Legal Perspectives on the Rights of Peoples and Minorities to Self-Determination (including through Secession)

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Brief Outline

• Focus on the rights of peoples and minorities under international law;

• The contribution of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) therein;

• Right to self-determination (legal basis and developments) and secession under international law;

• International responsibility for violations of rights of peoples and minorities:
  ➢ State responsibility;
  ➢ Individual criminal responsibility.

Concluding remarks and additional materials.
Introductory remarks

• State-centred nature of international law!!! What about ‘we, the peoples’?

• Literature review:
  - Mancini: issues re secession/ procedural guarantees vs substantive guarantees?
  - Weller: detailed discussion of self-determination struggles and techniques developed to resolve/deal with them? What that means for int’l law?
  - Castellino: critical overview of the development of key international law principles pertaining to territorial issues and how the decolonization process has not solved problems for indigenous and other communities/ dispossession and marginalization!

Legal entitlements of peoples, indigenous peoples and minorities under the right to self-determination?
The PCIJ and the ICJ: Minorities and Peoples

- PCIJ has dealt with issues relating to the rights of minorities.

- ICJ has dealt with issues relating to the rights of peoples.

- Neither peoples nor minorities have standing before the PCIJ or the ICJ.
Definitions? Who Needs Them?

- No definitions available from the case law of (quasi)judicial mechanisms.

- UN Reports:
  - Minorities – Capotorti (1977) and Eide (1993)
Definitions on Minorities

• **Capotorti:** ‘A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.’

• **Eide:** For the purpose of this study, a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population.
Definition of Peoples

- **UNESCO 1989:**
  - A people as a group of individual human beings who enjoy some or all of the following common features:
  - A common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life
  - The UNESCO description further states that "the group as a whole must have the will to be identified as a people or the consciousness of being a people" and that the group may have institutions or other means of expressing its common characteristics and will for identity.
  - Thus, the notion of a “people” combines objective characteristics describing a group's common historical, ethnic, cultural, religious or other background, with the subjective component of a common awareness as a people.
Development/Interpretation of the Law

- Legal findings of the PCIJ and the ICJ
- International human rights standards
- Work of the International Law Commission
- Case law of international and regional (quasi)judicial mechanisms
PCIJ and Rights of Minorities

- Prohibition of discrimination and equal treatment
- The right to identity (preservation)
- Institutional role within the League of Nations
- Emphasis on equality of treatment and minimum guarantees.
Rights of Minorities

• Phases of development of minority rights protection regimes:
  1. 1919 – 1939 – minority rights under the League of Nations
  2. 1945 -1990 – universalism and focus on individual human rights
  3. 1990 – present – return to minority rights?
Minority Rights: ICCPR

• **Article 27:**

• In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
ICJ and Rights of Peoples

• Right to self-determination and use of own natural resources;

• The decolonization process:
  ➢ Prohibition of racial discrimination and apartheid
Self-Determination Struggles

• Examples! Past and present!

• .............
Self-Determination in International Law

- Internal and external self-determination
- The process of decolonization (80 former colonies comprising some 750 million people have gained independence since the creation of the United Nations.)
- Present day challenges/ suitable constitutional designs
- Lingering issues? Bosnia and Herzegovina (Republika Srpska), Kosovo (Northern Mitrovica),
- De facto State entities? South Ossetia, Abkhazia, Transnistria, Nagorno-Karabakh, Turkish Republic of Northern Cyprus, etc.

Right to secession under international law
Legal Basis for the Right to Self-Determination

- United Nations Charter, Article 1, paragraph 2
- Article 1, 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- General Assembly Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)
- General Assembly Resolution 1541 (XV) defining the three options for self-determination (1960)
- General Assembly Resolution 1654 (XVI) establishing the Special Committee on Decolonization (1961)
- Final Act of the Conference on Security and Co-Operation in Europe of 1975
- 1993 Vienna Declaration and Programme of Action
- General Comment No. 12 of 13 March 1984, The Right to Self-Determination of Peoples (Art. 1) – UN Human Rights Committee
- Case law of the International Court of Justice.

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ICCPR and ICESCR

• **Common Article 1:**

  1. **All 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.

  2. **All peoples may**, for their own ends, **freely dispose of their natural wealth and resources** without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

• **3. The States Parties to the present Covenant**, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, **shall promote the realization of the right of self-determination**, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.
Weller’s Categories of Self-Determination

- Self-determination settlements can be divided into nine different categories:
  1. Trading self-determination for autonomy or enhanced local self-government
  2. Regionalism, federalization, or union with confirmation of territorial unity
  3. Deferring a substantive settlement while agreeing to a settlement mechanism
  4. Balancing self-determination claims
  5. Agreeing on self-determination but deferring implementation
  6. Establishing a *de facto* state
  7. Supervised independence
  8. Conditional self-determination
  9. Constitutional self-determination
Cases of the ICJ

- *International Status of South-West Africa*, ICJ Reports 1950
- *Western Sahara*, ICJ Reports 1975
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004
Right to Self-Determination

• Self-determination in the context of decolonization

• Namibia – sacred trust of civilization

• Expression of the will of the people (free and genuine)

• Obligation of States to respect the right to self-determination.
The Decolonization Process

• G.A. Res. 1541 (XV):
  1. secession of a territory to form a new state;
  2. association of a territory with an existing state; or
  3. integration of a territory into an already existing state

• Example of South-West Africa – Namibia (1949-1994).
Secession under International Law

- The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally (Crawford, The Creation of States in International Law, p. 390);
- General rule – minorities have no right to secede;
- Tension between stability/territorial integrity and secessionist movements:
  1. Right to external self-determination of former colonies;
  2. Where a people is oppressed, as for example under foreign military occupation;
  3. Where a definable group is denied meaningful access to the government to pursue their political, economic, social and cultural development => SELF-DETERMINATION.
Peremptory Norms on Protection of Peoples

• Article 53 of the 1969 Vienna Convention on the Law of Treaties:

• A peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

• Protection of populations from mass atrocity crimes/ Responsibility to Protect Doctrine (WSOD 2005, paras. 138-140).

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Prohibition of Genocide

• Duty to prevent;
• Duty to punish;
• Duty to cooperate with international criminal tribunals.

• Criteria for assessing responsibility:
  ➢ ‘Due diligence’;
  ➢ ‘Manifest failure to take action’;
  ➢ Standard of state awareness as ‘was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed’.
Prohibition of Racial Discrimination

• Barcelona Traction Case (ICJ Reports 1970, p. 32, para. 34):
  ➢ Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

• South-West Africa Advisory Opinion (ICJ Reports 1971, p. 57, para. 131):
  ➢ Establishing and enforcing distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights constitute a flagrant violation of the purposes and principles of the UN Charter.

• Armed Activities Case (ICJ Reports 2006, p. 35, para. 78)
  The prohibition of racial discrimination is a jus cogens norm.
State Responsibility

• A number of treaties provide for State responsibility in case the rights of a certain part of the population are violated:
  ➢ Genocide Convention 1948;
  ➢ Other major human rights treaties.
• Internationally recognized crimes: genocide, war crimes and crimes against humanity.
• 2001 Articles on State Responsibility for Internationally Wrongful Acts of the ILC.
Case law before the ICJ!
Individual Criminal Responsibility

- Military Tribunals for Nuremberg and the Far East (post-WW2);
- Ad hoc tribunals for Yugoslavia and for Rwanda (post-Cold War);
- International Criminal Court (1998);
- Domestic criminal proceedings!
Concluding Remarks (1)

• PCIJ and ICJ - Institutional support to the League of Nations/United Nations:
  ➢ protecting rights of peoples and minorities;
  ➢ in the process of decolonization.

• The effect of the legal findings of the ICJ is not strictly limited to solving the dispute at hand – important in the development of international law and in informing State behaviour.

• Internationally recognized crimes: Genocide, War Crimes, and Crimes against Humanity.

• State responsibility and individual criminal responsibility for crimes committed against a certain people/part of the population – relevant mechanisms.
Concluding Remarks (2)

• Phases of development of minority rights protection regimes:
  1. 1919 – 1939 – protection of minority rights system under the League of Nations;
  2. 1945 – 1990 – universalism and focus on individual rights;
  3. 1990 – present – return to minority rights?

• Are the secessionist struggles the new decolonization/re-emergence of the right to self-determination process?

• International law ill-equipped to protect the rights of peoples and minorities in view of their lack of standing before (quasi) judicial mechanisms?
Additional Literature (1)

Additional Literature (2)

- Audiovisual Library of International Law: Self-Determination (several lectures, including):
  - Mr. Hurst Hannum, The International Law of Self-Determination (video: 51’);
  - Mr. John Dugard, State Secession (video: 47’).