

CHALLENGING CLASSICAL SELF-DETERMINATION: KOSOVO'S CASE FOR SELF-DETERMINATION

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Introduction

Considering that no so long ago the status of self-determination as a legal principle was a contested one at best,² present considerations and debate surrounding the said principle shed light not only on the sheer developments registered but are also indicative of the way and pace at which progress is registered in an area of law that is so intricately intertwined with the political.

This right to self-determination, described in typical formulations as the right by which 'All peoples [may] freely determine their political status and freely pursue their economic, social and cultural development',³ has not only come to be generally recognised (by most Western jurists at least) as a legal principle but has also been confirmed by the International Court of Justice as a right applicable *erga omnes*.⁴ Indeed, in its very recent Advisory Opinion, the ICJ observed that the principle of self-determination has developed in such a way that 'a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation' can be said to have been established.⁵

However, beyond the rhetoric of self-determination from which governments seek popular legitimacy, the argument has also been made that self-determination amounts also, almost

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² Ian Brownlie, *Principles of Public International Law* (first published 1966, OUP 2008) 580.

³International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter ICCPR), Art. 1.

⁴ *Brownlie* (n 2) 580-582.

⁵ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (ICJ Reports 2010) para 79.

in a perverse way, to a ‘disenfranchisement of populations’.⁶ By being considered as an exceptional right it paves the way to a scenario where, beyond a number of carefully pre-defined circumstances, the concept of territorial integrity and the rhetoric of overall peace and stability may easily prevail over any claims of a right to unilateral secession.⁷ It is very much the case that the definition of self-determination that best suits the interests of existing states generally has almost perforce come to predominance.

In this scenario, it has been well observed that this question of whether self-determination can ever be said to encompass a unilateral right to secession encompasses the very ‘heart of the problem embodied in Kosovo’s secession from Serbia’.⁸ The Kosovo crisis, which effectively confronted the international community at a time when ‘an environment of change’ characterised viewpoints on self-determination,⁹ can be said not only to have put up for contestation established viewpoints on classical self-determination but also to have generally challenged the international community into contemplating a more diverse category of scenarios demanding perhaps broadened conceptions of self-determination. The point has long been reached where classical self-determination is simply no longer available as an answer to the vast multitude of modern conflicts at a time no longer characterised by colonial conflicts.¹⁰ Unless international law is content with a situation where its role is confined to one involving mostly a passive recognition of facts, new mechanisms need to be developed and embraced more thoroughly.

Remedial Secession

⁶ Marc Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers 2008). This author acknowledges his debt to Marc Weller’s numerous works on self-determination generally and Kosovo in particular, some of which are referenced in this article. Weller’s work has been a major source of inspiration for this article and the formation of this author’s opinion on self-determination.

⁷ Weller (n 6) 31-32.

⁸ Robert Muharremi, ‘Kosovo’s Declaration of Independence: Self-Determination and Sovereignty Revisited’ (2008) 33 *Review of Central and East European Law* 401, 414.

⁹ Marc Weller, *Contested Statehood: Kosovo’s Struggle for Independence* (OUP 2009) 269.

¹⁰ Weller (n 6) 9.

There seems to be no shortage of works disclaiming the merits of a widely available right to remedial secession and perhaps this is not only to be expected but also, at least to some extent, the natural position to be taken. It is, after all, 'in the interest of systematic stability [that] international law has a bias against secession'.¹¹ This having been said, as long as a proper regulatory framework is developed so as to prevent secessionist movements from threatening international peace and stability, there seems to be no tangible reason for imposing a blanket prohibition on secession. It has been observed,¹² after all, that there is an element of arbitrariness detectable in the classic limitation of self-determination to the colonial context. Where the elements that justify secession in the colonial context are present beyond the said context there seems to be no logical reason for excluding the possibility of a right to secession. It is the fact 'that the colonized are subject to exploitation and unjust domination, not the fact that a body of salt water separates them and their oppressors' that justifies secession.¹³ The Kosovo debacle, with all its peculiarities, presented a situation that arguably encouraged the international community to enter into a period of re-formulation of ideas on secession, even if at times amid widespread claims by diplomats and others generally that situation is a *sui generis* one.

Governments seemed to rely on the doctrine of constitutional self-determination when confronted with the disintegration of Yugoslavia and the subsequent unilateral declarations of independence that it triggered off. This doctrine was initially well suited to deal with units of the former Yugoslavia such as Croatia and Slovenia, but there were limits beyond which this doctrine could not be extended. Faced by Chechnya's attempt at constitutional self-determination, the international community responded with 'an emphatic no'.¹⁴ Such categorical an answer could not, however, be extended to the

¹¹ Christopher J. Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (2008) 12(2) ASIL <<http://www.asil.org/insights080229.cfm>> accessed 31 December 2010.

¹² Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral foundations for International Law* (OUP 2004) 339.

¹³ *Ibid.*

¹⁴ *Weller* (n 8) 19.

Kosovo situation and was at any rate unlikely to be accepted by the people of Kosovo.¹⁵

The applicability of constitutional self-determination to Kosovo was effectively ruled out on the ground that according to the former SFRY Constitution, Kosovo was (even if it had federal representation in its own right) ‘an autonomous province’ of Serbia.¹⁶ With constitutional self-determination ruled out of the picture, remedial self-determination presented itself as a viable alternative.

In an attempt to find a viable legal basis for remedial self-determination, recourse has often been had to what has been described as the ‘saving clause’ of the 1970 Friendly Relations Declaration.¹⁷ This clause has been construed at times to imply that the guarantee of territorial integrity is effectively dependent on ‘a government representing the whole people belonging to the territory without distinction as to race, creed or colour’.¹⁸ Even Marc Weller is effectively constrained to admit that ‘this wording was originally meant to be more restrictive than appears at first sight’.¹⁹ Indeed, ignoring for a while the inconsistency of such an interpretation with state practice generally, interpreting the Declaration in such a way would be tantamount to drastically reformulating its position on self-determination.²⁰

While Weller is able to detect in international scholarship at least a minimal shift from a position of general dismissal of a right to self-determination to one of cautious acceptance of the said right in given circumstances,²¹ it might be the case, as Weller himself points out, that it is not an essential requirement for further development that this debate be settled indisputably in favour of the right to secession. The

¹⁵ *Ibid.*

¹⁶ *Weller* (n 6) 53.

¹⁷ Peter Hilpold, ‘Self-Determination in the 21st Century – Modern Perspectives for an Old Concept’ (2006) 36 *Israel Yearbook on Human Rights* 247, 267.

¹⁸ Declaration on Principles of International Law Governing Friendly Relations and Cooperation between States, UN General Assembly Resolution 2625 (1970).

¹⁹ *Weller* (n 6) 62.

²⁰ *Hilpold* (n 17) 269.

²¹ *Weller* (n 6) 64.

establishment of an undisputed right to secession in given circumstances has obvious attractions and would enable states to better support the cause of rightful secessionist movements, however it is also the case that such a right can be formally done away with insofar as ‘there is no international norm prohibiting secession’.²² This is, in a way, the same line of reasoning adopted by the ICJ in its Advisory Opinion in examining whether there is a general prohibition against declarations of independence. Here it has been observed that the Court made use of the ‘Lotus principle’ by which ‘in international law everything is allowed that is not expressly prohibited’.²³

Kosovo’s case

It is well observed by Marc Weller that while ‘repression or exclusion’ cannot yet be said to equate to constitutive elements of a ‘remedial self-determination status’ with certainty, the said elements definitely would seem to give rise to a cognisable ‘legitimising effect’.²⁴ Indeed, while the tendency of diplomats to avoid reference to ‘self-determination’ is definitely detectable (even when it seems to have been *de facto* implemented),²⁵ it was with reference to repression exercised by the Serbian Government that numerous diplomats sought to make intelligible and tackle the legality or otherwise of Kosovo’s independence.

In his independence recommendation, UN Special Envoy Martti Ahtisaari considered, along with the present situation and need for stability, the realities of ‘Kosovo’s recent history’ and the “irreconcilable position” of the parties involved.²⁶ On a similar note, Muharremi makes reference to the UK’s representative in the Security Council who underscored ‘the legacy of Milosevic’s oppression and violence’ and to Costa

²² *Hilpold* (n 17) 269.

²³ Dr Stefan Talmon and Dr Marc Weller, ‘Kosovo: The ICJ Opinion – What Next?’ (Summary of the International Law Discussion Group meeting held at Chatham House, September 2010) <http://www.chathamhouse.org.uk/files/17391_il210910kosovo.pdf> accessed 31 December 2010.

²⁴ *Weller* (n 6) 65.

²⁵ *Muharremi* (n 8) 419.

²⁶ UN document S/2007/168 (March 2007) para 16.

Rica's representative who went as far as to allude to the Serb 'campaign of ethnic cleansing'.²⁷

A slight problem in the above trail of argumentation might be triggered by the question of what impact past human rights abuses may be said to have had on the legitimacy or otherwise of claims for self-determination following such a period of abuses. The extent that this question is considered relevant to the Kosovo case may aptly be described 'ambiguous'²⁸ inasmuch as 'internal self-determination [may] take precedence over a right to secession even if such a right might have existed previously'.²⁹ However it would seem that, in relation to Kosovo at least, this argument of a right which existed at some point in the past but which no longer subsists following a particular turn of events cannot be sustained with much persuasion. Indeed, Muharremi himself counters this argument not only by pointing out the impossibility of Kosovo building up the required levels of trust to work with a Serbian government, but also by pointing out the lack of effort by Serbian authorities to integrate Kosovo in the Serbian political process generally.³⁰

Without entering into the merits of the South Ossetia case, it is nevertheless pertinent to point out Russia's embrace of the remedial secession doctrine in its recognition of South Ossetia. Such acts would seem to indicate the increasing prominence of the argument that repression is the prime constitutive element for secessionist movements seeking 'remedial self-determination status'. With regard to Russia's invocation of the doctrine, Weller points out that the EU's opposition to Russia's argument would seem to counter applicability of the doctrine to the given circumstances in Georgia rather than applicability of the doctrine generally.³¹

²⁷ *Muharremi* (n 8) 419.

²⁸ *Borgen* (n 11).

²⁹ *Muharremi* (n 8) 421.

³⁰ *Ibid.*

³¹ *Weller* (n 6) 69.

The Impact of the Kosovo case

Considering yet again the close ties between political and legal developments insofar as self-determination is concerned, it was almost inevitable that the way the international community sought to tackle the Kosovo situation would have an impact on the development of the self-determination principle generally. This even more so when considering that the Kosovo case is, effectively, set to become 'the leading case of remedial secession outside the classical decolonisation context',³² notwithstanding the (sometimes justified) widespread claims that the Kosovo situation is a *sui generis* one.

Claims made by diplomats and others to the effect that the Kosovo case is a unique one have a good basis on which to be made, given that the Kosovo situation encompasses a number of factors which seem, at best, unlikely to subsist in a combined manner vis-à-vis any other secessionist movement existing at present. The confusion brought about by the disintegration of the former Yugoslavia into its constituent units, the unique status of the said constituent units and of Kosovo itself as determined by the Former SFRY constitution, the widespread human rights violations, the consistent denial of effective participation in governance and the long period of UN administration: all these factors construed together make claims that Kosovo is a *sui generis* case seem well-founded.

However, while the claim that the Kosovo situation is unique (and unlikely to be replicated any time soon) is a valid one, the claim that it has not created a precedent begs to be contested. In fact, while referring to international law as a 'gentle civilizer of nations', Muharremi makes the claim that a precedent has been set to the effect that the principles of sovereignty and territorial integrity may no longer be invoked with much effectiveness by a state that has engaged in active repression of a part of its population.³³ The Kosovo case has effectively exemplified various degrees of repression and postulated them into a precedent that may be invoked, if not as justification of remedial secession *per se*, at least as a basis for discussion of self-determination generally.

Like Muharremi, Borgen also makes the argument that while some elements of the Kosovo case are *sui generis*, others are

³² Muharremi (n 8) 433.

³³ Ibid 434.

essentially constitutive of a precedent. Observing that UN administration under Resolution 1244 effectively ‘moved Kosovo... into the grey zone of international administration’, Borgen also observes that some precedential value subsists in what the Kosovo case established *vis-à-vis* what constitutes a ‘people’ insofar as self-determination argumentation is concerned. It is not of minimal importance that ‘fragments of ethnic groups’ (as opposed to ‘nations’ in the strict sense) might find that ‘one of the bulwarks of international law against facile secessions may [have been] weakened’ as a consequence of what was established by the Kosovo case in this regard.³⁴

Nevertheless, as much as it makes sense to consider that some sort of precedent has been established and as desirable as it may be to consider that the borders of the territorial integrity principle have been more clearly defined by this precedent, it remains all too true that ‘international law is largely made and practised by states’.³⁵ It is not in the interest of a number of states (some of which might themselves be facing a threat from secessionist movements within their territory) that the self-determination principle be further developed beyond its classical boundaries. To the extent that this is the case, the precedent set by Kosovo might be a weaker one than might initially be foreseen. Nonetheless, the fact remains that attempts by a number of states to confine what was established *vis-à-vis* Kosovo’s case by describing it as *sui generis* might not, at the end of the day, turn out to be entirely successful. In self-determination situations, where situations tend to develop with unique haste on the political level, it may very well be the case that ‘the most effective law in politically-charged situations may be the law of unintended consequences’.³⁶

³⁴ Borgen (n 11).

³⁵ Muharremi (n 8) 435.

³⁶ Borgen (n 11).

The ICJ's Advisory Opinion

Much has been said about the extent of the ICJ's contribution to the self-determination discussion, particularly with regard to the apparent lack of contemplation on the merits of remedial secession. An instinctive reply to such criticism would probably hint at the restricted nature of the question put before the ICJ. While such a reply may not totally justify the at times mechanical approach adopted by the ICJ in its Advisory Opinion, a degree of justification in such a response would seem to subsist. Weller points out that the ICJ 'is not involved in academic or scholarly output' but in the present situation had the task of providing a determinate answer to the limited question placed before it.³⁷ Indeed, given the lack of substantive international law dealing with the matter and the confusion ensuing in state practice, it could barely be expected of the ICJ to tackle the question of remedial secession directly.

Nevertheless, it has rightly been indicated that the ICJ, while still circumscribing the issue of remedial secession per se, could still have engaged in useful discussion of the related subject-matter, such as the extent to which values of international law were served (or otherwise) by Kosovo's declaration of independence.³⁸ Szewczyk refers to Judge Aharon Barak's repeated statement that 'law is everywhere' and argues that, by adopting so mechanical an approach in its Advisory Opinion, the ICJ seemed to suggest otherwise.³⁹ While a commonplace argument in international law is that whatever is not prohibited is therefore permissible, this argument does not really do much in the way of creating a momentum for international support of repressed minorities in their attempts to attain enhanced levels of self-determination.

In this way, the Advisory Opinion may be said to lack an element of 'practical value' for those secessionist movements seeking legal mechanisms through which to implement their

³⁷ Dr Stefan Talmon and Dr Marc Weller, 'Kosovo: The ICJ Opinion – What Next?' (Summary of the International Law Discussion Group meeting held at Chatham House, September 2010) <http://www.chathamhouse.org.uk/files/17391_il210910kosovo.pdf> accessed 31 December 2010.

³⁸ Bart M. J. Szewczyk, 'Lawfulness of Kosovo's Declaration of Independence' (2010) 14 (26) ASIL Insight.

³⁹ Ibid.

claims⁴⁰. Such movements will effectively find that the Opinion fails to provide them with ‘a legal tool to realise those aspirations’.⁴¹ This is a major stumbling block, especially on account of the way progress is made in this area of law, where political will seems to be the main catalyst for change and development.

Conclusion

The impression has often been given that the principle of self-determination is engaged in a constant struggle to keep up with political ‘on the ground’ developments.

Given this situation, Peter Hilpold detects general consensus that ‘the golden age of self-determination always lies before us’.⁴² This recognition also emerges from the way academia generally opted to tackle the Kosovo case, wherein a lot of importance was given to the discussion of what impact, if at all, the Kosovo case may have on other secessionist movements and on the general development of the self-determination principle in the coming years.

Even if the ‘the golden age of self-determination’ seems far ahead, the intricate development of the self-determination principle is evident even at this stage. The Kosovo case, while being a complicated one, is itself testimony to such development. While no definite right to secession can be said to have been established, the statements and reasoning of the international community in its recognition of what was perhaps a *de facto* state of affairs cannot but further the case of international actors interested in remoulding hardened perceptions of self-determination. There is now, at the very least, a greater awareness of what options are available *vis-à-vis* a ‘people’ repressed by a government which happens to be governing a given territory. There is also a related awareness that the principle of territorial integrity might be challenged in given circumstances, even if the challenge between the

⁴⁰ Mindia Vashakmadze and Matthia Lippold, ‘Nothing but a road towards secession? – the ICJ’s Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo’ (2010) 2 *Goettingen Journal of International Law* 619, 647.

⁴¹ *Ibid.*

⁴² Peter Hilpold, ‘Self-Determination in the 21st Century – Modern Perspectives for an Old Concept’ (2006) 36 *Israel Yearbook on Human Rights* 247, 284.

principles of self-determination and territorial integrity itself remains unresolved.

The most significant contribution registered by the Kosovo case with regard to the development of the self-determination principle lies perhaps in its having exposed, in an unprecedented fashion, the deficiencies of the classical approach to the said principle. Weller observes how this approach has been shown to be a failure 'even on its own terms' of maintaining overall peace and stability, considering that the figure of ethno-nationalist wars has now reached the alarming rate of 75% of all military confrontations.⁴³ The way forward is a realisation by all parties involved in self-determination conflicts that good will and a genuine willingness to consider all possibilities is the way forward. Desirable as it may be for the general interest of currently existing states to ignore self-determination conflicts, the uncomfortable truth remains that deeply rooted conflicts are unlikely to be solved by the passage of time or simply by being ignored.

⁴³ *Weller* (n 6) 157.