

Introduction

Once one concedes that a single world government is not necessary, then where does one logically stop at the permissibility of separate states? If

Canada and the United States can be separate nations without being denounced as in a state of impermissible “anarchy,” why may not the South secede from the United States? New York State from the Union? New York City from the state? Why may not Manhattan secede? Each neighborhood? Each block? Each house? Each person?¹

The notion of self-determination is not novel in modern international law. It stems back to the beginning of the twentieth century, when world leaders realized in the wake of World War I that various peoples—groups with a shared ethnicity, language, culture, and religion—should be allowed to decide their fate, and thus to self-determine their affiliation and status on the world scene. The same idea applied later in the same century to colonial peoples, and by the 1960s it had become widely accepted that oppressed colonized groups ought to have similar rights to autoregulate and to choose their political and possibly sovereign status. However, as decades passed and as separatist minority groups operating outside of the decolonization framework began challenging the concept of state territorial integrity, it became clear that the notion of self-determination had to be somehow confined. Thus, courts and scholars came up with two different forms of self-determination: internal and external. The former potentially applies to all peoples, and signifies that all peoples should have a set of respected rights within their central state. In other words, a “people” should have cultural, social, political, linguistic, and religious rights and those rights should be respected by the mother state. As long as those rights are respected by the mother state, the “people” is not oppressed and does not need to challenge the territorial integrity of its mother state. The latter form of self-determination applies to oppressed peoples, whose basic rights are not being respected by the mother state and who are often subject to heinous human rights abuses. Such oppressed peoples, in theory, have a right to

¹ Murray N. Rothbard, *Man, Economy and State with Power and Market* (Scholars Edition), Auburn, USA: Ludwig von Mises Institute, 2004, at 1051.

external self-determination, which includes a right to remedial secession and independence.

In theory, the distinction between internal and external self-determination is easy to draw, and a scholar or a judge should have no difficulty deciding which peoples should accrue the more drastic right to external self-determination. One could look at the human rights record of the mother state, and if the record shows human rights violations, then one should allow the affected people to separate from the mother state, through the exercise of external self-determination. In reality, the distinction is very difficult to draw. Numerous groups around the globe have been mistreated and have asserted their right to external self-determination, only to find themselves rebuffed by the world community. On the other hand, some groups have found strong support in the eyes of external actors and have garnered sufficient international recognition to be allowed to separate. Why? What is so unique about minority groups and about their quests for independence that would justify the authorization to remedially secede? When exactly—under what circumstances—does the right to external self-determination, leading to remedial secession, accrue?

The famous novelist Salman Rushdie wrote in *Shalimar the Clown*: “Why not just stand still and draw a circle round your feet and name that Selfistan?”² Any legal analysis of a group’s right to secede from its mother state involves a determination of whether the group is randomly and thus illegitimately drawing a circle around its claimed territory and calling it a “Selfistan,” or whether the group has a legitimate claim to a defined territory, at the expense of the mother state’s borders and territorial integrity. International law has been inadequate in addressing the legality of secessionist claims: While it recognizes the right of colonial peoples to self-determination, as well as any state’s right to the respect of its territorial integrity, it is silent on the issue of whether a noncolonized minority group ever accrues the positive right to remedially secede from its mother state. This book argues that it is necessary to develop a new international law framework on secession. The development of such a normative framework is necessary in order to address various secessionist situations around the globe, and to replace the resolution of secessionist struggles through politics with true legal norms.

State practice demonstrates that secessions can be successful. Examples of such successful secessions in recent history include the Kosovar secession from Serbia, the South Sudanese secession from

² Salman Rushdie, *Shalimar the Clown*, New York, USA: Random House, 2005, at 102.

Sudan, and the Crimean secession from Ukraine. More remote successful secessions include the separation of Eritrea from Ethiopia in 1993, East Timor from Indonesia in 2000, and Bangladesh from Pakistan in 1971. State practice also demonstrates that secessions can be thwarted, for a variety of legal as well as geopolitical reasons. Examples of unsuccessful or attempted secessions include the so-called “frozen conflicts” in Georgia involving two breakaway provinces, South Ossetia and Abkhazia, and the recently attempted secession of Scotland from the rest of the United Kingdom through a popular referendum. Most recently, secessions were unsuccessfully attempted in Catalonia and in Kurdistan. Other, more remote attempted secessions involve Republika Srpska, Northern Cyprus, and Quebec.

International law is mostly neutral on the issue of secession. While international law embraces the right to self-determination for every people, and while this right can effectively translate into remedial secession, international law positively allows for this outcome only in the case of decolonization and, perhaps, occupation. Other than these two relatively rare instances, international law does not affirmatively authorize groups to seek secession. Secession inherently undermines the territorial integrity of the mother state, and international law has for centuries espoused the principles of state sovereignty and territorial integrity. Embracing the right of secession would jeopardize the above-mentioned principles and could, as critics assert, potentially lead to global chaos caused by an incessant redrawing of boundaries.

This type of ambiguous attitude by international law vis-à-vis the right of secession is unhelpful at best, and it is perhaps dangerous. It is unhelpful because critics of secessions are able to point to the fact that international law does not contain an affirmative right of secession, while secessionists themselves can claim that international law does not explicitly prohibit secession. Victory here may be in the eye of the beholder. It is dangerous because it leads to inconsistent results, entirely dominated by politics. Almost all secessionist entities which have been successful in their separatist quests have been supported by at least one Great Power, typically the United States or the Soviet Union/Russia. Statehood, the “end game” envisioned by almost all secessionist movements, in most instances of attempted secession truly depends on whether the majority of world countries, including the superpowers, are willing to recognize the seceding entity as a new sovereign state. Almost all unsuccessful secessionist entities have been unable to garner such recognition. This book will argue that this is a dangerous game, often leading to inconsistent results which do not necessarily favor the interests of the relevant country and/or region.

This book will argue that continuing the present state of affairs—by allowing international law to remain neutral on secession, and geopolitics to determine outcomes of secessionist struggles—is unsatisfactory. As Harold Hongju Koh, former legal advisor to the United States Department of State, famously argued in the context of a proposed humanitarian action in Syria, “lawyers are not potted plants.”³ It is our duty as lawyers to push for the development of new legal norms, when such norms are necessary to fill gaps and to provide binding guidelines to world leaders. This book will argue that the development of criteria on secession is a necessity in today’s world, because secessionist struggles can be analyzed through a legal lens only if we have specific legal rules to apply. Absent legal rules, secessionist struggles are dominated by politics and *sui generis* approaches, which validate secession attempts based on geopolitics and other regional states’ self-interest as opposed to validating such attempts under international law. Thus, this book will develop a normative international law framework on secession, which will focus on several factors when assessing the legitimacy of a separatist quest.

This book will propose an international law framework on secession that would consist of three general criteria. The first criterion would focus on process by legitimizing only secessions undertaken through negotiation and domestic constitutional frameworks. In cases where this is not possible, because the mother state has acted in oppressive ways and does not espouse democratic values, the first “process” criterion would focus on the behavior of the mother state and on the existence of internal autonomy rights. In other words, the inquiry here would be whether the mother state has respected the secessionist group’s rights to some sort of autonomy, such as the political right to form a provincial government and to be properly represented in the central government of the mother state, as well as other linguistic, cultural, ethnic, and religious rights. Thus, according to the first criterion on secession, absent oppression by the mother state, only secessions undertaken through a domestic constitutional framework, presumably with the consent of the mother state, would be considered legal. The second criterion would focus on reconciling the secessionist claim with the mother state’s right to the protection of its territorial integrity. Secession is always about territory and control of the land, and it is unhelpful to analyze any secession in the abstract. Professor Lea Brilmayer of Yale Law School wrote on the

³ Harold Hongju Koh, Syria and the Law of Humanitarian Intervention (Part III—A Reply), *Just Security*, October 12, 2013, www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-iii-a-reply/#more-9613.

subject of reconciling secession and territoriality more than two decades ago; this book will borrow from her analysis and build on her proposed framework.⁴ When evaluating the legitimacy of a territorial claim by a secessionist group, one could look at the immediacy of the claim, as well as how vocal the secessionist entity has been about its claim. Additionally, when evaluating the legitimacy of the secessionist territorial claim, one could look at the composition of the local population, to determine whether the secessionist ethnic group constitutes a significant majority. One could also look at this pragmatically, and wonder whether borders can be easily redrawn to allow the secessionist entity to form its own independent state without completely undermining the territorial layout and stability of the mother state. The third criterion would focus on fairness and would analyze secession in terms of both substantive and procedural fairness. Substantive fairness would focus on the outcome itself and whether it is fair to block a secessionist entity from separating from its mother state, and to alter the territory of the mother state. Procedural fairness would focus on whether the secession has been exercised through fair and unbiased processes, such as free and fair public referenda and subsequent elections. Fairness in the context of international law may imply a consensus by the majority of other states that the result of a secessionist struggle was positive. This consensus may be best reflected in United Nations General Assembly resolutions, where all states vote on a neutral footing, and by decisions to admit or not admit secessionist entities as sovereign partners into the United Nations, as well as into many other international organizations.

In order to develop the above-described normative framework on secession, this book will first provide a theoretical framework on secession, by distinguishing between the right to self-determination and the idea of secession and by linking secession to other principles of international law, such as statehood, recognition, sovereignty, intervention, territorial integrity, and *uti possidetis*. The book will then adopt a comparative approach. It will analyze the most recent secessionist struggles, including Kosovo, South Sudan, Crimea, Quebec, Scotland, Catalonia, and Georgia, as well as some historically more remote secessions, such as Bangladesh and Eritrea, and de facto secessions, such as South Ossetia, Abkhazia, Nagorno-Karabakh, and Northern Cyprus, in order to develop a historical context of secession and its influence on territorial integrity and sovereignty of different mother states. It will then apply the newly proposed

⁴ Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *Yale Journal of International Law* 177 (1991).

framework on secession to the above-mentioned secessions and attempted secessions, in order to attempt to reconcile the divergence of results and to evaluate the legitimacy thereof. It is this book's conclusion that international law should develop a normative framework on secession, distinct and separate from the principle of self-determination. Some secessionist struggles are not about the assertion of the right to self-determination but may be legitimate; others may imply the right to self-determination but may include other complex issues warranting against the exercise of secession. International law could play a large role in triaging secessionist struggles pursuant to a set of normative rules on secession. While self-determination remains relevant in discussing secession, the former should not constitute the only applicable legal framework. Future discussion of secessions should focus on legal rules, not on the geopolitical preferences of international actors.