Balancing the Rights of Sovereign States With Those of Secessionist Movements

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How Should One Balance the Rights of Sovereign States With Those of Secessionist Movements Under the Rules of International Law?

Secession in international law represents one of the more polarizing political and legal phenomena in global politics[1]. The International Court of Justice's advisory opinion following Kosovo's unilateral declaration of independence in 2008 signalled, for some, a shift in international law from a state-centric system to an individualistic approach. This reopened the debate amongst international lawyers and scholars regarding secession.

Secession is one method of dispute resolution that resists these liberalising trends in international law. The current situation in South Sudan is further fuelling the discussion on the normative direction of secession – has the creation of an independent South Sudan directly led to regional stability, or instead to violent ethnic conflict? As contemporary examples of secessionist movements have met with inconsistent results, a coherent and concrete normative theory cannot justifiably be formed. That being said, the mixed outcomes of secessionist movements shed significant light as to what the most effective 'drivers' of these movements are, encouraging study of these individual criteria and laying a modern foundational framework for the rights of secessionist movements under international law.

This essay seeks to explore the conflict between self-determination and secession, drawing on its position under international law to underpin a normative direction for secession that best fosters peace, justice, and security. First, the essay will situate secession and nationality in the theoretical discussion by reflecting on the ICJ Kosovo opinion. Second, it will chronicle the legal rights and interests of minority groups that target external self-determination. Thirdly, it will evaluate alternative methods of expressing sovereignty whilst protecting nationality. Through this, the essay argues that the balance of rights when contemplating secession, despite a deliberate shift towards a more 'liberal' international law in recent years, should remain in the favour of (just) sovereign states.

Theoretical Framework

This essay engages with several complex theoretical and legal debates, so it is imperative to clearly delineate these concepts, whilst defining the essay's parameters. 'Secession' is the result of a successful movement for national self-determination that typically claims territory or ethnic integrity to fracture an existing sovereign state.[2] This results in a newly independent state – as illustrated recently by South Sudan's newfound independence. It is important to distinguish between 'secession' and 'self-determination': the former being the legal and political outcome, the latter being a driver and motive for this secession. The right to self-determination under international law is outlined in the UN Charter Article 1(2).[3] This position of prominence demonstrates a conscious shift within the international legal order towards individuals as the focal point of international law.

There are countless drivers of self-determination, some with legal legitimacy, others with only moral legitimacy. This essay seeks to narrow down the argument by examining the merit and legitimacy of nationality as a cause for secessionist movements. Not only is nationality contemporarily relevant with ample case studies to assess, the increasing pressure to consider nationality as a peremptory norm allows the issue to engage with both the primary

right and remedial right theoretical debate. The emotion attached to the idea of nationality adds significance to the normative question of secession.

Although many scholars have chronicled secession conceptually, Buchanan offers the best outline of secession theory.[4] Simply, there are two principle (normative) theories of secession – remedial right only and primary right only.[5] For the purposes of this essay, this broad conceptual dichotomy provides the ideal environment for balancing the rights of those seeking to express nationality through self-determination.

Remedial right only theory as a concept advocates secession as a last-resort response to grave injustices, and is considered by some to be a modern day 'right to revolution'.[6] Conversely, primary right only theory is less stringent in its secession criteria, requiring no injustice for groups to justly pursue secession. It asserts a general right to secession even when a state is 'perfectly just', typically through a plebiscite or other democratic solution.[7] It could be argued that remedial right theorists promote a Lockean, state-centric vision of the international order, whereas primary right theorists assign greater power to groups and individuals. This essay seeks to determine how these conflicting 'rights' should be balanced within international law in order to produce the best outcome for those searching for greater autonomy.

Assuming a continuation of the general liberalization of international law, it would be unsurprising to see case law (since 1945) beginning to validate the normative direction of primary rights. However, the next section will deconstruct the ICJ Kosovo Opinion to demonstrate how both the international legal and political order strive to maintain the balance in favour of state sovereignty, in order to preserve regional peace and security.

ICJ Advisory Opinion

Despite its liberal promise, the International Court of Justice's (ICJ) Opinion on Kosovo offers little substantive value to advocates of minority rights. In determining that 'the adoption of that declaration did not violate any applicable rule of international law', the decision is undeniably significant, and gave hope and legitimacy to secessionist movements around the world. Unilateral declarations of independence bypass the wishes of the 'parent state' (Serbia in this case), thus compromising state consent – the cornerstone of international law.[8] This conflicts with frameworks posited by Beran – who advocates general secession through plebiscite, but never at the expense of state consent.[9] The Court can be seen to facilitate the secessionist movement-to-statehood transition by easing the constraints of state consent.[10] It is a firm declaration that in the eyes of the international legal order, states are not the exclusive subject of international law. The legal empowerment of secessionist movements – coupled with further universal declarations of independence witnessed since the Kosovo Opinion throughout the world (South Sudan is often offered as a prime example)[11] – arguably gives weight to the normative argument that the balance of rights *should* favour these movements, challenging an antiquated idea of state sovereignty. However, formulating a precedential direction from this opinion would be short-sighted.

The Opinion is reflective of both the liberalization of international law and the increasing influence of primary right theory, and yet despite its role in paving the way for further unilateral declarations of independence in Eurasia, it is argued that the ICJ missed an opportunity to make a clear ruling on the balance between secession and statehood.[12] Firstly, not only was the Court's decision to 'replace the question asked of it with its own question' noted by political commentators and academics, it prompted dissention from four of the Court's judges – including the Vice President.[13] Judge Koroma recognized the Court's right to reinterpret a question, but not to 'replace the question with its own question…that is distinct from the original'.[14] This over-reaching undermines the authority and influence of the Court's jurisdiction, whilst extending excuses to states to not recognise the new Republic of Kosovo – resulting still in only partial recognition from states, and non-recognition from the UN. Second, the Court either failed to transmit a clear statement of intent for the future direction of international law, or, conscious of the gravity of this moment, the judges purposely chose to avoid the 'big question' on secession – rendering the Opinion 'marginally significant'.[15]

The judgement engages only with one half of the theoretical debate, and is relatively toothless in generating a legal precedent that could clearly shape the future balance of rights regarding secessionist movements. If secessionist

movements seek to readjust the balance of rights from states to sub-state groups, the ICJ advisory opinion is simply not fit for purpose. More informed theoretical conclusions could be drawn from the ICJ opinion had it not reformulated the question in a way that concentrates on violations of 'general international law or the *lex specialis* created by the Security Council Resolution 1244'.[16] In doing this, the Court chose to ignore a remedial right to secession.[17] The Court's imbalanced opinion cannot therefore be used to support claims that international law is starting to endorse general rights to secession.

The reason for this avoidance may be that the ICJ feared making drastic changes to the global order, which would raise suspicions regarding democratic 'input'.[18] Also, sweeping decisions may irk, and ultimately risk the membership of important UN member states. There is also the irony of the UN's legal arm undermining the humanitarian operations of its political branch. Ban Ki-Moon summarized UNMIS' (UN Mission in Sudan) mission objective as ensuring '[we] avoid a secession'.[19] This, unlike the Advisory Opinion, is a clear statement of intent – and suggests rumours of a shift in balance from a state-based legal order are exaggerated. State's rights regarding secession should be preserved in order to comply with international law's overarching aims of maintaining peace and stability.

Normatively, this lack of legal support makes it difficult to adopt a new balance of rights between sovereign states and secessionist movements. Although the sentiment and outcome of the Opinion – and the resulting influence it had on *motivating* other movements – suggests a move from state's rights, both the law and behaviour of the UN suggests secession should only be a last resort. When regulating the balance of rights, generating a normative direction informed by primary right theory would be counter-productive to international law. Infusing the normative direction of secession with primary right theory would be hazardous, and sets a 'very dangerous precedent' by permitting any 'dissident group to circumvent international law…by crafting a declaration of independence'.[20] More generally, even though a remedial right to secession is more justifiable morally and legally, secession is not always positive – an aspect that will be explored in this essay's final section.

This section has challenged the normative value of the ICJ Kosovo Opinion. Despite its role in inspiring further movements and establishing a path for further declarations, the Opinion has little substantive effect on international law. On the other hand, its reticence in categorically affirming secession echoes this essay's assessment that promoting a general right to secession would threaten security and compromise the traditional, peace-building objectives of international law. That being said, perhaps there is merit to the argument that nationality deserves a more valued position in the international legal system. This next section will scrutinise the legitimacy of nationality (commonly expressed as a primary right) as a human right, and driver of secessionist movements.

Nationality as a Fundamental Right, or Just an Interest?

Nationality is a morally legitimate interest, without being a *jus cogens* norm that qualifies as remedial right to secession. This section will examine the process of external self-determination, assessing whether nationality rights provide sufficient legal and moral grounds for secession. First the existing legal protection of nationality will be outlined, before evaluating its potential in a new, postcolonial approach to self-determination.

International law guarantees individuals the 'right to a nationality' under Article 15 of the Universal Declaration of Human Rights[21]. This is pertinent as it clearly signals the worth of nationality in international law, ranking it highly on the post-war human rights agenda. The 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970 Declaration) expands on this to assert that *people* have the right to determine their own 'political status'.[22][23] Together, minority groups are given a legal platform with which to launch their movements.

Sterio argues that this signals a crucial shift in statehood theory – going so far as to claim a 'Grotian moment' in minority rights protection.[24] She contends that relaxing the territory stipulation in the Montevideo criteria is a ground-breaking development in international law, and in doing so, the rights of states concerning secession are significantly diluted. In conjunction with Kosovo's 'legal' declaration – which erodes Serbian sovereign territory – the case of East Timor is equally important.[25] In addition to dividing up existing Indonesian territory, it presents the ideal scenario for

remedial secession advocates – a democratic referendum following years of violent and political oppression. It is important to note that the cases of Kosovo and East Timor were influenced by prolonged periods of UN administrative authority. This questions the likeliness of external self-determination without the 'stabilizers' offered by a UN mission. The involvement of the UN obfuscates the discussion between the rights of movements and states. It is a reasonable assessment that without the stability offered by UN leadership, neither Kosovo nor East Timor would be confident expressing sovereignty in the face of a powerful parent state. However, despite support from these legal frameworks, nationality as a right is still contentious.

As the 1970 Declaration was passed unanimously, Cop and Eymiroglu suggest the right to external self-determination, thus the expression of nationality, qualifies as a *jus cogens* norm[26]. International legal intervention is justified when *jus cogens* norms are violated, resulting typically in new customary international law.[27] As *jus cogens*, the right to protect one's nationality would command a prominent position under international law – and secessionist movements would be further validated in their sometimes violent behaviour. However, taking case law into account in addition to an analysis of state practice, suggests it not to be a *jus cogens* norm. For example, following the S.S Wimbledon case (1923), it was decided that sovereignty must not stand in the way of the protection of peremptory norms.[28] This paves the way for intervention in cases of genocide, terrorism, and – as *jus cogens* – the protection of nationality through secession. The lack of interventions to enforce secession in Kosovo or South Sudan suggests states do not consider this to be an unchallengeable norm, or customary international law. Arguments that this bolsters secessionist movements' rights are, therefore, unfounded.

The unanimity of the 1970 Declaration suggests a certain degree of *opinio juris* – one prerequisite of customary law, but the lack of preventative action elsewhere suggests states have not embraced external self-determination as a universal norm. Most states do not recognize most unilateral declarations of independence – Kosovo being an empirical rarity. And as previously mentioned, the international order, particularly the UN, strives to maintain state sovereignty. Additionally, state practice has been historically confined to cases of decolonization.[29] The wave of African decolonization cannot be used as an indication of fading states' rights. The process coincided with a global awareness of African human rights movements and the post-war cessation in empire-building. Important, too, were the historical borders, allowing for the application of *uti posseditis* to ease the transition.[30] Simply, this creation of new independent states posed little threat to other states' sovereignty due to the novelty of the scenario – and it was not replicable outside Africa.

However, the rights of secessionist movements are ambiguous. Aligning 'protecting nationality' with *jus cogens* norms such as genocide and slavery, especially when the parent state is functional and just, seems unseemly. That being said, this essay does believe nationality to be a 'morally legitimate interest' that legitimately drives secession and merits closer study.[31] It is morally legitimate as nationality offers greater political representation, encourages a greater quality of democracy, and a source of collective identity.[32] This suggests that although the balance of rights should not favour self-determining groups, their plights are legitimate, and they should be engaged with and not isolated.

Considering its lack of concrete legal foundations, the legal status of self-determination remains ambiguous. Applying a Razian theory of rights to the debate is constructive in delineating rights to secession.[33] It could be argued that as the interest of nationality within secessionist movements does not impose an obligation on other states – as evidenced by the international community's lack of support for Palestinian groups for example[34] – the movements do not legally have the express right to convey this interest through secession. There are insufficient obligations *erga omnes* – an integral component to establishing customary international law and universal norms.[35] Although morally legitimate, the interest of nationality crumbles under the challenge posed by existing legal and theoretical frameworks. This critically weakens the rights of secessionist movements. One has a right to *a* nationality, but setting a legal precedent that permits movements to pursue a *desired* nationality could potentially be dangerous. It is crucial that this essay posits a viable alternative to secession. Mueller highlights how the international system funnels secessionist movements towards internal self-determination.[36] This idea that minority rights can be better expressed through other means is imperative to the future of this debate, and will rightly be examined in the following section.

Alternative Methods

Rights of individuals and groups that aim to express nationality can be better protected through alternative approaches to external self-determination. Whereas external self-determination results in a new state, internal self-determination leads to 'political, economic, social and cultural development within the framework of an existing state'.[37] This section contests that internal self-determination offers greater flexibility with the balance of rights between states and secessionist movements, and is more likely to result in peace than a full secession.[38] Here it will be shown how the individuals in secessionist movements are better protected in complete states, albeit within a self-autonomous region. In *Re Secession of Quebec*, the Canadian Supreme Court 'concluded that since [the Quebecois] have access to government, they do not have a right to secede'.[39][40] It was a responsible opinion welcomed by both the Canadian and Quebecois governments. In spite of this rejection of a general right to secede, the Canadian government responded to the question by awarding the province greater autonomy.

Buchanan argues that by maintaining the territorial integrity of the parent state, it is freer to build 'incentive structures' which encourage Quebecois political participation.[41] This rewards Quebec with greater autonomy, and reduces the demand for external self-determination. Since the failed 1995 referendum, only 43% of Quebecois would now support separation (compared to almost 50% in 1995).[42] Moreover, from 1998 to 2008 the most popular party in Quebec was the national liberal party, suggesting nationalism is becoming less of a political priority for the Quebecois.[43] Now, the province has a strong regional government which asserts its autonomy confidently, and a 'strong collective identity'.[44] Quebec can also access the world's 11th largest economy and wield the diplomatic clout of a G8 member.[45]

These practical benefits can be more readily witnessed in less prosperous regions with enhanced autonomy. Greenland, for example, is not only economically dependent to Denmark; Danish patrolmen – *Siriuspatruljen* – provide the only source of security in Greenland's inhospitable regions.[46] This then illustrates how individuals can retain some sense of national identity, whilst remaining under the protection of the parent state. These case studies highlight how both state and sub-state can profit by maintaining state sovereignty. Internal self-determination does not demand an abandonment of rights from minority groups, but instead it requires a readjustment of their desires. By 'sidelining' a need to be nationally independent, minority groups can gain important political rights by engaging with the existing process, and benefit from more concrete advantages such as stability and peace.

In contrast to this essay, Buchanan opposes Wellman's theory of 'decentralization', believing it to encourage a secessionist mentality, instead of quelling it.[47] The Canadian statistics confront this supposition. Concerning this essay's question, internal self-determination does not oblige the dichotomy of states' and secessionist movements'. Instead, in response to retaining their territory, states become obliged to rework their political systems to better incorporate secessionist movements, thereby increasing the rights of individuals within secessionist movements.

Normatively then, international law should favour state sovereignty and internal self-determination. A functioning state order benefits both states and individuals.[48] The inverse of this can currently be witnessed in South Sudan.[49] Post-secession violence is not uncommon, and in cases of ethnicity/nationality driven secession, further ethnic factions are created which results in more violence.[50] This 'vicious circle' justifies state's rights in cases of secession. In the face of South Sudanese violence, Scott suggests a new process is essential, including taking a closer look at which factors can justifiably trigger secession.[51] This closer look must readdress what qualifies as grounds for secession. This essay concludes that emotional plights such as nationality and ethnicity are counter-productive to global peace-building objectives.

Conclusion

This essay argued that the balance of rights concerning secession should remain in favour of just, sovereign states. It has done this by exposing the empirical and theoretical weaknesses of the ICJ Kosovo Opinion, by underlining the lack of legal support for the right to external self-determination, and by outlining alternative approaches that might result in increased regional stability and greater human security. It has illustrated the hotly contested debate surrounding the position of nationality and self-determination under international law. Following the ICJ Kosovo

Opinion, the debate is reopening, and it may take longer than four years for the consequences of the Opinion to be fully realized. Secession can precede both celebration and destruction in equal measure. Too often, emotional concepts of nationality and ethnicity wrongly overtake peace and stability in the list of priorities for secessionist movements. Perhaps an emotional adjustment of what is most important may make complete external self-determination a less attractive prospect, thereby increasing minority rights in cases of other forms of self-determination.

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[47] Buchanan: *supra.* 9

[48] *Ibid. 6-9*

[49] Scott: 'South Sudan and the right to secede: How to do better', *South Sudan News Agency* (January 13 2014), available at http://www.southsudannewsagency.com/opinion/columnists/south-sudan-and-the-right-to-secede

[50] Buchanan: *supra.*9.

[51] Scott: *supra.*

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