

Why Do the United Nations and The International Community Treat Cases of Post-Independence Remedial Secessionist Demands Differently?

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Abstract: *The exercise of post-independence, remedial secession remains a grey area in international law. However, the view by some scholars that post-independence remedial secession is not permitted within the ambit of international law is becoming academic, as many groups have been able to separate from their parent states. The success or failure of asserting this type of independence largely depends on factors such as the interests of states and the nature of claims. There have been inconsistencies in state practice, as similar cases of remedial secession outside colonial boundaries are treated differently. This situation can be explained by stating that the international community is trying to avoid setting a dangerous precedent. Nevertheless, the need for clarity, predictability, and stability supports a paradigm shift in normative institutionalization of the procedure for post-independence, remedial secession.*

Keywords- *Remedial Secession, Post-Independence Secession, International Community, United Nations, Predictability*

1. Background Facts

Advocates of the remedial right of secession outside the colonial situations contend that a distinct group is entitled to a remedial right of secession (Quane, 1998, pp. 537-572). In other words, there is the internal right of self-determination, the violation of which may result in a party enjoying the remedial right (which is a special right) (Seymour, 2007, pp. 395-423). Within the ambit of international law, the remedial right of secession is, to a certain extent, assessed, relying on the circumstances of each particular case. However, the question arises as to why the international community would recognize certain groups that effectively assert their sovereignty following a democratic outcome but reject others that successfully assert their independence. Why would the United Nations not admit the latter groups into its fold? The study identifies these inconsistencies and explains that these were consequences of the lack of a clear legal rule governing post-independence secessionist claims and the effort to avoid setting a dangerous precedent. However, in the absence of this rule, several authors such as Buchanan (1997, pp. 31-61) and Heraclides (1997, pp. 493-520) have espoused remedial rights theories and stipulated conditions for exercising them. Some of such conditions are namely, where an existing state engages in activities that are a threat to the collective survival of a group; such a group suffered systematic infringements of human rights or internal right of self-determination (Buchanan, 1997, pp. 31-61); where an autonomy granted to a region is arbitrarily withdrawn or made ineffective; and where such a state reneged on a previous agreement (Heraclides, 1997, pp. 493-520). These and many more should guide the international community and the United Nations in cases of remedial secession outside the colonial context. In the absence of a clear or definite rule or a streamlined or coherent state practice, the process would continue to be abused by groups seeking independence and manipulated by states.

2. Post-Independence Remedial Secession in the Eyes of the United Nations

The United Nations has been vocal in advancing the evolution of self-determination. The inclusion of self-determination as one of its purposes in the UN Charter supports this observation (United Nations Charter, 1945, Articles 1 (2), 55, xi, xii, and xiii). The United Nations has respected this right in many cases. In the

East Timor and Western Sahara cases, the UN through the ICJ confirmed the exercise of self-determination by peoples under colonial domination (Western Sahara Advisory Opinion, ICJ Reports, 1975, p. 12); (Portugal v Australia, Judgement ICJ Reports 1995, p. 90). In the latter case, the court emphasized that the right can be asserted against any state that violates it (Portugal v Australia, Judgement, ICJ Reports 1995, p. 90, para. 29). However, the United Nations has been unequivocal in opposing any attempt at breaching the territorial integrity of a state for the sake of international peace, security, and stability (Shaw, 2017, p. 202). With the evolution of the customary law principle of *uti possidetis* (which strives to safeguard territories of newly emerged states from future balkanization), we learned that the intention of the UN is the preservation of prevailing boundaries and not to support the alteration of these boundaries (Meester, 2011, pp. 215-254). In other words, the UN would always prefer certain options, such as varied forms of autonomous rule or federation on a regional or ethnic basis to outright separation (Tomuschat, 1993, pp. 1-20). The organization should search for the most appropriate solution to separatist claims in extreme cases of human rights violations (Hurst, 2006, pp. 61-80). Therefore, a blanket rejection of the rights of minorities clamoring for post-independence secession runs contrary to the protection of human rights. This explains why, despite the UN's opposition to post-independence secession, it has, in certain extreme cases, provided the vehicles for groups clamoring for secession to secede from their prevailing states. At least, it demonstrated this willingness when it supervised Eritrea's independence referendum in the 1990s (Seymour, 2007, pp. 395-423). The UN has respected the positive outcomes of independence referendums in Slovenia and Croatia, conducted in the early 1990s, by accepting their respective declarations of independence (Radan, 1994, pp. 183-195). So, it is safe to argue that despite the UN's respect for the territorial integrity of the state, it has not failed to acknowledge that freedom for a group is the most profound tool in the process of its social, economic, and political pursuits (Philpott, 1995, pp. 352-385). However, the snag is its ambivalence or inconsistency in certain extreme cases. It is difficult to explain how the UN recognized the rights of Eritrea, Bangladesh, and South Sudan to own their states while abandoning equally extreme cases of Biafra, Cabinda, and Katanga. If Bangladesh, South Sudan, and Eritrea succeeded based on being victims of systematic violations of human rights (Kiwanuka, 1988, pp. 80-101; Seymour, 2007, pp. 395-423), why didn't Cabinda, Biafra, and Katanga, who suffered a similar fate, succeed?

3. State Practice

There are no general criteria governing the model of state creation. Unfortunately, the lack of a normative foundation through which to assess the emergence of new states continues to be problematic. The first challenge confronting states is whether to accord recognition to emerging entities or not. However, the real issue is whether or not to recognize a territory that evolved through extra-constitutional means (Akehurst, 1987, p. 57). The challenges have not been satisfactorily resolved theoretically or in practical terms. There is a need to resolve these challenges since it is only through the act of recognition that a seceding group or territory becomes independent in the eyes of international law.

It seems, following a democratic process of a referendum, that the international community might accord a successful group or region the status of an independent state. The international community compelled Bosnia-Herzegovina to conduct a referendum, some months following its declaration of independence (Arbitration Commission of the Conference on Yugoslavia, Opinion 4, 1992, p. 3). Over 60 states have acknowledged Kosovar's declaration of independence, however, they cited different reasons for doing so. For instance, the United States and its close Western ally, the United Kingdom, cited gross human rights violations and the exhaustion of negotiations with Serbia (Orakhelashvili, 2008, pp. 12, 15, 16). It was curious that the international community recognized Kosovar's declaration of independence, yet denied Somaliland, which met the criteria for independence (UN Secretary General's Report on Somalia, 2002). The report implied that Somaliland satisfied the Montevideo criteria, nevertheless, its ability to participate in international politics was grossly curtailed as a result of its lack of 'formal' status. For clarity, it's wise to reproduce the Montevideo criteria of statehood within the ambit of international law. They are, namely, (a) permanent population; (b) a defined territory; (c) government, and (d) capacity to enter into relations with other states (Nandasiri, 1995, p. 20).

It must be observed that the inability of these states to explain what constitutes a special case and an extreme case of rights violations poses a grave danger to certainty and predictability. Again, why did states fail to recognize Biafra, which met the Montevideo Criteria, yet recognized the former Republics in Yugoslavia, which did not meet some of the criteria for statehood? (Post, 1968, p. 27; Okeke, 1974; Koskenniemi, 1994, p. 162). In terms of permanent population and territory, which are essential in the discourse of recognition, Biafra had a resident population. At least 13 million lived in the territory being

subject to its claim” (Post, 1968, p. 27). “When Biafra declared its independence in 1967, it had a defined territory, comprising the former Eastern Region of Nigeria” (Okeke, 1974, p. 162). Even though allowing independence for Croatia would pose a threat to Serbs in its territory of Krajina, the international community went ahead to recognize Croatia’s unilateral declaration of independence (Silber et al, 1992). Perhaps, Biafra failed in its attempt to obtain recognition from frontline member states of the UN because it didn’t furnish any promise of strategic, political, or economic benefit. Its quest was predicated largely on the enthronement of morality in human, intra-national, and inter-African relations (Stremlau, 1977, p. 132). Conversely, the United States promptly recognized Israel’s declaration of statehood, even though at the time of this declaration, Israel had no definite claim to the territory. The US’s action could be a result of its strategic and political interests (Brierly, 1963, p. 140). The US and its allies recognized former Republics in Yugoslavia when situations on the ground suggested they lacked effective control of their territories (Koskenniemi, 1994, pp. 241-269; Shaw, 2017, p. 202). All these conflicting cases suggest that the state practice is still inchoate and needs to be streamlined or refined.

4. Factors Likely to Influence the UN and the International Community in Accepting or Rejecting Claims to Post-Independence Remedial Secession

4.1. Effective Control of Territory

The international community is likely to accord recognition to a seceding region or group that maintains an effective government and establishes order, where the absence of order and lack of legitimate government control permeate the rest of the territory falling under the parent state. It could be argued that the weakening of the Soviet Union, coupled with the effective control of territories held by the former republics in the country, made a good case for the recognition of these republics by different states and their eventual admission into the United Nations. However, it is curious that Somaliland, which has managed to establish a stable and effective government, has not attracted recognition from any member of the United Nations as a *de jure* state. It is important to emphasise that the Somali government does not maintain an effective government, and this has been lingering since the early 1990s (Stremlau, 2019). Different armed groups control various regions of the country. In essence, the government does not possess a monopoly on the use of force (Stremlau, 2019). The central government has violated the UN’s Responsibility to Protect. So, Somaliland is a good candidate to be protected by the international community and the UN. Somaliland has demonstrated a capacity to maintain order within its declared territory and is indeed in its effective control (Stremlau, 2019).

Be that as it may, the case of Somaliland in comparison to those of South Sudan and Bosnia and Herzegovina has shown that being in effective control of a territory or having suffered oppression or discrimination from a parent state does not always lead to recognition or admission to the United Nations. Other factors, such as the strategic importance of the seceding party to certain members of the international community and other interests of these entities, might play crucial roles in recognizing new states seeking recognition or admission into the United Nations.

4.2. External Factors

States have, in many cases of secessionist claims, outside the colonial context, demonstrated their willingness or unwillingness to support such claims. It may be argued that many factors, such as the strategic importance of a secessionist state, the self-interest of powerful states, and the internal workings of these states, may influence their decisions. For instance, the religious dimension in the Sudanese conflict influenced the intervention of the United States. The Christian lobby in the United States massively campaigned for the independence of South Sudan, whose inhabitants are mostly Christians. (Huliaras, 2008, pp. 163). If the United States were not a democracy, it would be unlikely to yield to the demand of this Christian group (emphasis mine).

Before the intervention of the Christian lobby, there was an ongoing *Arabization* policy, whereby the southern people, who are mostly Christians, were denied their religious identity. Those who kicked against this religious subjugation and suppression were clamped with criminal prosecutions (Sharkey, 2008, pp. 34-36).

In the case of the breakup of the Soviet Union, it could be argued that the strategic interest of the powerful, democratic states, especially the United States, may have played a crucial role in the recognition of the former

republics in the Union and their eventual admission into the United Nations. At least, the breakup of the Soviet Union would weaken Russia and herald the United States as the undisputed superpower in the world. These cases and many others characterize the politics of state recognition.

5. Conclusion

The United Nations has since promoted self-determination and made it one of its fundamental objectives. This can be gleaned from the plethora of relevant documents it has enshrined in its chequered history. The first of these documents is the UN Charter. Initially, the UN and the international community's attention was focused on the decolonization process. However, as post-independence secessionist claims began to arise, the UN and the international community shifted their attention to these cases. However, they have not been able to devise a clear and pragmatic way of handling these cases. This explains their inconsistencies in similar secessionist claims. It is observed that the ambivalence of the UN and the international community in this field is limiting the corpus of this discourse or the application of the right. One clear thing is that the dispositions of the UN and the international community towards secession outside colonial situations appear not to have changed, notwithstanding their occasional 'bending of the rule' to accommodate certain interests. They are avoiding setting a precedent that could endanger the stability of the international system. The study does not support the notion that once a group meets the Montevideo Criteria for Statehood, such a group should be allowed to secede. The study instead advocates for treating similar cases equally. It has been observed that systemic failure to treat similar cases of secessionist claims equally stems from the absence of a clear legal rule governing post-independence remedial secession. However, the study advocates that even amid this seeming anarchy, there should be consistency if only to maintain international stability and ensure predictability.

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