

SECESSION AND THE TWO TYPES OF TERRITORIAL CLAIMS

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I.	INTRODUCTION.....	325
II.	THE NATURE OF TERRITORIAL CLAIMS.....	326
	A. Remedial Theories.....	327
	B. Direct Territorial Theories.....	328
III.	ASSESSING THE TWO ALTERNATIVES.....	328
	A. Considerations.....	330
	B. Final Thoughts.....	330

I. INTRODUCTION

Secession, conventionally, has been seen as a corollary of the “rights of peoples”; whether would-be secessionists were entitled to a state of their own, depended on whether they were a “people” sufficiently distinct from the balance of a state’s population. The first article of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reflect this position as, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹ As Woodrow Wilson famously announced at the end of the First World War, “[n]ational aspirations must be respected; people may now be dominated and governed only by their own consent.”²

As I have argued previously, however, convincing secessionist claims must actually be grounded not on what groups are “peoples” but on valid claims to territory.³ Territory does not change hands simply because the people who happen to be living on it at some particular point in time want to secede. Thus, the outcome of a referendum is not dispositive of the legitimacy of secession; of greater relevance is a legal assessment of the

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1. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., (Dec. 16, 1966). Additionally, U.N. Charter art. 1, part 2 lists as among the organization’s purposes, “[t]o 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.” (emphasis added).

2. Woodrow Wilson, President of the United States of America, President Wilson’s Address to Congress, Analyzing German and Austrian Peace Utterances (Feb. 11, 1918), available at <http://www.gwpda.org/1918/wilpeace.html> (last visited Feb. 7, 2015).

3. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 193 (1991).

arguments that secessionists marshal in support of their conviction that their territory does not belong to the larger state but to the secessionists, themselves.

The importance of territory has come to be taken more seriously in the years since this argument was first made. But in some respects, the nature of the territorial claim that must be made has been disputed. There is more than one way that territorial claims can be framed; two such interpretations of territorialism are discussed here. First, a territorial claim could take the shape of a generalized right to a territorial state, as a remedy for past injustices.⁴ Theories of this sort have been called “Remedial Right Only” theories of secession; for the sake of simplicity I will refer to these as simply “remedial.”⁵ Second, a territorial claim can take the form of an assertion that the group is currently the correct and legitimate owner of a particular piece of land.⁶ Such claims will be referred to below as “directly territorial.” My remarks here are designed to elaborate upon the nature of the claim to territory that the secessionists must assert. In my view, the direct territorial model is true to the meaning of secessionist claims—both as the secessionists themselves intend those claims to be understood and as the other parties and the general public ought to see them.

II. THE NATURE OF TERRITORIAL CLAIMS

Not every cohesive or homogeneous group is entitled to secede. A group that is linguistically, ethnically or religiously homogeneous may still not be entitled to a state. Homogeneity is neither a necessary nor a sufficient condition for the establishment of a territorial state. It makes no sense for groups to claim independence from the current state without asserting a territorial basis for the new international entity that they seek to bring into existence.

The thing that distinguishes secessionists from other parties protesting against the authority of the state (e.g., religious extremists or revolutionaries) is that their object is to separate and form a state of their own. They aspire to create a new state—free and independent—recognized as equal to the other states in the international system.⁷ It is this aspiration that gives rise to the requirement that secessionists must justify their claims

4. See, e.g., Amandine Catala, *Remedial Theories of Secession and Territorial Justification*, 44 J. SOC. PHIL. 74 (2013).

5. *Id.*

6. *Id.*

7. Brilmayer, *supra* note 3, at 193.

in territorial terms. The consequence of secession is that the “people” in question become recognized as a territorial entity.⁸

Territoriality is central to established law concerning the formation of states. States are territorially defined; indeed, international law provides that a new state must possess “a defined territory.”⁹ Thus the new state must show that it is entitled to the territory that the secessionists propose to take over, in accordance with the international law of territorial acquisition.¹⁰ Proponents of self-determination through secession cannot avoid the question of what territorial rights (if any) the would-be secessionists are entitled to.

A. Remedial Theories

There are at least two ways that territorial claims can be framed. The first type of territorial claim has been dubbed a “remedial right only” theory.¹¹ Remedial theories of secession are generally associated with the philosopher Allen Buchanan.

Buchanan describes how a territorial claim could take the shape of a generalized right to have a territorial state, rather than as a right to a particular state.¹² The group might have a history of domination, discrimination, and violation of rights, which cannot be protected against without giving that group a state of its own. In order to protect itself, the people in question must achieve full independence in the meaning of international law. They must, in short, become a state. The grant of territory upon which to found a new state, constitutes a remedy for past injustices, as well as providing the means to allow the secessionist group better to defend itself.¹³

8. *Id.* at 177.

9. Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, T.S. 881. Article 1 of the Montevideo Convention on Rights and Duties of States lists the generally accepted criteria for statehood. According to the Convention a state should have:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other states.

Presumably a sufficiently organized group of people can meet the first, third, and fourth of these criteria. The question revolves around the second.

10. Brilmayer, *supra* note 3, at 201.

11. Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 34 (1997).

12. *Id.* at 36.

13. *Id.* at 39. According to the Abstract, all theories of the right to secede either understand the right as a remedial right only or also recognize a primary right to secede. By a right in this context is meant a general, not a special, right (one generated through promising, contract, or some special

B. Direct Territorial Theories

The second type of territorial claim that might be used to justify secession is more directly territorial. Territoriality is not a means to an end (as where victims of human rights violations seek a state in order better to defend themselves). Nor is it designed as compensation for past wrongs that the victims suffered. Rather, the proponent of secession argues that his or her group is entitled to a particular territory on its own merits, as a consequence of international law concerning rightful acquisition.¹⁴

International law is relatively clear on the principles of lawful acquisition of territories.¹⁵ When there was still *res nullius* available—land unclaimed by any existing state—international law supported acquisition by occupation.¹⁶ Territory could also be acquired legally by signing a treaty or by peacefully exercising sovereignty over an area over a long period of time without protest from the other claimant states.¹⁷ The legal methods for resolving questions of disputed territorial sovereignty are founded on widely recognized principles of international law.

III. ASSESSING THE TWO ALTERNATIVES

The alternatives can be illustrated by a comparison between secessionist movements and the somewhat analogous problem of territorial sovereignty over the land of Israel. Although the creation of the state of Israel did not occur through secession, the different forms that the competing territorial claims took are apparent, and pose some of the same issues that arise in disputes of a genuinely secessionist nature.

The two ways to argue that the Jewish people were entitled to the state of Israel both surfaced during the first half of the twentieth century.¹⁸ They depend on different sets of factual allegations and legal claims, which (if valid) would justify creation of Israel in totally different ways. First, it was argued that the history of injustice that the Jews experienced, over past

relationship). Remedial Right Only Theories assert that a group has a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort. Different Remedial Right Only Theories identify different injustices as warranting the remedy of secession.

14. *Id.*

15. See generally SIR ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* (Manchester Univ. Press 1963).

16. *Id.* at 20.

17. *Id.* at 6.

18. See Joel Beinin & Lisa Hajjar, *Primer on Palestine, Israel, and the Arab-Israeli Conflict*, MERIP.ORG (Feb. 2014), available at http://web.stanford.edu/group/sper/images/Palestine-Israel_Primer_MERIP.pdf. (last visited Feb. 6, 2015).

centuries, and then in particular during the Holocaust, necessitated that they have a land of their own; in no other way could their safety be assured.¹⁹ This is a remedial version of the argument for a state. Second, many claimed a historical right based on the long-term presence of Jews in the area, alleging that Jews “have always lived there” and other potential claimants have not, and so forth.²⁰ This approach seeks to justify today’s state of Israel by reference to history of the area and to ordinary principles of territorial acquisition. Observers are split over what to make of these very different theories of why the Jewish people (allegedly) are entitled to a state.²¹

The difference between the two types of argument was important to the debate over the eventual creation of Israel in 1948. During the early twentieth century, various locations for a new Israeli state were considered; one that marshaled a degree of support was Uganda.²² Proponents of “the Uganda plan” were clearly making the first sort of argument and not the second. The Jewish people had no historic claim to the land at issue in northern Uganda, and no one pretended that they did.²³ The argument did not depend on whether they had a current claim based on existing legal right to the land in question; any territory on which they could settle would have been suitable.

This example illustrates several important points of comparison between the two conceptual approaches to justification of a claim to land.

19. *Id.*

20. Robert H. Mnookin et al., *Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians*, 6 NEV. L.J. 299, 306 (2006).

21. For example, researchers believe the claim that the Holocaust was a primary reason for the creation of the state of Israel is plausible, “since International support for the Jewish homeland increased after the end of World War II;” Yet nowhere did initial Prime Minister of Israel, David Ben-Gurion, mention the Holocaust in Israel’s Declaration of Independence and it is argued that the State of Israel would have been founded without the Holocaust as a result of thirty years of territorial advocacy by the Zionist movement. Nathan Guttman, *Debating, Again, the Founding of Israel: Holocaust and the Zionist Narratives Collide in Muslim Outreach*, FORWARD.COM (June 10, 2009), <http://forward.com/articles/107574/debating-again-the-founding-of-israel/> (last visited Jan. 21, 2015).

22. Tom Segrev, *The Makings of History/Zionism, Uganda, and the Jews*, HARRETTZ.COM (Dec. 9, 2011), available at <http://www.haaretz.com/weekend/week-s-end/the-makings-of-history-zionism-uganda-and-the-jews-1.400516> (last visited Jan. 21, 2015) (“In the annals of the Zionist movement there was no argument more bitter and more formative than that over whether the Jewish state should be built within the Land of Israel, or whether it would be better off wherever possible.”).

23. See, e.g., *The Uganda Proposal Rejected: Today in Israeli History July 30, 1905*, CTR. FOR ISR. EDUC. (2015), <http://israeled.org/the-uganda-proposal-rejected/> (last visited Jan. 21, 2015). The Uganda Proposal was intended as “an interim plan to alleviate the condition of Jews in Eastern Europe without abandoning the ultimate aim of a Jewish Homeland in Palestine.”

A. Considerations

The remedial theory does not by itself single out any particular piece of land. If one location turns out to be unsuitable, then others can be considered. In contrast, the direct territorial claim attaches to one, and only one, piece of territory. It addresses the question of legal ownership of a particular territory, and a failure to establish rights over that particular territory does not translate into an occasion for laying claim to some other piece of land.

For direct territorial claims, the gravamen of the claim is that some other state is occupying and laying claim to land that already belongs (if only in some inchoate way) to the dispossessed contenders. The remedial version of the territorial argument is different. It is not an argument that the contenders presently own the territory and the now-dominant group is a usurper; it is an argument that the contenders should be given some territory, which they do not currently own.

The decision whether to resolve direct territorial claims of the contenders in their favor is (roughly speaking) in the nature of adjudication. In contrast, a decision to grant particular territory as a remedial matter is more in the nature of a diplomatic/political process. Several different territories might be equally suitable for remedial purposes and the choice between them can be made according to considerations that would, strictly speaking, be inappropriate for determining existing territorial rights (e.g. What are the interests of the great powers or of the neighboring states? Would the new state be viable as an independent economic entity?).

Accordingly, for remedial purposes, the interests of existing occupants of the territory ought to be a serious consideration. The contenders' claims do not rest on allegations that the existing occupants do not deserve legal title to the land; the current occupants are innocent bystanders who, up until now, have had unchallenged title. In contrast, a direct territorial claim is based on a legal/historical account that purports to establish that the contenders have a better title than the now-dominant occupants.

B. Final Thoughts

As these considerations show, the difference between these two approaches—despite the superficial similar concern with disposition of territory—is stark. I believe that in the case of secessionist movements, at least, it is the direct territorial model which conforms to the current intuitions of the secessionists themselves about what ought to matter. Wrongful acquisition is part of the central narrative of a secessionist movement. Thus, the Baltic States argued that they were illegally

conquered by the Soviet Union;²⁴ Tibet says the same about China,²⁵ and Eritreans fought for decades to reverse their illegal annexation by Ethiopia.²⁶ I also believe that it is the right approach to take, as a general matter. But showing this would require a much longer article.

24. *Russia Denies Baltic 'Occupation'*, BBC.COM (May 5, 2005), available at <http://news.bbc.co.uk/2/hi/europe/4517683.stm> (last visited Jan. 21, 2015).

25. *Invasion & After*, TIBETOFFICE.ORG (2015), available at <http://tibetoffice.org/tibet-info/invasion-after> (last visited Jan. 21, 2015).

26. *Eritrea Alleges UN 'Ignoring' Ethiopian Occupation of its Territory*, UN NEWS CTR., (Sept. 28, 2010), available at <http://www.un.org/apps/news/story.asp?NewsID=36251#> (last visited Jan. 21, 2015).

