

RESOLUTION OF CLAIMS TO SELF- DETERMINATION: THE EXPANSION AND CREATION OF DISPUTE SETTLEMENT MECHANISMS

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I. INTRODUCTION

My task is three fold. I shall first give a very brief introduction to the topic of self-determination within the general jurisprudence of the proliferation of international dispute settlement mechanisms. Next, I shall explore why this proliferation of fora has not occurred for settling claims to self-determination. Finally, I want to suggest a particular mechanism for the settlement of self-determination claims that may, in the long term, prove successful.

II. SELF-DETERMINATION

Much, perhaps too much, has been written about the topic of self-determination. We have moved from Woodrow Wilson's pronouncement at the conference to confirm the Treaty of Versailles¹ on through tomes of scholarship on the definition of who, or which groups, have a right to claim self-determination,² to

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1. Full text of Treaty of Versailles, June 28, 1919 (including original text of each of the 440 treaty articles), Department of History at the University of San Diego, at http://history.acusd.edu/gen/text/versailles_treaty/vercontents.html (last visited Mar. 16, 2004). See also EDWARD MANDELL, WHAT REALLY HAPPENED AT PARIS: THE STORY OF THE PEACE CONFERENCE, 1918-1919, 407 (Charles E. Merrill ed. 1921) and NATIONAL SELF-DETERMINATION AND SECESSION 2-3 (Margaret Moore, ed., Oxford Univ. 1998).

2. See generally NATIONAL SELF-DETERMINATION AND SECESSION (Margaret Moore ed., Oxford Univ. 1998); see also Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AMER. J. INT'L. L. 590 (1996).

long discussions on the content of the right.³ Internal and external self-determination,⁴ measures of autonomy versus secession⁵ have all been extensively canvassed. The only principles that can be asserted with any confidence in this area are that colonial peoples,⁶ and peoples living under foreign occupation,⁷ have a right to rule themselves. Beyond that, all is political will, supported sometimes by sections of world opinion. That there have been successful claims to self-determination,⁸ even secession,⁹ which represents the far end of the self-determination graph has not done much to move any part of the norm toward acceptance, except the colonial or foreign occupation rule. East Timor fought a bloody war and gained independence from Indonesia.¹⁰ Eritrea has fought several bloody wars with Ethiopia and has gained independence,¹¹ but Biafra was not successful in gaining independence from Nigeria despite thousands of deaths.¹² Dozens of other groups dare not raise their claims.

In spite of all of the accumulated scholarship, groups that claim self-determination have very few fora in which to present their claims. War is often the only alternative. The Supreme Court of Canada did render a thoughtful judgment on the legality of Quebec's claim to secession but that decision was only what the Canadians call a reference opinion, and what we would call an advisory opinion, rendered after a request by the Canadian authorities.¹³ The purpose of this panel is to examine possible fora and mechanisms for resolving

3. For history and content of right of self-determination, see DOV RONEN, *THE QUEST FOR SELF-DETERMINATION*, 1-70 (Yale Univ. Press 1979).

4. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 590 (1991).

5. Pierre Bienvenu, *Secession By Constitutional Means: The Decision of the Supreme Court of Canada in the Quebec Secession Reference*, 23 HAMLIN J. PUB. L. & POL'Y 185 (2001).

6. REFERENCE RE: SECESSION OF QUEBEC, [1998] 2 S.C.R. 217.

7. Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AM. J. INT'L L. 364, 365 (2003); see generally Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

8. Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT'L L. 455 (2001).

9. JORGE M. VALADEZ, *DELIBERATIVE DEMOCRACY: POLITICAL LEGITIMACY AND SELF-DETERMINATION IN MULTICULTURAL SOCIETIES* 211 (Westview Press 2000).

10. Richard Falk, *The East Timor Ordeal: International Law and Its Limits*, 32 BULLETIN OF CONCERNED ASIAN SCHOLARS 49 (2000).

11. WILLIAM ZARTMAN, *ELUSIVE PEACE: NEGOTIATING AN END TO CIVIL WARS* 103 (Brookings Institution 1995).

12. Thomas D. Grant, *East Timor, the U.N. System and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 33 (2000); JAMES D.D. SMITH, *STOPPING WARS: DEFINING THE OBSTACLES TO CEASE-FIRE* 44-47 (Westview Press 1995).

13. REFERENCE RE: SECESSION OF QUEBEC, [1998] 2 S.C.R. 217; see also Pierre Bienvenu, *Secession By Constitutional Means: The Decision of the Supreme Court of Canada in the Quebec Secession Reference*, 23 HAMLIN J. PUB. L. & POL'Y 185 (2001).

claims to self-determination, short of war. I think it is not unreasonable to suppose that, for example, if the Kosovars had been able to present their claims to self-determination in a recognized settlement mechanism, perhaps only at the level of the restoration of the autonomy they had previously enjoyed, such a process may have prevented the bloody conflict in Serbia/Montenegro/Kosovo.¹⁴ If that supposition is true, and could reasonably be expected to be replicated many times over for other self-determination claims, finding settlement fora becomes an enterprise of huge and worthwhile consequences.

III. PROLIFERATION OF INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS

There has been much scholarship on the proliferation of international dispute settlement mechanisms. I refer to the numerous books, periodical articles, and studies that address the phenomenon of the recent proliferation of international courts and other international dispute settlement mechanisms.¹⁵ There is a wonderful two-volume book, now in its second edition, published by the Max-Planck Institute called *Dispute Settlement in Public International Law*, written by Karin Oellers-Frahm and Andreas Zimmermann.¹⁶ These two volumes set out to provide a comprehensive account of all the available dispute settlement mechanisms for interstate disputes. The book also contains all of the relevant instruments creating the settlement mechanisms. The mechanisms described range from the weakest systems, such as a reporting obligation, to the most formal, such as a full-fledged court, and everything in between. The table of contents alone runs to eighteen pages. Another good source for viewing the developments in this area can be found at the web site of the Project on International Courts and Tribunals put out by New York University.¹⁷

The scholarship addressing the proliferation of international dispute settlement fora falls into several categories. The international relations scholarship tends to ask why these new institutions have been thrown up at this particular time. They develop a theory of legal and institutional change and try to fit the phenomenon with the framework of a theory of change.¹⁸

14. ANDREW J. BACEVICH, *WAR OVER KOSOVO: POLITICS AND STRATEGY IN A GLOBAL AGE* (Columbia Univ. Press 2001); see generally Timothy Crawford, *Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement Failed*, 116 POL. SCI. Q. 499 (2001).

15. See generally D.A. Mundis, *Current Developments At the Ad Hoc International Criminal Tribunals*, 1 J. INT'L. CRIM. JUSTICE 197 (2003); S. de Bertodano, *Current Developments in Internationalized Courts*, 1 J. INT'L. CRIM. JUSTICE 226 (2003); see also Rosalyn Higgins, *The ICJ, ECJ, and the Integrity of International Law*, 51 INT'L & COMP. L.Q. 1 (2003).

16. *DISPUTE SETTLEMENT IN PUBLIC INT'L LAW* (Vol. I and II) (Karin Oellers-Frahm & Andreas Zimmermann eds., Springer 2d ed. 2001).

17. Project on International Courts and Tribunals, New York University, at <http://www.pict-pecti.org> (last visited Mar. 16, 2004).

18. See generally Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

The legal scholarship tends to be either descriptive, that is, it details, sometimes *ad nauseam*, how the particular institution was created, the scope of its remit, and the problems that may be anticipated in its operations.¹⁹ Sometimes the legal scholarship is anxious about the complications of too many fora.²⁰ Where these two lines of scholarship, international relations and international law come together is where they ask what effect the proliferation phenomenon will have on the theoretical framework of their particular discipline. Here the general and common theme has been the demise of the state-centered sovereignty system.²¹ The frequently observed exponential rise in transnational movement of peoples, goods, and services has resulted in both the inability of purely national institutions to accommodate such transnational activity and has exposed the limits of a separate sovereignty system. The creation of institutions to deal with transnational activity is seen as a direct functional outgrowth of the movement and communications revolution.²²

At this point, the scholarship settles down into three main categories. First, there are the zealous internationalists who welcome the creation of virtually any new international institution with joy, see it as one more step on the road to global governance and are entirely happy with the nails being driven into the coffin of sovereignty.²³ At the other end of the spectrum are the die-hard nationalists, who resist all new international regimes, whether in the form of multi-lateral treaties, such as the Kyoto Protocol,²⁴ or the establishment of new institutions, such as the International Criminal Court.²⁵ This group tends to come from those who live in economically and militarily powerful states and for whom the old state sovereignty system meant "winning." This group rightly understands that the creation of international mechanisms that its country does not (either entirely or perhaps even partially) control means the end of its

19. VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (two volumes) (Transnational Publishers Inc. 1995).

20. See generally Naomi Roht-Arriaza, *Institutions of International Justice*, 52 J. INT'L AFFAIRS 473 (1999).

21. *Id.*

22. J.M. CHAPMAN & PAUL REUTER, INTERNATIONAL INSTITUTIONS 53 (Praeger 1961); see generally Robert O. Keohane, *International Institutions: Can Interdependence Work?*, 110 FOREIGN POL. 82 (1998).

23. Rosalyn Higgins, *The ICJ, ECJ and the Integrity of International Law*, 51 INT'L & COMP. L. Q. 1, 12 (2003); Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091 (2003).

24. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Dec. 11, 1997, UNFCCC. See full text of protocol, at <http://unfccc.int/resource/docs/convkp/kpeng.html> (last visited Mar. 16, 2004).

25. Rome Statute of the International Criminal Court (ICC), at <http://www.un.org/law/icc/index.html> (last visited Mar. 16, 2004). See also DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, *supra* note 16, at 2069.

dominance over preferred outcomes to any dispute that may arise.²⁶ They write vehemently about the illegitimacy of such institutions and resist participation in such international regimes.²⁷ In the middle of these two groups, the internationalists and the nationalists, with their very different approaches towards the appropriate basis and scope of international law, are the groups I will call the “cautionaries.” They observe the phenomenon of proliferation of international settlement mechanisms but tend to concentrate on recounting the flaws of such mechanism and pointing out what these mechanisms cannot be expected to do.²⁸ On the whole, I think they represent the group that suspects they have seen the future in such institutions, but are not sure they like the future because they recognize that the old mold—the state centered system—is waning. The uncertainty of what will rise in its place troubles them.

Some areas of international law now have a choice of dispute settlement mechanisms and those mechanisms are already working well. For example, if we take continental shelf disputes: such disputes can be settled between states diplomatically, via arbitration, at the ICJ or at the International Tribunal for the Law of the Sea. In the area of international commercial dispute resolution there are a plethora of venues available.²⁹ The scholarship in this area is already well into methods for assessing preferences in terms of procedural rules, substantive rules and enforceability.³⁰

Just as I believe that law and settlement systems within a state reduce the likelihood of civil disturbances within the state, so I believe that the availability of well established and respected institutions for the settlement of international disputes, including claims to self-determination, makes it a lot less likely that we shall see wars breaking out. The issues that have settlement mechanisms in place seldom give rise to armed conflict. Because of the variety of available

26. Jed Rubenfeld, *The Two World Orders*, 27 WILSON Q. 22, 25 (2003):

Our willingness to promote and sign on to international law would be second to none—except when it came to any conventions that might require a change in U.S. domestic law or policy. The principal organs of U.S. foreign policy... emphatically resisted the idea that international law could be a means of changing internal U.S. law.

27. Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395 (1999) (quoting from Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 575 (1966) and Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665, 708-09 (1986)).

28. Jose E. Alvarez, *The New Dispute Settlers: (Half) Truth and Consequences*, 38 TEXAS INT'L L.J. 405 (2003).

29. For more detail of international commercial law and tribunals, see Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49 (2000).

30. *Id.* (quoting United Nations Convention on Contracts for the International Sale of Goods (CISG) art. 7, 19 I.L.M. 671, 672 (opened for signature Apr. 11, 1980)).

settlement mechanisms for continental self delimitation disputes, it is now much less likely that there will be wars over such disputes.

IV. CAUSES OF ARMED CONFLICT

Another favorite topic of both international relations, and lately international law, is examining the causes of war and asking whether anything reduces the likelihood of conflict. This is, of course, of crucial importance to self-determination claims because they so often result in bloodshed. The much-touted "findings" of some scholars is the observation that democracies never fight each other.³¹ These scholars have elaborate definitions of conflict and what counts as a democracy.³² Having observed this "fact," they then set about proselytizing for democracy.

Now, democratic governance usually implies a whole series of beliefs in the worth of the individual, transparency of governmental structures, various individual freedoms, and restrictions on governmental excesses all of which certainly have value in themselves, although some of the newer democracies challenge these linkages. The jury is still out on whether democracy, as such, will ultimately reduce interstate conflict particularly where some democracies seem trigger-happy in starting wars with non-democracies whenever they like. A much more convincing argument about reducing conflict is that international dispute settlement mechanisms reduce the likelihood of interstate conflict. As the availability of dispute settlement mechanisms grow, so the likelihood of conflict shrinks. Now, it may well be that such institutions are more likely to be established if the basic governmental structure of states is democratic and, if that is so, we should encourage democracy for that reason, as well as all the other reasons, but I think it takes more than mere democracy to create international settlement mechanisms.

What it takes, fundamentally, is a belief in international settlement with international rules. This means a fundamental belief that nationally cabined rules will not work. The question then arises as to why claims in certain well established areas of international law, such as self-determination, have virtually no place to be resolved in (other than inhospitable national courts) and what would be the outcome if there were some place to take such claims.

31. R.J. Rummel, *Eliminating Democide and War through an Alliance of Democracies*, 18 INT'L J. ON WORLD PEACE 55, 56-57 (2001).

32. See generally WHAT IS DEMOCRACY? (Alain Touraine & David Macey trans., Westview Press 1997); EDWARD MCWHINNEY, CONFLICT AND COMPROMISE: INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE (Holmes & Meier 1981).

V. THE LACK OF SETTLEMENT MECHANISMS FOR SELF-DETERMINATION CLAIMS

First, why is there such a dearth of settlement fora for claims to self-determination? My guess is that because claims to self-determination strike directly at the heart of the state sovereignty system, they will be among the last to find a hospitable forum for settlement. Many international issues are necessarily transnational and thus create pressure for international settlement mechanisms. Environmental concerns need to be settled internationally because environmental problems are no respecters of national borders.

One of the difficulties for peoples' claims to self-determination is that "peoples" always live within a state. Even if a people live in several states, such as the Kurds, each one of them lives within a state. Each state can then see the "problem" of self-determination as an intra-state problem, entirely within the state's domestic jurisdiction. The state exists to control and regulate the life of the people and resources within its jurisdictions. The prospect of relinquishing control over peoples and resources is the prospect of dismembering the existing state. This prospect is unwelcome to all states and their resistance to agreeing to participate in fora that may result in the loss of their very limbs is not surprising. The ultimate question here is whether territorial integrity/sovereignty trumps self-determination of peoples or vice-versa: whether we are willing to adapt our legal rules to restrain the tyranny of the majority within the state, as we do in our national system for certain subjects, or whether we will reduce claims of self-determination to the age-old law of the jungle: might is right. To ask the question should be to answer it. Will nation states allow a question they perceive as intra-national to be resolved by international standards and international institutions?

VI. CHALLENGING PROPOSAL

I want to propose what I see as the mechanism that holds out the best hope of success for providing a peaceful resolution to claims for self-determination, though I confess it is a distant dream. I refer to the drafting of a treaty defining the right of self-determination, defining to whom the right applies, and creating, within the four corners of the proposed treaty, a mandatory dispute settlement mechanism. Clearly, states would have to agree to such a treaty. That may seem unlikely at the moment. It took at least 50 years to establish the International Criminal Court. Criminal trials were seen as the prerogative of states and the whole notion of the existence of international crimes was hotly disputed. But we have to start somewhere and the treaty route may hold the most promise.