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Does Self-Determination Entail an Automatic Right to Secession?

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Despite the centrality that states undoubtedly have in international relations, in particular in the formation and evolving practice of the international legal order, the dynamics of state birth and extinction remain mostly unregulated by law – hence generating confusion and contradictions among different cases. Contemporary public international law enumerates at least two seemingly contrasting concepts that govern these phenomena: the principles of self-determination and territorial integrity.

In theory, '[b]y virtue of […] self-determination […] all peoples always have the right […] to determine, when and as they wish, their internal and external political status'.[1] One may infer that 'all peoples', whose definition remains vague to say the least, can refer to this notion in order to secede from their patron state and create a new state entity.[2] We will refer to secession, to differentiate it from devolution, as an act aimed at creating a new independent state from territory originally part of another one, stressing the lack of consent from the former sovereign.[3] However, secession in the case of self-determination (which would be referred to as 'external') should be regarded as an *ultimum remedium*, since the principle can manifest itself in two different paths.

Besides, to counterbalance the potentially destabilising effect that external self-determination might have on the international order, international law also comprises the principle of territorial integrity, which basically concerns continuity of borders for sovereign states, preventing them from being deprived of their "territorial wholeness".[4] The norm is closely related to the doctrine of *uti possidetis juris*, which in modern times has been associated with the reaffirmation of colonial boundaries after former colonies achieved independence.[5]

This paper demonstrates that in order to reconcile these two notions, international law has evolved in a way that focused on preventing conflicts over territory, rather than giving primacy to other claims that would seem legitimate in the light of human rights and minority contexts. As a consequence, the principle of territorial integrity has often (albeit not always) been placed above that of external self-determination, especially since the general interpretation of the latter, through state practice and codification from international organisations, remained confined to the context of the post-WWII decolonisation process. Hence, beyond cases of decolonisation, self-determination has not automatically provided peoples with a right to secession.

In spite of this, international law has to be seen as a process in constant evolution, and the aftermaths of the dissolutions of the Union of Soviet Socialist Republics (USSR) and Socialist Federal Republic of Yugoslavia (SFRY) brought renewed interest in the issue. Some authors have revisited the relationship between the two notions, suggesting that the scope of self-determination could be expanded to cases beyond decolonisation – when international supervision is granted or gross and systematic violations of human rights occur. The Kosovo case, notwithstanding the evident contradictions that were involved, can be interpreted as a result of this approach, and despite its being defined as a *sui generis* event, it can have the effect of fuelling future claims from other groups.

Some Underlying Concepts and Caveats

The right to self-determination, notwithstanding a persistent ineffable aura, can manifest itself in two different forms:

an internal one (often associated with human rights and democratic values), in which peoples' rights are recognised within an independent state, or an external one, meaning either devolution or secession.[6] One important caveat is that international instruments avoid detailing which 'peoples' have a right to self-determination and which form they qualify for. Are these entities the population of a territory as a whole, minorities, indigenous peoples, or ethnic groups? So far, it is sufficient to notice that apart from whom is entitled to the right, also how to distinguish these terms can be controversial.[7]

The aim of a people seceding via self-determination is to establish a new state entity. A huge debate surrounding state creation and its nature still divides scholars between constitutivists and declaratorists, but what unites them is the attention devoted to the act of recognition.[8] Even if the 1933 Montevideo Convention identified the characteristics that states should possess to be defined as such, the list provides *necessary* but not *sufficient* statehood criteria. These include a permanent population, defined territory, a government, and the capacity to enter into relations with other states.[9] It is evident that recognition (especially from powerful international community members), a clearly political act, has proved to be decisive in certain situations, and even viability can possibly be considered an additional criteria.[10] If we accept the declaratory theory – namely that statehood is determined by facts and not by recognition – it becomes hard to deny *de facto* states like Taiwan or Somaliland membership in the community of states. Besides, any people seriously committed to secession, including the Basques and Chechens, could aspire to such a status.

Another problem is that, given the absence of *terrae nullius* – territories unoccupied and unacquired – seceding entities can obtain the second feature of the Montevideo Convention only by infringing two peremptory norms of international law, namely the prohibition on the use of force and territorial integrity.[11] This most certainly has a correlation with the pervasiveness and resilience of anti-secessionist positions among states.

Self-Determination: Origins and Its Decolonisation Interpretation

As we briefly mentioned before, self-determination today is a concept that has gained full legal normative status. A whole series of treaties, declarations, and judicial decisions contribute to make self-determination a norm of international law. Most importantly, states' conduct has demonstrated the legal relevance of the principle, reinforcing the element of *opinio juris*. Borrowing the words of Cassese, self-determination means that '[p]eoples must be enabled freely to express their wishes in matter concerning their conditions'.[12]

Self-determination, as a political aspiration, began to be discussed after the Great War (mainly sponsored by US President Wilson), but it failed to become generally accepted as a legal norm; as a matter of fact, during the Aaland Islands case, it was clearly defined as a 'purely political concept'. It was only with the establishment of the United Nations (UN) that the notion became more prominent, firstly with the inclusion in the UN Charter, and subsequently via states' practice.[13]

Definitions of the principle – serving also as a law-creation steps – comprise United Nations General Assembly (UNGA) Resolution 1514 (XV), the 1966 International Covenants on Human Rights, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 1975 Helsinki Accords Final Act, and 1993 Vienna Conference on Human Rights.[14] Even the International Court of Justice (ICJ) was repeatedly involved in the discussions, confirming the ranking of self-determination as a new norm of international law – affording it also an *erga omnes* character.[15]

But all these references, however important and visionary, fail to be precise in defining the scope and application of the right, and taken outside their context become rather misleading (especially if compared to how they translated in reality). The debate surrounding the Colonial Declaration, for instance, was particularly important for creating an intimate association between self-determination and decolonisation; similarly, the Declaration of 1970 affirmed that in their seeking independence, 'trusts and non-self-governing territories' had to respect 'national unity and territorial integrity of a country'.[15] Even the ICJ contributed to reinforcing the link: in 1971, the Court suggested that the principle was applicable 'to all […] non-self-governing territories', and later in 1975 re-endorsed this limited interpretation.[16] All these elements, in sum, contributed to the crystallization of the principle into a 'western-European

decolonisation rule' – apparently opposing secession in general. The interpretation functioned to prevent every dissatisfied minority group from disrupting states' territorial integrity.[17]

For instance, UN resolutions concerning self-determination in East Timor – which resulted in the birth of the independent state of Timor-Leste in 2002 – continued to focus on the link that the territory had with the former colonial power (Portugal), the 'administering [p]ower', rather than the actual occupier, Indonesia.[18] Indeed, if East Timor had to gain independence from Indonesia, it would have been a 'new form of decolonisation' – one that Russia or China, Permanent 5 (P-5) members with veto power over the UN, would have hardly endorsed. Their own disputes with minorities from Chechnya, Tibet, or Xinjiang were powerful reasons to endorse Timorese independence, only when a clear differentiation between the case and their domestic ones was made.[19]

Nevertheless, Western Sahara shows how difficult it may be to assert the right to self-determination even in the context of 'traditional' decolonisation. The ICJ considered the territory 'occupied' by Spain in the nineteenth century, judging in addition the Moroccan and Mauritanian sovereignty claims to it insufficient (despite arising from some 'unclear legal relations'). In spite of this, the result of the decolonisation process was not that of granting full independence to the Sahrawi Arab Democratic Republic (founded by the Polisario liberation movement in 1976), but a deadlock stemming from failed tentatives to either accomplish annexation – by both Mauritania and Morocco – or establish a referendum.[20] The actual conundrum is the result of contrasting interests at both international and local levels: the international community, which supported the implementation of the legal principle, proved to be not determined enough to overcome the resistance of conflicting regional parties, and ultimately enforcement failed to materialise.[21]

Beyond Decolonisation? Human Rights and 'Remedial Secession'

The aforementioned international instruments suggest that, in principle, self-determination extends beyond the colonial context – at least in its internal form. This remains true irrespective of the huge limitation on secession that the principle of territorial integrity entails. A more controversial question is whether secession would be lawful in circumstances where a state denies the internal form of the right to a people – violating their fundamental human rights.

The global context is assisting an evolution in conflict dynamics, shifting from being primarily state-to-state towards being within states: self-determination, in large-scale conflicts, has often been one of the main issues. In this particular environment, law and justice have gradually become more converging, and the theory of 'remedial secession' began to gain ground. Secession as a 'remedial right' fundamentally restricts the scope of external self-determination to being a last resort measure for those groups that witness serious, persistent injustices.[22] Although existing at least since the writings of Grotius, remedial secession was reaffirmed – albeit with a twisted language – in UNGA Resolution 2625 (XXV) and in the 1993 Vienna Declaration; it is also partly supported by judicial practice, and widely advocated by prominent authors.[23]

The Kosovo case was a major turning point for the theory: after Kosovo's unilateral declaration of independence in 2008, the UNGA brought the issue before the Court enquiring whether the tentative secession was in accordance with international law.[25] Even if the ICJ avoided elaborating specifically on the subject of remedial secession, it was affirmed that international law does 'not preclude [Kosovo's] declaration of independence', indirectly raising Kosovo's diplomatic standing.[24] Indeed, remedial secession was the main legal argument put forward by the states supporting the move (led by the US and UK, among others).[25] The real issue before the Court, though, should have been the legality of international support to the unilateral declaration, rather than that of UDIs (Unilateral Declaration of Independence) in general. Russia, which stated not to disagree with the notion in principle (as an *ultimum remedium*), suggested that after 1999 – when international administration was enforced through UN Security Council (UNSC) Resolution 1244 – Kosovar-Albanians were no longer in 'extreme circumstances' that required their secession; it added that since 1999, Serbia has been granting the Kosovar minority a good degree of autonomy under the Constitutional framework, and has stopped threatening or using violence against them.[26] It is evident that states practice reflected whether or not national interests were at stake, since those that opposed secession were often the same ones worried by secessionist movements at home (Spain and Cyprus, *inter alia*).[27]

An interesting spillover happened just few months later in the regions of South Ossetia and Abkhazia, when a Georgian unwise military offensive in its autonomous regions – protected by Russian peacekeepers – was carried out. The outcome was the expulsion of Georgian forces, followed by Russian (and few more states') recognition of the two as independent states.[28] The declared intention of seeing Kosovo as a unique case, apparently, was not powerful enough to prevent these peoples' hopes from awakening. The parallelism is particularly relevant, since both autonomous regions share some common constitutional and historical grounds with Kosovo. Besides, it is evident that Russia, to justify recognition, has undertaken the way of remedial secession theory – albeit stressing some supposed uniqueness that differentiate Abkhazia and South Ossetia from Kosovo.[29] Whether the inhabitants of these two regions were in 'more extreme situations' than those of Kosovo is at least controversial; what is less hard to say is that even in this case, *realpolitik* finally had the upper hand.

Conclusions

There is a fragile balance between the principles of territorial integrity and self-determination, and careful considerations are needed before applying them to international affairs. Dismissing self-determination in too simplistic terms – as it was often done before Kosovo, to preserve territorial integrity – generated great and widespread unfairness. In spite of its being a well-established norm of international law, self-determination, outside the decolonisation context, has been largely sacrificed in favour of territorial integrity; in addition, even within decolonisation, many of the existing borders still do not consider ethnic or tribal realities (especially in Africa). State practice before the 2000s made external self-determination almost like a single, unrepeatable moment in time.[30]

On the one hand, that depended on an understandable fear of potential chaos that could arise in the international system; on the other hand, it was due to diverging states' interests, which exploited the vagueness surrounding more basic concepts such as 'statehood' or 'peoples'.

To best interpret different outcomes in cases of external self-determination (Western Sahara *vis-à-vis* Timor Leste, or Kosovo versus Abkhazia, for instance), it is necessary to fully understand the interplay between international law and international politics. Political considerations have often prevailed over precedent and principle, and as a consequence, today self-determination remains a rather vague principle of international law, instead of a more specific and precise rule.[31] To successfully overcome the justice-interests divide, the international community should be willing to undertake a more decisive shift towards solidarist stances, which would in turn generate greater coherence in interpreting self-determination in its external form. Remedial secession theory provides the starting ground for such a prospect. Nevertheless, as of today, it remains at least a long-term objective.

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