

Interdisciplinary Programmes

Academic year 2021-2022

The Right of Peoples to Self-Determination

MINT199 - Spring - 6 ECTS

Tuesday 16h15 – 18h00

Course Description

Alongside the prohibition of the use of force, self-determination constitutes one of the most important fundamental principles of contemporary international law, and can certainly be described as the most revolutionary one. For the first time in the history of international law, one of its rules recognised the right of certain human communities, the “peoples”, to freely decide their international status, which includes the possibility of independence. After tracing the history of this principle, this seminar will explore the critical problems relating to the ascertainment of its content: the holders of the right, the specific obligations that the principle creates in its different aspects, and its impact for the international community as a whole. Current complex cases will be proposed for research and discussion.

> PROFESSOR

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Syllabus

Organization and evaluation of the course

The course is open to students of all programmes, with priority to MINT. It combines lecturing and seminars. In both cases, active class participation is expected. Class participation will be taken into consideration in the final grading. Students have the possibility of choosing one of the following methods of evaluation:

- 1) To prepare a research paper of a maximum 15 pages, in Times New Roman, font size 12, line spacing 1.5 (footnotes should be in Times New Roman, font size 10, single space, free citation style as long as it is used consistently. Arguments should not be developed in

footnotes). Participants can pick any of the topics mentioned in the syllabus, or propose alternative related topics. For the oral presentation, participants will be required to submit an outline and up to three brief suggested readings five days before. The allocation of time for the oral presentations will depend on the number of participants opting for the research paper assessment. The deadline for submission of the written research paper will be 3 June 2022.

- 2) To submit short essays discussing any of the topics mentioned below. Students have to submit essays for 3 sessions which they select at the outset of the term and are expected to have a leading role in the discussion of those sessions. Essays should have a maximum length of 1500 words and be submitted by email by Monday at noon CET previous to the relevant session.
- 3) To take a final written exam. The final exam will consist of a general question (80% of the grade) and a short question (20% of the grade). In the general question, participants will pick and discuss one of three different issues among those covered during the semester. The short question will be common to all participants.

The first sessions of the course will have an introductory character and be dedicated to general discussions of the historical elements leading to the emergence of the principle of self-determination. The precise dates for the other sessions and their content will be announced during the third week of classes, on the basis of the number of participants and their choices with regard to oral presentations.

Course materials

The main reference text for the course is M. G. Kohen, "Self-Determination", in J. E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP, 2020), pp. 132-165. Before each class, students are required to read all the assigned materials indicated in the syllabus. Unless specific chapters, paragraphs or pages are indicated, the materials should be read in their entirety.

Outline of lectures

I. Historical aspects: The long road to self-determination

A. Ancient doctrinal echoes: from the Salamanca school to Grotius

Main readings:

- F. de Vitoria, "The First Reflection on the Indians Lately Discovered (Translation by John Pawley Bate)", in J. Brown Scott (ed.), *The Classics of International Law* (Carnegie Institution of Washington, 1917), pp. 115–128
- H. Grotius, *De iure belli ac paci libri tres* (1625), book 2, chapter 6, V, VI and VII

Further readings:

- M. Hébié, "The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansionism", in M. G. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar, 2018), pp. 87-144

B. From popular sovereignty to the principle of nationalities

Main readings:

- Plan de Constitution présenté à la Convention nationale les 15 et 16 février 1793, Titre 13, Article 2
- Constitution of the French Republic, 4 October 1958, Article 53

C. The Socialist impulse: from the Second International to Lenin

Main readings:

- Official German report of the London Congress: Verhandlungen und Beschlüsse des internationalen sozialistischen Arbeiter und Gewerkschafts-Kongresses zu London, vom 27. Juli bis 1. August 1896 (Berlin, 1896), p. 18
- Vladimir Ilych Lenin, 'The Right of Nations to Self-Determination (1914)', Lenin's Collected Works, vol 20 (Progress Publishers, 1972), pp. 393-454 (available at: www.marxists.org/archive/lenin/works/1914/self-det/)
- Second All-Russian Congress of Soviet of Workers' and Soldiers' Deputies (available at: <https://www.marxists.org/archive/lenin/works/1917/oct/25-26/index.htm>)
- Decree on Finnish State Independence, 4 December 1917 (available at: <https://histdoc.net/history/itsjul.html>)

D. President W. Wilson's "consent to the governed"

Main readings:

- 1774 American Declaration of Independence
- W. Wilson, Fourteen Points, 8 January 1918 (available at: https://avalon.law.yale.edu/20th_century/wilson14.asp)
- W. Wilson, Address of the President of the United States to the Senate, 22 January 1917 (available at: <http://www-personal.umd.umich.edu/~ppennock/doc-Wilsonpeace.htm>)
- W. Wilson, Address of the President of the United States to the Congress, 11 February 1918 (available at: www.gwpda.org/1918/wilpeace.html)

E. "The sacred mission of civilization" of the League of Nations

Main readings:

- Covenant of the League of Nations, Article 22
- N. Bentwich, "Le Système des mandats", *Recueil des cours*, Vol. 29 (1929), pp. 121-132

- J. C. Smuts, *The League of Nations: A Practical Suggestion* (Hodder & Stoughton, 1918), pp. 12–20 (available at: <https://archive.org/details/leagueofnationsp00smutuoft/page/n7/mode/2up>)

F. The inter-war period and its *locus classicus*: The Aaland Islands case

Main readings:

- *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, Verbatim Record, 8 December 2009, Ms Kaukoranta (Finland), CR 2009/30, p. 56, para. 12
- Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations Official Journal, October 1920, Special Supp. No. 3, 5
- The Aaland Islands Question, Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, 16 April 1921, League of Nations Doc 21/68/106

G. Self-determination at the United Nations: from San Francisco to the Friendly Relations Declaration

Main readings:

- 1941 Atlantic Charter
- Commission I, Committee 1, General Provisions, UNCIO, Doc 343 I/1/16, 16 May 1945, 1
- Commission I, Committee 1, General Provisions, UNCIO, Doc 723, I/1/A/19, 1 June 1945, 8–9
- UN Charter, Articles 1(2), 55
- UN General Assembly resolution 545 (VI), 5 February 1952
- UN General Assembly resolution 1514 (XV), 'Declaration on the Granting of Independence to Colonial Countries and Peoples', 14 December 1960
- UN General Assembly resolution 1541 (XV), 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter', 15 December 1960
- International Covenant on Civil and Political Rights, Article 1; International Covenant on Economic, Social and Cultural Rights, Article 1
- UN General Assembly resolution 2621 (XXV), 'Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples', 12 October 1970
- UN General Assembly resolution 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', 24 October 1970

- UN General Assembly resolution 35/118, 'Plan of the Action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted at the twentieth anniversary of Resolution 1514 (XV) and being a development of Resolution 2621 (XXII)', 11 December 1980
- UN General Assembly resolution 65/119, 'Third International Decade for the Eradication of Colonialism, which declared the period 2011–20 as the Third International Decade for the Eradication of Colonialism', 10 December 2010

Further readings:

- H. Quane, "The United Nations and the Evolving Right to Self-Determination", *International and Comparative Law Quarterly*, vol. 47 (1998), pp. 537-572
- R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", *American Journal of International Law*, vol. 65 (1971), pp. 713-735
- M. Virally, "Droit international et décolonisation devant les Nations Unies", *Annuaire français de droit international*, vol. 9 (1963), pp. 508-541
- M. Scheinin, "The Right to Self-Determination under the Covenant of Civil and Political Rights", in P. Aikio and M. Scheinin (eds.), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, 2000), p. 179

II. The holder of the right: the "peoples"

A. Peoples and nations

B. Peoples and minorities

Main readings:

- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly resolution 47/135, 18 December 1992
- 1995 European Framework Convention for the Protection of National Minorities
- CCPR General Comment No. 23 on the Rights of Minorities (Article 27 of the ICCPR), CCPR/C/21/Rev.1/ Add.5, 1994
- African Charter of Human and Peoples' Rights, Article 20
- J. Castellino, "International Law and Self-Determination: Peoples, Indigenous Peoples, And Minorities", in Ch. Walter *et al.* (eds.), *Self-Determination and Secession in International Law* (OUP, 2014), pp. 27-44

Further readings:

- R. McCorquodale, "Rights of Peoples and Minorities", in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (OUP, 2010), pp. 365-387

C. Indigenous peoples

Main readings:

- 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries
- UN Declaration on the Rights of Indigenous Peoples, UN General Assembly resolution 61/295, 13 September 2007
- B. Kingsbury, "Restructuring Self-Determination: A Relational Approach", in P. Aikio and M. Scheinin (eds.), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, 2000), pp. 19-37
- J. Castellino, "International Law and Self-Determination: Peoples, Indigenous Peoples, And Minorities", in Ch. Walter *et al.* (eds.), *Self-Determination and Secession in International Law* (OUP, 2014), pp. 27-44
- M. Weller, "Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23 and 46(1)", in J. Hohmann and M. Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP, 2018), p. 116

D. Tribal peoples

- 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

E. Self-determination in domestic law

Main readings:

- Constitution of Ethiopia, Article 47
- Constitution of Saint Kitts and Nevis, Article 113
- Constitution of Uzbekistan, Article 74
- Constitution of Serbia-Montenegro, Article 60

F. What constitutes a "people" from an international law perspective?

Main readings:

- G. H. Fox, "Self-Determination in the Post-Cold War: A New Internal Focus", *Michigan Journal of International Law*, vol. 16 (1995), pp. 733-781
- J. Summers, "The Right of Self-Determination and Nationalism in International Law", *International Journal on Minority and Group Rights*, vol. 12 (2005), pp. 325-354

Further readings:

- E. Elsner, *Die Bedeutung des Volkes im Völkerrecht: Unter besonderer Berücksichtigung der historischen Entwicklung und der Praxis des Selbstbestimmungsrechts der Völker* (Duncker & Humblot, 2000)

III. The content of the right

A. Internal and external self-determination

B. Self-determination and democracy

C. Self-determination and secession

D. Self-determination and the “right to decide”

E. Self-determination and referendums

F. Self-determination and consent for territorial change (Article 53 of the French Constitution)

Main readings:

- J. Crawford, *The Creation of States in International Law*, 2nd edition (OUP, 2007), pp. 383-418
- J. Klabbers, “The Right to Be Taken Seriously: Self-Determination in International Law”, *Human Rights Quarterly*, Vol. 28 (2006), pp. 186-206
- J. Salmon, “Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?”, in Ch. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993), p. 253
- Ch. Tomuschat, “Secession and self-determination”, in M. G. Kohen (ed.), *Secession: International Law Perspectives* (CUP, 2009), pp. 23-45
- J. Vidmar, “The Right to Self-determination and Multiparty Democracy: Two Sides of the Same Coin?”, *Human Rights Law Review*, vol. 10 (2010), pp. 239-268

Further readings:

- D. Cass, “Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories”, *Syracuse Journal of International Law and Commerce*, vol. 18 (1992), pp. 21-40
- M. G. Kohen, “Introduction”, in M. G. Kohen (ed.), *Secession: International Law Perspectives* (CUP, 2009), pp. 1-20
- M. Saul, “The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?”, *Human Rights Law Review*, Vol. 11 (2011), pp. 609-644
- J. Summers, “The Status of Self-determination in International Law: A Question of Legal Significance or Political Importance”, *Finnish Yearbook of International Law*, vol. 14 (2003), p. 271
- J. Vidmar, “Remedial Secession in International Law: Theory and (Lack Of) Practice”, *St Anthony’s International Review*, vol. 6 (2006), pp. 37-56

IV. Self-determination in the case law

A. International Court of Justice

- *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16*
- *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12*
- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 108, para 206*
- *Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554, at pp. 566-567, para 25*
- *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p. 351, at p. 419, para. 97*
- *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90*
- *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Merits, I.C.J. Reports 2002, p. 303, at p. 370, para. 107, and pp. 373-374, para. 123*
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136*
- *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403*
- *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95*

B. African Commission and Court of Human and Peoples' Rights

- *Congrès du peuple katangais v. DRC, Communication 75/92, Decision, 22 March 1995, African Commission on Human and Peoples' Rights, paras. 2-6*
- *Communication 266/03, Kevin Mgwanga Gunme et al v Cameroon (2009), paras. 169 ff.*
- *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek case), ACtHPR App 006/2012, Judgment of 26 May 2017, paras 197–199*

C. European Court of Human Rights and European Court of Justice

Main readings:

- *Chiragov and Others v. Armenia, Grand Chamber, Judgment, 16 June 2015, Dissenting Opinion of Judge Gyulumyan, paras. 1-31, and Dissenting Opinion of Judge Pinto de Albuquerque, paras. 41-47*

- *Front populaire pour la liberation de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* (Case T-512/12), Judgment, General Court of the European Union, 10 December 2015, paras. 56, 75, 143-144, 150, 159, 189-190, 200, 203
- *Council of the European Union v Front Populaire pour la liberation de la Saguia-el-Hamra et du Rio de Oro (Front Polisario)* (Case C-104/16 P), Judgment of the Court (Grand Chamber), 21 December 2016, paras. 87-93
- *Western Sahara Campaign UK v HMRC and Secretary of State for Environment, Food and Rural Affairs* (Case C-266/16), Judgement, Grand Chamber, 27 February 2018, para. 63
- *Front Populaire pour la liberation de la Saguia-el-Hamra et du Rio de Oro (Front Polisario) v. Council of the European Union* (Case Case T-279/19), Judgment of the General Court (Ninth Chamber, Extended Composition), 9 September 2021, paras. 298-392

Further readings:

- N. Levrat, “The Right to National Self-Determination within the EU: A Legal Investigation”, *Euborders Working Paper Series*, No. 8

D. Self-determination at the Inter-American Court of Human Rights

- *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgment, 28 November 2007, para. 93.
- *Kaliña and Lokono Peoples v. Suriname*, Inter-American Court of Human Rights, Judgment, 25 November 2015, para. 122

E. Human Rights Committee

- See *Kitok v Sweden* (CCPR/C/33/D/197/1985); *RL v Canada* (CCPR/C/43/D/358/1989)
- CCPR General Comment No 12 on the Right to Self-Determination (Article 1 of the Covenant), 13 March 1984, HRI/GEN/1/Rev.9

F. Domestic courts

- Supreme Court of Canada, Reference Re Secession of Quebec [1998] 2 SCR 217

G. Others:

- Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992, (1992) 31 ILM 1488, 1498
- Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award, Perm Ct Arb, 22 July 2009, RIAA, vol XXX, 145, para 263

V. Self-determination and its international legal status

A. Since when is it a legal right?

B. Is it a peremptory norm of general international law (*jus cogens*)?

C. The relationship of self-determination with other fundamental principles of international law

Self-determination and the use of force Self-determination and territorial integrity

Main readings:

- Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, UN Doc A/CN.4/727, paras. 108-115
- F. L. Kirgis Jr., “Degrees of Self-Determination in the United Nations Era”, *American Journal of International Law*, vol. 88 (1994), pp. 304-310
- M. G. Kohen, “Sur quelques vicissitudes du droit des peuples à disposer d’eux-mêmes” in N. Angelet, O. Corten and P. Klein (eds), *Droit du pouvoir, pouvoir du droit : Mélanges offerts à Jean Salmon* (Bruylant, 2007), pp. 961–982
- M. Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice”, *International and Comparative Law Quarterly*, vol. 43 (1994) pp. 241-269
- A. Orakhelashvili, *Peremptory Norms in International Law* (OUP, 2008), pp. 51-53
- D. Thürer and Th. Burri, “Self-Determination”, in *Max Planck Encyclopedia of Public International Law* (2008)

Further readings:

- Anaya, “Self-Determination as a Collective Human Right under Contemporary International Law”, in P. Aikio and M. Scheinin (eds.), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, 2000), p. 3
- R. S. Bhalla, “The Right of Self-Determination in International Law”, in W. Twining (ed.) *Issues of Self-Determination* (Aberdeen University Press, 1989), pp. 91-101
- A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP, 1995), pp. 193-200
- A. Clapham, “Secession, Terrorism and the Right of Self-Determination”, in M. G. Kohen (ed.), *Secession: International Law Perspectives* (CUP, 2006), pp. 46-64
- E. A. Laing, “The Norm of Self-Determination, 1941-1991”, *California Western International Law Journal*, vol. 22 (1991), pp. 209-308
- J. Salo, “Self-Determination: An Overview of History and Present State With Emphasis on the CSCE Process”, *Finnish Yearbook of International Law*, vol. 2 (1991), 268-342

VI. Case Studies

Catalonia

Scotland

Kosovo

Quebec

Gibraltar

Falkland Islands (Malvinas)

Western Sahara

Crimea and the City of Sebastopol

Eastern Ukraine

Abkhazia and South Ossetia

Transnistria

Nagorno-Karabakh

The Mandate of Palestine: one or two peoples?

Others (to be proposed by participants)