rights. In this connection the distinction between the internal and the external dimension of the right of self-determination is important. The former concerns the right of a people freely to pursue its economic, social and cultural development, the latter its right freely to determine their political status. The distinction is essential for people=s participation. It enables States to subject the right of self-determination of peoples to the provisions of the International Bill of Human Rights on derogating from human rights in time of public emergency and of limiting them in other situations for reasons of public order, morality and the general welfare in a democratic society. The 2005 World Summit Outcome underlined that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In so doing, it stressed that although democracies share common features, there is no single model of democracy (ibid., paragraph 135).

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Biographical Sketch

Paul J.I.M. de Waart was born in Amsterdam on August 11, 1932. He studied at the University of Amsterdam (Lawyer's degree, 1960). Doctor of Law cum laude University of Amsterdam, 1971. He joined the Development Cooperation Department of the Netherlands Ministry of Foreign Affairs in the Hague in 1962 after working for several years as a journalist. Joined the Faculty of Law of the Vrije Universiteit Amsterdam as professor of International Law in 1974 part-time and in 1978 fulltime. Emeritus Professor of International Law as of September 1997. Member UN Ad hoc Working Group of Governmental Experts on the Right to Development 1981 to 1987. Member International Law Association's (ILA) Committee on Legal Aspects of a New International Economic Order 1980-1992; Member ILA Committee on Legal Aspects of Sustainable Development from 1992 to 2002; Member ILA Committee on International Law on Sustainable Development since 2002; Chairman Netherlands Branch NIEO Committee 1980 to 2004. Publications on a variety of topics such as international settlement of disputes, legal aspects of a new international economic order, principles of good governance and human rights, including the right to development and the right to self-determination.