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SECESSION AND SELF-DETERMINATION: THEORY AND PRACTICE IN INTERNATIONAL POLITICSDr. Dimpi V Divakaran¹

Secession is, perhaps, the most undesirable development that any state likes to avoid. The protection of territorial integrity is considered as a foremost national interest, and unsurprisingly no state can think about this option lightly. But with the emergence of several national assertions, and protracted and bloody wars fought over it, secession becomes a feasible reality. Secession means the formal withdrawal of a constituent unit from an established, internationally recognized state and the creation of a new sovereign state (Bartkus 1999: 9), or the unification of secessionist entity with its kin state. Since the population of the majority of states are composed of various nationals, the spectre of secession is a serious issue to many states in our period.

In the above mentioned context this article is an attempt, in the first instance, to understand how secession is treated in theoretical discussions in our period. Secondly, the article tries to map the development of self-determination as an international legal principle during the post-World War II period. The last part of the article inquires how the question secession is treated under international legal instruments and the impact of some recent developments to it.

Theoretical Discussions

Ever since self-determination became an international legal principle, states were concerned about its operational consequences in the secessionist context. However, for a long period, secession received scant attention in theoretical discussions of political science or international relations. But the emergence of several ethno-national movements and the challenges it posed to a large number of states transformed it into a crucial contemporary issue. The disintegration of Yugoslavia and the disturbing events that followed it also forced scholars to pay attention to the principle. Currently, a

¹ Assistant Professor, Department of Political Science, Panampilly Memmorial Government College, Chalakudy, Kerala. Email: scbosekp@gmail.com.

serious theoretical debate is taking place over the issue, the major point being whether secession is a desirable model of self-determination, and in what context would secession be a justifiable option?

One of the notable views regarding secession is that if majority of population wishes to secede, they should have the right to do so. This approach, known as choice or primary right theory, is based on liberal ideas of autonomy, free association and consent. Beran and Philpott are some of the proponents of this view. Beran (1984: 24-25) maintains that the state should be a voluntary association of citizens and there can be no political authority without the consent of the governed. If the state were based on coercion it would weaken the legitimacy of the states. This in turn would create a situation where only a few people would have a role in politics, and the rest would be alienated from the state. Secession would be allowed because it should promote the democratic autonomy of its members. Those who go by this view, like Philpott (1988: 82), insist that members' autonomy alone sufficient to justify self-determination. According to this view, there is nothing natural and pre-given about existing state boundaries.

Although this approach sanctions secession, it sets forth some conditions that should be met by secessionist groups. Most important among them are: a) majority or overwhelming majority in a democratically held plebiscite, b) assurance of basic human and cultural rights of all of the population in the new states—including anti-secessionist minorities, c) sharing of resources, i.e., secessionist should not secede with a disproportionate share of goods generated in common by the citizens of the original state or natural resources explored commonly.²

A second view contends that the right to secession is applicable only to national groups. Unlike primary right theorists, who consider the right to self-determination an individual right, this approach maintains that nations collectively hold the right. Nations derive this right from the importance of national identity and membership to

² Beran sets six conditions that may justify the denial of secession: a) the group that wishes to secede is not sufficiently large enough to assume the basic responsibilities of an independent state, b) it is not prepared to permit sub-groups within itself to secede although such secession is morally and practically possible, c) it wishes to exploit or oppress a subgroup within itself which cannot secede in turn because of territorial dispersal or other reasons, d) it occupies an area not on the borders of the existing states so that secession would create enclaves, e) it occupies an area which is culturally or militarily essential to the existing state, f) it occupies an area which has a disproportionately high share of the economic resources of the existing state. However Beran also comments that conditions mentioned in d, e, and f need not be insuperable barriers to secession, and may be solved through some agreements. Harry Beran (1984), p. 30-31.

individuals. Miller, one of the main proponents of this view, believes that national sentiments has an intrinsic ethical significance for its members and that it has an instrumental value in helping them to achieve other goods. According to him when a nation, which is a community of obligation, has a state of its own it must promote distributive justice and its culture. And where the inhabitants of a territory form a national community, they have a good claim to political self-determination. Since a sovereign state is the main institution to realise self-determination, a territorially compact nation has the right to secede (Miller, 1998: 65). Nielsen (1998: 103-33) also maintains that nations have a right to secession in certain circumstances.

Another approach concerning secession maintains that there is no primary right to secession. Buchanan, Birch and Norman, are the main proponents of this view. This approach, which is known as “just cause” theory, traces its roots to Locke’s theory of revolution and suggests that secession is an option only in response to injustice. According to this view, democracy provides a fair procedure for reaching collective decisions about government policy, and an unconditional right to secession would allow territorially concentrated groups to withdraw from the state whenever they lose an election or when some decisions go against them. In Birch’s view (1984: 599), the balance and tolerance of the system would be upset if losing groups, provided they are territorially concentrated, can threaten to withdraw any time they dislike the decisions favoured by the majority. Such actions would encourage even just states to act in ways that would prevent groups from becoming claimants to the right to secede, and this might lead to the perpetration of injustice. It is also pointed out that in most of the instances of secession have engendered enormous violence.

Just Cause theorists limit the permissible cases of secession to as few as possible.³ According to Buchanan (1991: 353), secession is permissible only on two occasions. The first is for rectificatory justice—here secession is simply the re-appropriation by the legitimate owners of stolen property. This applies in situations in which the people attempting to secede are literally the same people who had held a legitimate title to the territory at the time of its unjust annexation, or at least are the indisputable descendants

³ Birch (1984) points out four situations in which secession is permissible: a) incorporation of the region by force, b) the national government has failed in a serious way to protect the basic rights and security of the citizens of the region, c) the democratic system has failed to safeguard the legitimate political and economic interests of the region, either because the representative process is biased against the region or because the executive authorities contrive to ignore the result of that process, d) the national government has ignored or rejected an explicit or implicit bargain between sections that was entered into as a way of preserving the essential interest of a section that might find itself outvoted by a national majority, pp. 599-600.

of those people. This can also be called the historic grievance version of territoriality thesis. Buchanan argues that a valid claim to a territory is a necessary pre-requisite for any sound justification for secession and must be grounded in an historical grievance concerning a pre-existing right to territory (Buchanan, 1991: *ibid.*). The second reason that justifies secession is discriminatory re-distribution. A state engages in discriminatory re-distribution whenever it implements taxation schemes, regulatory policies or economic programmes that systematically work to the disadvantage of some groups while benefiting others. (*Ibid*: 354)

Some scholars believe that secession is an undesirable option and is to be avoided as much as possible. Secession rarely produces a homogenous state and neither secessionist nor rump states are going to be homogenous. In fact such homogeneity can be achieved only through the unsavoury methods like expulsion, ethnic cleansing, etc. (Horowitz, 1998: 190-91). Horowitz, a proponent of this view, observes that on occasions secession may simplify inter-group confrontations and this could lead to the worsening of ethnic relations. He argues that clean break theorists have not noticed the contextual nature of the ethnicity due to an inadequate analysis of ethnic affiliations.⁴ In Horowitz's view (1998: 206) "what is needed is to substitute inter-ethnic accommodation within borders for a self-determination that either creates new borders or legitimates ethnic exclusion within old one."

Recognition of People's Right to Self Determination

The people's right to decide their political destiny tends to appear as a 'demand' for self-determination from the late Eighteenth century onwards. The emergence of the principle of self-determination is often associated with the French Revolution (1789). The Revolution was inspired by the ideas of liberty, equality and fraternity and symbolised the fall of a society that was controlled by nobles, feudal lords and the clergy; it also marked the ascendancy of the bourgeoisie and the transformation of France into a modern nation-state. This radical change was proclaimed in the *Rights of Man*⁵, which declared that "sources of all sovereignty reside essentially in nation." The state was transformed into the collective political institution of the people rather than a

⁴ Horowitz (1998) at p. 191. He also observes that the view that considers ethnic self-determination as the collective equivalent of the moral autonomy of individuals is fairly sweeping. p. 197.

⁵ The Declaration of the Rights of Man and of the Citizen (French: Déclaration des droits de l'homme et du citoyen), passed by France's National Constituent Assembly in August 1789, is a fundamental document of the French Revolution and in the history of human and civil rights.

mere territory that belonged to a king or a dynasty. Thus the French Revolution was a turning point in the history of national self-determination: it helped infuse the principle in political rhetoric and popular imagination. Another event that advanced the idea was the American Revolution (1776).⁶

In the nineteenth century, the idea of self-determination spread all over Europe. Many oppressed national groups like the Irish and the Polish as well as people divided into many principalities, like Italy and Germany, gave birth to powerful national upheavals.⁷ The Young Italy movement, started by Mazzini (1805-1872) had its reverberations across Europe. Mazzini and Garibaldi emerged as leaders with a pan-European appeal. The writings of Mazzini and German nationalists like Herder and Fichte contributed to the development of nationalism as a political doctrine. National consciousness also grew among the peoples in the Ottoman and Austro-Hungarian Empires. During the revolution of 1848, numerous national groups came up all over Europe hoping for the emancipation of their nations.

In the second half of the nineteenth century, Italy and Germany got unified and various national groups in the Balkans—Serbia, Montenegro, Romania and Bulgaria—tried to shake off the yoke of oppressive Ottoman rule and attain freedom. The Congress of Berlin (1878) accepted the independence of Serbia, Montenegro and Romania, previously tributary principalities of the Ottoman Empire, and confirmed Bulgaria as a self-governing principedom.⁸ The idea of plebiscite was also increasingly accepted.⁹

⁶ The term 'self-determination' did not appear in the political vocabulary of this period. According to Umozurike Oji Omozurike, the phrase 'right to self-determination' receives its first specific treatment in a resolution of London International Socialist Congress in 1896. Quoted in Gerry J Simpson (1996), "The Diffusion of Sovereign Self-determination in the Post Colonial Age", *Stanford Journal in International Law*, vol- 32 (1), p.262.

⁷ The pan-European impact of these national aspirations and the growing sympathy toward their causes was evident in the support rendered by the intellectuals of that period. Rousseau supported Polish nationalism. Marx and Engels not only supported the Irish and Polish people, but also condemned colonial domination.

⁸ Mikulas Fabry (2002), "The Idea of National Self-determination and the Recognition of New States at the Congress of Berlin (1878)", paper presented at the ISA Annual Convention New Orleans, March 24-27, 2002, available at [Online: Web] Accessed on 23 July 2015 Url: www.isanet.org/noarchive/berlincongress.html.

⁹ Plebiscites were conducted in Italy in 1860 and Ionian Isles voted for union with Greece in 1862. These plebiscites were held with very rudimentary democratic procedure and narrow franchise. For example in the Ionian island only 13419 out of 250,000 people voted. Alfred Cobban (1969), *The Nation-State and National Self-determination*, London, Collins, p. 42.

During World War-I, the principle of national self-determination emerged as an important political question. The Allies claimed that the primary purpose of the war was to build a world based on the principle of nationality, the right of people to decide their destiny, and the right of small states. President Wilson's insistence was the main factor that brought these principles into the official policy of the Allies. Wilson announced his *Fourteen Points* on 8th January 1918 and *Four Principles* on 11th February 1918, which contained his vision of a new world based on the principle of self-determination.¹⁰ Lloyd George, the then Prime Minister of the United Kingdom, declared on 5th January 1918 that the principle of national self-determination was equally applicable in the case of the colonies as in those of the occupied European territories.¹¹

However, the Allies conveniently forgot these pious declarations during the peace process. The geo-strategic and economic interests of the victors, rather than the principle of self-determination, dominated the Versailles Conference. Many of the post-war territorial settlements were based on secret agreements reached during the war. Even the main sponsor of the principle – the United States – was quite suspicious of the implications of the national self-determination. For example, Robert Lansing, the then US Secretary of State, stated that the principle was loaded with dynamite and would raise hopes that never could be realised.¹² The self-determination of colonial countries even failed to become a serious issue in the discussions. President Wilson sacrificed the principle of self-determination on several instances. During the Peace Conference, President Wilson stated that “it was not within the privilege of the Conference of Peace to act upon the right of self-determination of any peoples except those which had been included in the territories of the defeated empires.”¹³ President Wilson also refused to meet representatives of many national movements, including the young Ho Chi Minh, the Vietnamese Communist revolutionary leader who later became prime minister (1945–55) and president (1945–69) of the Democratic Republic of Vietnam. Thus, at the end of the World War-I, the national aspirations of most people remained unfulfilled. And finally, the principle of self-determination was not incorporated in the Covenant of the League of Nations.

¹⁰ In the Fourteen Points, the word *self-determination* was absent, even though it was embedded in it.

¹¹ Lloyd George, Quoted in Alfred Cobban (1969), p. 61.

¹² Robert Lansing also claimed that both the United States and Canada continue to exist because of the denial of the principle and the considerations of national safety, historic rights and economic interests should have predominance over the principle of self-determination. Quoted in Alfred Cobban (1969), p. 62.

¹³ Woodrow Wilson, Speech on 17 September 1919, Quoted in Alfred Cobban (1969), p. 66.

However, the Peace Conference did take some important steps that furthered the spirit of the principle. Significant among them was the recognition of new states in Central Europe. During the last phase of the war, national armies emerged in various places and national governments were set up in some of those areas where old powers fell. The Peace Conference reluctantly recognised some and states like Romania, Poland, and Czechoslovakia emerged on 'national' lines.¹⁴ Plebiscites were conducted in some areas to make territorial changes in accordance with the popular will.

One event of momentous significance during the War was the fall of Tsarist government in Russia. The newly installed Russian provincial government of Kerensky, in March 1917, declared its intention to establish peace on the basis of the "right of the nations to decide their own destiny."¹⁵ The Bolshevik government, which took over in October 1917, also announced their decision to sign the terms of peace based on the principle of equal justice for all nationalities. At Brest-Litovsk the principle of self-determination became a dominant factor.¹⁶ In the Conference, however, the Soviet commitment to the principle confronted the stark geo-strategic interest of Germany who wanted to bring Eastern Europe into their sphere of influence. Later, the Soviet constitution incorporated the right to secede and recognized the independence of Finland.

The principle of self-determination resurfaced as a major issue during World War II as well. It received an important place in the vision of the post war world propounded by US President Roosevelt and British Prime Minister Winston Churchill as it was included in the Atlantic Charter (1941) as a general standard governing territorial changes and a principle concerning the free choice of rulers in every state.¹⁷ In the

¹⁴ *Ibid.*, p. 55-56.

¹⁵ H.W.V. Temperley (1921) (ed.), *A History of Peace Conference 1920-1924*, vo-1V, London, Henry Frowde and Hodder and Stoughton, p. 183.

¹⁶ V. I. Lenin (1986), "Decree on Peace October 26 (November - 8)", in V.I. Lenin, *On National Liberation and Social Emancipation*, Moscow, Progress Publishers, p. 255.

¹⁷ The Charter reads, "they (the two leaders) desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;... they respect rights of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them." Text in J.A.S. Grenville (1974), *The Major International Treaties 1914-1973, A History and Guide with Texts*, London, p. 198. However, the hollowness of these loud claims came out sooner than later. Just one month after Churchill stated, in the House of Commons on 9th September 1941, that the self-determination mentioned in the Charter was not applicable to the colonial people, but to restore "the sovereignty, self government and national life of the States and nations of Europe under the Nazi Yoke", besides providing for "any alternations in the territorial boundaries which may have to

same period, the Allied states were engaged in discussions to set up an international organization after the war. A draft Charter of such an organization had come out of the Dumbarton Oaks talks (1944), held among the US, UK, China and USSR, in which the principle of self-determination was absent. However, in the San Francisco Conference (April, 1945), on the insistence of the Soviet Union, the principle of self-determination was incorporated as one of the goals of the organization.

The suggestion to include the principle of self-determination in the Charter was not appreciated by all and many states had considerable reservations about its implications. One important area of concern was over the term 'people', which was seen as a departure from the state-oriented approach in international relations in which the equality of states rather than that of people mattered. The extent of power entrusted to international bodies was also a matter of serious concern and it was asked whether the provision permitted for the intervention of the UN or other states to implement self-determination.¹⁸ Other apprehensions were about the possible encouragement to civil strife, secessionist aspirations and the potential misuse of the principle for revanchist purposes as was done by Nazi Germany.

In the UN Charter, self-determination appears in two articles.¹⁹ Article 1 (2) explains the UN's purpose as, "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Article 55 states; "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

The incorporation of self-determination in the UN Charter was a big step forward as it was for the first time that the principle became part of a multilateral treaty. This was a

be made." Parliamentary debates, 5th series, vol-374, House of Commons, Official Report, 8th vol of session-1940-41, p-68-69. Quoted in Antonio Cassese, *Self-determination of People: A Legal Reappraisal*, Cambridge University Press, 1995, p.37.

¹⁸ UNCIO, Vol. VI, 1945, p. 296. Quoted in Antonio Cassese, no-37, pp. 38-39.

¹⁹ Even though the word self-determination was not used, while explaining the basic objectives of the Trusteeship system, Article 76 (b), states, "...and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the *freely expressed wishes of the peoples concerned*"

milestone because it was a transition of the peoples right to self-determination from a political postulate to an international legal principle.

In 1960s UN General Assembly adopted a series of resolutions approving the peoples right to self-determination. Key among them was the *Declaration on the Granting of Independence to Colonial Countries and Peoples-1514 (XV)*, adopted at the 15th session of the General Assembly on 14th December 1960. Article 2 of the Declaration states,

All people have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This Declaration stands as a milestone in the struggle against colonialism and all forms of alien subjugation and oppression. It was also a radical departure from the ambivalent tone of the UN Charter, and drastically transformed the international status of the principle. It called for a speedy and unconditional end to colonialism in all its forms and manifestations and stated that the inadequacy of political, economic, social or educational preparedness, which was one of the major arguments of the West, should never serve as a pretext to delay independence. Thus, in many ways, the resolution was ‘revolutionary’ and marked a real turning point, which laid the foundation stone of a “new law of self-determination” (Daes 1996: 48).

After this declaration many important international instruments affirmed the peoples right to self-determination. Most important among them were the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights, which were adopted by the General Assembly on 16 December 1966. The UN General Assembly adopted Resolution 2200 (XXI) on 16th December 1966 and opened for signature and ratification the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights. The International Covenants were another high point in the growing international recognition of the peoples’ right to self-determination and a milestone in its transformation into an international legal right.

Does Right to Self-Determination Embody Secession?

Whether people’s right to self-determination, which is recognised under international law, encompass right to secession is a vexing question. The possibility of using right to

self-determination in secessionist context was one of the major concern raised many states at the preparatory meetings. Majority of the states believed that any sympathy towards secession would be a huge threat to territorial integrity of large number of states which eventfully cause incessant disorder in the international realm.

From the very beginning, the UN has been sensitive to the potential dangers inherent in the principle of self-determination. The unity and territorial integrity of states have always been more valued in the international system rather than the people's right to self-determination. The UN instruments on self-determination are, as we have seen before, applicable to peoples under colonial rule and alien occupation. In other words, under the existing UN instruments, secession from a sovereign state is not permissible. Invariably all UN resolutions concerning self-determination explicitly state this point. For example, Article 6 of the UN General Assembly resolution 1514 states, "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."²⁰

A clear indication of the UN's position is the statement of Mr. U Thant, UN Secretary General in 1970, in the context of the Biafran secessionist conflict in Nigeria. "The United Nations' attitude is unequivocal. 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."²¹ This shows that the UN's approach on this question was undoubtedly against secession. During 1955-1989 the only successful case of secession was that of Bangladesh.

However, a few recent developments have raised doubts, at least among some sections of scholars that right to secession exists in limited circumstances. One of the developments is the growing recognition of the democratic aspect of self-determination. It has been observed earlier that the democratic dimension of self-determination has been increasingly recognized over the years. The Western states have been demanding the inclusion of this aspect into the UN instruments in the post Second World War period and finally UN General Assembly resolution on *Friendly Relations and Co-*

²⁰ This view is not different from the position taken by the Jurists in the Aaland Islands case.

²¹ U Thant, Quoted in Emerson R (1971), "Self-determination", *American Journal of International Law*, vol-65 (3), p. 464.

operation and the *Vienna Declaration* adopted by the World Conference on Human Rights (1993) incorporated democratic aspect in their resolutions.

Vienna Declaration points out that it shall not be “construed as authorizing or encouraging any action which could dismember or impair, totally or in part, 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 and thus *possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*”²² One section of scholars believes that these lines link the denial of democratic self-determination to the right to external self-determination or more precisely they bestow limited right to secession. According to Kirgis (1994: 306), from about 1970 on, there could be a right to secede from an established state whose government excludes people of any race, creed or colour from political representation and have claims to a defined territory. Cristescu (1981: 26) also observes that, “the right of secession unquestionably exists, however, in a very special, but very important case: that of peoples, territories and entities subjugated in violation of international law.”

The second development was the disintegration of former socialist states of the Soviet Union, Yugoslavia and Czechoslovakia on national lines. More than twenty new sovereign states emerged in this way. The speedy international recognition of the former republics raised questions as to whether the world community was showing a new openness towards secession. Scholars like Heraclides (1992: 403) commented that the existing taboo against secession is weakening.

Nevertheless this new enthusiasm over secession died down soon. The Badinter Commission, constituted by the EU after the disintegration of Yugoslavia, made a significant observation on the rights of the Serb minorities in Bosnia and Croatia: “it is well established that whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidits juris*) except where the states concerned agree otherwise.”²³ This shows that the international community again uphold the territorial notion of self-determination as before. The

²² The Vienna Declaration (1993). Emphasis Added. *Friendly Relations and Cooperation* states that there should not be any discrimination on the basis of race, colour and creed.

²³ Badinter Commission 1992, 31 *ILM* 1488.

European Union's position on the Kosovo issue also reinstated that secession from an existing state does not have the support of international community.

As far as the resolution on *Friendly Relations and Co-operation* and the *Vienna Declaration* are concerned, the most prevalent understanding is that the issues of democratic governance should be resolved within the states with necessary changes in the system. According to Eide (1996: 91), it is (the clause in the above mentioned resolutions) for an inclusive, democratic and representative government which on the behalf of the population as a whole freely can pursue the economic, social and cultural development of the country. The political status has already been settled by becoming a sovereign, independent state. Thus, growing recognition of the democratic aspect is about the internal aspect of self-determination rather than the external, in almost all situations.

However, it has already been pointed out that, the question of national groups and their interests is seldom solved through such measures. Some liberal scholars like Kymlicka, Tamir and Moore observe that rights such as formal equality of citizenship or political participation may not be an answer to a national question. Their grievances are related to the political recognition of their identity and this question has not yet been addressed in international instruments. For what the UN instruments does is to insist that such issues should be settled within states without disturbing existing boundaries.

The general, overarching ideological environment of the world will reflect in the decision of all actors—states, international organizations, etc. And in the present world it is widely accepted that in a democracy, people have to express their aspirations through the national political system. Consequently, secession receives some support from scholars when there is denial of democracy and justice. However, it would be too unrealistic to assume that UN instruments, which are adopted by states, validate secession that may pose a serious challenge to their own existence.

The Kosovo and verdict of ICJ

The unilateral declaration of independence by Kosovo Assembly On February 17, 2008 and eventual recognition of the new state by more than 100 countries set off new debate in the topic of secession. The opinion of the International Court of Justice that “*the declaration of independence of 17 February 2008 did not violate general international*

law²⁴ has heated up this discussion. Before accessing the impacts of these developments let us have a short description of developments that led to the Declaration of Independence in Kosovo.

Kosovo History

Kosovo is a Muslim, Albanian-speaking majority province in the former state of Yugoslavia. Kosovo, although it is an Albanian majority area, has sentimental concern for Serbian nationalists because it was the center of a medieval Serbian monarchy and the site of two epic battles in the 14th and 15th centuries. During the Balkan wars of 1912-13 Kosovo was incorporated into the modern Serbian state for the first time. It was an autonomous province in Josip Broz Tito's Yugoslavia.

Kosovo become part of Serbia after the disintegration of Yugoslavia. Although forces that work for an independent statehood was alive in those days, they fail to get international support. Both Dayton agreement (1995) and Badinter Commission (1991) observed that Kosovo do not qualify for the independence²⁵. Rather, the principle of *uti possidetis*, which enabled a unique interpretation that newly established sovereign states should be recognized within the same borders that their preceding dependent area had before their independence, was endorsed.²⁶

The movement for independence entered into a new face with the beginning of guerilla war by Kosovo Liberation Army (KLA) in 1996. Response of the Serbian army against this insurgency was massive. The civil war intensified by 1998; the death toll and refugee flows of Albanians increased over the years. The report of mounting human rights violations by Serbian army has drawn international attention to the conflict. To

²⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports* 2010, pp.403-453, para 123.

²⁵ Republics of former Yugoslavia was considered as natural candidate for independent statehood. Kosovo was only an autonomous region.

²⁶ The claim of Vojvodina, another autonomous region in former Yugoslavia, was also not considered in this period. It is also argued that western powers were concerned about intensification of Albanian national movements in Macedonia and Montenegro as an contagious effect of independent Kosovo

counter Serbian forces US led NATO launched air strikes in March 1999 which, ultimately, forced Milosevic to withdraw its forces from Kosovo.²⁷

Kosovo was under the UN Mission for Kosovo (UNMIK) and the NATO-led Kosovo Force (KFOR) after The United Nations Security Council Resolution of 1244 of 10 June 1999. The resolution authorizes the UN Mission to perform civilian administrative functions, establishment of substantial autonomy and self-government in Kosovo; facilitate a political process to determine Kosovo's future status, etc.

The discussions for the final status of Kosovo began in 2006 by Secretary General's special envoy and former Finnish President Martti Ahtisaari. After initial discussions, Maartti Ahtisaari suggested internationally-supervised independence for Kosovo. This plan was rejected by Serbia and its supporters in UN Security Council. This was followed by a series discussions by a *Troika* composed of the European Union, the Russian Federation and the United States in August 2007. These deliberations also, however, failed to recommend a mutually agreed solution. While an international discussion on final status was in a deadlock Kosovo Assembly adopted declaration of independence in February 2008.

*"We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state."*²⁸

Although Serbia and its supporters strongly objected the unilateral declaration of independence Kosovo was recognised by many Western states without any delay. Serbia raised its protest in UN also. In response to Serbian demand UN General Assembly asked the ICJ to exercise its advisory opinion and determine whether the declaration of independence, written by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law.²⁹

²⁷ There were many discussions on legal and moral aspect of NATO intervention in Kosovo. The Western countries argued that although intervention was not sanctioned by UN, so not legal, it was unavoidable in the context of a 'humanitarian catastrophe'.

²⁸ Assembly of Kosovo, Kosova Declaration of Indipendence (Feb. 17, 2008. available at http://www.icj-cij.org/docket/files/141/150_38.pdf (see page 20 of the document).

²⁹ Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

International Court of Justice provided its advisory opinion on Kosovo in June 2010. In its verdict ICJ pointed out that there exist no explicit prohibition to unilateral declaration of independence in International law³⁰ and Kosovo's declaration is accordance with International law.³¹ It was also stated that "the scope of the principle of territorial integrity is confined to the sphere of relations between States" and, hence, does not concern non-state actors, including secessionist groups.³²

Thus Advisory Opinion on Kosovo by ICJ commenced new discussion on secession in International level. ICJ opinion, perhaps for the first time, pointed out that unilateral declaration of independence can be defended under international law. This interpretation is contrary to the general consensus on secession in the Post World War II period; i.e. international community recognized external self-determination in very limited circumstances – for people under colonial rule and alien occupation.

The rationale of such a cautious stance towards secession stem from the realities of this era. Secessionist movements emerged in large number of states across the world in this period. In some cases such movements developed into bloody armed conflicts between the states and the secessionist groups. One of the major threats to the territorial integrity and survival of the states in this era was from such movements. These movements, in a few occasions, spill over into interstate conflicts. More sympathetic approach to secession, in the above mentioned context, would have threatened the stability and peace of interstate system.

The impact of Advisory opinion on Kosovo, thus, should be understood in this background. This Opinion may provide motivation to secessionist groups around the world to adopt any steps, including violence/ terrorism, to tear apart apportion of territory from a state. The Opinion may be interpreted as a legal sanction to announce unilateral declarations of independence in secessionist context. This feeling of legality would be a huge encouragement to secessionist groups to make unilateral declarations.

³⁰ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports* 2010, at pp.438–39, para. 84.

³¹ *Ibid.* at p.452, para. 122 (concluding that the adoption of the unilateral declaration of independence did not violate any applicable rule of international law).

³² *Ibid.* para 80.

Apart from that, this can be cited as a precedence to demand and defend secession. The secessionist group that is supported by strong states can declare independence. Court verdict also enable irredentist groups to secede and join another state without any violation of international law.³³ Perhaps the most suitable example is Crimea case. The Russian authorities defended the accession of Crimea by referring Kosovo incident.³⁴ Thus, although western states place Kosovo as a unique case, i.e. it is a sui generis case in international politics, it will be reference point in future.

More importantly, in future, it looks, states would be more cautious to refer protracted self-determination conflicts to UN. It is possible that secessionist groups under UN mandated conflict settlement arrangements would unilaterally declare independence. Kosovo episode, regrettably, provides legal sanction for such actions.

Conclusion

Secession or break up of territory is one of the most unacceptable developments that any state wants to avoid even at high economic, military and human cost. However, a survey of theoretical discussions shows that very few scholars have out rightly rejected the possibility of secession. It is also important to note that majority of them do not consider it as a primary right. The most accepted view, perhaps, is one that considers secession in the context of just cause.

International community felt the hassle of secessionist movements in the post-World War II period. Large number of secessionist movements emerged in the period which challenged the authority and legitimacy of the states by diverting the loyalty of a certain section of the people, and thus threatening their territorial integrity. Many states fought bloody, protracted wars to maintain their territorial integrity. States also adopted various types of the power sharing agreements to find amicable solution to these conflicts.

The same period also witnessed the elevation of principle of self-determination as an international legal principle. The UN Declaration on the Granting of Independence to

³³ The ICJ verdict states that, “the scope of the principle of territorial integrity is confined to the sphere of relations between States” – this means, it does not concern non-state actors, including secessionist groups. see supra n. 44.

³⁴ Russian Foreign Minister Sergey Lavrov proclaimed “If Kosovo is a special case then Crimea is a special case; it’s just equally special.”.

Colonial Countries and Peoples (1960) and the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights (1966) are two milestones in this regard.

International community, however, took adequate precaution to avoid the application of right to self-determination in the secessionist context. It was, rather, more concerned about interests of the states and order and peace in inter-state system. Consequently, application of right to self-determination has restricted in very limited contexts, i.e. to peoples under colonial rule and alien occupation. In other words, the demand for secession from independent states has not been considered sympathetically by international community. More acceptable view was that the national question in independent states has to be settled not by dividing it but by adopting more accommodative, power sharing models of Self-determination. Such an international consensus remained as a big constraint on states to support secessionist movements in the cold war era. Cases of secession, consequently, were very few during this period.

The unilateral declaration of independence by Kosovo and its recognition by Western states was contrary to this international consensus. The verdict of International Court of justice, more importantly, heavily shook this informal agreement. An act of secession received legal sanction, perhaps for the first time, from an international body. These developments would definitely provide huge encouragement to secessionist movements and offer a legal justification for unilateral declaration of independence. Powerful states may use this incident as a precedence to validate their political goals as in the case of Crimea. In the above mentioned context, more matured attitude of the international community is unavoidable to avert more 'unique cases' of secession in future.

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Briefs

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Sumeetha M, Centre for Development Studies, Trivandrum

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Vipin Das, NUALS, Cochin

