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The Right of Self-Determination After Helsinki and its Significance for the Baltic Nations*

by Boris Meissner†

I. INTRODUCTION

THE CONFERENCE FOR Security and Cooperation in Europe (CSCE) was concluded on August 1, 1975 with the adoption of a Final Act (the Helsinki Accords) by the 35 participating States in Helsinki.¹ This Final Act has been used since then as the basis for Implementation Conferences in Belgrade and Madrid. The Accords were prefaced by a Declaration of Principles in which the right of peoples to self-determination is the Eighth Principle. Its formulation corresponds to the definition of the right of self-determination in Article 1 of the two U.N. Covenants on Human Rights of December 16, 1966 which have also been ratified by most of the Communist nations, including the Soviet Union.²

The international legal nature of the right of self-determination has long been disputed.³ Since, however, its inclusion in the Charter of the United Nations, the U.N. Declaration of "Friendly Relations" of 1970, and the subsequent entry into force of the 1966 Covenant on Human Rights in 1966 it can be asserted that it is now generally recognized as a principle of international law. It is important to note that the Soviet Union participated significantly in this development. In fact, the principle of self-determination was included in the Charter of the United Nations on Soviet initiative, and it was also the Soviets who supported having a treaty to establish the right of self-determination in connection with universal human rights.⁴ A brief look, therefore, at the evolution of the right of self-determination, and Soviet attitudes toward it, up to its inclu-

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¹ Final Act of the Conference on Security and Co-operation in Europe, concluded Aug. 1, 1975, reprinted in 14 INT'L L. MATERIALS 1292 [hereinafter Helsinki Accords].

² Helsinki Accords, *supra* note 1, at 1295. U.N. Covenant on Economic, Social and Cultural Rights and U.N. Covenant on Civil and Political Rights [hereinafter U.N. Covenants] G.A. Res. 2200, 21 G.A.O.R., Supp. (No.16) 49, U.N. Doc. A/6316 (1966-67).

³ See generally, K. RABL, DAS SELBSTBESTIMMUNGSRECHT DER VÖLKER (1973); W. HEIDELMEYER, DAS SELBSTBESTIMMUNGSRECHT DER VÖLKER (1973).

⁴ Meissner, *Oststaaten und Europäische Sicherheit 1972-1975*, [1975-76] INTERNATIONALES RECHT UND DIPLOMATIE 218.

sion in the Helsinki Accords, is necessary for a full understanding of its significance for the Baltic peoples today.

II. DEVELOPMENT OF THE RIGHT OF SELF-DETERMINATION AS AN INTERNATIONAL LEGAL PRINCIPLE

At the sixth session of the U.N. General Assembly in February 1952 a decision was made to handle the right of self-determination in the Covenants on Human Rights. This was deemed necessary because of the conviction that violations of the right of self-determination that had led to wars in the past, and in the present, must be seen as a constant threat to peace. Resolution No. 545 (VI) provided for the inclusion of the following sentence in the Covenants: "All peoples have the right to self-determination."⁵

The emphasis placed on the universal nature of the right of self-determination rested on a Polish formulation supported by the Soviet Union.⁶ The draft of a corresponding article pertaining to the right of self-determination was adopted at the eighth meeting of the Commission on Human Rights on April 21, 1952. Paragraph 1 of the resolution reads: "All peoples in all nations have the right of self-determination, that is, the right to be free to determine their own political, economic, social and cultural status." This wording was changed slightly at the 10th session of the U.N. General Assembly in November 1955. The final version of the two Covenants on Human Rights was adopted by the U.N. General Assembly on December 16, 1966.⁷ The issue of the right of self-determination was explored in Part I, which includes only Article 1 and now contains the following text: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁸ In contrast to the Charter of the U.N. which only discusses "the *principle* of self-determination of peoples and nations," both U.N. Covenants on Human Rights speak of "the *right* of self-determination". "All peoples" is clearly stated as the subject of the right of self-determination. Any allusion to the term "nations" was avoided because it was believed that use of the term could give rise to misunderstandings.

The inclusion of the right of self-determination in the U.N. Covenants on Human Rights was significant in two respects. On one hand, a decisive step had been taken toward *legalization* of the principle of self-

⁵ Reprinted in, Whiteman, 5 *Digest of International Law* § 4 *Self-Determination* at 69 (1965).

⁶ *Id.* at 76.

⁷ U.N. Covenants, *supra* note 2.

⁸ U.N. Covenants, *supra* note 2.

determination within the framework of the United Nations. On the other hand, the wording made clear that this is a universal *right* valid for all peoples, regardless of the type of political system they live under.

It is significant that before the 1976 implementation of the U.N. Covenants on Human Rights the right of self-determination was discussed in detail on still two other occasions which confirmed it as an international legal principle. The first was in connection with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly of the U.N. on October 24, 1970.⁹ The second occasion was in the Declaration of Principles of the Final Act of the Conference for Security and Cooperation in Europe (CSCE), adopted at the summit meeting in Helsinki on August 1, 1975.¹⁰ The Soviet Union's desire to achieve a codification of principles of "peaceful coexistence" viewed on the Soviet side as the basis of international law in general constituted a point of departure for both documents.

The first document on "Friendly Relations," contains seven principles in its final version. The right of self-determination together with equal rights comprises the Sixth Principle:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle. . . .¹¹

The right of self-determination has always been particularly emphasized by the Soviets as one of the principles of "peaceful coexistence" which led to the "five principles."¹² Therefore, it was surprising that at the preliminary negotiations of the CSCE in Helsinki the Soviets opposed adopting not only the precepts of regard of human rights and fundamental freedoms in the Declaration of Principles of the CSCE, but the right

⁹ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States. G.A. Res. 2625, 25 U.N. G.A.O.R., Supp. (No.28) 121, U.N. Doc. A/8028 (1970).

¹⁰ Helsinki Accords, *supra* note 1.

¹¹ Declaration, *supra* note 9.

¹² MEISSNER UND USCHAKOW, PROBLEME DER KONFERENZ UBER SICHERHEIT UND ZUSAMMENARBEIT IN EUROPA 48 (1975).

of self-determination as well. Even after it was evident that this position could not be maintained, the Soviets attempted to avoid the concept of the "right of self-determination" in the draft submitted June 4, 1973 at the foreign ministers conference in Helsinki. It was circumscribed under the presentation of the idea of equal rights as the "right of peoples to decide their own fate." All peoples have the right "to establish such a social order and to elect such a form of government as they deem appropriate and necessary for the guarantee of the economic, social, and cultural development of their country." A more unequivocal position was expressed in the Yugoslavian and French drafts of the declaration on the right of self-determination.

The inclusion of the right of self-determination as the Eighth Principle in the Declaration on Principles Guiding Relations between Participating States had already been decided upon at the foreign minister conference of the CSCE. Long and tedious negotiations at the Conference of Experts in Geneva were necessary to reach agreement on the final formulation of the Declaration of Principles.

The key portion of the Eighth Principle that refers to equal rights and the right of self-determination now reads:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.¹³

This wording corresponds to the definition of the right of self-determination in Article 1 of the U.N. Covenants on Human Rights of 1966.¹⁴ Since their entry into force, these 1966 U.N. Covenants have a more binding effect in an international legal sense than the U.N. Declaration of "Friendly Relations" and the Final Act of the CSCE.

The significance of including the right of self-determination in the CSCE's Declaration of Principles should not be underestimated, however, notwithstanding its declarative nature. Note that its inclusion emphasizes the validity and thereby the universal nature of self-determination for all peoples who have lost their political independence through force or who have been separated against their will. The Declaration of Principles offers them a stronger position for claiming their right to determine their internal and external political status in full freedom and for demanding protection of all of those rights that belong to all peoples within the framework of international law today.

¹³ Helsinki Accords, *supra* note 1, at 1295.

¹⁴ U.N. Covenants, *supra* note 2.

III. THE BALTIC NATIONS AND THE RIGHT OF SELF-DETERMINATION

The development of the right of self-determination is particularly meaningful for the three Baltic peoples— the Estonians, Latvians, and Lithuanians—who have lost their political independence due to Soviet intervention.¹⁵ The point of departure for this intervention (which led in the Summer of 1940 to the forceful transformation of the Baltic countries into Soviet republics and their subsequent incorporation into the Union of Soviet Socialistic Republics) was the Hitler-Stalin Pact of the Fall of 1939.¹⁶ This designation should also be understood to include the secret corollary protocols regarding the German-Soviet Non-Aggression Treaty of August 23, 1939 and the Border and Friendship Treaty of September 27, 1939.¹⁷ These agreements succeeded in dividing Eastern Middle Europe into two spheres of influence bringing the Baltic nations and Finland into the Soviet sphere. Pursuant to these agreements the Soviet Union secured from Nazi Germany a free hand regarding the future “territorial-political transformation” within the Soviet sphere of influence.

The Soviet Union could not derive any special rights with regard to the Baltic states from an agreement between two totalitarian powers, since modern international law opposes the fixing of spheres of influence and, above all, does not permit armed intervention by a superpower even within its sphere of influence. To the extent that the Soviet Union ever raised such a claim to special rights regarding the Baltic nations it was clearly abandoned, from the viewpoint of international law, when the Soviet Union concluded mutual assistance pacts with the three Baltic nations.

The mutual assistance pact with Estonia was concluded on September 28, 1939, with Latvia on October 5, 1939 and with Lithuania on October 10, 1939.¹⁸

The preamble to these Pacts expressly referred to the peace treaty of 1920, and the treaty of non-aggression and peaceful settlement of disputes. In connection therewith the Soviet Union promised to protect the political independence of the Baltic states and not to interfere in their internal affairs, thereby evidencing its obligation to observe the international legal prohibition against intervention and annexations. In addition,

¹⁵ See generally, MEISSNER, *DIE SOWJETUNION, DIE BALTISCHEN STAATEN UND DAS VOLKRECHT* (1956), TARULUS, *SOVIET POLICY TOWARD THE BALTIC STATES 1918-1940* (1959).

¹⁶ Boundary and Friendship Treaty, Sept. 28, 1939, Germany-Russia, *reprinted in*, J. GRENVILLE, *THE MAJOR INT'L. TREATIES 1914-1973* at 199 (1974).

¹⁷ Treaty of Non-Aggression, Aug. 23, 1939, Germany-Russia, *reprinted in*, GRENVILLE, *supra* note 16, at 195.

¹⁸ For example of treaties, see, Pact of Mutual Assistance, Oct. 5, 1939 Latvia-Soviet Union, *reprinted in*, GRENVILLE, *supra* note 16, at 201. See generally, GRENVILLE, *supra* note 16, at 183.

the pacts specifically emphasized that the concession of military bases and the measures associated with carrying out the treaties would not in anyway affect the sovereign rights of the parties to the treaties, particularly their economic and political systems. Accordingly, the political sovereignty of the Baltic states was to be fully preserved.

With the concession of military strongpoints by the Baltic states, which the Soviets had demanded in the treaties, the security needs of the Soviet Union, which had been intensified by the outbreak of the second World War, were fulfilled. The importance of the mutual assistance pacts for the guarantee of the Soviet Union's external security was stressed by Molotov, the Minister President and Foreign Minister of the U.S.S.R. at that time, in his speeches before the Soviet Politburo on October 31, 1939 and March 29, 1940.

In fact, however, the Soviet leadership was not satisfied with the existing status quo. With ultimatums on June 15 and June 16, 1940, they used the German advance into Western Europe as a pretense for demanding a total occupation of the Baltic states by the Red Army and the formation of Soviet-friendly governments.¹⁹

The Soviet plan called for closer cooperation between the Baltic states in the sense of a Baltic entente that was not military in character. All this overlooked the provisions for a peaceful mediation of disputed questions that had been provided for in earlier treaties.

With the acceptance of the ultimatums the Soviet Union declared itself ready to provide for the protection of the political independence of the three Baltic Republics in the framework of a meaningful treaty-like statement. Based on this principle prerequisite the governments of Lithuania, Latvia, and Estonia accepted the Soviet ultimatum; at that time a military resistance against the Soviet demands offered no chance of success.

The Soviet government did not fulfill these obligations. Following the occupation of the Baltic states the interim democratic phase came to an abrupt halt. Mock-elections were held on July 14 and 15, 1940 in violation of the constitutions and election laws of the Baltic states and a dictatorial communist regime was set up and accelerated sovietization begun.

After the Communist takeover the Baltic states, which had been transformed into Soviet Social Republics, were incorporated into the Soviet nation in August of 1940.

The armed intervention of the Baltic states by the Soviet Union was based solely on the ultimate threat of military force. Soviet intervention practice in this unveiled form occurs relatively rarely notwithstanding Hungary in 1956, Czechoslovakia in 1968, and Afghanistan in 1979. The

¹⁹ GRENVILLE, *supra* note 16, at 183.

international illegal nature of the Soviet intervention was particularly clear-cut in the Baltic situation.

The Soviet Union's actions constituted "direct aggression" which they had themselves defined in the Conventions of 1933 and which evolved from the terms of the non-aggression pacts. The incorporation of the Baltic states into the Soviet political alliance, which was effected by Soviet legislation of August 3, 5 and 6, 1940, did not constitute a voluntary union based on federal principles, but rather a forcible acquisition forbidden in modern international law.

In connection with the international legal ramifications of this one-sided act of aggression, three questions are raised:

1. How can the Soviet acquisition be judged from the standpoint of the right of self-determination, even though the issue of whether or not it was a universal international legal principle was being disputed at this point in time?

2. Hasn't the annexation been healed by the passage of time?

3. What claims do the Baltic people have if their right of self-determination was not affected by these events and there has been universal recognition of the normative character of the right of self-determination?

The first question can be answered easily. There is no doubt that already before the outbreak of World War II one could assume a general annexation prohibition existed. This annexation prohibition was established in Western Europe with a general prohibition of the use of force and by the Soviet Union with the violation of the right of self-determination. Both were evident in the Baltic situation. It is significant that the right of self-determination in relation to the Soviet and the Baltic states possessed separatist international legal, and thereby normative, characteristics. This was allowed for through the settlement of the peace treaties that were concluded in 1920 by Bolshevistic Russia with the three Baltic states and Finland.²⁰ In these treaties the RSFSR recognized the political independence of Estonia, Latvia and Lithuania and waived "voluntarily and for all time" all sovereignty rights that were due Russia concerning the Baltic peoples and their land.

Consequently, with an objective assessment of the Baltic situation from the standpoint of modern international law, one can come to the conclusion that the forcible incorporation of the Baltic states into the Soviet Union is invalid because of the annexation prohibition. Accordingly, the Baltic states could be considered territory that is occupied by the Soviet Union. Legally and politically the existing governments in the three Baltic states lack necessary legitimacy.

²⁰ Treaty of Peace, Aug. 11, 1920 Latvia-Soviet Union, *reprinted in*, GRENVILLE, *supra* note 16, at 134; Treaty of Peace, Oct. 14, 1920, Finland-Soviet Union, *reprinted in*, GRENVILLE, *supra* note 16, at 136; see GRENVILLE, *supra* note 16, at 130.

Reality often differs from theory, however. It is well known that international law is an imperfect legal system since it has no central authority that would be in a position to eliminate an existing unjust situation. It is the individual sovereign states as contributors to international law formation that interpret a certain situation by agreement or opposition with the actual legal situation. For the states who have not recognized the annexation *de jure*; for example, the United States and a host of other Western nations; Estonia, Latvia, and Lithuania continue to exist as legitimate nations from the viewpoint of the international legal system. To be sure, they have lost their independence and because of that they must experience a substantial loss of their political sovereignty. They have not totally lost their sovereignty, however. To the extent that those nations that haven't recognized the annexation have diplomatic or consular representatives in the Baltic states, they can be considered representatives of the remaining sovereignty rights. Even if such representatives do not exist, as for example in the Federal Republic of Germany,²¹ the guest state will continue to recognize Estonian, Latvian, and Lithuanian citizenship when it can be established by appropriate documents.

For those nations who have recognized the annexation *de jure* the Baltic states have totally lost their political independence. Thereby they acknowledge that the Soviet Union has extended its own sovereignty to the Baltic states. Even most of the nations that did not establish diplomatic relations with the Soviet Union until after World War II can understand the existing territorial situation of the Soviet Union without having to take a stand on the international legal problems involved. Therefore, these nations will not question the Soviet assertion that the Baltic Union Republics constitute sovereign member states.

Independent of these differing attitudes of individual nations toward Soviet annexation and the issue of the statehood of Estonia, Latvia and Lithuania, it can be certain that these events do not affect the continuation of the right of self-determination of the Baltic peoples in any way.

Such a conclusion does not result even from the possibility of prescription as a form of territorial gain. Here, the Soviet viewpoint that such a territorial gain cannot take place without being in contradiction to the right of self-determination is of particular significance.

Moreover, from the right of secession that was established in Article 17 of the constitution of the U.S.S.R. used up to now,²² the logical conclusion could be drawn that the right of self-determination officially continues to exist in the respective states of the individual Union Republics.

The right of secession has been retained in Article 72 of the new

²¹ Meissner, *Die Bundesrepublik Deutschland und die baltische Frage*, [1977] JAHRBUCH DES BALTISCHEN DEUTSCHTUMS 134.

²² MAURACH, HANDBUCH DER SOWJETVERFASSUNG 105 (1955).

U.S.S.R. constitution of 1977.²³ In part, however, from the Soviet viewpoint, the theme of a unified "Soviet people" established in the constitution gives the impression that the right of self-determination of the individual states has been consumed by the fact that they belong to the Soviet people, i.e., it has been exhausted. Along the same lines, in the differing formulation in Article 70 the Soviet Union is referred to as a homogeneous multi-national federal state and not, as before, simply a federal state.²⁴ That is impossible, however, after the right of self-determination in the scope of the U.N. Covenant on Human Rights has been recognized in treaty form by the Soviet Union as a universal principle of international law. The right of self-determination cannot be consumed. As long as peoples are in the position to protect their national unity, they collectively have a continuing right to self-determination.

According to Soviet interpretation, the state is considered to be the major representative of a peoples' right of self-determination. The Soviet conception of a nation is still derived from Stalin's definition of 1913 that was fully confirmed in 1970. Stalin set forth four objective characteristics of a nation: 1) a common language, 2) a common territory, 3) a common economic life, and 4) a common culture, which is evidenced by a certain mental attitude. Aside from the question of whether these characteristics suffice to define a nation, they are certainly true of the Baltic peoples. No matter how the question of their present statehood may be judged, their continuing existence as nations, which is not disputed by anyone, is directly related to their "national sovereignty" and thereby, according to Soviet interpretation, also to the right of self-determination.

The general opinion is being expressed today by the Soviet international jurists that national sovereignty (which is to be differentiated from political sovereignty), represents, from an international legal viewpoint, the right of a nation to establish or restore an independent state. In addition, it is pointed that from national sovereignty certain rights of defense arise for individual nations.²⁵

By the adoption of the Declaration of Principles of the CSCE in the foreign policy section of the Soviet Union's new constitution the ten principles agreed upon in Helsinki have resulted in an additional constitutional judicial obligation for the Soviet Union. It is striking that the Soviet side is once again endeavoring to avoid the idea of the "right of self-determination" in Principle 8 and to reword it in the sense of the Soviet draft declaration of June 4, 1973. This type of rewording can not change

²³ KONSTITUTSIIA art. 72 (U.S.S.R.).

²⁴ KONSTITUTSIIA art. 70 (U.S.S.R.).

²⁵ Meissner, *Der Souveränitätsgedanke in der sowjetischen Völkerrechtslehre*, RECHTSPOSITIVISMUS, MENSCHENRECHTE UND SOUVERÄNITÄTSLEHRE IN VERSCHIEDENEN RECHTSKREISEN 118 (Kroker und Veiter eds. 1976).

the normative meaning of the right of self-determination. It shows though, how explosive the nationality issue is for the leadership in the Soviet Union and additionally with regard to the endeavors of the East European people toward national self-determination.

IV. CONCLUSION

The right of the Baltic states to freely determine their political status evolves from the right of self-determination, whose normative nature is no longer disputed. Up until now, the Soviet leadership has denied them this right. It is valid, from an international legal viewpoint, however, for them to continually make this claim valid. How this political status might be considered depends upon the goal on which the will of the three nations is directed. In today's situation the desire to break away from the Soviet Union and form an independent nation could dominate in every case. In comparison to this desire for political independence, the issue concerning the strived-for economic and social system could be of secondary importance.

In connection with national sovereignty in Soviet teachings the international legal subjectivity of a nation has been accepted to the extent that it doesn't conflict with political sovereignty. Certainly this issue was treated exclusively in connection with the struggle of the colonial peoples for their independence. But if national sovereignty is to be treated as a universal principle, as the Soviet international jurists stress, it is not understood why it shouldn't have the same significance for nations who have lost their political independence through force and by violation of the right of self-determination.

Soviet international legal teachings justifiably emphasize that the issue of final political and legal status of a nation with the acknowledgment and confirmation of national sovereignty will not be decided in advance by international law. International law would merely demand the respect of the nation's free expression of will. With regard to the Baltic states, as long as such a free expression of will is prevented by the Soviet leadership the existing territorial situation of the Soviet Union in the Baltic provinces lacks the necessary international legal legitimacy to be considered permanent.