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Degrees of Self-Determination in the United Nations Era

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EDITORIAL COMMENT

THE DEGREES OF SELF-DETERMINATION IN THE UNITED NATIONS ERA

The self-determination idea is closely identified with Woodrow Wilson, who first used the term publicly in 1918,[1] but it did not emerge as a principle of positive international law until the Soviet Union insisted on it at the 1945 San Francisco Conference on the United Nations.[2] It did not appear in the League of Nations Covenant. In 1921 an international commission decisively rejected an extreme form of it in the *Aaland Islands* case. Even though the Commission recognized that the vast majority of the people of the Aaland Islands would choose union with Sweden over their existing attachment to Finland, the Commission denied them any right to secede.[3] It said:

> To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.[4]

The United States delegation at the San Francisco Conference had misgivings about resuscitating the self-determination idea in binding treaty form.[5] Nevertheless, the idea found its way into Articles 1 and 55 of the UN Charter as the principle of "equal rights and self-determination of peoples." The drafters did not bother to define self-determination or to identify who the "peoples" were, but the Soviet Foreign Minister referred to the idea as "equality and the self-determination of nations." [6] He seemed to view the beneficiaries to be the populations of colonies and the populations of territories then under League of Nations Man-

[1] *See* Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AJIL 1, 2 (1976).

[2] *See* RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES, 1940–1945, at 810–11 (1958).

[3] The case nevertheless demonstrates that, as early as 1921, questions of self-determination in a noncolonial context were not considered solely within the domestic jurisdiction of the resisting state. Finland had argued that they were, but the League of Nations Council took up the matter. *See* LEAGUE OF NATIONS, TEN YEARS OF WORLD CO-OPERATION 28–29 (1930); DENYS P. MYERS, HANDBOOK OF THE LEAGUE OF NATIONS 298–99 (1935).

[4] Report of the Commission of Rapporteurs presented to the League of Nations Council, League of Nations Doc. B.7.21/68/106 (1921), *quoted in* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 30 (1990). *See also* A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE 29–34 (1973). More recently, the Inter-American Commission on Human Rights concluded that international law does not recognize a right to secede—or more broadly, a right independently to choose its form of political organization—of an ethnic group such as the Miskito population of Nicaragua. Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc. OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983).

[5] *See* RUSSELL & MUTHER, *supra* note 2, at 811.

[6] *Id.*

dates.[7] There is evidence, though, that a broader definition of "peoples" was intended.[8]

The right of self-determination did not appear explicitly in the 1948 Universal Declaration of Human Rights,[9] but it became the centerpiece of the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[10] It appears in both of the 1966 UN Covenants on Human Rights.[11] Brownlie treats it as "probably" a peremptory norm.[12] Arguably it is, in its anticolonialist form, but surely not when it puts on all its possible faces.

In fact, the self-determination principle in the UN era has a great many faces. The one that virtually everybody now agrees it has is freedom from colonial domination, at least when the domination is of people of color in their homeland by other racial groups.[13] The International Court of Justice has endorsed the principle in this form, in its 1971 Advisory Opinion on *Namibia*[14] and in its 1975 Advisory Opinion on the *Western Sahara,* where it defined the principle as "the need to pay regard to the freely expressed will of peoples." [15] For many years the majority of states in the UN General Assembly asserted that the expressed will of peoples to be free from colonial domination was the only face self-determination had.

Under pressure from the West, the General Assembly in 1970 expanded the concept beyond anticolonialism. In its Declaration on Principles of International Law concerning Friendly Relations,[16] the General Assembly said—among other things—that emergence into *any* political status freely determined by a people constitutes a mode of implementing the right of self-determination. The declaration disclaimed any intent to authorize or encourage the dismemberment of states, but its disclaimer was tied to a concept of internal self-determination. It said:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a

[7] On the definition of "peoples," see Anna Michalska, *Rights of Peoples to Self-determination in International Law, in* ISSUES OF SELF-DETERMINATION 71 (William Twining ed., 1991).

[8] *See* SUREDA, *supra* note 4, at 99–101.

[9] GA Res. 217A, UN Doc. A/810, at 71 (1948). Article 21 did set forth rights now identified with internal self-determination, without labeling them as such.

[10] GA Res. 1514, UN GAOR, 15th Sess., Supp. No. 16, at 66, UN Doc. A/4684 (1960).

[11] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 1, 993 UNTS 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 1, 999 UNTS 171.

[12] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (4th ed. 1990). Brownlie says that the principle's precise ramifications have not yet been worked out. *Id.* at 597. *See also* Héctor Gros Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions, UN Doc. E/CN.4/Sub.2/Rev.1, at 13 (1980) (defining the principle to exclude a right of secession for peoples not under colonial and alien domination); Héctor Gros Espiell, *Self-Determination and Jus Cogens, in* UN LAW/FUNDAMENTAL RIGHTS 167 (Antonio Cassese ed., 1979).

[13] *See, e.g.,* Rupert Emerson, *Self-Determination,* 65 AJIL 459 (1971).

[14] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16, 31 (Advisory Opinion of June 21).

[15] Western Sahara, 1975 ICJ REP. 12, 33 (Advisory Opinion of Oct. 16).

[16] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970), *reprinted in* 9 ILM 1292 (1970).

> government representing the whole people belonging to the territory without distinction as to race, creed or color.[17]

Thus, the disclaimer referred only to a government representing the whole people belonging to the territory without distinction as to race, creed or color.[18] The disclaimer was reiterated in the Vienna Declaration emanating from the 1993 UN World Conference on Human Rights, with one significant change. The Vienna Declaration exempted only "a Government representing the whole people belonging to the territory without distinction *of any kind.*" [19] These disclaimers are a far cry from the General Assembly's formulation in 1960, when it said: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." [20]

Of course, these are nonbinding instruments. Nevertheless, they purport to, and probably do, reflect an *opinio juris.* In the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule.[21] The striking contrast between the 1960 and 1970 General Assembly formulations suggests that from about 1970 on, there could be a right of "peoples"—still not well defined—to secede from an established state that does not have a fully representative form of government, or at least to secede from a state whose government excludes people of any race, creed or color from political representation when those people are the ones asserting the right and they have a claim to a defined territory.[22] By 1993, the right had arguably expanded to be assertable against a government that is unrepresentative of people who are defined by characteristics not limited to race, creed or color.

An arguable, limited right of secession is only one of the numerous faces of self-determination.[23] Mentioned below are the more prominent ones that have ap-

[17] *Id.* at 124, 9 ILM at 1296.

[18] *See* Robert Rosenstock, *The Declaration of Principles concerning Friendly Relations: A Survey,* 65 AJIL 713, 732 (1971); *see also* Antonio Cassese, *Political Self-Determination—Old Concepts and New Developments, in* UN LAW/FUNDAMENTAL RIGHTS, *supra* note 12, at 137, 144–45 (noting the difficulty of determining when a government is "representative").

[19] Vienna Declaration and Programme of Action, pt. I, para. 2, UN Doc. A/CONF.157/24 (pt. I) (1993), *reprinted in* 32 ILM 1661 (1993) (emphasis added).

[20] GA Res. 1514, *supra* note 10, at 67.

[21] *See* Frederic L. Kirgis, Jr., *Custom on a Sliding Scale,* 81 AJIL 146, 149 (1987).

[22] *See* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 92–96 (1978); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede,* 13 CASE W. RES. J. INT'L L. 257, 269–70, 275 (1981). On the territorial point, see text at note 32 *infra.* Contrast what U Thant said before Resolution 2625 had been adopted: "As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State." UN MONTHLY CHRON., Feb. 1970, at 36. Writing in 1989, Hurst Hannum said, "[C]onstant state practice and the weight of authority require the conclusion that such a right [to secede] does not yet exist." HANNUM, *supra* note 4, at 49. Thomas Franck also finds no general right to secede, but notes that a minority within a state, especially if it occupies discrete territory, may have a right to secede—roughly analogous to a decolonization right—if it is persistently and egregiously denied political and social equality as well as the opportunity to retain its cultural identity. Thomas M. Franck, *Postmodern Tribalism and the Right to Secession, in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 13–14 (Catherine Brölmann, René Lefeber & Marjoleine Zieck eds., 1993).

[23] For recognition that some concepts, such as nonsovereign autonomy, minority rights and integration with an existing state, might be faces of self-determination rather than denials of it, see MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 3, 25–26 (1982). Another face—as a building block toward a democratic entitlement—is discussed in Thomas M. Franck, *The Emerging Right to*

peared.[24] Of course, some of them remain quite controversial because of disagreement either over what is meant by "peoples" or over what is meant by self-determination itself.[25] The many faces include:

(1) The established right to be free from colonial domination, with plenty of well-known examples in Africa, Asia and the Caribbean.

(2) The converse of that—a right to remain dependent, if it represents the will of the dependent people who occupy a defined territory, as in the case of the Island of Mayotte in the Comoros, or Puerto Rico.

(3) The right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one, as in the former Soviet Union and Czechoslovakia. The breakup of the former Yugoslavia except for Serbia and Montenegro might even be considered an example of this, after the initial skirmish in Slovenia ended and the Yugoslav federal forces ceased operating as such in Croatia and Bosnia-Hercegovina.[26] The later fighting in Croatia and Bosnia-Hercegovina could be seen as efforts not so much to hold the old state of Yugoslavia together as to define the territories and ethnic composition of the new states, including possible new states within Bosnia-Hercegovina.

(4) The disputed right to secede, as in the case of Bangladesh and Eritrea.

(5) The right of divided states to reunite, as in Germany.

(6) The right of limited autonomy, short of secession, for groups defined territorially or by common ethnic, religious and linguistic bonds—as in autonomous areas within confederations.

(7) Rights of minority groups within a larger political entity, as recognized in Article 27 of the Covenant on Civil and Political Rights[27] and in the General Assembly's 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[28]

(8) The internal self-determination freedom to choose one's own form of government, or even more sharply, the right to a democratic form of government, as in Haiti.

Democratic Governance, 86 AJIL 46 (1992). *See also* Benedict Kingsbury, *Claims by Non-State Groups in International Law,* 25 CORNELL INT'L L.J. 481, 487 (1992) (noting limited categories of cases in which claims to separate statehood have been recognized); Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories,* 18 SYRACUSE J. INT'L L. & COM. 21 (1992) (criticizing the limited "conventional" view of self-determination).

[24] They are expressed here as "rights." They could also be viewed as "remedies." *See* S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination,* 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993).

[25] For a somewhat different typology of self-determination claims actually made, see Benedict Kingsbury, *Self-Determination and "Indigenous Peoples,"* 86 ASIL PROC. 383, 384 (1992).

[26] *But see* Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?,* 3 TRANSNAT'L L. & CONTEMP. PROBS. 57 (1993).

[27] *Supra* note 11. *See* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 141–247 (1991). Article 27 does not use the term "self-determination." Since Article 1 does use it without relating it to minority rights, it may be argued that the rights in Article 27 are distinct from self-determination rights. *See* Rosalyn Higgins, *Comments on Postmodern Tribalism and the Right to Secession, in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW, *supra* note 22, at 29, 32.

[28] Annex to GA Res. 47/135, UN GAOR, 47th Sess., Supp. No. 49, at 210, UN Doc. A/47/49 (Vol. I) (1992), *reprinted in* 32 ILM 911 (1993). *See also* ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, *in* 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919–1991, at 1436 (1992).

One must ask which of these is actually a right under international law, and which just an aspiration of some groups or putative governments. Clearly, the right to be free from alien colonial control is an established rule of international law. One cannot categorically say the same about the other manifestations. Their juridical status varies. Nevertheless, we can make some headway toward evaluating each claim by borrowing some of the tools of social scientists. That is, we can try to identify key variables that reduce the vast complexity of the problem to a manageable form and can serve as rough predictors for normative assessment of claims as they are made.

The key variables can be found in the General Assembly's 1970 Declaration of Principles of International Law concerning Friendly Relations[29] and in the 1993 Vienna Declaration.[30] As noted above, the disclaimer of any intent to authorize dismemberment of a state—the most destabilizing form of self-determination—is tied to the proposition of democratic government representing at least all the races, creeds and colors within the state, or—according to the 1993 Vienna Declaration—representing all people belonging to the territory without *any* distinction. Dismemberment is at the end of a scale of claims, ranging from modest to extremely destabilizing, that includes all of those listed above. Moreover, as there are degrees of claim, there are degrees of representative government, with absolute dictatorship and all-inclusive democracy at the opposite extremes.

One can thus discern degrees of self-determination, with the legitimacy of each tied to the degree of representative government in the state.[31] The relationship is inverse between the degree of representative government, on one hand, and the extent of destabilization that the international community will tolerate in a self-determination claim, on the other. If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized.

In this schema, a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination, but a claim of right by indigenous groups within the democracy to use their own languages and engage in their own noncoercive cultural practices is likely to be recognized—not always under the rubric of self-determination, but recognized nevertheless. Conversely, a claim of a right to secede from a repressive dictatorship *may* be regarded as legitimate. Not all secessionist claims are equally destabilizing. The degree to which a claimed right to secede will be destabilizing may depend on such things as the plausibility of the historical claim of the secessionist group to the territory it seeks to slice off.[32]

[29] *Supra* note 16.

[30] *Supra* note 19.

[31] Some manifestations might be called quasi-self-determination, but that term does not add much to the analysis.

[32] For example, if the secessionist group once occupied the territory as an independent state, the destabilization posed by its claim may not be as great as if it seeks to carve out new territory for itself. *Cf.* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation,* 16 YALE J. INT'L L. 177 (1991). But even a claim to historic title may be quite destabilizing if the territory itself now includes dissident minority groups.

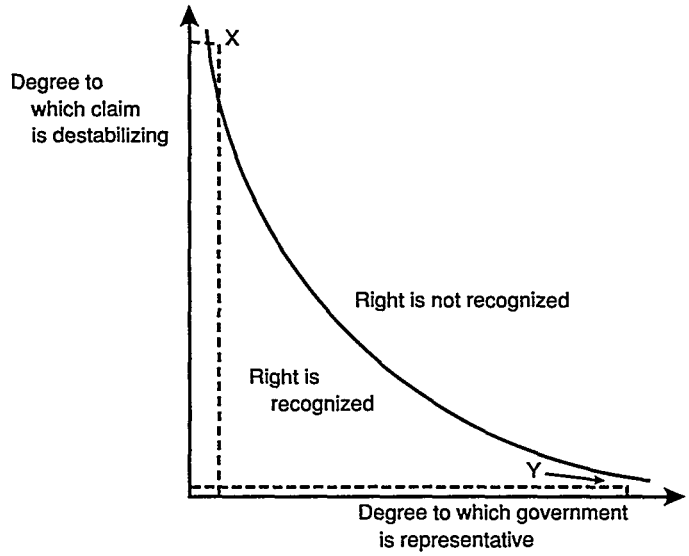

FIGURE 1. LEGITIMACY OF SELF-DETERMINATION CLAIMS

There are points between the extremes, as is illustrated by a diagram that may look suspiciously like a product of the economist's craft.[33] The vertical axis, measuring the degree to which a particular self-determination claim is destabilizing, reflects a prediction based on circumstances and experience at the time when the claim is made. The horizontal axis, measuring the degree to which the particular government is representative, reflects essentially a question of fact—though it necessarily involves an element of judgment.

Any self-determination claim combining degrees of destabilization and government representativeness that intersect above the curve would be unlikely to be accepted by the international community. Conversely, if the intersection between destabilization and government representativeness falls below the curve, the claim would be recognized. The curve is concave, reflecting the rather limited sphere in which self-determination claims are recognized. It never quite touches either axis, indicating that even at the extremes a few claims could be regarded as legitimate. The diagram assumes that any claim worth measuring is asserted insistently.

To revert to the examples already given: A claim of a right to secede by a group without a plausible historical claim to its own territory would be almost certain to fall above the curve and would not be recognized, no matter how unrepresentative the government—as indicated by the intersection point *X*. On the other hand, a claim of right by an indigenous group to use its own language within the group would be likely to be recognized even against a highly representative government —as would be the case at intersection point *Y*.

The diagram, and the approach to self-determination it illustrates, may be problematic when the claim is for internal self-determination in the form of a more

[33] A similar chart, illustrating the interaction between state practice and *opinio juris* in the proof of custom, appears in Kirgis, *supra* note 21, at 150. When a norm rests heavily on two factors, or variables, the two frequently are not mutually exclusive in practice even if the authoritative statement of the norm treats each of them as an independent standard to be met.

representative government. The degree to which that claim is likely to be destabilizing could depend, to a greater extent than the other self-determination claims, on the degree to which the existing government already is representative. If the point on one axis is significantly influenced by the point on the other, the outcome, illustrated by the intersection of the lines emanating from both points, becomes indeterminate. But even when the claim is for a more representative government, it is influenced by exogenous factors. Prominent among them would be what Thomas Franck has identified as the emerging international right to democratic governance.[34] As such a right becomes widely recognized, its capacity to destabilize is lessened because it becomes difficult for an existing government to explain any intransigent resistance to the claim in international forums. Thus, the degree of destabilization, even in a claim for a more representative government, would not depend entirely on the extent to which the current government is representative, and the point of intersection (and thus the outcome as to legitimacy) would be determinate at least within a meaningful range.

The diagram above does not solve all self-determination questions, but it illustrates how the two key variables work together to guide decision making on the legitimacy of a variety of self-determination claims. I do not claim that these are the only variables at work; only that they are key, and that they therefore have predictive power.

To summarize: The right of self-determination may be seen as a variable right, depending on a combination of factors. The two most important of these seem to be the degree of destabilization in any given claim, taking into account all the circumstances surrounding it, and the degree to which the responding government represents the people belonging to the territory. If a government is quite unrepresentative, the international community may recognize even a seriously destabilizing self-determination claim as legitimate.

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[34] *See* Franck, *supra* note 23. See also Higgins, *supra* note 27, pointing out the Human Rights Committee's emphasis on this form of self-determination and its widespread acceptance by governments reporting to the Committee.

* An earlier version of this Comment was presented on November 12, 1993, at a conference, Building Nations, Ending Wars: The Wilsonian Legacy of Self-Determination, organized by the Woodrow Wilson Birthplace and Museum, Staunton, Virginia.