

by C. Lloyd Brown-John

# SELF-DETERMINATION AND SEPARATION

*L'auteur examine l'éclairage que peut jeter le droit international sur la question de savoir si le Québec jouit du droit à l'autodétermination et à quelles conditions. Si le droit international reconnaît effectivement le droit à l'autodétermination nationale, celui-ci ne s'applique toutefois que dans des conditions précises et peut facilement se trouver en conflit avec la reconnaissance internationale de l'intégrité territoriale.*

It should be quite clear that by the end of the 20th Century no reasonably distinctive group of culturally homogenous people should be unreasonably constrained from pursuing their own cultural, linguistic or religious interests. Yet, pursuit of collective or communal interest is not without conditions. In international law the concept of pursuing a collective interest is known as "self-determination." The fundamental question one need raise is: does pursuit of self-determination automatically lead to a right of independence? The unequivocal answer is "no." Indeed, self-determination and secession to achieve independence are not mutually compatible concepts in international law except under circumstances where oppression and persecution or a colonial relationship persists.

Former US President Woodrow Wilson promoted the idea of self-determination in the post-World War I period. Wilson's concept hinged upon three basic ideas: i) there should be a right of people to choose its own form of government (internal self-determination); ii) there is a right of people to be free from other rule and to choose the sovereign under which they choose to live

(external self-determination); and, iii) there should be a continuous consent of the governed by way of a representative democratic government.

Wilson's concept was applied rather imperfectly as assorted minorities sought their own destinies as the Austro-Hungarian and German empires collapsed. Within the existing European state system the rule was also applied imperfectly as Ireland became independent while the Aaland Islands, which sought to join Sweden, was denied. In respect to the Aaland Island case, an International Commission of Jurists observed that while popular, the principle of self-determination had not attained the status of a positive rule of international law in the 1920s. The Commission concluded that the principle was essentially political and, thus could not be employed as justification of dismemberment of a clearly established state. That same principle still holds to-day.

The right to self-determination clearly emerged within the League of Nations Mandates system and applied without exception to peoples in underdeveloped territories.

The 1941 Atlantic Charter employed the term "self-determination" in respect to peoples forcibly deprived of rights inherent in sovereignty by virtue of Nazi and Fascist conquest. There seems little doubt that "self-determination" was essentially a political concept and had not fully entered international law beyond implied rights arising from mandated territories administered in trust by the League of Nations and, later, the United Nations. This general political tone was affirmed by the International Court of Justice (ICJ) in the 1962 decision on Southwest Africa. The same concept was reiterated in the 1971 ICJ advisory opinion on Namibia. This interpretation was in keeping with the intent of Article I of the Charter of the UN which lists among the purposes of that organization "respect for the principles of equal rights and self-determination of peoples."

Article 55 of the UN Charter notes that peaceful and friendly relations among nations should be based upon respect for the principle of equal rights and self-determination while Article 73 implies a principle of self-determination for colonies and other dependent territories. Article 76 does refer to "progressive development towards self-government" as is appropriate for territories and peoples as freely expressed wishes of those peoples.

The bottom line insofar as concerns the principles of self-determination outlined in the UN Charter is that there is absolutely no direction as to what constitutes a "people" nor is there preciseness in the definition of what is meant by "self-determination."

Clearly, the references in the UN Charter and, as reiterated in several other UN documents (e.g., Resolution 1514 [XV] of December 14, 1960 on the "Granting of Independence to Colonial Countries and Peoples"; the 1966 Covenants on "Economic, Social and Cultural Rights" and on "Civil and Political Rights"; the 1970 "Declaration on Principles of International Law Con-

cerning Friendly Relations and Co-operation Among States") are intended to establish an international politically inspired normative basis to force decolonization.

It can be argued that Articles 1 and 27 of the 1966 Covenant on Civil and Political Rights extends the right of self-determination beyond persons dwelling in a colonial status. Professor Capotorti, special rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, prepared a definition of a "minority" which proposed that a "numerically inferior group" in a "non-dominant position" but being nationals of a state would constitute a minority if it possessed "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." The problem with this type of definition is simply clarification of who is included in the minority community or group. Is the group "inclusive" or "exclusive"? Is determination by individual choice and self-definition or by fiat of a, for example, "race relations board" such as was the case in the former Republic of South Africa. Or can there be degrees of association with the defining community, *e.g.*, 10 percent or 99.9 percent pure?

The problem for international law is that Capotorti's definition is simply instructive and, in any case, neither he nor the Covenant of Civil and Political

Rights, especially Article 27 which enumerates rights, provides for a right of secession should protection of the minority status be sought by recourse to significant political and constitutional change.

Indeed, under fairly specific circumstances, the right of secession simply does not follow. From UNGA Resolution 1541 (XV) it is clear that a minority who are "geographically separate" and who are "distinct ethnically and culturally" and who have been placed in a position of subordination may have a right to secede. That right, however, could only be exercised if there is a clear constitutional denial of political, linguistic, cultural and religious rights. Interestingly, the only formal effort to exercise such a right through the UN was a 1984 application by a person purporting to represent the Micmacs of Canada. The application was denied as the author was unable to show that he represented the ethnic community. Were the applicant to be an elected provincial Government then the merits of the question of minority rights and self-determination would come into play.

However, there is little certainty even then that international law would provide a basis for secession and self-determination when there is no evidence of significant discrimination on the basis of race, language, reli-

gion or culture. Moreover, even if such a case could be argued by a minority within a territory, *e.g.*, a Canadian province, it could equally be argued by other minorities however defined that they too had a right of secession. Thus, the political principle which was established in the US when a portion of the state of Virginia separated to become West Virginia could be applicable under the most extreme circumstances.

The points to be considered in international law is that there is no question that "minority peoples" (however defined) have political and civil rights. The measure of the rights to self-determination is, however, largely negative, that is "to what extent have they been formally restrained by law and/or constitution?" If there is a significant abuse of those rights then it may be possible to argue that secession may be sought. However, as the Rhodesian Unilateral Declaration of Independence case made obvious, a UDI will not be tolerated if another peoples' rights are to be impaired. In the case of Rhodesia in 1965 it was an effort by a minority to discriminate against a majority. It is possible—indeed, probable — that defining the precise dimensions of the "ethnic community" against which it is alleged discrimination has been perpetrated will not be an easy matter.

Furthermore, in the case, for example, of a founding partner in Canada, arguing a case for systematic abuse and discrimination sufficient to meet even the minimum

case for applying existing principles of international law, will be extremely tenuous. One might argue historic examples of discrimination but to do so today in light of an enforceable and entrenched constitutional Charter of Rights and Freedoms and universally accessible electoral processes would be extremely difficult.

Returning once again to the matter of international law and the "right" of a cultural, ethnic, religious or linguistic minority to secede, several other matters require clarification.

Very liberally interpreted, the 1970 Declaration on Friendly Relations might be construed as a basis for the right of a minority to pursue self-determination. However, as the document is a "declaration" it serves more as a statement of intention than as a prescriptive legal premise. But, even if one were to consider the 1970 Declaration indicative of the law there still remains no absolute right to secession. Indeed, one could argue that existing international law could permit some form of secession under very restricted conditions: a) that a minority is under a racist or other form of discriminatory regime; b) that the minority is disadvantaged in consequence of foreign occupation; or, c) that the minority persists in a colonial relationship. In the case of Quebec's relationship to a federally structured state

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such as Canada, none of those pre-conditions for secession would seem to apply.

Foreign domination of politics and administration would appear to be a very basic premise upon which a claim to self-determination by secession could be tolerated in international law. There is, however, no absolute right to secession even if a people vote for a Government sworn to that course.

What if a people declares separation and nobody acknowledges it? This happened in the case of Biafra's attempted separation from another federal state, Nigeria. While it is true the Nigerians sought a military solution, the declaration of Biafran independence was recognized by only five states and one, Tanzania, did so in an effort to force Nigeria to negotiate. Similarly, Katanga's attempted secession from the Congo failed to receive international acknowledgement and was actively opposed by most major countries at the time.

At issue are some very fundamental international legal principles relating to territorial integrity, sovereignty, non-intervention in domestic affairs, a rule against pre-mature recognition (somewhat re-interpreted by Germany in the case of the Yugoslavian breakup), and application of the principle of *uti possidetis juris* (that boundaries are what they were at independence).

The Government of India, for example, in acceding to United Nations Human Rights Covenants in 1987 (Human Rights, Status of International Instruments) made it quite clear that pursuit of self-determination referred only to peoples under foreign domination and Article 1 of the Human Rights Covenants did not apply to sovereign independent states. India stressed that the concept of self-determination could not in any form be interpreted to impair national integrity.

A fundamental conflict between the principle of *uti possidetis* and self-determination does exist. Clearly pursuit of self-determination, if it involves territorial secession, would conflict with a legal principle which holds that boundaries are fundamental to territorial integrity. In a 1986 boundary dispute between Burkina Faso and Mali, the International Court identified the basic conflict but concluded in favour of the pre-eminence of the principle of *uti possidetis*. Frontiers inherited from colonial times are deemed permanent where states have made the transition from colonial to independent status.

For provinces within Canada, were this to become an issue, it could be argued that any provincial boundaries would be defined at the time either of Confederation in 1867 or upon that province's accession to Confederation. Thus, for example, in international legal terms Labrador's boundary with Quebec would be that

in place in 1949 when Newfoundland entered Confederation. By same token, were Quebec to seek to secede from Confederation it could be validly argued that its territorial boundaries would have to be those in place on July 1st, 1867. The only counter argument that might be cited, and that under the exceptional circumstance of burgeoning civil war, was the opinion of the Administrative Tribunal (the Badinter Commission) established by the European Community's Conference of Foreign Ministers in 1991 to examine whether the Serbian population in Croatia and Bosnia-Herzegovina were a constituent people with a right to self-determination. The Tribunal recommended respect for the republic boundaries as they existed before dissolution of the Yugoslavian federation and, thus placed Serbians in Bosnia and Croatia in the position of minorities within potentially new states.

The concept of *uti possidetis* as a basis for determining boundaries has been affirmed in several international documents including interpretations by the ICJ. In addition it has been explicitly affirmed or implicitly reiterated in: Principle 3 of the Final Act of Helsinki (1975); the Vienna Diplomatic Convention (1966); Article 62 of the Vienna Convention on the Law of Treaties (1969); and, the Vienna Convention on Succession of States (1978); Article 3 of the Charter of the Organization of African Unity; Article 20 (implied) of the African Charter of Human and Peoples' Rights (1981); Paragraph 6 of the UNGA Resolution 1514(XV) expressly states that self-determination cannot be interpreted to impair the territorial integrity of a sovereign country.

To return to an earlier point, what if you declare independence and no state (or states) recognizes your declaration? This issue is important because it raises fundamental questions not only about territorial integrity of existing states but also what constitutes intervention into domestic affairs in contravention of the UN Charter.

A declaration by Canada that the "territory of Canada is inviolate" would be in keeping with constitutional and other forms of declarations made by many countries worldwide. Moreover, if such a statement of inviolability also included the admonition that "recognition of any illegal secession would be deemed an hostile act in international law," the way would be open for an appeal to the UN (e.g., along the 1965 and 1966 UN Security Council Resolutions on Rhodesia's UDI) for invocation of full sanctions under Article 41 of the UN Charter to be imposed against any state purporting to recognize an illegal secession. Illegal, in this instance, having been defined by existing principles of international law.

The UN has recognized some cases of secession

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(Bangladesh from Pakistan; Slovenia, Macedonia, Bosnia-Herzegovina and Croatia from Yugoslavia) but in all these cases a potential (or real) civil war was a major concern. The voluntary breakup of Czechoslovakia was by mutual referendum; that example is not likely to garner much attention in Canada.

As recently as 1993, in the declaration of the UN World Conference on Human Rights it was affirmed that all peoples have a right to self-determination but that right is limited to the free exercise of democratic governance. In no manner could the 1993 Declaration, even if it were considered positive international law, be construed to permit territorial secession where democratic rights are exercised and where free expression of language is encouraged. In a nutshell, in complex political systems such as federal states, as long as diverse ethnic, religious or linguistic communities can find free expression of their rights and those rights are protected under law, contemporary international law would leave no avenue open for a unilateral declaration of independence even by a popularly elected provincial government. Indeed, the 1989 UNESCO Meeting of Experts on the Concept of the Rights of Peoples essentially concluded that the term "peoples" insofar as it related to self-determination really carried different meanings depending upon individual circumstances. Some special acknowledgement has been made for "indigenous" peoples, but even indigenous peoples right to self-determination would not appear to include an automatic right to secession.

Generally, there is very little international law which would lend support to any argument by Quebec that it has a "right" to secede from Canada. To repeat, of course, nobody is seriously interested in constraining the people of Quebec from choosing a course deemed most conducive to protection and fulfilment of cultural and linguistic rights should those people in overwhelming numbers find that persecution is intolerable. The problems, I suggest, relate to very practical matters: "who are those people seeking to exercise such rights?"; "how is the community of those people to be determined?"; "what proportion of the people resident in a territory constitute a valid proportion for recognition in international law?"; "what clearly discriminatory abuses have these people suffered such that their assertion of independence would constitute sufficient basis for acknowledgement by the UN and the international community of sovereign states?"; and, finally, "what territory are these peoples claiming and would such territorial claims violate the principle of *uti posseditis* and/or the rights to self-determination by other peoples, especially 'indigenous' peoples?"

Secession is not an absolute principle of international law. Indeed, it can be argued that quite the con-

trary is the appropriate rule unless there is oppression and a clear denial of civil and human rights. Self-determination is a concept related to the communal quality of human existence. In practice, self-determination exists when there is a full and complete respect for human and civil rights and where democratic alternatives exist to assure respect for those rights be they linguistic, religious or cultural. In practice it can be argued that the application of human rights norms, especially those which are constitutionally entrenched and freely interpreted by the judiciary, is assurance that self-determination has been achieved. Self-determination does not in any manner imply a right to independence.

Finally, it is a trifle ironic, but if one were to turn to state practice — which is, after all, one of the basis for asserting normative international law under Article 38 of the Statute of the International Court of Justice — there is a clear predilection for solving self-determination issues by recourse to federal and federative arrangements. States do not encourage the breakup of other states because virtually all states are vulnerable (e.g., Zaire has over 200 ethnic communities).

In conclusion, and despite much political posturing to the contrary by some Canadian provincial politicians, I do not believe that there exists sufficient support in international law for a declaration of secession by any component unit of the Canadian federation. Self-determination is important but it is a concept that

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international law acknowledges must be secondary to the integrity of democratic states. Democracy and human rights are unquestionably available and pro-

protected in Canada — the UN itself has acknowledged that fact. To assert independence in the face of such entrenched rights is simply an exercise in backyard politics and would be viewed by most states throughout the world as precisely that type of "home crowd posturing." For any other sovereign state to risk recognition of an independence claimed under such conditions would be foolhardy at minimum and dangerous at maximum, even for its own continued integrity at best. Delusions to the contrary, international law would not now nor for the foreseeable future provide any significant substance for a unilateral claim to independence.

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