JUSTICE, LEGITIMACY, AND SELF-DETERMINATION

MORAL FOUNDATIONS FOR INTERNATIONAL LAW

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CHAPTER 8

Self-Determination and Secession

This chapter begins the task of applying the justice-based conception of political legitimacy developed in Part Two to the practically urgent and theoretically vexing issues of secession and self-determination. Two main theses are advanced. (1) International law should recognize a remedial right to secede but not a general right of self-determination that includes the right to secede for all peoples or nations. From the standpoint of international law, the unilateral right to secede—the right to secede without consent or constitutional authorization—should be understood as a remedial right only, a last-resort response to serious injustices. Accordingly, the international legal order should support states’ efforts to preserve their territorial integrity so long as they do a credible job of protecting basic human rights, but deny that states have the right to suppress secession when secession is a remedy of last resort against serious injustices. In affirming a remedial understanding of the right to secede, international law should unambiguously repudiate the nationalist principle that all nations (or “peoples”) are entitled to their own states. (2) The international legal order should encourage alternatives to secession, in particular by working for greater compliance with existing international human rights norms prohibiting ethno-national and religious discrimination and in some cases by supporting intrastate autonomy regimes, that is, arrangements for self-government short of full sovereignty. Restricting the unilateral right to secession to cases of severe and persisting injustices would encourage states to take a more flexible stance toward intrastate autonomy arrangements, because it would dispel the fears of a slippery slope toward state-breaking that a general right of self-determination for all peoples or nations understandably evokes.
1. Introduction

The need for a comprehensive theory of self-determination

In 1919 U.S. Secretary of State Stanton observed that the phrase "self-determination" is "loaded with dynamite." A moral theory of international law should provide practical guidance for defusing the self-determination bomb, while at the same time giving legitimate interests in self-determination their due.

The need for a principled stance on self-determination has never been greater. Most large-scale violent conflicts now occur within states rather than between them, and in many cases of large-scale intrastate conflict, self-determination is an issue—sometimes the issue.1 In this chapter and the next, I draw the outlines of a moral theory of self-determination for international law grounded in an justice-based account of legitimacy developed in Part Two. The result is a proposal for an international legal response to claims and counterclaims regarding self-determination that is grounded in the commitment to protecting basic human rights, rather than any putative fundamental "right of self-determination" of peoples or nations.

Self-determination and secession

Secession is the most dramatic form assertions of self-determination can take. Nevertheless, as I shall argue, focusing exclusively or even primarily on secession distorts theory and impedes progress in practice. Achievement of independent statehood is in many cases the least feasible or appropriate exercise of self-determination. A comprehensive theory of self-determination, therefore, must include not only an account of the right to secede but also a broader normative framework for evaluating and responding to claims to self-determination, and one that does not assume that independent statehood is the natural goal or inevitable culmination of aspirations for self-determination.

James Anaya has distinguished usefully between two modes or dimensions of self-determination:2 (1) Constitutive self-determination

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occurs when a group makes a fundamental choice concerning its political status, for example, opting for or rejecting independent statehood or inclusion in a state other than the one it is currently a part of. (2) Ongoing self-determination is self-government, though it need not be full independence. To be self-governing a group must exercise some independent political control over some significant aspects of its common life. With regard to at least some matters of importance, it must wield political power in its own right, rather than merely power delegated by a higher political unit and subject to being overridden or revoked by the latter.

Thus self-determination (or autonomy) implies an independent domain of political control. But this characterization leaves open (1) the nature of the domain of independent control (what sorts of activities and institutions the group exerts control over in its own right), (2) the extent of its control over items in the domain (which may vary from item to item), and (3) the particular political institutions by which the group exercises political control over its domain of control. Given the indefinitely large set of self-government arrangements made possible by various combinations of different ways of specifying these three variables, it is extraordinarily unhelpful to talk about "the" right of self-determination (or autonomy). Yet existing international law contains dangerously ambiguous references to "the right of self-determination of all peoples."

The status of secession in international law

The prevailing opinion among international legal scholars appears to be that at present there is no international legal right to secede except in two rather specific circumstances: (1) "classic" decolonization (when an overseas colony seeks to liberate itself from metropolitan control), and (2) (perhaps) the reclaiming of state territory that is subject to unjust military occupation. (Some scholars would add a third circumstance: where a racial group has been denied meaningful access to participation in government.)

By a right to secede here is meant a claim-right; a liberty-right or permission, plus a correlative obligation. To say that a group has the

right to secede, then, implies at least this much: (1) it is permissible (not forbidden) for it to attempt to establish its own legitimate state, and (2) others, including the state in which the group is now located, are obligated not to interfere with the attempt.

The ambiguity of 'the right to secede'

At this point a complication emerges. There is a difference between saying that (1) a group has a right to attempt to establish its own legitimate state and saying that (2) it has a right to its own legitimate state. The international legal system might recognize that under certain conditions, such as colonization or unjust military occupation, a group is entitled to attempt to constitute a fully independent, primary political unit that will be recognized as such by the international system, but might leave it up to existing states to accord legitimate statehood status to the group depending upon whether the new unit it constitutes meets certain requirements.

To say that the group is entitled to attempt to constitute a legitimate, fully independent political unit, would only be to say that in making this attempt it acts permissibly, with the implication that the group's claim to the territory is valid at least in the sense that it is not voided by any claim the state from which it is seceding might make. Understood as a claim-right, this would also include the obligation on the part of states not to interfere with the group's attempt to achieve independence. Indeed this is probably the most accurate interpretation of existing international law: that in cases of decolonization and perhaps unjust military occupation it establishes a right of a group to repudiate the authority of the existing state and to attempt to achieve recognition of independence, but that this does not entail that the group has the right to a legitimate state, in the sense of being entitled to recognition as legitimate, since recognition is a matter of discretion for existing states.

This distinction between the right to secede understood as (1) a right to throw off the existing state's control and attempt to achieve the status of being a legitimate state and as (2) the right to be recognized as a legitimate state under international law is often ignored in moral theorizing about secession. But when secessionists claim a right to secede they typically understand this to mean—and expect others to understand it to mean—that they are entitled to their own
legitimate state, not just that they are entitled to attempt to establish their own state.

The distinction is important because it reveals two distinct options for how international law should respond to secession. According to the first option, a morally defensible international law of secession would only recognize a right to secede understood as the right of a group to throw off the state's authority and attempt to constitute an entity that will be recognized as a legitimate state; according to the second, the right to secede is the right of a group to have its own legitimate state. On the second option, the right to break away and the right to recognition go together; on the first they do not.

The proposal for international legal reform I am advancing is the first option. If the state persists in certain serious injustices toward a group, and the group's forming its own independent political unit is a remedy of last resort for these injustices, then the group ought to be acknowledged by the international community to have the claim-right to repudiate the authority of the state and to attempt to establish its own independent political unit. But this by itself does not imply that the new entity ought to be recognized as a legitimate state in international law.

Acknowledging the group's right to secede, where the right is understood in this weaker way, as only encompassing the right to attempt to create a new state, is far from vacuous. It implies a profound change in institutional status, namely, that the state's right to territorial integrity no longer encompasses the area in question, because the injustices the state has perpetrated have voided its claim to a part of the state's territory. It also accords legitimacy to the secessionists' attempt to create an entity that will be recognized as a legitimate state, making it clear that in attempting to do so the secessionists do not commit a wrong. But acknowledging the right to secede in this weaker sense does not imply that the secessionists have a right to recognitional legitimacy. It does not imply that states are obligated to recognize the entity in question as a legitimate state, only that they are obligated not to interfere with the secessionists' efforts to gain recognition.

Whether the international community should in addition recognize the new entity as a legitimate state, with all the rights and privileges that go with that peculiar status, should depend upon whether
the group provides credible commitments to satisfying the appropriate normative criteria for recognition of new entities as legitimate states, in particular whether its constitution and other relevant documents (such as a declaration of independence) evidence a clear commitment to equal rights for all within their borders, including ethno-national minorities. Chapter 6 developed the case for such a normativized, conditional practice of recognition in some detail.

The rationale for separating the right to repudiate state control over a portion of the state's territory and to attempt to establish an independent state, on the one hand, and the right to legitimate statehood, on the other, is straightforward: The grounds of the two rights differ. The ground of the former right is that by persisting in grave injustices toward the group the state has voided its own claim to that part of its territory, and this makes it permissible for the group to repudiate the state's authority and to attempt to exert their own control over the territory with the ultimate goal of achieving recognition of statehood. By recognizing the right to secede understood in this weaker sense, as the right to attempt to form an independent state, the international community would do two things: empower oppressed groups to use separation as a means of self-defense against their oppressors, and at the same time withdraw support for the territorial integrity of the existing state on the grounds that the state has failed to satisfy the conditions upon which its rightful control of the territory depends.

The ground of the right to recognitional legitimacy, in contrast, is that the entity in question has satisfied appropriate justice-based criteria, those for which I argued in Chapter 6. By ascribing the right to be recognized as a legitimate state to a new political entity, the international legal order signals that it is ready to take its place in the system of states, discharging the functions that only states have and enjoying the rights, liberties, privileges, and immunities peculiar to states.

The point of distinguishing between the right to repudiate the state's control over the territory and to attempt to form a political unit that will be recognized as a state, on the one hand, and the right to be recognized as a state, on the other, is to make clear that there is a difference between (1) the conditions under which a group may defend itself against serious and persistent injustices by wresting control over a territory and in which other states should no longer
recognize the oppressing state’s right to that territory, and (2) the conditions that a new entity ought to satisfy if it is to be recognized as a legitimate state.

Marking this distinction in international law has a point. By distinguishing the right to secede from the right to recognition as a legitimate state and by making the recognition of the new entity as a legitimate state dependent upon its satisfaction of justice-based criteria, the international community would tie the practice of recognizing new states to what I argued in Part One should be a primary goal of the system, namely, justice—and thereby reduce the risk that the seceding group will escape oppression by the state only to become the opppressor of its own minorities.

The importance of the territorial claim

A state in the context of issues of secession is understood as a territorially based primary political unit. Thus, as Lea Brilmayer has rightly emphasized, every assertion of a right to secede includes a claim to territory.\(^\text{1}\) Furthermore, the claim is to a portion of the territory of an existing state—a primary political unit that itself claims the territory to which the secessionist lays claim. From this it follows that to make a case that a group has a right to secede one must show that the group’s claim to the territory in question is valid and therefore that it trumps or supercedes or negates the state’s claim to that territory.

This simple point has large implications for evaluating rival theories of the right to secede. Unless a theory can provide a plausible account of the validity of the claim to territory by those to whom it ascribes the right to secede, it fails. I will argue in Section II that there is only one type of theory of the unilateral right to secede that can provide a convincing account of the territorial claim that is essential to secession—what I have elsewhere called a Remedial Right Only Theory.\(^\text{2}\)

According to this type of theory the right to secede unilaterally, like the right to revolution, is a right to a remedy of last resort

\(^1\) Brilmayer, ‘Secession and Self-Determination’.

\(^2\) Buchanan, ‘Theories of Secession’ and ‘Recognition Legitimacy and the State System’.
against serious and persistent injustices. These injustices must be of such consequence as to void international support for the state's claim to the territory in question.

Unilateral versus consensual or constitutional secession

The statement that international law only recognizes a right to secede in the case of classic decolonization and (perhaps) unjust military occupation applies only to the unilateral right to secede—that is, to the right of a group to attempt to establish a fully independent territorial political unit without state consent or any other form of negotiated or institutionally sanctioned process of separation. Nothing in international law prohibits—or should prohibit—negotiated agreements to allow secession between the state and the secessionists, as occurred with the secession of Norway from Sweden in 1905.

Nor does international law prohibit secession by constitutional provision. The latter could proceed in either of two ways: (1) by the exercise of an explicit constitutional right to secede (an example of which is included in the current Ethiopian Constitution), or (2) by a process of constitutional amendment (for example, as outlined by the Supreme Court of Canada in its recent Reference on Quebec Secession).

The unilateral right is the right of a group to attempt to form its own independent territorial political unit and seek recognition as a legitimate state in a portion of the territory of an existing state absent consent or constitutional authorization; the consensual right to secede is generated by a process of negotiation or exercised in accordance with constitutional processes.

Some might argue that while international law only includes a unilateral right to secede in the two special circumstances of classic colonization and military occupation or annexation, it does not include any clear prohibition of secession either. They would assert that since what is not forbidden is permissible in international law, secession is permissible—that there is a Hohfeldian liberty-right (a mere permission) to secede for a group that seeks to do so.

However, one could argue that if it is true that in international law “what is not forbidden is permissible,” this has traditionally...

*Reference re Secession of Quebec, 1998, 2 SCR.*
applied only to the actions of states, not to nonstate groups and so is irrelevant to the question of whether secession is permissible, except perhaps in the case when secession is simply the taking back of unjustly taken state territory (as with the secession of the Baltic Republics from the U.S.S.R.). In addition, one could argue that international law's long-standing emphasis on supporting the territorial integrity of existing states implies a strong presumption against the permissibility of unilateral secession in situations other than the two cases in which there is a legal claim-right (the cases of classic colonization and military occupation), or at least imposes obligations on third-party states not to aid secessionists, except in those two cases.

My aim is not to settle definitively this dispute about what the international law of secession is, but only to show that even the statement that international law does not prohibit secession is controversial. This uncertainty is only one indication of the inadequacy of international law regarding secession.

*The flaws of the existing international law of secession*

The most obvious deficiency of existing international law regarding unilateral secession is the apparent arbitrariness of the restriction to classic decolonization. Presumably what justifies secession by overseas colonies of a metropolitan power is that the colonized are subject to exploitation and unjust domination, not the fact that a body of salt water separates them and their oppressors. But if this is so, then the narrow scope of the existing legal right of self-determination is inappropriate. The existing right to secession as decolonization appears to be justice-based, yet the idea that serious injustices can justify secession points to a more expansive right.

Furthermore, international law provides little or no guidance for how the international community ought to respond to many, perhaps most, of the cases of secession that have occurred recently, are now occurring, or are likely to occur in the coming years—cases that do not involve decolonization in the classic sense. The secessions of Slovenia, Croatia, and Bosnia-Hercegovina from Yugoslavia are not addressed by the highly restrictive international legal right to secede, nor is that of Nagorno-Karabakh, or that of Chechnya, to take only a few examples among many.
The ambiguity or silence of international law concerning cases of secession other than those involving classic ("saltwater") decolonization (and perhaps unjust annexation or military occupation) is not merely a theoretical deficiency. It contributes to the human misery that almost always has attended secession, by failing to provide a defensible basis for institutional responses that would avoid or mitigate the violence of unconstrained secession.

As I noted in Chapter 1, the confused and ineffectual international response to the break-up of Yugoslavia and to the wars of Chechen secession shows not only a lack of political will but also an absence of consensus on principles. In the case of Yugoslavia the Western powers vacillated between proclaiming the conflict to be an internal dispute protected from intervention by the veil of Yugoslav state sovereignty and attempting to constrain what soon came to be seen as the inevitable process of disintegration by applying the international legal principle of *uti possidetis*, rather implausibly, to a situation quite different from that in which the principle had previously been recognized.

According to *uti possidetis*, borders are to remain intact, except where changed by mutual consent. This principle had been invoked to a limited extent in the processes of decolonization in South America and was later affirmed by the Organization of African Unity during the period of African decolonization in the 1960s and 1970s. In these contexts, *uti possidetis* prescribes that when colonial liberation occurs, the new states that emerge should take as their boundaries the pre-existing colonial boundaries, unless changes are made by mutual consent of contiguous former colonies.

In the case of Yugoslavia the principle was applied, not to boundaries of colonial states, but to the internal boundaries of a fully sovereign federation. (Elsewhere I have argued for a much more limited interpretation of *uti possidetis* and explained in detail the shortcomings of the recent application of the principle to the case of Yugoslavia.)

In the case of Chechnya, the most influential members of the international community have tended to proceed, without any credible justification, as if that conflict is an "internal matter," without

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