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## The Principle of Self-Determination in the Context of Human Rights

### Introduction

The principle of self-determination, along with the principle of respect for human rights and fundamental freedoms, belongs to the fundamental principles of international law that have the character of peremptory norms. Such norms, as defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties, being *jus cogens* norms, give rise to *erga omnes* obligations. There is no doubt that both of these principles occupy a very important place in the system of modern international law, and particularly in the hierarchically constructed catalogue of the fundamental principles of this law. It is therefore necessary to draw attention to the very clear connection and interdependence between these two principles. The doctrine holds that there is a kind of bilateral dependence between the principle of self-determination and human rights law. This means that on the one hand the principle of self-determination is essential for the effective guarantee of human rights, while on the other hand the guarantee of human rights is ensured by the principle of self-determination<sup>1</sup>. Therefore, such an understanding of the interdependence between the principle of self-determination and human rights entails that in practice it is possible to implement the principle of self-determination in a national legal system as *lex generalis*, through application of the norms of international human rights law as *lex specialis*.<sup>2</sup>

In highlighting these issues, it should be noted that in the norms of international law, which include the norms of international human rights law, and in the doctrine of international law, two concepts are present: the principle of self-determination and the

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1 U. Barten, *Minorities, Minority Rights and Internal Self-Determination*, Heidelberg – New York – Dordrecht – London 2015, p. 81 *et seq.*; A. Michalska, *Interpretacja Międzynarodowego Paktu Praw Cywilnych i Politycznych w świetle raportów Komitetu Praw Człowieka*, RPEiS 1986, no. 2, pp. 13–14.

2 M. Perkowski, *Samostanowienie narodów w prawie międzynarodowym*, Warszawa 2001, p. 131.

right of peoples to self-determination. With this borne in mind, it is necessary to stress that the theoretical construct of the right to self-determination is very interesting, since on the one hand it is conceived of as a principle of international law, and on the other hand it can be seen as a crucial law in the inventory of human rights. The inventory of human rights is based on general principles that apply to all the provisions for rights and freedoms, and which are essential in both their interpretation and application.<sup>3</sup> One of these principles is the principle of self-determination, and a fundamental element of this principle, which enables its practical implementation, is the right of peoples to self-determination.<sup>4</sup>

The principle of self-determination was for a long time regarded as purely political and was thus deprived of legal character.<sup>5</sup> The political dimension of the principle was clearly formulated in President Woodrow Wilson's Declaration, which in practice significantly contributed to the emergence of new states after the First World War, particularly in Central Europe.<sup>6</sup> Of course, the emergence of these new states did not entail that the principle of self-determination was implemented in the sense defined in the later provisions of international law, particularly within the United Nations system. The principle was absent from the provisions of the Covenant of the League of Nations, which established the mandate system, and which was a kind of compromise between the political principle of self-determination and the political and economic interests of the colonial powers. It should be borne in mind that in the practice of the League of Nations the relevant legal aspects of the principle of self-determination were discussed by two committees that were set up to investigate the issue of the Åland Islands. The committees recognised the principle of self-determination, but ruled out the possibility of secession as a road to implementing self-determination in practice.<sup>7</sup> The principle of self-determination only finally attained the status of a positive, universal principle of international law in the United Nations Charter, two provisions of which merit close attention, namely Article 1 § 2 and Article 55.<sup>8</sup> Article 1 outlines the basic purposes of the United Nations, and just after defining the organisation's primary purpose – which is to strive for the maintenance of international peace and security – § 1 states that the aim of

3 A. Michalska, *Prawa człowieka w systemie norm międzynarodowych*, Warszawa – Poznań 1982, p. 67.

4 For an often cited commentary v.: B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford 2014, p. 12 *et seq.*

5 L. Dembiński, *Samostanowienie w prawie i praktyce ONZ*, Warszawa 1969, p. 35 *et seq.*

6 K. Kocot, K. Wolfke, *Wybór dokumentów do nauki prawa międzynarodowego*, Wrocław – Warszawa 1978, p. 45.

7 M. Kałduński, *Samostanowienie (zasada samostanowienia narodów)*, in *Leksykon ochrony praw człowieka*, ed. M. Balcerzak, S. Sykuna, Warszawa 2010, p. 442.

8 T. Gadkowski, *Narody i inne podmioty uprawnione w ramach prawa do samostanowienia*, in *Ubi ius, ibi remedium. Księga dedykowana pamięci Profesora Jana Kolasy*, ed. B. Krzan, Warszawa 2016, p. 144 *et seq.*

the United Nations is: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” Whereas Article 55 of the Charter, from Chapter IX – which is devoted to international economic and social cooperation – states that there is a need to create “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>9</sup> This clear and unambiguous expression of the principle of self-determination in the provisions of the Charter undoubtedly contributed to the strong position the principle holds today. It should be borne in mind, however, that in the first years after the adoption of the Charter this principle had *lex imperfecta* character, due to the geopolitical situation, the distinguishing feature of which was the continued existence of the colonial system.<sup>10</sup>

### **The international law sources of the principle of self-determination**

These provisions from the United Nations Charter mark the introduction of the principle of self-determination into the normative system of international law. The principle was further defined and developed in subsequent regulations of international law, in its various forms – thus both in treaty regulations and regulations of a *soft law* character. There is no doubt that the principle was originally interpreted to support the process of decolonisation, and to this end the most authoritative and purposeful interpretation of the Charter provisions cited above can be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted on 14 December 1960, as a resolution of the UN General Assembly.<sup>11</sup> The provisions of the Declaration can be viewed as constituting a broader interpretation of the United Nations Charter provisions, being based on the assumption that: “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.” Accordingly, the Declaration goes on to state, in § 2, that: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” When the title of this Declaration is taken into consideration, along with the general political context that accompanied its adoption, it is apparent

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<sup>9</sup> United Nations, Charter of the United Nations, 24 October 1945, Ch. IX, Article 55, 1 UNTS XVI.

<sup>10</sup> M. Perkowski, *op. cit.*, p. 29

<sup>11</sup> UNGA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples.

that the principle of self-determination was unambiguously linked to the observance of human rights, and the right to self-determination stipulated in the Declaration clearly refers to the holders of these rights: peoples from colonized and subjugated territories. It is also noteworthy that the clearly formulated principle of self-determination in the provisions of the United Nations Charter, and its interpretation in the provisions of Resolution 1514 (XV), gave weight to the arguments for including the principle in the International Covenant on Human Rights, which was prepared by the Commission on Human Rights. Proponents of this inclusion even asserted the primacy of the right to self-determination over other human rights, pointing out that in many cases individuals are unable to exercise their individual rights effectively, since their society has no guaranteed right to self-determination and cannot establish its own state. And yet it is precisely states that are able to guarantee the legal and institutional protection of human rights and the fundamental freedoms.<sup>12</sup> It goes without saying that this position was not universally accepted, with critics holding that since the right to self-determination is a collective right, and therefore applies to entities of a collective nature, it should not be a component of a legal regulation that is based on an individualist conception of human rights.<sup>13</sup> Ultimately, in Resolution 545 (VI) the General Assembly decided to include the right to self-determination in the International Covenant on Human Rights. However, subsequent discussion focused on two distinct and opposing conceptions of this right. The concept of internal self-determination was based on the assumption that this right is the right of peoples organised as states to freely decide on the political, social and economic system that their state should adopt. In contrast, the concept of external self-determination entailed the right of peoples subjugated by colonial powers to gain their own statehood.<sup>14</sup>

In Article 1, section 1 of both Covenants, the following statement can be found: “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.”<sup>15</sup> The interpretation of these provisions leads to two important conclusions. Firstly, the Covenants presented the universal character of the principle of self-determination and, secondly, the provisions clearly associate human rights with the rights of nations, par-

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12 L. Antonowicz, *Samostanowienie narodów jako zasada prawa międzynarodowego*, “Annales UMCS” 1996, no. 43, p. 70 *et seq.*; J. Symonides, *Międzynarodowa ochrona praw człowieka*, Warszawa 1977, p. 45.

13 A. Michalska, *Komitet Praw Człowieka. Kompetencje, funkcjonowanie, orzecznictwo*, Warszawa 1994, p. 101.

14 UNGA Third Committee, A/3077 and UNGA Res. 2158 (XXI), Permanent Sovereignty over Natural Resources.

15 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Part 1, Article 1, UNTS, vol. 993, p. 3.

ticularly the right to self-determination.<sup>16</sup> For this reason, the Covenants should be seen as having crucial significance for the formulation and development of the concept of collective human rights, which are defined as 'third generation' human rights. This thesis appears to be all the more plausible if it is borne in mind that in the later work of the General Assembly, and in discussion within this organ, there was a clear tendency to connect the right to self-determination with the category of collective human rights. Examples of this are provided by the provisions of the Declaration on Social Progress and Development, of 11 December 1969,<sup>17</sup> and the provisions of the Charter of Economic Rights and Duties of States, of 14 December 1974.<sup>18</sup>

The most representative interpretations of the principle of self-determination – as well as representative interpretations of other fundamental principles of international law – can be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which was adopted as a resolution of the General Assembly on 24 October 1970.<sup>19</sup> This Declaration, similarly to the Declaration of 1960, explicitly connects the principle of self-determination with human rights, stating that: "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter." When defining the essence of the principle of self-determination, the Declaration goes on to state that: "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." However, when it comes to the potential means for implementing this right, the Declaration states that: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." It should be borne in mind, however, that the Declaration's interpretation of the United Nations Charter provisions that concern the principle of self-determination is only a *sui generis* authentic interpretation. This is because it was not formulated in an international agreement, but rather in a General Assembly resolution. It should also be emphasized that this Declaration interprets the right to self-determination in a broader

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16 A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge 1995, p. 159 *et seq.*

17 UNGA Res. 2542 (XXIV).

18 UNGA Res. 3281 (XXIX).

19 UNGA Res. 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.

context, rather than only in the colonial context, in such a way that it extends the scope of entities who are entitled to exercise this right.<sup>20</sup>

The principle of self-determination was also formulated in normative acts outside of the UN system. A good example of this is provided by the Helsinki Final Act of the Conference on Security and Co-operation in Europe, of 1 August 1975. The doctrine of international law emphasizes that this Act introduced the principle of self-determination to Europe, which consists of states of national and ethnic diversity.<sup>21</sup> The Helsinki Final Act proclaimed the ten principles of international law, placing the principle of respecting human rights and fundamental freedoms alongside the principles of equality and national self-determination. In contrast, the right of peoples to self-determination, which follows from this principle, was defined as follows: “The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. 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.”<sup>22</sup> Interpretation of these provisions leads to the conclusion that, in contrast to the majority of regulations adopted under the United Nations system which are concerned with the principle of self-determination, the European dimension of this principle referred primarily to internal self-determination. These provisions were reflected in international practice. For example, UN General Assembly resolution 48/49 acknowledged the right of the Palestinians and the people of South Africa to internal self-determination.<sup>23</sup> Similarly, Opinion no. 2 of the Badinter Commission invoked the right to self-determination in the case of the states formed after the break up of Yugoslavia.<sup>24</sup>

Discussion on the nature of the principle of self-determination would not be complete without reference to its customary law sources. This is due to the fact that international

20 W. Czaplński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, Warszawa 2014, p. 182.

21 L. Antonowicz, *op. cit.*, p. 70 *et seq.*; M. Perkowski, *op. cit.*, p. 38.

22 Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975, chap. VIII, [www.osce.org](http://www.osce.org) [access: 22.10.2016].

23 UNGA Res. 48/94, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights.

24 A. Pellet, *The Opinions of the Badinter Arbitration Committee. A Second Breadth for Determination of Peoples*, “European Journal of International Law” 1992, no. 3, p. 178 *et seq.*; P. Łaski, *Dezintegracja Związku Radzieckiego i Jugosławii w świetle prawa międzynarodowego*, “Annales UMCS” 1992, no. 39, p. 57 *et seq.*

custom, as a typical source of the rights and obligations, still occupies a prominent place in the system of the formal sources of international law. It can therefore be claimed that, despite the prevailing role of agreements in various areas of international co-operation, discussion on the basic institutions of this law frequently requires reference to international custom. As was mentioned previously, until the establishment of the United Nations, there was no positive convergence of *usus* and *opinio juris* on the issue of the self-determination of peoples. Consequently, the principle of self-determination took on a political character.<sup>25</sup> However, there was a fundamental change after the founding of the United Nations, which assigned itself a leading role in shaping customary law with regard to self-determination. This is clear from the fact that the General Assembly resolutions mentioned above, despite only having the status of 'soft law', frequently invoke the principle of self-determination<sup>26</sup>. This situation indicates not only that the UN attempted to coordinate the behaviour of states in this regard, but also that this practice paved the way for customary law to be introduced to the field of human rights protection<sup>27</sup>. As a consequence, many authors are of the opinion that the customary law roots of the principle of self-determination – which was eventually incorporated into the UN Charter and confirmed in other treaty regulations – is beyond doubt.<sup>28</sup> For some authors, the General Assembly resolutions that were adopted in accordance with Articles 10, 13 and 14 of the UN Charter, and which affirm the principle of national self-determination, thereby established customary law, which can be best seen in the aforementioned resolution 2625 (XXV).<sup>29</sup> Mention should also be made of the UN Security Council's resolutions on Namibia,<sup>30</sup> East Timor<sup>31</sup> and Western Sahara.<sup>32</sup> It should be remembered, however, that this way of shaping the customary norms of international law conferred the right to self-determination on colonized peoples, since international practice at this time in principle referred exclusively to the process of decolonisation. In this context, therefore, the process of decolonisation unambiguously determined the formation of customary law norms, entailing the right of colonized peoples to self-determination.

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25 A. Cristescu, *The Right to Self-determination. Historical and Current Development on the Basis of the United Nations Instruments*, New York 1981, p. 23 *et seq.*

26 Na temat mocy prawnej uchwał organów organizacji międzynarodowych: K. Skubiszewski, *Czy uchwały Zgromadzenia Ogólnego ONZ są źródłem prawa?*, "Państwo i Prawo" 1981, no. 2, p. 24 *et seq.*

27 V., e.g., R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, New York 1963, p. 104 *et seq.*

28 J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa 1990, p. 206; W. Czapliński, *Aktualne problemy prawa do samostanowienia*, "Toruński Rocznik Praw Człowieka i Pokoju 1994–1995" 1996, vol. 3, p. 87.

29 M. Perkowski, *op. cit.*, p. 34.

30 UN SC Res. 301/1971.

31 UN SC Res. 377/1975.

32 UN SC Res. 1598/2005.

This right was codified and developed in the texts of both the International Covenants on Human Rights. At this point it is worth emphasizing that the customary character of international law norms, which affirmed the right of peoples to self-determination, was also invoked by the International Court of Justice, whose case-law delineates and continues to delineate important directions in the development of this right. For example, in the advisory opinion on the Namibia case, the Court confirmed the legal merits of the General Assembly resolution 1514 of 1960, and incorporated the right of peoples to self-determination into the system of modern international law.<sup>33</sup> In the advisory opinion on the Western Sahara case, the court recognized the principle of self-determination to be a fundamental principle of international law in the context of the decolonisation process. The court also decided in favour of the principle of self-determination if there should be conflict with the principle of territorial integrity.<sup>34</sup> A broader context for the right to self-determination can be found in the Court's judgment in the Portuguese-Australian conflict over the East Timor case, which emphasized that, for both Portugal and Australia, East Timor constituted a non-self governing territory, and held that both Parties in the dispute should respect the right of the people living in the territory to self-determination. As has been previously stated, in this judgment the Court also emphasised the *erga omnes* character of the obligations of all states, resulting from the right of peoples to self-determination.<sup>35</sup> The *erga omnes* character of such obligations was later confirmed by the ICJ in the advisory opinion in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court recognised the right of the Palestinian people to self-determination. At the same time, the Court ruled that no state could claim any situation to be contrary to this right, or undertake or support any action that would violate a nation's right to self-determination.<sup>36</sup> To sum up the Court's position, it must be emphasized that states are obliged to assist peoples to achieve their right to self-determination and to refrain from recognizing a state of affairs which would in practice constitute a violation of this right.<sup>37</sup> It would seem that the Court's deliberations followed a similar vein in the advisory opinion on whether Kosovo's declaration of independence was compatible with international law. When investigating and assessing the legality of Kosovo's declaration of independence in the context of Security Council resolution 1244 (1999), the Court ruled that there is no general prohibition on declara-

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33 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, pp. 31–32.

34 *Western Sahara Advisory Opinion*, ICJ Reports 1975, pp. 31–33, 52–53 and 122.

35 *East Timor Case (Portugal v. Australia), Judgment*, ICJ Reports 1995, pp. 102 and 29.

36 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, pp. 171–172 and 88.

37 M. Kałduński, *op. cit.*, p. 448.

tions of independence in international law, considering the development of international law with regard to self-determination.<sup>38</sup>

### Concluding remarks

There is no doubt that the principle of self-determination is a particularly important universal norm of international law of a peremptory character, which gives rise to *erga omnes* obligations. The essential element is the right of peoples to self-determination, the exercise of which is realized in the right to establish their own state, the right to integrate through unification with another state, and the right to free economic, social and cultural development.<sup>39</sup> From the above analysis of the regulations of modern international law, it is evident that there is a clear connection between the principle of self-determination and human rights law. Despite the fact that the right to self-determination is classed as a collective human right, it is necessary to analyse and assess this right in a much broader context. Its implementation is a prerequisite for the proper exercise, promotion and development of all individual human rights which have been defined in the norms of universal international human rights law. This position has been put forward in the discussions of the various organs of the United Nations, which can be seen from both numerous General Assembly resolutions<sup>40</sup> and the invaluable general commentaries of the Human Rights Committee, the treaty body of the International Covenant on Civil

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38 *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, Advisory Opinion*, ICJ Reports 2010, p. 403. (“During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation [...] A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”) For commentary v., e.g., A. Potyrała, *Niepodległość Kosowa w świetle opinii doradczej Międzynarodowego Trybunału Sprawiedliwości*, “Środkowoeuropejskie Studia Polityczne” 2010, no. 3, p. 27 *et seq.* In this regard, v. also the position of the Canadian High Court in the case of the secession of Quebec: Canadian Supreme Court, *Secession of Quebec* (1998) 2 SCR 217 § 112.

39 M. Perkowski, *op. cit.*, p. 137.

40 For example: in resolution 637 A (VII) of 16 December 1952 The General Assembly recognized that: “the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights”, and in resolution 49/148 of 23 December 1994 the General Assembly confirmed that: “the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights.”

and Political Rights.<sup>41</sup> The literature also puts forward the position that there is a kind of interdependence between the principle of self-determination and human rights law<sup>42</sup>. All this allows the following conclusion to be drawn: that, just as in the past, in the near future the evolution of the principle of self-determination in international practice will primarily take place in the context of the development of international human rights law. Of course, nowadays the opportunities for exercising the right to self-determination in practice are significantly more limited than they were in the second half of the twentieth century, but the principle of self-determination will remain an essential element in the process of implementing the norms of international human right law.

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41 For example: in general commentary no. 12 of 12 April 1984 the Human Rights Committee stated that "In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants." V. HRC, General Comment no. 12, Article 1 (Right to self-determination), § 1.

42 Cf. A. Michalska, *Interpretacja...*, *op. cit.*, pp. 13–14; U. Barten, *op. cit.*, p. 81 *et seq.*

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#### SUMMARY

### **The Principle of Self-Determination in the Context of Human Rights**

The essay presents the issue of the principle of self-determination from the perspective of international human rights law. The author highlights the close relationship between the principle of self-determination and the principle of respect for human rights and fundamental freedoms. In practice, the principle of self-determination is a prerequisite for the effective guarantee of human rights, and, at the same time, guaranteed protection of human rights is a prerequisite for implementing the principle of national self-determination. The author presents the issue of self-determination in the context of the basic

regulations of international human rights law, considering regulations of both a 'hard' and 'soft' law character.

Keywords: public international law, human rights, the principle of self-determination

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