

Is There a Right to Secession in International Law?

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MIA ABEL, MAY 18 2020

The right to self-determination amounting in secession can easily be considered one of the most controversial principles of international law. It has been the subject of much debate throughout the 20th and 21st centuries and has governed a large amount of the changing state relations within this period, particularly during decolonisation. There are currently only seventeen non-governing territories globally which are left to assert their right to self-determination and become decolonised, yet the right is still a highly relevant and frequently discussed element of international law.[1] This is largely due to the development of the principle of remedial secession, which has sought to apply the right to secessionist self-determination outside of colonial contexts, in cases where territorial minority ethnic groups have faced structural discrimination and severe violations of fundamental human rights. The purpose of this essay is to explore the question; can the principle of self-determination encompass a right to secession? Particularly, has a right to 'remedial' secession emerged in recent international law? This is a complex legal issue, not all of which can be analysed here. However, this essay attempts to give an analytic overview of the extent to which a right to remedial secession has developed in international law and the impact of this. It will be argued that, there is minimal and conflicting evidence in regard to the application of this principle in practice, requiring urgent consolidation from the International Court of Justice.

The quintessential definition of self-determination is having control over one's own life. When applied politically this relates to the power of the people of a nation to decide how it is governed.[2] The phrase was first used in this way by President Wilson at the Versailles Peace Conference, regarding which his Secretary of State Robert Lansing warned, 'the phrase is loaded with dynamite. It will raise hopes that can never be realised'.[3] This is expressed as true by many scholars, as it is accepted that the principle is, 'attractive so long as it has not been attained', as this essay will seek to prove.[4] It is worth noting that this principle is always to be applied in conjunction with the Montevideo Criteria,[5] which although was never ratified, has become a jus cogens norm for determining whether or not a territorial entity can be considered a state.[6]

The Principle of Self-Determination in International Law

The principle of self-determination is one that has undergone many changes in its political and legal meaning over the last century. The first international legal case to be heard regarding self-determination was the *Aaland Islands* case of 1920. The archipelago brought the case to the Council of the League of Nations to enquire whether the citizens of Aaland could assert their self-determination and return from Finland to the Kingdom of Sweden.[7] The Council held that, 'Positive international law does not recognise the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish'.[8] Therefore, the right to self-determination was not considered to amount to a right to secession. The Charter of the United Nations came into force in 1945, in which Article 1 includes reference to self-determination.[9] This meant, for the first time, self-determination was recognised in an official international legal document, affirming that it was an existing right. However, the lack of definition and detail as to what self-determination entails provided in the Charter left little ability for the right to be applied, particularly in relation to secession. But, the 1966 International Covenants transformed that, by providing a substantive definition about what is encompassed in the right to self-determination; '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'.[10] This therefore incorporated self-determination as a human right, however this incorporation was not intended to provide a right to individuals, but rather to peoples.[11] The main purpose of granting this right was to provide a meaningful vehicle for decolonisation. Between 1945 and 1970 fifty-five states had become independent through the application of self-determination, displaying the value of the principle in this context. This intended use was also clearly displayed in

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the *Namibia* case, in which the ICJ held that the right to self-determination had become applicable to non-self-governing territories, making South Africa's presence in Namibia illegal under international law.[12] Decolonisation had therefore been the prime purpose of the advancement of a right to self-determination amounting to secession. Yet, as countries increasingly utilised the principle and became post-colonial states, the international community became increasingly wary of the ramifications of self-determination amounting to secession being considered a right in a post-colonial world.

Self-determination began to be referred to once more not as a right but simply as a principle, implying its limited applicability outside of colonial situations.[13] This was only furthered by the development of the customary principle of *uti possideits*, which serves to protect the boundaries of emerging states from further secession. It was acknowledged in the *Frontier Dispute* case that this is, 'a general principle, which is logically connected with the phenomenon of independence wherever it occurs', suggesting the ICJ's priority outside of colonial circumstances is the preservation of borders, not the application of secessionist self-determination.[14] There are obvious reasons for this limitation of self-determination as a right, as stated by the UN, 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and well-being for all would become even more difficult to achieve'.[15] The verdict of the Canadian Supreme Court in the *Quebec* case brought a valuable new legal definition to the principle of self-determination, as the Court legally distinguished between 'internal' and 'external' self-determination, and the different rights each term entails.[16] Although the case was not heard in the ICJ, and the Court acknowledged, 'it remains unclear whether this actually reflects an established international law standard', this case implied that the principle of self-determination can still encompass a right to secession.[17] This helped to encourage the development of arguments in favour of a right to secession in 'extreme' cases, which will be explored in the next sections.

The Arguments in Favour of Remedial Secession

Remedial secession began to be seriously discussed in the 1990s, as an increase in ethnic conflicts made academic commentators consider that there was a need to provide those who face an extreme denial of internal self-determination with the ability to exercise a right external self-determination.[18] It is well accepted by international lawyers and academics that unilateral secession is a legally neutral act; it is neither expressly accepted nor prohibited by international law, hence why the doctrine of remedial secession has been able to develop.[19] In the *Aaland Islands* case it was held that, 'the separation of a minority from the state can only be considered an altogether exceptional solution, a last resort where a state lack either the will or the power to enact and apply just and effective guarantees'.[20] The lack of specificity in this statement has led scholars to interpret it to apply not only in colonial situations, but also in those of other extreme denials of internal self-determination. This has only been furthered by other ambiguous pieces of international legislation, such as the Helsinki Final Act, which states, 'all people always have the right, in full freedom, when and as they wish, to determine their internal and external political status', but that this should be exercised with regard to the territorial integrity of states.[21] Scholars have therefore argued that where a state fails to provide, 'government representing the whole people belonging to a territory without distinction as to race, creed or colour',[22] as required under international law, it cannot invoke the principle of territorial integrity to limit peoples' right to self-determination.[23] This therefore suggests, that where a territorial group within a state is denied meaningful access to self-determination, it can assert a right to self-determination externally, through secession from that state.[24] This has been enhanced by recent legal judgements, particularly in the 1990s, as courts paid increasing attention to the developing concept in their judgements, most notably in the *Quebec* case. Significantly, the Court held that, 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession'.[25] This was also upheld in Judge Yusuf's dissenting opinion in the *Kosovo* case, in which he considered that, 'under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood'.[26] Accordingly, there can be considered to be strong international legal opinion believing that the right to secession based upon the right to self-determination is applicable beyond cases of colonial rule, in circumstances considered to amount to being 'exceptional'.

Other than recognising that self-determination has an *erga omnes* character, [27] as stated earlier there has been no actual ICJ judgements to provide definitive guidelines on self-determination in contexts outside of colonialism.

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Therefore the definition of what is meant by 'exceptional' circumstances is still unclear. In the case of *Loizidou v Turkey* it was held that the right to self-determination through secession would be available where, 'human rights are consistently and flagrantly violated or if they are without representation at all or are massively under representative in an undemocratic and discriminatory way'.^[28] This was also followed in Judge Yusuf's opinion in which he cited the requirement of ethnic or racial persecution, denial of access to autonomous government and the exhaustion of all other possible remedies.^[29] Currently 64 states have recognised Kosovo as an independent state. In recognition, it appears states have taken into account this criterion for remedial secession in their justification, most notably both the US and UK referred to human rights abuses and the exhaustion of negotiations with Serbia.^[30] This implies an application of the principle in practice, however this is the only example and it has not amounted to actual secession nor the formulation of a new state of Kosovo, highlighting the struggle with applying remedial secession in practice.

Remedial Secession in Practice

The evidence of the application of remedial secession in practice is limited and inconsistent at best, only further muddying the waters in regard to whether or not the right can be considered to exist. It appears that there is still a reluctance to actually apply the principle, due to the lack of clarity surrounding its implications on the principle of territorial integrity. As Klabbers stated, 'there is a strong but telling discrepancy between the alleged existence of the right in concrete situations and its execution in those same situations'.^[31] The *Kosovo Opinion* was an ideal opportunity for the ICJ to address the issue and clarify the true position of remedial secession and self-determination in international law, however if anything, it made the doctrine even more unclear. Kosovo is an ideal candidate for the doctrine of remedial secession, if it is considered to exist. The nation satisfies the Montevideo Criteria, as it has a permanent population of Kosovar Albanians, who speak their own dialect,^[32] and it comprises of a defined administrative unit within Serbia, particularly since being placed under the administration of the UN in 1999.^[33] Furthermore, the breakdown of the Federal Republic of Yugoslavia (SFRY) was accompanied by widespread ethnic cleansing of the Kosovar Albanian people at the hands of the now Serbian State.^[34] The breakdown of SFRY was controversial for many areas of international law, but early recognition of Croatia and Bosnia-Herzegovina by EU Member States raised many issues for self-determination,^[35] and has been criticised for advocating the protection of minorities and failing to take into account the standard criteria for independence, notably, effective control of territory.^[36] The confusing reasoning behind recognition from other states has made it unclear why Kosovo is not deserving of the same status and protection.^[37] In the *Kosovo Opinion*, 14 states asserted that a right to remedial secession exists, 14 denied and 25 were neutral on the matter.^[38] Yet the Court still chose not to address the issue, stating it, 'considers that it is not necessary to resolve these questions in the present case', instead focussing on the legality of the independence declaration.^[39] Two judges released separate opinions addressing the issue and considering that a potential right to remedial secession could exist, as evidenced above, serving only to further confuse the legality of remedial secession and leaving Kosovo in limbo as to its status.

The ICJ's failure to clarify in *Kosovo* has only served to create further confusion in other case studies of attempted unilateral secession, most notably, the situation in Crimea. The circumstances in the Crimean Peninsula have arguably only presented a manipulation of the doctrine, due to the ambiguity surrounding the legal position of a right to remedial, unilateral secession.^[40] 'Little green man' began invading key areas of Crimea in 2014, including airports, military bases and the Supreme Council, where a pro-Russian Prime Minister was installed.^[41] These were later admitted to be Russian troops, in violation of the international legal principle of territorial integrity.^[42] A referendum was then held; 95.5% voted in favour of Crimea joining Russia and an agreement was formally signed by President Putin and Crimean Representatives on March 18th 2014.^[43] Russia justified this action in the Security Council by stating that there had been, 'threats of violence by ultranationalists against the security, lives and legitimate interests of Russian and all Russian-speaking people'.^[44] This suggests a clear use of the principles, or lack thereof, of remedial secession stemming from the *Kosovo* judgement and the surrounding circumstances. However, there is no evidence to support Russia's claims of issues for Crimean Russians in exercising internal self-determination. Moreover, there have been increasing reports of a worsening human rights situation in Crimea post-Russian intervention.^[45] Russia has no *opinio juris* in supporting remedial secession for groups who suffer severe discrimination and lack of access to internal self-determination, due to its substantial

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human rights violations during the attempted unilateral secession of Chechnya in the 1990s.[46] It is clear from this case study that there is a serious need for clarification from the ICJ in regard to the application of remedial secession in practice, to prevent further abuses of the principle and ensure it is truly being used for the protection and advancement of the human rights of minorities, or not used at all.

Another case which highlights the current issues with self-determination and remedial secession in practice is Palestine. There are much wider issues taking place with the Israel-Palestine conflict, however the self-determination of the Palestinian people is important to discuss. In 2004 the General Assembly requested an advisory opinion from the ICJ in regard to Israel building a wall in and around the city of Jerusalem.[47] In this case the Court stated, 'As regards to the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian People' is no longer an issue...[the rights of the Palestinian People] include the right to self-determination'.[48] However, the Court failed to assert what this right entails, and to what extent Palestinian people can assert this right. Despite human rights abuses spanning over half-a-decade, no right to remedial secession has been extended to Palestine and its legal status remains entirely unclear.[49] Palestine is currently recognised by 137 states,[50] and was granted non-member observer state status to the UN in 2012.[51] It has also recently instituted proceedings in the ICJ against the United States of America over its decision to move its Israeli embassy to Jerusalem, which is still highly contested territory.[52] This evidence has suggested that Palestine can be considered a de facto state, however this is still strongly contested, and the new proceedings in the ICJ are an opportunity to clarify the true status of Palestine, and how this has arisen.

Reform

The current issues with the application of remedial secession in practice highlight the flaws in the special nature of the international legal system, in particular the lack of a central authority which can confirm the correct or incorrect assertion of a rule.[53] Clarification on the principle from the ICJ is clearly desperately needed to determine whether or not the principle is to become solidified in international law. The current ambiguity is resulting in a lack of state action in some crucial case studies and is forcing the decision to recognise and support secession to be based on politics, rather than the law. The fact that Kosovo provides the only case in which recognition has had a basis in the principles of remedial secession is demonstrative of this, as 'Western' actors were heavily involved in the breakdown of SFRY and ultimately sought to defend their own breach of territorial integrity which occurred with the NATO intervention in 1999.[54] The current political nature of secession is further emphasised by examples such as Somaliland, which has still failed to gain recognition from any state, despite evidence of genocide, [55] and the fact that the last government of Somalia fled in 1991 meaning there is no conflict with territorial integrity.[56] It clearly satisfies the Montevideo Criteria and can be described as a de facto state, [57] yet its ability to participate in international governance is drastically limited by its lack of formal status, implying that the doctrine currently only applies as and when 'Western' actors wish.

Further clarity is also needed to deal with issues which have become of greater international concern in the 21st Century, such as terrorism. The ICJ needs to provide a solid legal position to assert the difference between terrorist groups and rightful secessionist entities, particularly in war-torn areas. Kurdistan is a prime example of this, as in 2017 the Kurdish population in Iraq voted overwhelmingly in favour of secession in a referendum.[58] This has led to an increase in hostilities and violence between Kurdish forces and Iraq and Turkey, who describe them as a, 'terrorist organisation'.[59] It is vital to be able to properly distinguish between terrorism and the right to secessionist self-determination in order to prevent further violence between states and minority groups. As Nanda stated the, 'difficulty of giving effect to the concept of self-determination is illustrated by the heeded claims of many minority and indigenous groups on the ground that their identity is not being protected by the State'.[60] It is clear that in current international law, there needs to be an emphasis on upholding the right to internal self-determination, as democracy and respect for all human rights is ultimately the most peaceful and practical way of resolving secessionist claims. However, if the ICJ does decide to affirm that a right to remedial secession has come to exist, this must be applied with clear, restrictive guidelines to ensure it cannot be manipulated nor too readily utilised, which would destabilise the entire international legal system.

Conclusion

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The principle of self-determination, particularly the right to remedial secession, is still a much-debated topic in international law. Its development from a colonial to post-colonial doctrine has been highly controversial for many states, scholars and international lawyers alike. The lack of recent ICJ opinion and judgement on the matter has only served to add further confusion to the principle, and there is a pressing need for the Court to resolve this before its ambiguous interpretation impacts further on the international legal system. Focus on the forwarding of democracy and human rights in all states, for all peoples, of all territories is the best antidote to secession. It will help to provide the internal self-determination people need, but also the stability required for the international legal system to flourish. In an increasingly globalised world, it is key now more than ever to ensure cooperation for all peoples to prevent further destructive conflict.

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[2] See Collins Online Dictionary < <https://dictionary.cambridge.org/dictionary/english/self-determination>> accessed 27th December 2019

[3] Robert Lansing, 'The Peace Narratives' (1921) Quoted in Ved P Nanda, 'Self-Determination and Secession under International Law' (2001) 29 Denv J Int'l L & Pol'y 305, 307

[4] Antonio Cassese, 'Self-Determination of Peoples: A Legal Reappraisal' (Cambridge University Press, 1995)

[5] *Montevideo Convention on the Rights and Duties of States* (1933) Article 1 states: 'The state as a person of international law should possess the following qualities;

1. A permanent population
2. A defined territory
3. A government
4. Capacity to enter into relations with other states'

[6] Jus cogens norms are defined in the Vienna Convention as, 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted'. *Vienna Convention on the Law of Treaties* (1969) Art.53

[7] *The Question of the Aaland Islands: Report of the Commission of Jurists*, (1920) League of Nations Official Journal Spec Supp 3 [3]

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[9] United Nations, *Charter of the United Nations* (24th October 1945) 1 UNTS XVI, Art. 1(2) states that the purposes of the organisation are, 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

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[14] *Frontier Dispute Case* [1986] ICJ Reports 554 [20]

[15] 'An Agenda for Peace', UN Doc. A/47/277 [5]

[16] 'The recognised sources of international law establish that a right to self-determination of a people is normally fulfilled through *internal* self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.' – *Reference re Secession of Quebec* [1998] 2 SCR 217 [126]

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[37] Koskenniemi considers the use of recognition in the breakdown of SFRY as a, 'tragic mistake', and that this case study should therefore not serve as a precedent for the correct application of international law – Martti Koskenniemi, *National Self-determination Today: Problems of International Legal Theory and Practice* [1994] *International and Comparative Law Quarterly* 43(2), 268. See also James Crawford, *The Creation of States in International Law* (OUP 2006) 387

[38] Marko Milanovic, 'A Footnote on Secession' (2017) *EJIL: Talk!* < <https://www.ejiltalk.org/a-footnote-on-secession/> accessed 10th December 2019

[39] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)* [2010] *ICGJ* 423 [82]

[40] Russia itself stated in the Kosovo case that, 'all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existing state' and that remedial secession should only be utilised in a case of, 'an outright armed attack by the parent state, threatening the very existence of the people in question' yet its actions in Crimea have entirely contradicted this stance – *Ibid (Statement from the Russian Federation)* [88]

[41] Simone F. van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' [2015] *Neth Int Law Rev* 62, 333

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