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ARTICLE: Self-Determination in the Taiwan/China Context

Valerie Epps \*

\* Professor of Law, Suffolk University Law School. B.A., Birmingham University, England; J.D., Boston University; LL.M., Harvard University.

#### SUMMARY:

... Secondly, I will discuss why the international community is so reluctant to embrace, or so fearful about proclaiming a fully fledged right to secede, even in certain limited circumstances. ... Lastly, I want to relate the evolving definition of the term self-determination and the resistance to a right of secession to the Taiwan/China status debate. ... THE INTERNATIONAL COMMUNITY'S RELUCTANCE TO EMBRACE A FULLY FLEDGED RIGHT TO SECESSION ... THE NEW SELF-DETERMINATION AND THE RESISTANCE TO SECESSION IN THE TAIWAN/CHINA CONTEXT ... On the issue of foreign domination and resistance to colonial overlords, Taiwan would not fit the paradigm. ... If either China or Taiwan exercised the force option, I believe that the international community would regard that as illegitimate, though whether they would mobilize to resist it is questionable. ... I believe we need a new international norm of self-determination to fit the Taiwan/China model. ... A modified version of this right, and one that would also fit the Taiwan/China situation, would read: "If the majority of the adult population of a geographic area expresses its wish to separate from the territorial unit of which it is currently a part because the government of the territorial unit does not represent the whole people, it has the right to do so." ...

#### TEXT-1:

##### [\*685] I. INTRODUCTION

This Article will address three points. First, what do we mean by self-determination. Who is the self? What is this "determination," and who or what entity gets this right? I shall approach this point by giving a brief historical overview of the gradual development of the meaning of the term "self-determination." n1 Secondly, I will discuss why the international community is so reluctant to embrace, or so fearful about proclaiming a fully fledged right to secede, even in certain limited circumstances. n2 I choose secession as a focus because it is the most extreme form of the claim of self-determination and because it has met with the most resistance. Perhaps, indeed, that is why we call it the most "extreme" form of the claim. Lastly, I want to relate the evolving definition of the term self-determination and the resistance to a right of secession to the Taiwan/China status debate. n3

##### II. THE EVOLUTION OF THE MEANING OF THE TERM "SELF-DETERMINATION" IN INTERNATIONAL LAW

In the twentieth century, Woodrow Wilson was the first to use the term "self-determination" in 1918. n4 However, it was not until the drafting [\*686] of the UN Charter in 1945 n5 that the term appears as part of the international legal landscape. Indeed, it had been roundly rejected by the Commission of Jurists in their decision in the *Aaland Islands Case*. n6 Their language is worth quoting because it demonstrated the belief in the state as the bedrock concept of the international community and expressed the fear that any threat to the unity of the state was necessarily a threat to the whole basis of the international system and its stability.

The Commission stated in 1921:

To concede to minorities, either of language or religion, or to any fraction 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. n7

Our concept of the state, and particularly individual's and groups' relationships with, and participation in, the state, has altered since 1921. As a result, we may find the adamancy of the Commission misplaced or even irrelevant because the dimensions of the state based construct have shifted. What has caused this shift? Here I only mean cause in the sense of what concepts have altered in international law that have shifted the landscape. I do not mean to address the much more difficult, largely empirical question of what has caused the shift in the concepts themselves.

#### A. *Key Steps in the Evolving Legal Concept of Self-Determination*

First, the UN Charter (Charter) refers to the "equal rights and self-determination of peoples." n8 At the time of the drafting of the Charter, some leaders equated "peoples" with "nations," n9 "nations" in the sense [\*687] of nation-states or nations freeing themselves from colonialism. So the principle articulated in Articles 1 and 55 was really a reiteration of the notion of the sovereign equality of states. The Universal Declaration of Human Rights only refers to the right of self-determination obliquely in Article 21, n10 but the 1960 General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples boldly proclaims the right, n11 and both the International Covenant on Civil and Political Rights n12 and the International Covenant on Economic, Social and Cultural Rights n13 declare the right of self-determination in Article 1. n14 These declarations and covenants appeared on the tide of anti-colonialism and the international community agreed that people have a right to freedom from colonial domination by foreigners of a different racial group. That was the way self-determination was understood through the 1960s.

In 1970, the General Assembly moved a step further in its Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, n15 which stated:

By virtue of the principle of equal rights and self-determination of peoples, . . . all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

. . . .

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. n16

[\*688] The 1970 Declaration may have represented a more veiled resistance to the cry for fully participatory democracy than a further definition of either the self or the meaning of determination. But the 1970 Declaration carefully disclaimed any encouragement of secession:

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 government representing the whole people belonging to the territory without distinction as to race, creed or colour. n17

The 1993 Vienna Declaration, n18 which arose out of the UN World Conference on Human Rights, only altered the disclaimer by emphasizing that there should be no distinction between people of "any kind." n19 What these two Declarations together do, if we examine their unstated premises, is to say that people have a right of self-determination but they do not have a right to secession unless the government does not represent the whole of the people but in fact makes distinctions on the basis of race, creed, or color, and later, distinctions of any kind. It is unclear whether the distinctions have to be made in the context of the representative governmental system or whether distinctions in any sphere negate the prohibition on secession. Anyone who has taken a basic course in logic can tell us that technically the Declarations say nothing about rights that accrue from non-representative governments or governments that make political or other distinctions among people on various grounds that are regarded as invidious. Nonetheless, the tenor of the Declarations seems to be that only those governments that represent their whole populations can expect international support if a discriminated against group makes secessionist moves.

### B. *The Emerging Right to Secession in Limited Circumstances*

What emerges from this evolutionary progression in the concept of self-determination is an emerging right of secession, at least in certain circumstances. What circumstances? This is where the scholars have a [\*689] field day. They have tried to describe various levels of lack of political representation or other forms of discrimination on the basis of various factors (viewed by the particular author as invidious) that give rise to a right of secession from the dominant group and a right to create a separate government. n20 The characteristics listed have expanded from the General Assembly's "race, creed or colour," n21 to include distinctions made on the bases of ethnicity, language, culture, religion, caste or class, gender, education, or social status, n22 and doubtless more will be added. Some authors are also careful to add that, for a claim of secession to be viewed as legitimate, the group claiming discrimination must have an historic claim to a parcel of territory. n23

### C. *The Right to Secession Linked to the Right to Participate in Government*

I would maintain that as international law now prohibits states from treating its citizens in ways that violate human rights norms, so international law also requires governments to permit citizens to participate in government and to determine its form. n24 When a government fails in these duties and marginalizes one or more groups (identifiable by some or all of the categories mentioned above), then the group can legitimately claim that it is being denied its right of self-determination and has a right to separate itself from the dominant group and form its own government. The marginalization may be directly in political participation or it may take other forms of excluding the group from full community life such as limiting access to education. The right to separate is obviously a group right, but it is based on the aggregation of individual rights to be fully represented by government and/or to participate fully in the community's life.

### [\*690] III. THE INTERNATIONAL COMMUNITY'S RELUCTANCE TO EMBRACE A FULLY FLEDGED RIGHT TO SECESSION

Obviously, any claim to self-determination which includes a right to secession is controversial and there are no resolutions, declarations, or treaties that clearly articulate such a right. n25 Why are we so reluctant to assert such a right? Why are we not drawing up an international draft treaty proclaiming the right? The obvious answer is that such a right is seen as destabilizing the state-based international framework. Professor Frederic Kirgis has suggested that the international community will not support claims of secession if the government in question is highly democratic, but will tolerate the threat of unrest or civil war where the government is "extremely unrepresentative." n26 In part, such an observation is a reflection on political reality informed by careful historical case analysis, but Kirgis goes further by discussing his observation in terms of the legitimacy of the claim. The less represented the group is, the more its claim to self-determination will be viewed as legitimate and the international community will tolerate and support the destabilization that is part of that claim.

Certainly, we fear the use of force by governments, and with good reason, but we also dislike repression. The equation the international community is trying to work out is when the level of repression or discrimination is sufficient to overcome the desire for peaceful statebased stability. In 1921, the Commission of Jurists obviously felt that no amount of repression or violation of rights was sufficient to trigger legitimization of forceful separation. In fact, it might have been true to say that it was impossible for governments to violate any of their citizens' rights (with the possible exception of slavery) because citizens did not possess rights. As the rights of the individual have reached normative levels, governmental denial of those rights has triggered a remedial regime. One of the suggested remedies is the severing of the relationship between the state and the group of citizens, at the group's option. But the international community has been reluctant to enunciate this right because it attacks the old framework of the international system. Some writers also fear that ever smaller entities are not viable in our globalized world. n27 Others reject the whole notion of divisions [\*691] based on race or religion, caste or class and regard this new right as wrongly endorsing racial, ethnic, religious, and cultural separation. n28

### IV. THE NEW SELF-DETERMINATION AND THE RESISTANCE TO SECESSION IN THE TAIWAN/CHINA CONTEXT

How does this evolution of the meaning of self-determination and the resistance, albeit diminishing resistance, to forceful instability in the context of self-determination relate to the Taiwan/China debate? In the first place, neither China's nor Taiwan's avowed policy is in favor of separation. Presumably a group must want and demand secession to have a right to it — just as colonial peoples do not have to become independent if they choose not to, as Bermuda constantly reminds us. Secondly, the list of factors on which a state might discriminate and thus legitimize claims to self-determination are blurred in the Taiwan/China situation. Though there are indeed different ethnic, linguistic, and religious groups in

China and Taiwan, the groups do not appear only on one side or the other of the Taiwan Strait. On the issue of foreign domination and resistance to colonial overlords, Taiwan would not fit the paradigm. On the issue of political representation, Taiwan has made bold strides towards representative government in the last decade. China has not done so. If Taiwan were part of China, presumably Taiwan's people would be no better or worse represented than other Chinese citizens so that the discriminations or distinctions would not be made against the Taiwanese as such. Of course, the Taiwanese could claim that if they were to become part of China, they, like every-one else, would not be "possessed of a government representing the whole people,"<sup>n29</sup> though they could not claim that this lack of representation was the result of "distinctions" made on the basis of "race, creed or colour."<sup>n30</sup> Thus, the Taiwan/China case does not fit even the newer, more controversial models for declaring a right to self-determination or secession.

States can choose to divide peacefully, as Sweden and Norway did and the Czech Republic and Slovakia did, but at the moment neither China nor Taiwan, seems to want this. In a recent poll in Taiwan, if [\*692] given the choice of gaining independence, maintaining the status quo or achieving unification, the majority opted for status quo.<sup>n31</sup> Given the choice of gaining independence or achieving unification, forty-three percent opted for independence and thirty-four percent for unification, with twenty-three percent undecided.<sup>n32</sup> Hardly an overwhelming vote in either direction.

If either China or Taiwan exercised the force option, I believe that the international community would regard that as illegitimate, though whether they would mobilize to resist it is questionable. The United States did send the U.S. Seventh Fleet to the Taiwan Straits in March of 1996 when China was flexing its military muscles in protest against the Taiwanese Presidential elections.

I believe we need a new international norm of self-determination to fit the Taiwan/China model. It would read something like this: "If the majority (or we might demand a higher percentage) of the adult population of a geographic area expresses its wish, for any reason, to separate from the territorial unit of which it is currently a part, it has the right to do so." A modified version of this right, and one that would also fit the Taiwan/China situation, would read: "If the majority of the adult population of a geographic area expresses its wish to separate from the territorial unit of which it is currently a part because the government of the territorial unit does not represent the whole people, it has the right to do so." Obviously, there would have to be an equitable division of state debts and perhaps a redistribution of natural resources. The right as framed puts the particular groups' wishes above the wishes of the whole unit. Indeed, the whole unit's wishes are discarded. It is a direct rejection of the sanctity of the nation-state at least as far as the sanctity of borders is concerned. It is a statement that a particular groups' wishes takes precedent over the territorial sanctity of the existing state. The recognition of such a right might in fact reduce the use of force and instability and, strangely enough, might even prevent the break-up of existing states. If China knew that Taiwan had a clear right to secede, she might be much more willing to discuss favorable terms of re-unification.

Until Taiwan is assured of a representative and economic system similar to her own within the larger Chinese state, or a right to continue her own representative and economic system, she will be unlikely to opt for unification. The longer the separation continues, the stronger [\*693] the claim to self-determination through secession becomes.

I do not believe that we have reached the era of the total demise of the sovereign state, but I do believe that we have redefined the state to make it subservient to certain individual rights, most particular human rights, and it is time that we made the sanctity of the state subservient to certain group rights, in particular the right of self-determination, meaning secession demanded by a group for any reason. Once such a right is established, the legal status of Taiwan will be clear, at least if she opts to exercise such a right.<sup>n33</sup>

#### FOOTNOTES:

n1 *See infra* notes 4-24 and accompanying text.

n2 *See infra* notes 25-28 and accompanying text.

n3 *See infra* notes 29-33 and accompanying text.

n4 WOODROW WILSON WAR AIMS OF GERMANY AND AUSTRIA, 5 THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE 177, 180 (Ray Stannard Baker & William E. Dodd eds.) (reprint 1970) (1927); Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 *AM. J. INT'L L.* 1, 2 (1976); Frederic L. Kirgis, Jr., Comment, *The Degrees of Self-Determination in the United Nations Era*, 88 *AM. J. INT'L L.* 304, 304 (1994); *see also* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L*

L. 46, 53 (1992) (tracing the origin of "the aspiration that underpins the principle of self-determination . . . to the Hebrews' exodus from Egypt").

n5 U.N. CHARTER arts. 1, para. 2 & 55.

n6 Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations O.J. Spec. Supp. 3 (1920).

n7 Report of the Commission of Rapporteurs Presented to the League of Nations Council, League of Nations Doc. B.7.21/68/106 (1921).

n8 U.N. CHARTER arts. 1, para. 2 & 55.

n9 RUTH B. RUSSELL & JEANETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 811 (1958); cf. A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE 99-101 (1973).

n10 G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. I, 183d plen. mtg., at 71, 75 (1948). Article 21 actually refers to "the right to take part in . . . government" and a state's obligation to hold "periodic and genuine elections." *Id.*

n11 G.A. Res. 1514, U.N. GAOR, 15th Sess., 947th plen. mtg., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

n12 G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force, Mar. 23, 1976), *reprinted in 6 I.L.M. 368 (1967)*.

n13 G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force, Jan. 3, 1976), *reprinted in 6 I.L.M. 360 (1967)*.

n14 *See* G.A. Res. 2200, *supra* note 12, at 53, *reprinted in 6 I.L.M. at 369*; G.A. Res. 2200, *supra* note 13, at 49, *reprinted in 6 I.L.M. at 360*.

n15 G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d plen. mtg., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), *reprinted in 9 I.L.M. 1292 (1970)*.

n16 *Id.* at 123-24, *reprinted in 9 I.L.M. at 1296*.

n17 *Id.* at 124, *reprinted in 9 I.L.M. at 1296*.

n18 *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, U.N. Doc. A/Conf.157/24 (pt. I) (1993), *reprinted in 32 I.L.M. 1661 (1993)*.

n19 *Id.* art. 2, para. 3, *reprinted in 32 I.L.M. at 1665*.

n20 *See generally* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 43-60 (1978); BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 71 (1986); Ved P. Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 193, 193 (Yonah Alexander & Robert A. Friedlander eds., 1980).

n21 G.A. Res. 2625, *supra* note 15, at 124, *reprinted in 9 I.L.M. at 1296*.

n22 *See generally* Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 *CASE W. RES. J. INT'L L.* 257, 275-80 (1981).

n23 *See, e.g.*, Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177, 201 (1991).

n24 *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 61 (1992).

n25 Some authors doubt that there is any right to secession. *See* Hurst Hannum, *Rethinking Self-Determination*, 34 *VA. J. INT'L L.* 1, 42 (1993).

n26 Kirgis, *supra* note 4, at 308.

n27 See Harry Beran, *Self-Determination: A Philosophical Perspective*, in SELF-DETERMINATION IN THE COMMONWEALTH 23, 28-30 (W. J. Allan Macartney ed., 1988).

n28 See Michael Stopford, *Locating the Balance: The United Nations and the New World Disorder*, 34 VA. J. INT'L L. 685, 689 (1994); see also *United Nations: Report of the Secretary-General on an Agenda for Peace — Preventative Diplomacy, Peacemaking and Peace-keeping*, U.N. Doc. S/24111 (1992), reprinted in 31 I.L.M. 953, 958-59 (1992).

n29 G.A. Res. 2625, *supra* note 15, at 124, reprinted in 9 I.L.M. at 1296.

n30 *Id.*

n31 See Indira A.R. Lakshmanan, *Anxious Taiwan Watches China*, BOSTON GLOBE, July 27, 1997, at A1.

n32 See *id.*

n33 I do not mean to minimize the whole range of possible consequences should Taiwan opt for independence. Calculating the consequences is always part of the equation whenever states act, regardless of their recognized or unrecognized legal rights.

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