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A NOTE ON THE RIGHT OF SECESSION AS A HUMAN RIGHT*

CHRIS N. OKEKE**

I. THE RIGHT TO SECEDE AS A PEOPLE'S RIGHT

Alexander Martinenko's article, "*The Right Of Secession As A Human Right*," is certainly a commendable and bold attempt by an international legal scholar from the former Soviet bloc to tackle a subject of such unprecedented controversy in international law. The debate as to whether the principle of self-determination is a right in international law, or simply a principle of political thought, has assumed great prominence in international affairs at various periods since the eighteenth century. For a long time after the end of World War II, it remained the most controversial issue in international law. However, the principle of self-determination is now firmly established as a right exercisable by all peoples under international law. This brief note is not intended to chronicle the development of the concept of self-determination. The history of the right of self-determination may be found elsewhere.¹ Rather, this note

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1. Ian Brownlie, *An Essay in History of the Principle of Self-determination*, GROTIAN SOCIETY PAPERS: STUDIES IN THE HISTORY OF THE LAW OF NATIONS, 1968 (Charles Henry Alexandrowicz ed., The Hague: Martinus Nijhoff 1970); RUPPERT EMERSON, FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND

examines first, the conditions that give rise to secession; next, the old and new normative framework and constitutional law and the attitude of states to secession; arguments for and against secession and new trends on the issue of secession; and the practical significance of the provision of the right of secession in the constitutions of the former Union of Soviet Socialist Republics (hereinafter U.S.S.R.), and the provision of the right to secession in the Constitution of the Ukrainian Republic (hereinafter U.R.).

II. BASIS OF SECESSIONIST MOVEMENTS

Since 1945, the world has witnessed the rejection normatively and practically of colonialism and other forms of alien domination and control. Contemporary international normative systems, with few exceptions, frown upon secession, yet separatist movements persist. Indeed, they have become a permanent feature of the contemporary world scene. The reasons for their persistence deserve our closest attention.

According to Alexis Heraclides, for a successful secessionist movement to occur, three elements must be present. First, there must exist a community or a society that is a self-defined human collectivity (an "ingroup") which is distinguishable and dichotomizes itself from the Center (the "outgroup").² Second, there should be an actual or at least a perceived, present, past, or future inequality or disadvantage in the existing unified state.³ Lastly, there must exist territorial contiguity, that is, a distinct and integral territory in which ingroup habitation manifests a discernible degree of compactness over a period of time.⁴ Only if all three coexist can a fully-fledged and legitimized separatist movement emerge. The three attitudes interact to defuse or reinforce each other.⁵

AFRICAN PEOPLES (Harvard University Press 1960); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* (Leiden: A.W. Sijthoff 1973); ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF-DETERMINATION* (rev. ed., London: Collins 1969); U.O. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* (Hamden: Archon 1972).

2. See ALEXIS HERACLIDES, *THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS* (Frank Cass 1991).

3. *Id.* at 196.

4. *Id.*

5. All secessionist territories have an international border or an outlet to the

Secessions have sprung from separate communities, that is, from groups with an ascriptive basis,⁶ as well as from societies which are separate from the community or society at the Center. Two principal types of separatist societies are known to have emerged on the international scene: those which have a distinct history of separate administration from the Center, and those whose secession would split a nation into two.⁷ The more a group within a distinct territory nears the point of being considered an ethnic group or nation, the lesser the weight in justifying secession is placed on inequality, or to put it differently, the lesser the required degree of inequality.⁸ Conversely, the more the group lacks ethnic identity, the greater the required degree of inequality.⁹

III. OLD AND NEW FRAMEWORK

The perplexing irony about the normative basis of secession is that the very norm - the principle of self-determination, developed during the late 1950s and 1960s, and which secessionist movements invoke in support of their goal - is the main legal bulwark against secession.

The United Nations Charter refers to self-determination as a principle in Articles 1(2)¹⁰ and 55.¹¹ A series of other U.N.

sea which allows them to seek sanctuary, access, and establish arms routes. Rarely have the neighboring state(s) assisted the Central Government militarily.

6. There are five types of categories used for identifying the ascriptive basis of a community. These are: 1) ethno-national identity (formed on the basis of language), 2) national identity (in which the basis is not linguistic), 3) religious identity, 4) racial identity, and 5) sub-ethnic or "tribal" identity.

7. It is the precise political situation which lends salience to one or the other separate identity and to its endurance. For example, the ethno-nations like the Iraqi Kurds and the Karens of Myanmar claim to have maintained the "longest secessionist war." There are, however, groups with an attenuated (if any) ascriptive identity, such as the Southern Sudanese, as well as groups with a common ascriptive identity, such as the Eritreans.

8. HERACLIDES, *supra* note 2, at 197.

9. *Id.*

10. One of the purposes of the United Nations noted in Article 1(2) is to "develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." See U.N. CHARTER art. 1(2).

11. Article 55 reads in part:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly

General Assembly Resolutions has been passed to elaborate these articles still further. Six years earlier, in 1960, came the trail-blazer of the U.N. General Assembly Resolutions - the *Declaration on the Granting of Independence to Colonial Countries and Peoples*¹² which acknowledged the "right" of "all peoples" to self-determination. However, the *U.N. Declaration on the Principles of Friendly Relations and Cooperation among Nations* in 1970 rejected any right of secession from an independent state and condemns "any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country."¹³

If self-determination refers to "the freedom of a people to choose its government and institutions and to control its own resources," there seems to be a striking contradiction between the right of "all peoples" to self-determination and the right of a state to its "territorial integrity," the latter precluding secession. This contradiction is also apparent from the U.N. prescriptions and practice in regard to self-determination as well as in the practice of states.¹⁴

Constitutional law of states has been equally adverse to secession as a matter of international law. A very limited number of post-World War II national constitutions has recognized a right of secession. Examples of constitutions that recognize this right of secession include the Burmese Constitution, which at the same time provided almost insurmountable rules of procedure and, not surprisingly, did not afford such a right to the three regional states most likely to seek independence, *i.e.*, the Shan, the Karen, and the Kachin states.¹⁵ The Constitu-

relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote (ellipsis added).

See U.N. CHARTER art. 55.

12. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

13. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1960). Such paragraphs are not unusual in other U.N. General Assembly Resolutions.

14. CHRIS N. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW* 176 (Rotterdam University Press 1974). The cases of Bangladesh and Biafra were studies in which inconsistencies in state practice as well as the U.N. were very clearly illustrated. For details see generally OKEKE *supra*, at 131-177.

15. Joseph Silverstein, *Politics in the Shan State: The Question of Secession*

tion of the former Yugoslavia recognized the right of secession.¹⁶ It stipulated that self-determination included secession but stated unambiguously that territorial revisions were possible only with the consent of all six Republics and the autonomous provinces.¹⁷ The Constitution of the former U.S.S.R. granted under its Article 72 "the right freely to secede" to each Union Republic. Needless to say, that right was never allowed to be taken up by any of the Republics before the collapse of the Union. When invoked by Georgia and other Union Republics in the early days of the Russian Revolution, it was rejected.¹⁸ Even most recently, the Chechnian bid to secede from the Russian Federation has led to gruesome war that is still taking a heavy toll in deaths on both sides and threatens the future of the Federated Russian Republic.

IV. ARGUMENTS AGAINST SECESSION

A number of specific arguments has been advanced over the years against secession. Some of these arguments are strictly legal or legalistic while others are non-legal. These arguments have been comprehensively summarized by Lee C. Buchheit.¹⁹ The strictly legal or legalistic arguments against secession include the following:

1. The right of self-determination can only be exercised once on the basis of the maxim *pacta sunt servanda*;
2. International law is the law of states and not of peoples or individuals. States are the subjects of international law and peoples (majorities or minorities) are the objects of that law; and

from the *Union of Burma*, 18 J. ASIAN STUD. 43-57 (1958).

16. Bosnia-Herzegovina, Croatia, Macedonia, Slovenia, Serbia, and Montenegro have arisen from the disintegration of the former Republic of Yugoslavia.

17. YUGOSLAV CONST. prmb. and art. 5 (3).

18. The origins of the secession clause in the former Soviet Constitution are based on Vladimir Ilich Lenin's approach to self-determination (in contrast with the more orthodox standpoint on the subject).

19. LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (New Haven 1978).

3. The so-called argument based on mutuality, *i.e.*, as states cannot oust one of their provinces, equally a province cannot secede.

All the arguments enumerated above are rebuttable. The Latin maxim *rebus sic stantibus*²⁰ can be appropriately used to deal with the first. The second argument has suffered heavy criticisms by eminent international lawyers in modern times. The view that states are the only subjects of international law can no longer be maintained in contemporary international law.²¹ The third argument ignores the possibility of population transfers or cession of territories without a plebiscite, as in the cases of Eritrea and West New Guinea.²²

Buchheit's summary of even more substantial non-legal arguments against secession includes:

1. The fear of balkanization, the domino theory, or the specter of the Pandora's Box;

2. The fear of indefinite divisibility, because very few states are ethnically homogeneous, nor often are secessionist territories themselves;

3. The fear of the effect such a right could have on the democratic system, by providing a minority with an opportunity for continual blackmail, threatening to secede if there is no conformity with its wishes;

4. The danger of giving birth to non-viable and particularly small entities which would rely on extensive international aid;

20. The clause stands for "provided that things stand as they were."

21. For a comprehensive discussion of subjects of international law, see OKEKE, *supra* note 14, at 9-124. See also CHRIS N. OKEKE, *THE THEORY AND PRACTICE OF INTERNATIONAL LAW IN NIGERIA* (Enugu 1986). The view of states being only subjects of international law can no longer stand for it has difficulty in accommodating the international law of human rights and cases of international criminality.

22. HERACLIDES, *supra* note 2.

5. The fear of trapped minorities within the seceding state who presumably cannot each secede in turn; and

6. The fear of stranded majorities in cases where the seceding territory is economically or strategically crucial to the original state.²³

The case for a right of secession has hardly ever been presented as an unqualified right for anyone who claims it. It has rather been a call for the articulation of adequate criteria, or standards of legitimacy, whereby only legitimate claims to secession would fall within the scope of the self-determination principle.²⁴

It is the considered opinion of this note, as earlier expressed,²⁵ that the demands of self-determination must in the last resort be placed above the needs for "territorial integrity" and "non-interventionist" stands taken by the United Nations. But, the question is largely one of timing. Under certain circumstances a claim to self-determination, even in a non-colonial setting, may be valid under international law. Third states must recognize and appreciate the concurrence of two competing international personalities.²⁶ They should refrain from giving support to either of them, precisely because both of them enjoy international personality and as such should be protected by international law. If an insurrectionist movement has acquired sufficient force and stability to call for a recognition of its character as a movement of genuine self-determination - which is not to say recognition of the insurgent authority as a government as such - other States are entitled, even bound, to recognize and deal with the insurgent element *qua* belligerent, though not necessarily as a recognized government. It is essential to recognize the legitimacy of its aim if it appears that it can achieve it, and if its status as a regular belligerent is apparent.

23. BUCCHEIT, *supra* note 19, at 20-30.

24. HERACLIDES, *supra* note 2, at 29.

25. OKEKE, *supra* note 14, at 177.

26. *Id.*

Secession can be tolerated only as the ultimate remedy in a situation of marked oppression. This line of thought is not new. It appeared as early as the 1920's in the Aalands Island case, known then as *carence de souveraineté*, and applied to territories which were so "badly misgoverned" that they became totally alienated from the metropolitan state.²⁷ Beitz argues that secessionist self-determination can be justified if the overwhelming majority of the inhabitants of a region favor it and if independent statehood is a necessary condition for the attainment of justice.²⁸

V. CONCLUSION

As matters stand today, secessionist independence can be achieved mainly if there is total military intervention on the part of a third state which has the power of defeating or otherwise neutralizing the Center. Under present conditions, attracting a large-scale intervention, such as occurred in the India-Bangladesh case, is highly improbable. The best a secessionist movement can realistically hope for is some measure of autonomy or federated status in which there is adequate constitutional guarantee for a good degree of power-sharing with the Center.

What is clear is that the time for secessionist states in the international arena appears to have arrived. A case in point is the breakup of the former Soviet Union earlier mentioned. As a first case for post-colonial Africa, Eritrea seceded from Ethiopia and in 1993 became an independent state. The breakup of the former Yugoslavia is still fresh. Until Eritrea's recent success in its secessionist war against Ethiopia, prevailing state ideology in Africa treated as treason any discussion or movement about border changes, separatist movements, or ethnic self-determination within an independent African State.²⁹

27. M. Crawford Young, *Nationalism and Separatism in Africa*, NEW STATES IN THE MODERN WORLD 60-67 (Martin Kilson ed., Cambridge 1975).

28. CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 112-115 (Princeton 1979).

29. For a journalistic account of the recent creation of mini-states through the breakup of larger entities, see Russell Warren Howe, *Countries are Breaking into Mini-states and That's Not Necessarily Bad*, BALT. SUN, Jan. 23, 1994, at E8.

These recent events should set the people of Africa thinking on how best to address the problem of determining the "self" which would possess the right to self-determination and how the will of that "self" should be determined. Unfortunately, identifying these criteria will be especially difficult because, according to Mutua, "the colonial state substantially changed social relations and created new alliances and interests not in existence in the pre-colonial era."³⁰

One outstanding contrast emerges from reading Martinenko's article. The practical significance of the provision of the right of secession in the U.R. Constitution, as was provided in the Constitution of the former U.S.S.R., which is worth remembering, is that at least on paper, one model regards secessionist self-determination as legitimate, while another model such as the United States and Australia views it as unconstitutional and reserves for the federal union the sovereign authority to quell any secessionist movement.

In the final analysis, there seems to be a good case for the qualified exceptional right to secessionist self-determination and it ought not to be rejected outright when a separatist plea is particularly sound. Not to recognize that there can be cases of well-founded secessionist pleas is not only to turn a deaf ear to living reality, but also a blind eye to the conceptual deficiency of the old normative framework on the question. It is time to listen with open eyes and minds.

30. Mukau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1176 (1995).

