SECESSION, STAGNATION AND THE STATE-CENTERED VERSION OF INTERNATIONAL LAW

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I. RECENT SECESSION VOTES

Votes on secession are breaking out all over the globe. On Sunday, November 9, 2014, more than 80% of the Catalans who voted in the straw poll on secession voted in favor of seceding from Spain. However, the Spanish government in Madrid declared the vote to be illegal and the Constitutional Court of Spain had ordered that the vote should be suspended. The vote went ahead on an informal basis with an army of volunteers manning the polls. On September 18, 2014, an independence referendum was held in Scotland with British government approval. Those against secession won, with 53.3% voting "NO" to independence, and 44.7% voting in favor of a separate state. Similarly, Quebec has held two referenda asking voters in the Canadian province whether they should

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3. Id.
4. Id.
become a separate state or at least negotiate separate sovereignty.7 In both instances the voters rejected secession, although the second vote (held in 1995) rejected sovereignty by a very small margin.8

Do the votes in Quebec, Scotland and Catalonia represent a new, mature democratic approach to the thorny and often blood-soaked issue of secession, or are the votes representative of outlers that will never gain any traction in fostering a new legal concept of “the right to secession”? Separatist movements are not about to vanish. Currently, they span the globe from Kashmir to Chechnya, from the Uighur region of Xinjiang Province in China to Somaliland in Somalia, from the Basque region of Spain to South Ossetia and Abkhazia in Georgia, and many other places.9 Some separatist movements are successful, usually after devastating wars, as was the case with Eritrea when it successfully gained independence from Ethiopia in 1993 after a United Nations monitored referendum on independence.10 East Timor also fought Indonesia at great human and material cost, finally becoming independent in 2002, again, after a U.N. administered referendum that was initially not accepted by Indonesia.11

II. THE EVOLUTION OF THE PHRASE “SELF-DETERMINATION”

Secession as a legal concept, lies at the far end of the spectrum known as self-determination. There has been much scholarship on the evolving nature of the term “self-determination” since it was first tossed into the international arena by U.S. President Woodrow Wilson after World War I, when the victorious nations were literally carving up the rubble of the Austro-Hungarian and Ottoman Empires.12

12. President Wilson stated: “National aspirations must be respected: peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.” WOODROW WILSON, THE PUBLIC PAPERS OF WOODROW WILSON WAR AND PEACE VOLUME 1180 (Ray Stannard Baker & William E. Dodd eds. 1927).
14. Id. at 285.
15. Id. at 286.
17. U.N. Charter arts. 73(b) & 76(b).

The phrase “self-determination” has evolved, but not very far. The right of colonial peoples to govern themselves and break free from the ruling state is settled.13 The right of people subject to alien occupation or subjugation to throw off the shackles of alien rule is also settled, although few examples are ever cited. The last piece of the puzzle, however, “the right to secede” in a variety of other circumstances remains controversial. The Canadian Supreme Court has gone so far as to state that there are some commentators who assert a right to secession in another instance: “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as last resort, to exercise it [self-determination] by secession.”14 However, the Court adds that with this last category of self-determination permitting secession “it remains unclear whether this . . . proposition actually reflects an established international law standard.”15

Self-determination is mentioned twice in the U.N. Charter.16 Even though the Charter accepted the idea of colonialism when it was adopted in 1945, the articles on the Trusteeship system made it clear that the ultimate aim was to provide for self-government for the Trust administered territories at some future, undetermined date.17 The modern decolonization movement, starting with India in 1947, gathered momentum throughout the 1960s and 1970s. Now there are hardly any colonies left, with a few exceptions, such as Bermuda or The Falkland Islands/Islas Malvinas, who have had referenda rejecting independence, or where the U.N. has not been able to administer a referendum, such as the Western Sahara.18
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The term "peoples", to whom self-determination is granted by numerous General Assembly Resolutions,\(^\text{19}\) refers not merely to all the people within a state, but also to sub-groups within the larger body of citizens.\(^\text{20}\) The Canadian Supreme Court was prepared to state that "people" can be interpreted to include "only a portion of the population of an existing state."\(^\text{21}\) Much has been written on the types of distinguishing characteristics that these "peoples" need to exhibit before they can claim "self-determination." The scholarship suggests that a people needs to be distinct by virtue of such characteristics as race, ethnicity, culture, religion, language, history or tradition;\(^\text{22}\) and that the people must also have an historic claim to a portion of a state's territory.\(^\text{23}\) It should be noted, however, that practically all the U.N. declarations on self-determination culminate with a prohibition against breaking up the territorial integrity of the state.\(^\text{24}\) The Declaration on the Granting of Independence to Colonial Countries and Peoples, for example, ends by stating: "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."\(^\text{25}\)

III. THE CONTENT OF THE RIGHT TO SELF-DETERMINATION AND REMEDIAL SECESSION

Treaties also mention the right to self-determination and begin to give the term some substance. Both the International Covenant on Civil and Political Rights (ICCPR)\(^\text{26}\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^\text{27}\) mention the "right of self-

determination." Article 1 of both Covenants declares that: "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."\(^\text{28}\) The 1993 Vienna Declaration, which arose from the U.N. World Conference on Human Rights, indicated that states were not to undertake any form of discrimination with respect to its citizens and that governments must "represent the whole people belonging to the territory."\(^\text{29}\) At the same time, the idea that people had a right to participate in their governing institutions began to take hold.\(^\text{30}\) The argument was then made that if a state fails in its obligation to establish a government that represents the whole people, the requirement of maintaining the territorial integrity of the state vanishes and any sub-group credibly claiming lack of representation can then claim the remedial right to secede. Secession is seen as the remedy for the failure of the state to make good on its obligations not to discriminate and to establish a fully representative government.

The European Community had also strengthened the notion of a state's obligation to full democracy when it issued "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union."\(^\text{31}\) When Yugoslavia began to crumble in the early 1990s, Europe established a mechanism for the recognition of new states, which became known by its chairman's name as The Badinter Commission.\(^\text{32}\) The Commission had the authority to address a wide variety of issues relating to the former Yugoslavia including "[m]inority rights, use of force, border changes, the rule of law, state succession and recognition."\(^\text{33}\) The Commission issued fifteen opinions, a number of which addressed whether a constituent republic of the former Yugoslavia should be recognized as a new state. The Guidelines indicated that new entities had to be constituted "on a democratic basis."\(^\text{34}\) They also had to accept the "rule of law, democracy and human rights" with "guarantees for the rights of ethnic and national
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groups and minorities. The Commission was an attempt to move Europe towards a process of collective recognition of new entities seceding from larger states within Europe, although not all European states followed the Commission's decisions on recognition. The Guidelines also sought to provide standards to be reached by new entities before they would be viewed as acceptable states. These standards were very much focused on representative government and respect for human rights as part of the right to self-determination in the context of seceding new state entities.

IV. STAGNATION AND THE CONCEPT OF SELF-DETERMINATION

Although the concept of self-determination has evolved somewhat, it has essentially been static since the 1970s. The remainder of this article will try to answer the question of why there has been this stagnation and why it is still not possible to claim with any certainty, that there is in limited, defined circumstances, beyond colonialism and alien occupation or subjugation, a right to secession. The concept of self-determination remains amorphous at its edges. It never really settles down into black-letter doctrine outside the colonial and occupation contexts. Why is this?

V. COURT DECISIONS ON SECESSION

The Supreme Court of Canada's decision in the Quebec case remains the most useful court case in coming to grips with the substantive law of secession. The International Court of Justice (ICJ) has addressed self-determination in a number of cases, but has yet to say anything definitive on when the right to secession might arise outside the colonial or occupation contexts.

It was hoped that the ICJ would provide useful guidance on secession when it agreed to issue an advisory opinion on Kosovo's declaration of independence, but this was not to be. The General Assembly submitted the following question to the Court for an advisory opinion: Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?

The Court invited U.N. member states and the authority that issued the Declaration to submit written statements on the question presented. The Court received thirty-seven written submissions, plus a further fifteen comments. Twenty-nine oral statements were also presented. The Court decided to issue an advisory opinion although it could easily have declined on a number of grounds, not least of which was that the Security Council had been issuing resolutions on Kosovo for the past ten years. Having decided to issue an opinion, all that was made clear was that: "The Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law."

The extreme narrowness of the Court's opinion resulted in the Court's giving no opinion on the substantive issue of whether, and under what circumstances, people residing in a part of a larger state have the right to declare independence from the parent state and become a separate state entity. At one point, the Court notes that on the issue of secession, "radically different views were expressed by those taking part in the proceedings." It may have been that the Court could reach no consensus on the law of secession and thus decided to issue an opinion which some of the dissenters described as "meaningless" and "foam on the tide of time." In his ninety-four-page dissenting opinion, Judge Cançado Trindade gives us his vision of a person-centered (as opposed to a state-centered) theory of international law, and throughout his opinion, comes closest to explaining why the doctrine of self-determination has sunk in "the slough of despond." Cançado Trindade claims that the Court has been unable to shake off the old international law paradigm where only states were international actors and every other entity was shut out of the arena of international law. He traces the rise of human rights and individuals gaining stature under international law and he argues that the human being

37. Id. at ¶ 32.
38. "In accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 at ¶ 58 (July 22) [hereinafter Kosovo]."
39. Id. at ¶ 92.
40. Id. at ¶ 39-40 (Benvenisti, J., dissenting).
41. Kovesi, supra note 41, at ¶ 59 (Cançado Trindade, J., dissenting).
42. KEVIN RUTTEN, THE PROHIBITION OF SECESSION (New Ed. 2015).
groups and minorities.\textsuperscript{35} The Commission was an attempt to move Europe towards a process of collective recognition of new entities seceding from larger states within Europe, although not all European states followed the Commission's decisions on recognition. The Guidelines also sought to provide standards to be reached by new entities before they would be viewed as acceptable states. These standards were very much focused on representative government and respect for human rights as part of the right to self-determination in the context of seceding new state entities.

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  \item \textsuperscript{35} \textit{Id.} at 98.
  \item \textsuperscript{36} \textit{See Secession of Quebec, supra note 13.}
\end{itemize}

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  \item \textsuperscript{39} U.N. GAOR, 63rd Sess., 22d plen. mtg., U.N. Doc. A/63/PV.22 (Oct. 8, 2008).
  \item \textsuperscript{40} \textit{Id.}
  \item \textsuperscript{41} \textit{Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 at ¶ 84 (July 22) [hereinafter Kosovo].}
  \item \textsuperscript{42} \textit{Id.} at ¶ 82.
  \item \textsuperscript{43} \textit{Id.} at ¶ 39–69 (Bensouda, J., dissenting).
  \item \textsuperscript{44} Kosovo, supra note 41, at 591 (Cañedo Trindade, J., dissenting); \textit{JOHN BUNYAN, THE PILGRIM'S PROGRESS} 46 (New Ed. ed., Penguin Books 1965) (1678).
  \item \textsuperscript{45} Kosovo, supra note 41, at ¶ 169 (Cañedo Trindade, J., dissenting).
\end{itemize}
should now be the central focus of international law. He castigates the inability of the Court, and more generally, international law, to shift from the desperate need to support the structure of the state at all costs, even in the face of a state flagrantly violating jus cogens norms of international law. He would place human rights above the need to preserve a state's territorial integrity, particularly when it is the state that has violated human rights standards. He sees the battle between two views of international law: a state-centered view that denies the right to secession, versus a human-centered view that would grant secession to a distinct group when its human rights have been denied by the state.

VI. THE RULE ON NON-INTERVENTION ALSO RIGIDLY SUPPORTS EXISTING STATE STRUCTURES

The rule on non-intervention also exhibits the dichotomy between a state-centered vision and a human rights centered vision of international law. In the Nicaragua case, the ICJ held to the traditional doctrine that when a state was seeking to suppress rebels within its borders, it could ask other states for assistance. If other states came to the requesting state's assistance, that would not constitute prohibited intervention. On the other hand, if the rebels sought assistance from outside states, such assistance would constitute a violation of the norm of non-intervention. This unequal rule presumably holds good even if the government is run by an authoritarian dictator with an atrocious human rights record, and, even if the rebels are fighting for democracy, human rights, and the rule of law. In the state-centered version of international law, the maintenance of the state structure trumps rebellion every time. This view of the rule of non-intervention is currently being severely tested, particularly with respect to Syria.

46. Id. at ¶ 170 (Cançado Trindade, J., dissenting).
47. Id. at ¶ 214 (Cançado Trindade, J., dissenting).
48. Id. at ¶ 176 (Cançado Trindade, J., dissenting).
49. See generally id.
52. Id. at ¶ 246.
53. Id. at ¶ 241.

VII. CONCLUSION

The support of the state structure and its territorial integrity comes into direct conflict with human rights, including non-discrimination and participation in a government, in both the secession and non-intervention contexts. As long as international law always sides with the state structure, the opportunity to develop a more nuanced balancing of competing international law norms cannot move forward. What international law needs is a mechanism where these sometimes-conflicting doctrines can be balanced. This balancing is what courts do (or should do) all the time and what they are adept at doing. When international courts get the opportunity to engage in such balancing, they should work at developing the criteria for determining the limited scenarios where the human rights claims of the disenfranchised will sometimes trump the state's territorial integrity. Courts should forgo the easy temptation to serve up "foam." If they do not, the right to secede, outside the colonial or occupation contexts, is likely to remain a right only for those who are willing to take up arms, or fortunate enough to live in stable, democratic states, such as the United Kingdom or Canada, where the people's right to rule themselves is viewed as more valuable than the state's absolute insistence on the maintenance of historic borders.

55. Kosovo, supra note 41, at ¶ 69 (Bennouna, J., dissenting).
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