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Separatism in Africa - A Fundamental Problem -

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Summary

It is reported in 2017 that the world's most active armed conflict zones involved disputes related to self-determination, with an estimated civilian death-toll of over 20 million, and there were over 60 ongoing self-determination conflicts in the world[1].
While Brexit, Barcelona and Crimea's separation from Ukraine have received worldwide attention today in respect to separatism[2], "Africa is home to a number of separatist movements"[3]. In fact, separatism in Africa has been discussed comprehensively[4]. Then, what is separatism?

I. Introduction

The term separatism may have an almost limitless variety of meaning, from the divorce of a couple to the withdrawal from an international organization. Its exact definition is not easy, and is not always necessary. A working hypothesis will do. On its meaning, Benjamin Elisha Sawe conceives that "[s]eparatism refers to the advocacy of a separation from the larger group, often, though not always, for reasons that are ethnic, religious, cultural, gender-based, or racial. When separatism involves countries it is also known as secession. Separatist movements mostly want the freedom to self-govern. Political and economic circumstances are the main driving factor behind separatist movements"[5]. Marcelo Kohen defines secession as "the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter ... in order to be incorporated as part of another State"[6].

1. P. Williams, "United States Policy Toward National Self-Determination Movements", 2017, www.foreignaffairs.house.gov/ at 4, quoted in I. Berlin, "Unilateral Non-Colonial Secessions: An Affirmation of the Right to Self-Determination and a Legal Exception to the Use of Force in International Law", Western University, Electronic Thesis and Dissertation Repository 4777, 2017, p. 62, https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=6699&context=etd.

2. S. F. V. D. Driest, "Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law", Netherlands International Law Review, Vol. 62, 2015, pp. 329-363.

3. B. E. Sawe, "10 Separatist Movements In Africa." WorldAtlas, December 19, 2017, worldatlas.com/articles/10-separatist-movements-from-africa.html.

4. R. Bereketeab (ed.), Self-Determination and Secession in Africa, Routledge, 2016. D. M. Ahmed, African Borders and Secession in International Law, Al Jazeera Centre for Studies and al-Dar al-Arabi lil-Ulum, 2017. Idem., Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis, Cambridge University Press, 2015. On secession in international law, generally, see M. D. Hood, "Bibliography on Secession and International Law", Santa Clara Digital Commons, 2001.

5. Sawe, loc. cit., supra n. 3..

6. M. Kohen, 'Introduction', in Secession: International Law Perspectives, idem. (ed.), 2006, p. 3.

The legal issue of secession involves: first, interpretation of the phrase "a status separate and distinct from the territory of the State administering it" in the Declaration on Friendly Relations, adopted in October 1970 by the UN General Assembly, in the case of a non-self-governing territory; second, comparative legal effects of the principle of respect for the territorial integrity of a State and the right to self-determination, in case of secession from the territory of the parent State. And, if the parent State has granted a State recognition to the seceding group, the erga omnes effect of a 'dispositive treaty' would require even the non-recognizing third States to respect the agreed border in conformity with international law.

Even if secession is successfully attained with the recognition as a State by the parent State and third States, however, separatism may not stop at secession from the parent State. It is noted by Max Fisher that "in countries such as Nigeria or the Democratic Republic of Congo, disparate cultural groups have tended to band together, competing with one another for finite power and resources, sometimes disastrously". "The debate over whether or not secession is good for Africa ... is a complicated and sometimes contentious one", Fischer continues[7]. No matter how complicated and contentious it is, such debate is indispensable because social cohesion in most African States is not always strong and in practice, the problem of separatism or secessionism has frequently occurred in post-colonial Africa[8].

The only way for establishing a right to secession is the creation of a customary international law, which consists of State practice and opinio juris. They are to be found in the positions of State, expressed in the Written Statements submitted in the context of the Kosovo Advisory Opinion[9].

The discussions on secession have been mainly concentrated on its legality as a last resort, or a 'remedial secession'. But the focal points should not be restricted only to the final stage of separatist conflicts. What is needed with respect to separatist or secessionist conflicts is their prevention and mitigation. Hence, its fundamental problem should be unraveled.

2. Separatism and International law

Even after the end of colonial rule on the African continent, African independent sovereign States have continued to be bothered by the right to self-determination and separatist movements. But, successful secession has been rare. "Following Eritrea's independence from Ethiopia in 1993, South Sudan is the only second case of a successful secession in postcolonial Africa", Dennis M. Tull observes[10], though the domino effect of Sudan's division was more or less concerning. The existing borders of African States have been accepted, and Sudan's case was regarded as an exception. Thus, Jon Temin estimated that most secessionist movements were weak and would not have a real chance of success, so as to minimize the domino effect[11].

According to Seth Kaplan, however, "there are innumerable regions, ethnic groups, religious groups, and clans that feel disenfranchised by the way states are run, the way spoils of power are distributed, and the way public services are provided. Many of these might be tempted to do what Eritrea and South Sudan have done if the prospects were better"[12]. As examples of such regions, Biafra, Katanga and Azawad have been mentioned[13].

"The few successful cases of self-determination and secession testify that, although the final divorce took place through amicable agreements and popular plebiscites, what followed the divorce was anything but peace, security and good neighborliness", points out Redie Bereketeab[14]. Even a so-called "final" peace

7. M. Fischer, "The Dividing of a Continent: Africa's Separatist Problem", The Atlantic, September 10, 2012, https://www.theatlantic.com/international/archive/2012/09/the-dividing-of-a-continent-africas-separatist-problem/262171/.

8. S. Kaplan, "Secessionism in Africa: Where Will the Map Change Next?", Fragile States, 2012, https://www.fragilestates.org/2012/03/08/secessionism-in-africa-where-will-the-map-change-next/.

9. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Rep 2010. Hereinafter, cited as 'Kosovo Advisory Opinion'.

10. D. M. Tull, "Separatism in Africa: The Secession of South Sudan and Its (Un-)likely Consequences", SWP, June 2011, https://www.swp-berlin.org/fileadmin/contents/products/comments/2011C18_tll_ks.pdf.

11. J. Temin, "Africa: Secession and Precedent in Sudan and Africa", United States Institute of Peace, 17 November, 2010, https://allafrica.com/stories/201101100818.html.

12. S. Kaplan, loc. cit., supra n. 8.

13. N. Bamfo, "The Menace of Secession in Africa and Why Governments Should Care: The Disparate Cases of Katanga, Biafra, South Sudan, and Azawad", Global Journal of Human Social Science, Sociology, Economics & Political Science, Vol. 12, 2012, https://globaljournals.org/GJHSS_Volume12/5-The-Menace-of-Secession-in-Africa.pdf.

14. R. Bereketeab, loc. cit., supra n. 4.

agreement was signed between the incumbent president and rebel leader in South Sudan[15]. In this sense, any secession may not be a final solution. Then, what is the problem before or after secession?

"What if the tyranny of the majority ensures that the government cannot be transformed or obliterated, thus the oppressed need to create a new sovereign state?" This question is posed by Michael Khorommbi in respect of the Anglophone alienation caused by the Francophone-dominated government in Cameroon. He concludes, after considering the case of South Sudan, "in Africa there has been an emergence of ethnic or tribal groups that are beginning to sentimentalize secessionism or autonomism"[16]. Legal perspectives would ensure to overcome sentimentalism.

The International Court of Justice (ICJ) held in the Unilateral Declaration of Independence in respect of Kosovo opinions that international law contained no prohibition on declarations of independence[17]. Thus, a unilateral declaration of independence or secession, whether described as 'remedial' or not, was held by the ICJ as one of the domestic matters of a State[18]. According to Christian Marxsen, "[t]he underlying rationale is that the principle of territorial integrity only applies in the relations between states. It does not bind actors that are themselves not sovereign states, such as internal secessionist movements"[19]. In fact, in the recent case of South Sudan's independence from Sudan in 2011, for example, a referendum was implemented on the basis of the Naivasha Agreement which had been signed in 2005 by the incumbent government of Sudan[20]. Thus, a secession consented by the incumbent government in the form of agreement to a referendum would domestically legitimize secession. However, the Kosovo Advisory Opinion finds that even a referendum-based declaration of independence may be illegal, as shown below:

> [T]he illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)[21].

Based on this argument, Marxsen declares, because of the illegal intervention by Russia, on which the referendum fundamentally relied on, the application of the principles applied in the Kosovo Advisory Opinion leads to an illegality of the unilateral Crimean declaration of independence[22].

Unilateral declarations of independence would confront third States with difficult problems. While third States would retain discretion to grant or not a State recognition to a seceded entity, if it is granted, the erga omnes effect of such 'dispositive treaties' as an agreement on territory between the incumbent government and seceding group requires even the non-recognizing third States to respect the agreed border. Because of its erga omnes character, territorial agreements have been held as opposable to third States under international law.

> Boundary and territorial treaties between two parties are res inter alios acta vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third States. If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of res inter alios acta, unless its title is better than that of A (rather than of B)[23].

The International Law Commission (ILC) states that the "issues of territorial status have frequently been addressed in erga omnes terms, referring to their opposability to all States. Thus, boundary and territorial treaties have been stated to represent a legal reality which necessarily impinges upon third States", citing

15. M. Khorommbi, "Self-Determination and Secessionism in Africa", Daily Maverick, January 28, 2019, https://www.dailymaverick.co.za/opinionista/2019-01-28-self-determination-and-secessionism-in-africa/.

16. Ibid.

17. ICJ Rep 2010, paras. 79, 123.

18. That's why Malaysia could expel Singapore in 1965, forming a precedent to gain independence against its own will, International Legal Materials (ILM), Vol. 4, 1965, pp. 928-930.

19. C. Marxsen, "The Crimea Crisis: An International Law Perspective", ZaöRV, Vol. 74, 2014, pp.383-384, https://www.mpil.de/files/pdf4/Marxsen_2014_-_The_crimea_crisis_-_an_international_law_perspective.pdf.

20. R. Krammer et al., Historical Dictionary of Sudan, Scarecrow Press, 2013, p. 336. M. Sterio, "Self-Determination and Secession Under International Law: The New Framework", ILSA Journal of International and Comparative Law, Vol. 21, 2015, pp. 293-306.

21. Kosovo Advisory Opinion, p. 437. Hereinafter'.

22. C. Marxsen, loc. cit., supra n. 18, p. 384.

23. Eritrea v Yemen (Phase one), Report of International Arbitral Award (RIAA), 1998 xxii, para. 153.

the above-cited award. Therefore, even a third State that does not grant a State recognition to the seceded entity assumes an international responsibility to respect the border. As a result, the parent State is not held responsible for the international wrongful acts committed in the seceded territory. If taken otherwise, on the other hand, international responsibilities for the wrongful acts committed in the seceded territory would be imposed on the parent State.

Next, the problem of separatism or secession has been raised in respect of the phrase "a status separate and distinct from the State administering it" in the Declaration on Friendly Relations, proclaiming as below:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles[24].

The ICJ holds, in the Kosovo Advisory Opinion, that the Declaration "reflects customary international law"[25]. The problem is its exact meaning. The meaning of a status "separate and distinct" has sometimes been inaccurately interpreted and applied, consciously or unconsciously, as granting the people or populations in a non-self-governing territory a territorial status.

It is highly questionable whether the legal status of a territory as a non-self-governing territory grants the people or populations some form of territorial sovereignty. The question is caused by an inaccurate interpretation of the phrase "a separate and distinct" status.

Accurately, the phrase has been interpreted in that a non-self-governing territory enjoys "a separate legal status, i.e. a measure of international legal personality, and not necessarily a separate territorial status". In addition to an issue of territorial sovereignty, the administration of a non-self-governing territory is also usually assumed by the administering State. As both sovereignty and administration are not assumed by the people or populations of a non-self-governing territory, any separate territorial status is not granted to them.

24. Declaration on Friendly Relations.

25. Kosovo Advisory Opinion, ICJ Rep 2010, para. 80.

That is partly because the General Assembly is not entitled to impose responsibility on the administering State to transfer part of its territory to the people or populations in a non-self-governing territory, even in the form of a Declaration. Eva Kassoti elucidates on the issue that "neither Chapter XI of the UN Charter (dealing with non-self-governing territories), nor the Friendly Relations Declaration address matters of territorial title as such"[26]. Instead, the concept of territory would be relevant only for the purpose of defining the people or populations who are granted 'a measure of international legal personality'.

Furthermore, the factual difference of culture and language of its people or populations from those of an administering State is obviously irrelevant. Inaccurately, however, the difference is taken into account in the Cherry Blossom Case in a South African court, for example, in a statement that "[t]he Sahrawi people are a distinct people. They have their own culture and customs. They speak Hassaniya Arabic, which is closer to the Arabic spoken in Mauritania than to the Arabic spoken in Morocco"[27]. However, the difference of culture and language concerns, not a territorial status of the people or populations in a non-self-governing territory, but determination by a UN Member State itself as an administering State, in an application of the Principles which should guide Members in determining whether or not an obligation exists to transmit the information[28]. In fact, moreover, the populations of the Sahara, Guelmim, and Tata have the same characteristics in religion, language and culture.

For example, a report of the New York City Bar Association should be criticized as inaccurate when it argues in favor

26. E. Kassoti, "The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)", European Papers, Vol. 2, No. 1, 2017, pp. 32-33, citting from James Crawford, The Creation of States in International Law: the Law and Practice of Decolonization, Clarendon Press, 2006, pp. 618-619.

27. Polisario v NM Cherry Blossom, High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, Case No. 1487/17, June 15, 2017. para. 18. Cited as 'Cherry Blossom Case'. See M. Loulichki, When Politics Darkens the Independence of South African Justice, Policy Brief, OCP Policy Center, 2017.

28. Principle IV of the Principles which should guide Members in determining whether or not an obligation exists to transmit the information provides that "[p]rima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it", UN GA Res 1541, 1970, Annex. Although the wording is similar to the relevant phrase in Declaration on Friendly Relations, each scope to which the wording is intended to be applied is different: international legal personality of a people or populations in a non-self-governing territory; and determination of an administering State.

of "the right to form an independent self-governing state" on the basis of "a geographic separateness of the territory and a distinctive social identity of the people"[29]. Such inaccuracy is also found in 'the Joint Written Statement' submitted to the UN Secretary-General by American Association of Jurists et al[30]. In the context of the Saharan issue, the same inaccuracy is repeated in Council v Polisario Front of the EU court as below:

> In view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot … be interpreted in such a way that Western Sahara is included within the territorial scope of the agreement[31].

Later, again, this passage is quoted in the decision of the Cherry Blossom Case by the South African court as it is[32]. No matter how often they are repeated, however, the inaccuracy would not be reduced. Moreover, the inaccurately interpreted principle would not constitute a customary international law, because it inevitably lacks opinio juris, due to inaccuracy and apostasy by the serious consideration of national interests by States. Opinio juris is one of the two necessary constituents for proving the existence of a customary international law, along with the recurring State practice[33]. Thus, the holding of the ICJ in the Kosovo Advisory Opinion that the Declaration "reflects customary international law" should not be construed on the basis of the inaccurate interpretation of a "separate and distinct" status for a non-self-governing territory. As Sapio Asatiani concludes, "even the most liberal approach towards customary international law would not suggest creation of a new custom based on the several states strong support towards new rule": Albania, Finland, Germany, Netherlands, Poland and Switzerland[34]

With regards to the international personality of the people or populations in a non-self-governing territory, J. Crawford explains that the Declaration on Friendly Relations has served as the basis for allowing separate representation of peoples from non-self-governing territories[34]. Likewise, A. Schwed maintains that "[n]on-self-governing territories now have international legal personalities distinct from those of the administering states"[35]. While a people would obtain a legal position to make a dialogue with the government for finding a solution, it does not necessarily enjoy any territorial status in the non-self-governing territory. In consequence, the government's sovereignty over the territory would neither be affected nor impaired by its status as a non-self-governing territory.

Here, it should be remembered that the UN General Assembly is not entitled to impose responsibility on an administering State, specifically in respect of a non-self-governing territory, to transfer part of its territory to the people or populations. A. Schwed declares that "[t]here is a general consensus that resolutions of the General Assembly were never meant to be international law by virtue of their mere passage", and he concludes that "[t]he wording of the Charter never grants the General Assembly legislative powers; instead it consistently limits it to an exhortatory capacity"[36].

Although under the Declaration on Friendly Relations all Member States are recommended to assume responsibilities to promote self-determination and to support the UN in implementing the principle of self-determination, no legal right are accorded to the people or populations of a non-self-governing territory. The rights and duties are addressed only to the Member States, and expected to be implemented in the friendly relations among the neighboring States[37].

29. The Committee on the United Nations, Report on Legal Issues Involved in the Western Sahara Dispute: Use of Natural Resources, New York City Bar Association, 2011, p. 57.

30. UN Doc A/HRC/37/NGO/X, 2018, p. 3.

31. Council of the EU v Front Polisario, Court of Justice of the EU, Grand Chamber, judgment of 21 December 2016, Case C-104/16 P, para. 92.

32. Cherry Blossom Case, para. 42. But the phrase "separate and distinct" was not referred to in the decision of British court in R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another, EWHC 2898 (Admin), 2015, paras. 12-22. Instead, the court relied on the concept of "military occupation", though the military agreements between Morocco and Polisario are reportedly observed, according to the report by the UN Secretary-General. "The ceasefire, despite some significant violations, continues to hold with both parties on the whole continuing to respect MINURSO's mandate in safeguarding the rules enshrined in Military Agreement No.1 and other related agreements". UN Doc S/2019/282, 2019, para. 3.

33. North Sea Continental Shelf Cases, ICJ Rep. 1969, para. 83.

34. J. Crawford, op. cit., supra n. 26.

35. A. Schwed, "Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute", Fordham International Law Journal, Vol. 6, 1982, p. 452.

36. Ibid., p. 449, n. 33.

37. C. D. Johnson, "Toward Self-Determination – A Reappraisal as Reflected in the Declaration of Friendly Relations", Georgia Journal of International and Comparative Law, Vol. 13. 1973. p. 148.

Thus, a people or populations "in the territory of a colony or other non-self-governing territory" or subjected to "alien subjugation, domination and exploitation" would not be entitled to disrupt the territorial integrity of the parent State. That's why the Declaration imposes together the obligations to respect the territorial integrity of a State. Since the people or populations in a non-self-governing territory do not enjoy a separate territorial status under the Declaration on Friendly Relations, the Declaration continues in paragraph 7, called the 'safeguard clause', as below:

> 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[38].

In this regard, Judge Dugard proclaims that "it is difficult to resist the conclusion that respect for the territorial integrity of a State by other States is a norm of jus cogens" in Nicaragua Border Area Case[39]. Based on the erga omnes norm to respect the territorial integrity of a State, States are prohibited from disrupting the territorial integrity of other States. As for non-State entities, although the principle to respect the territorial integrity of a State is not directly applied, they are not entitled to disrupt the territorial integrity of any State, including their parent State.

Nevertheless, the Supreme Court of Canada finds in the Secession of Quebec Case that the right to external self-determination is generated not only in situations of colonies, but where a people is oppressed, as for example under foreign military occupation, or where a definable group is denied meaningful access to government. "In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination"[40], though the decision has been criticized[41].

3. Positions of States

In the case of the Kosovo Advisory Opinion, Kosovo's representative has cited the decision on the Secession of Quebec to conclude that the law on self-determination guarantees independence for groups "meaningful access to government"[42]. On the other hand, Serbia has argued that territorial integrity is predominant to the principle of equal rights and the self-determination of peoples, and has maintained "international law only allows for two legal consequences of such conduct: one is 'to put an end' to violations and second to 'reparations'." However, Serbia continues, "remedial secession goes much further than requiring reparation. It is tantamount to imposing a type of sanction that is wholly outside the field of state responsibility for wrongful acts[43]." To similar effect, Spain has stated in its Written Statement on the Kosovo Advisory Opinion, that "it cannot be concluded that respect for sovereignty and territorial integrity of States is subservient to the exercise of an alleged right to self-determination exercised via a unilateral act", and added that the UN Security Council "repeatedly and constantly maintained a position of unequivocal support and respect for sovereignty and integrity of the state" even in cases of serious armed conflicts[44].

Under the UN Charter, sanctions may be imposed only by the Security Council in conformity with its Chapter 7. Here, the positions of the Security Council permanent members on the comparative legal effects between the principle of respect for territorial integrity of a State

38. Declaration on Friendly Relations, para. 7.

39. Certain Activities Carried Out by Nicaragua in the Border Area, ICJ Rep 2011, Separate Opinion of Judge ad hoc Dugard, para. 15.

40. Re Secession of Quebec Case, ILM, Vol. 37, 1998, para. 138.

41. While in the first two situations the right to external self-determination is in conformity with the Declaration, in the third situation it is not. Foreign military occupation does not affect the international personality of an occupied State, as held in Ottoman Debt Arbitration (RIAA 1925 Vol. 1, p. 555). With respect to the third situation, an oppressed people may not lose their administration. It's not improbable that some members of a people are oppressed by others under the same administration. The International Covenant on Civil and Political Rights (ICCPR) allows the State parties, in time of public emergency, to take measures deviating from an obligation to respect the right to self-determination, let alone the right to secession, because its article 1, providing for the right to self-determination, is not included in the list of deviateable articles in article 4(2). The list enumerates only articles 6, 7, 8(1)(2), 11, 15, 16 and 18, to which the deviation from obligations to observe the ICCPR in time of declared public emergency is applicable. Besides, the principle of local remedies requires the exhaustion of domestic remedies. Under this principle, an allegation of secession must be examined in the domestic courts before the issue is internationalized.

42. Written Contributions of the Authors of the Unilateral Declaration of Independence of Kosovo, 17 July 2009, para. 4.39.

43. Written Comments of Serbia, 17 April 2009, paras. 593, 628.

44. Written Statements of the Kingdom of Spain, 14 April 2009, para. 34.

and a right to secession had better be reconfirmed, because of their exclusive privilege in the maintenance of international peace and security in case of "any threat to peace, breach of the peace, or act of aggression"[45]. As the ICJ held on the North Sea Continental Shelf Cases, moreover, "the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that ... State practice, including that of States whose interests are specially affected"[46]. The interests of permanent members may be specially affected by secessionist conflicts.

China states, "in order to justify the doctrine which contradicts such an essential principle as territorial integrity 'there should have been positive and explicit provisions to that effect' and not a mere a contrario interpretation"[47]. An a contrario interpretation addresses the 'safeguard clause' in paragraph 7 of the Declaration on Friendly Relations[48].

Russia has stated what follows on the relevant passage in paragraph 7 of the Declaration on Friendly Relations, regarding the principle of respect for territorial integrity of a State:

> This passage suggests that a State that respects the rights of peoples living in its territory, is protected by the principle of territorial integrity from the implementation of the right to self-determination in the form of secession ('external self-determination'). As stated by the Supreme Court of Canada in the Quebec secession case, 'the international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states'[49].

And Russia reconfirms that "[i]t is important to note that self-determination can be exercised within an existing State"[50], quoting opinions of eminent international lawyers[51]: "[O]utside the colonial context, the principle of self-determination is not recognized as giving rise to unilateral rights of secession by parts of independent States" (J. Crawford)[52]; "[T]he concept of secession is irrelevant to the ongoing entitlement of peoples to self-determination in the post-colonial era" (R. Higgins)[53]; "The principle of territorial integrity of sovereign States was, and still is, considered sacred ... [A]ny licence to secede must be interpreted very strictly" (A. Cassese)[54]; "[I]n no case should existing governmental structures be put in jeopardy lightly" (C. Tomuschat)[55].

Not long after the Kosovo Advisory Opinion, however, Russia recognized the secession of Abkhazia and South Ossetia from Georgia[56], though in vein. Five years later, Russia recognized the secession of Crimea from Ukraine. Now, it is pointed that "it is evident that Russia, to justify recognition, has undertaken the way of remedial secession theory"[57]. If it is true, it is also evident that the position of States on secession in international law would largely depend on their consideration of national interests rather than on their beliefs on an opinion of law or necessity, or opinio juris sive necessitatis. The prospects for creating customary international law on a right to secession would therefore be made definitely depressing. Therefore, it will be natural to predict that the positions of States, including other permanent members of the Security Council, on secession may differ. The positions of the other three permanent members expressed in the context of the Kosovo Advisory Opinion will be hereafter touched upon.

The United States maintain that "[i]t is widely accepted that declarations of independence, standing alone, present matters of fact, which are neither authorized

45. UN Charter, art. 39.

46. ICJ Rep 1969, para. 69.

47. Oral Statement of China, 7 December 2009, para. 25.

48. 'A contrario interpretation' is expounded in Separate Opinion of Judge Yusuf: The saving clause in its latter part is interpreted to imply "that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State's territorial unity and sovereignty", in Kosovo Advisory Opinion, Separate Opinion of Judge Yusuf, para. 12.

49. Written Statement of the Russian Federation, 17 April, 2009, para. 84.

50. Ibid., para. 85.

51. Ibid., n. 73.

52. Crawford, op.cit., supra n. 26, p. 415.

53. R. Higgins, "Self-Determination and Secession", in Secession and International Law, J. Dahlitz (ed.), United Nations, 2003, p. 36.

54. A. Cassese, Self-Determination of Peoples: A Legal Reappraisal, Cambridge University Press, 1995, p. 112.

55. C. Tomuschat, "Self-Determination in a Post-Colonial World", in Modern Law of Self-Determination, idem. (ed.), Martinus Nijhoff, 1993, p. 11.

56. "Russia Recognizes Abkhazia, South Ossetia", REF/RL, August 26, 2008, https://www.rferl.org/a/Russia_Recognizes_Abkhazia_South_Ossetia/1193932.html.

57. M. Capeleto, "Does Self-Determination Entail an Automatic Right to Secession?", International Relations Studies, 2014, https://www.e-ir.info/2014/05/02/does-self-determination-entail-an-automatic-right-to-secession/.

nor prohibited by international law. Neither the United Nations Charter, nor other general international agreements, nor customary international law regulate the act of declaring independence"[58]. Likewise, the United Kingdom concludes under the title of "Remedial Secession" that "international law favours the territorial integrity of States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede'. But neither, in general, does it prohibit secession or separation, or guarantee the unity of predecessor States against internal movements leading to separation or independence with the support of the peoples concerned"[59]. Similarly, but more simply, France has definitely declared that "the Court should decline to answer the request for an opinion"[60].

Thus, the opinion of the Security Council permanent members on the relative legal effects between the principle of respect for the territorial integrity of a State and the right of peoples to self-determination is divided. It may be concluded, however, that none of the permanent members positively advocate in favor of the right to secession under international law. There is not much difference between the permanent members and other States in the division of opinion on the relative legal effects.

In this connection, Germany is also of the opinion that "[t]here is considerable authority for the proposition that a declaration of independence leading to a secession and secession itself are of an entirely factual nature and that international law in general is silent as to their legality"[61]. Among African States, only Egypt, Sierra Leone and Libya have submitted statements. Sierra Leone was in favor of Kosovo's independence. Libya, however, stated that "the independence of the Province of Kosovo was proclaimed before negotiations had been completed with Serbia on self-determination, and therefore has no legal justification"[62]. Egypt advocated for "a well-rounded approach that protects the exercise of human rights in such a way that does not infringe the principle of territorial integrity"[63]. Then, State practice in the past related to a right to secession should be considered to make it clear whether there are decisive precedents in favor of customary international law on a right to secession.

The rule of no right to secession without a consent of the parent State has survived the breakups of the former USSR and Yugoslavia. The independence of Estonia, Latvia and Lithuania from the USSR was founded on the invalidity of the secret Molotov-Ribbentrop Pact, signed by Stalin's USSR and Hitler's Germany in 1939[64]. The USSR recognized their independence during its dissolution. The dissolution in 1991 was allegedly in conformity with Article 72 of 1977 USSR Constitution: "Each Union Republic shall retain the right freely to secede from the USSR." Although the referendum procedure was provided in 1990, it could not be applied before the dissolution. 18 of the 21 republics signed the 1992 Federation Treaty proposed by Russia. While Tatarstan later agreed on the "delimitation of jurisdictional subjects and mutual delegation of authority," Chechnya rejected both the 1992 Federation Treaty and the 1993 referendum on the new Russian Constitution[65]. In 2014, the UN General Assembly adopted a Resolution on the Territorial Integrity of Ukraine, declaring the referendum in Crimea invalid and Russia's annexation of Crimea illegal. It called upon States not to recognize changes in the status of the region[66].

In former Yugoslavia, declarations of independence, first issued by Slovenia and Croatia in 1991, were also considered domestic matters. They were not recognized by the former Yugoslavia. Third States were not, therefore, entitled to recognize them. The EC Member States declared that any unilateral declaration of independence would not be recognized in the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union[67]. And the UN Security Council declared that "no territorial gains or changes within Yugoslavia brought about by violence are acceptable"[68]. The Arbitration Commission of the International Conference on Yugoslavia presented the Opinion No. 1 in 1992. It held that Yugoslavia was "in the

58. Written Statement of the USA, April 17, 2009, p. 50,

59. Written Statement of the UK, April 17, 2009, para. 5.33.

60. Written Statement of French Republic, April 17, 2009, Conclusion.

61. Statement of Federal Republic of Germany, p. 27.

62. Letter to the Registrar dated 17 April 2009 from the Libyan Ambassador to Belgium, Note concerning the Proclamation by the Province of Kosovo of its Secession from the Republic of Serbia, April 17, 2009, (5).

63. Written Statement of the Government of the Arab Republic of Egypt, April 2009, para. 67.

64. D. Žalimas, "Legal Issues on the Continuity of the Republic of Lithuania", Hawaiian Journal of Law & Politics, Vol. 2, 2006, pp. 73-96.

65. H. Bienen, "Self-Determination and Self-Administration in the Former Soviet Union", in Self-Determination and Self-Administration, Danspeckgruber and Watts (eds.), Lynne Rienner, 1997, pp. 255-266.

66. Resolution on Territorial Integrity of Ukraine, UN Doc A/68/L. 39, March 27, 2014.

67. ILM, Vol. 31, 1992, pp. 1485-1487.

68. UN SC Res 1244, UN Doc S/RES/713, 1991, preamble, para. 9.

process of dissolution"[69]. It therefore asked whether the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination? Opinion No. 2 answered: "[I] t 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 possidetis juris)"[70], refusing to the Serbian population the right to self-determination. The Committee on the Elimination of All Forms of Racial Discrimination (CERD) also concluded that "International law has not recognized a general right of peoples unilaterally to declare secession from a State"[71].

With respect to Kosovo, in 1999, the UN Security Council reaffirms the calls for "substantial autonomy and meaningful self-administration"[72]. Returning to the issue of Yugoslavia, the Letter dated 27 April 1992 from the Permanent Mission of Yugoslavia to the UN addressed to the President of the Security Council declares, "[u] nder the constitution, on the basis of the continuing personality of Yugoslavia … the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro"[73]. Then, third States granted State recognition unto them.

The rule of no right to secession is also derived from the law of State recognition, as referred to above, because its discretionary character keeps the establishment of a right to secede impossible. Thus, the UK states as below:

> Whether declarations of independence achieve the desired result of independence is another matter. It is a matter not determined by the mere fact of the claim – the simple expression of a wish – but by the response given by the international community through the medium, in particular, of recognition and the participation of the entity in interstate relations[74].

Halima Aboila maintains in the context of the Nigerian separatism that "there is no conventional rule guiding the recognition of state in international law. However, recognition is under international politics and practice has been regarded as a political act that produces a legal consequence"[75]. Though "ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession", the CERD warns in the General Comment that "in particular, States must refrain from interfering in the internal affairs of the other States and thereby adversely affecting the exercise of the right to self-determination"[76]. Thus, Crawford concludes that "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally"[77].

On the other hand, no reference to a "separate and distinct" status seems almost common to the advocates of 'remedial secession', which justifies a right to secession from a sovereign State 'as the last resort'. Glen Anderson, one of such advocates, for example, does not refer to it at all in his elaborate discussion on the Declaration on Friendly Relations[78]. To them, whether the territory concerned has a "separate and distinct" status would not matter, for their arguments on remedial secession are applicable to any territory.

4. Remedial Secession

Recently, 'remedial secession' as a last resort in the situation when there has been harm made to a seceding entity has been referred to[79], though there is no exact definition in international law and the difference from secession as such is not always unequivocal. The legality of remedial secession was examined in the African Commission on Human and Peoples' Rights (ACHPR).

The rule of no right to secession, whether remedial or not, is in conformity with the holdings of ACHPR. Article 20(2) of the African Charter on Human and Peoples' Rights (African Charter) prescribes, "[c]olonized or

69. ILM, Vol. 31, 1992, p. 1394.

70. Ibid., p. 1497.

71. CERD, General Recommendation XXI, para. 6.

72. UN Doc S/RES/1244, 1999.

73. Security Council Resolution, UN Doc S/RES/1244, 1999.

74. Written Statement of the UK, April 17, 2009, para. 36.

75. H. Abiola, "Remedial Secession in International Law: Understanding the Legal Status of a Separatist Group by Fredrick Okagua", The Royal Nigerian Lawyer, September 3, 2018, p. 27, https://loyalnigerianlawyer.com/remedial-secession-in- international-law-understanding-the-legal-status-of-a-seperatist-group-by-fredrick-okagua/.

76. CERD: General Recommendation XXI, paras. 1, 6.

77. J. Crawford, op. cit., supra n. 26, pp. 384, 390, citing H. Lauterpacht, Recognition in International Law, Cambridge University Press, 1947, p. 8.

78. Glen Anderson, "A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession", Vandelbilt Journal of Transnational law, Vol. 49, 2016, pp. 1215-1229.

79. A. Buchanan, "Theories of Secession", February 1, 2015, http://philosophyfaculty.ucsd.edu/faculty/rarneson/BuchananTheoriesofSecession.pdf.

oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community". The ACHPR distinguishes the right of 'colonized or oppressed peoples' from that of 'all peoples', who "shall have the right to the assistance of the States parties"[80] and "shall freely dispose of their wealth and natural resources"[81]. Only 'colonized or oppressed peoples' shall have the right to free themselves from the bonds of domination by resorting to "any means". On the contrary, 'all peoples' are not entitled to "any means"[82]. Although the concept of 'oppressed peoples' is not defined, it would not be very different from that of 'colonized peoples' if it is taken into account that individual members of a people, whether colonized or oppressed, are under obligation to respect the territorial integrity of their States[83]. The African Charter does not stipulate a remedial secession, which is twice addressed by the ACHPR.

The ACHPR finds in Congrès du Peuple Katangais v Zaire that "Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire". However, the following passage shows an a contrario interpretation of paragraph 7 of the Declaration on Friendly Relations:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire[84].

Likewise, Kevin Mgwanga Gunme et al v Cameroon reconfirms that "autonomy within a sovereign state, in the context of self-government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised"[85]. But, the following passage is constructed, in a contrario interpretation of the Declaration on Friendly Relations, to uphold the possibility of remedial secession in Kevin Mgwanga Gunme et al v Cameroon, citing Congrès du Peuple Katangais v Zaire:

> The Commission holds the view that when a Complainant seeks to invoke Article 20 of the African Charter, it must satisfy the Commission that the two conditions under Article 20.2 namely oppression and domination have been met[86].

In this regard, Stephan Salomon conceives from political perspectives that "[u]pholding the perpetual possibility of a remedial right to secession, as vague and abstract as it might be, likely increases the incentives of African states to treat the people within their territories more justly. An interpretation to the contrary would fall back on regarding the right to self-determination as an end-norm, as it was under colonialism"[87]. That may be politically sound. But, S. Salomon himself admits that "the legal effects of a remedial right to secession are anything but clear"[88]. Then, the positions of States on a right to remedial secession should be reconfirmed, with regards to customary international law.

In favor of the new customary international law on a right to remedial secession, A. E. Hillestad reveals, based on the analysis of Written Statements submitted by States in the context of the Kosovo Advisory Opinion, that the arguments of 14 States including Kosovo in favor of the new customary law are not sufficient to create a customary international law legitimizing a right to remedial secession, while the States that argued against a right to remedial secession are only 11 and other states refrained from arguing against such a right. Thus, Aksel Erik Hillestad suggests that "[i]n abstaining from making such arguments, they acquiesced to such a customary law coming into existence"[89].

80. African Charter on Human and Peoples' Rights, art. 20(3).

81. Ibid., art. 21(1).

82. Ibid., arts. 19-24.

83. Ibid., art. 29.

84. Katangese Peoples' Congress v. Zaire, Comm. 75/92, ACHPR, 1995, para 6.

85. Ibid.

86. Kevin Mwaganga Gunme and others v. Cameroon, Comm. 266/03, ACHPR, 2009, para 197.

87. S. Salomon, "Self-determination in the Case Law of the African Commission", Verfassung und Recht in Übersee VRÜ, Vol. 50, 2017, p. 235.

88. "International humanitarian law does not grant secessionists a favorable status, and the support of the secessionists by other states is prohibited by the principles on the use of force and the principle of non-interference. Moreover, it remains unclear who has the "authentic voice" to decide", ibid., pp. 235-236.

89. A. E. Hillestad, "A Right to Remedial Secession? The Case of Kosovo and its Implications for International Law", Norwegian Open Research Archives, 2010, p. 66, https://core.ac.uk/reader/30869246.

On that issue, the ICJ admitted in the Kosovo Advisory Opinion that there were "radically different views" in the Written Statements submitted by several States "regarding whether international law provides for a right of remedial secession and if so in what circumstances"[90]. Different views are found also in the opinions of the ICJ Judges of the Kosovo Advisory Opinion.

In the Separate Opinion, Judge Yusuf asserts in favor of a right to remedial secession as an exception, that though not "general positive right", the right of peoples to self-determination may support a claim to separate statehood provided that it meets conditions prescribed by international law[91]. According to Judge Yusuf, international law should not turn a blind eye to the plight of ethnically or racially distinct groups within existing State, particularly in those cases where the State not only denies them the exercise of their internal right of self-determination, but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. "Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context"[92]. Such affirmative doctrine of remedial secession is also elaborated by Halima Abiola so that "[t]he doctrine of remedial secession has a legal status in international law. However, the exercise of such legal status by a people is subject to certain condition and such people can only exercise such right in extreme circumstances". For the affirmative doctrine of remedial secession, the problem is regarding what constitutes "extreme circumstances", which is critical. Thus, Judge Yusuf refers to "a specific situation, taking into account the historical context". And Abiola enumerates "extreme or egregious violation of their fundamental human right, discrimination, disproportionate allocation of social amenities and above all the total annihilation and deprivation of their cultural heritage"[93]. The circumstances should be more precisely articulated[94].

In respect to the ACHPR, Solomon asks "[w]ho should decide on whether the threshold of triggering such a right, domination or oppression, is met?", and then criticizes that "[d]omestic courts are barred from deciding such a question (par in parem, non habet imperium), and it is highly unlikely that an international court or tribunal, including the African Commission or the African Court, will decide on such a question"[95]. Besides, the question on whether "[t]he doctrine of remedial secession has a legal status in international law" is arguable.

On the contrary, Judge Koroma definitely declared against a right to secession in Dissenting Opinion, stating that "[i] t was unlawful and invalid"[96], and warns that the Kosovo Advisory Opinion will be used "as a guide and instruction manual for secessionist groups", thus undermining the stability of international law will, explaining that:

> International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms.[97]

Five years after the Kosovo Advisory Opinion, as a historical fact, the secessionist group in Crimea unilaterally declared independence from Ukraine without the consent of Ukraine[98], though in a different situation from Kosovo. The Crimea Case might have worked against a right to remedial secession.

Thus, Jure Vidmar argues that "secession is never an entitlement, not even in a situation of severe oppression". And, it is added, "[r]emedial secession was, at best, mentioned as an obiter dictum and, even then,

90. Kosovo Advisory Opinion, para. 81.

91. Ibid., Separate Opinion of Judge Yusuf, para. 11,

92. Ibid., paras. 10-11.

93. Abiola, loc, cit., supra n. 76.

94. Joel Day further points out, "future scholarship should concentrate on fundamental questions resulting from a remedial view of international law on secession. For instance, more work needs to be done determining what constitutes justified secession. What, precisely, is the threshold of atrocities and abuses at which the international community recognises the need for secession?", in idem., "The Remedial Right of Secession in International law", Potentia, 2012, p. 32, https://blogs.elpais.com/files/2.secession_day.pdf.

95. Solomon, loc. cit., supra n. 88, p. 236.

96. Kosovo Advisory Opinion, Dissenting Opinion of Judge Koroma, para. 2.

97. Ibid., para. 4.

98. Marxsen, loc. cit., supra n. 18, pp. 383-391.

not unequivocally as an entitlement"[99]. Zuzana Žaludová also concluded that "the right is neither acknowledged nor documented"[100]. Finally, the Declaration of Judge Simma in the Kosovo Advisory Opinion has reconfirmed a fundamental principle of international law proclaimed in the SS Lotus Case[101], though critically: According to 'an old, tired view' of international law, "restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order"[102]. Though the view may be 'an old, tired view', its effectiveness would not be lost, so long as sovereignty is held as a foundation of international law. Then, should 'an old, tired view' be lost? To answer the question, fundamental problems of separatism or secessionism should be elucidated first.

5. Conclusion: A Fundamental Problem

What is the problem of separatism? While moral reasoning in favor of a right to secession is considered by David Lefkowitz[103], fundamental problems of separatism have yet to be considered. With regards to the causes of separatists or secessionists, it has been pointed out, for example, that "[s]eparatism refers to the advocacy of a separation from the larger group, often, though not always, for reasons that are ethnic, religious, cultural, gender, or racial", as quoted above.

One of the main problems with separatism stems from its non-acceptance of differences inherent to the human condition – a denial which in turn impedes any hope of social cohesion in the aforementioned countries.

Contemporary European societies view certain concepts – such as "being and non-being", "life and death", "emotion and reason", "self and other", as dialectically opposed, while these are intrinsically complementary. "Being and non-being create each other. Difficult and easy support each other. Long and short define each other. High and low depend on each other. Before and after follow each other"[104]

Complementarity is practiced when one's responsibility to others is implemented by accepting their differences[105], which involves differential and external concepts such exteriority, time, death and the existence – or not, of a God, or gods. Complementarity is different from the concept of solidarity in the sense of 'Help me. I'll help you', which is tantamount to a commitment to only two dialectically opposed parties. On the contrary, complementarity addresses the relations between a self and the whole[106], while solidarity is between a self and another, both are only a part of the infinite and eternal whole[107], which signifies the exact opposite of whole-ism or totalitarianism[108]. Solidarity is thus practiced as a fluke, asking the other for charity or benevolence, without challenging the underlying problems of the social structure.

Historically, the European Renaissance focused on the individual human autonomy, called Individualism. It was proclaimed that human beings stood at the center of the universe under geocentric theory, capable of realizing their potentialities, whatever they had chosen. The concept of self-determination stating that human beings can determine their own destinies was modeled by Renaissance thinkers in the struggle against a traditions-bound destiny[109]. The concept is, thus, originally self-central and egoistic, making little account of the other[110]. Under individualist thinking, however, ethics as a calling into question of a self's spontaneity by self-consciousness of the other's presence would not necessarily occur[111]. The other would be conceived within the concept of "the claim of the ignorant and helpless on the enlightened and strong"[112]. If a self can know itself as strong only because the other is weak, then self's "identity depends on a perpetual competition that only leaves losers". Besides,

99. Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice", St Antony's International Review Vol. 6, 2010, p. 37.

100. Z. Žaludová, "Concept of Remedial Secession under International Law", VIII. ročník SVOČ, 2015, p. 23, Zuzana%20Žaludová%20(1).pdf.

101. SS Lotus Case, PCIJ, Ser. A, No. 10, 1927, p. 18.

102. Kosovo Advisory Opinion, Declaration of Judge Simma, para. 2.

103. David Lefkowitz, "International Law, Institutional Moral Reasoning, and Secession", Law and Philosophy, Vol. 37, 2018, pp. 385-413.

104. S. Mitchell, Tao Te Ching, Harper and Row, 1988, Chap. 2.

105. G. Deleuze, Difference and Repetition, Columbia University Press, 1994, pp. 70-128.

106. T. Todorov, The Conquest of America, Oklahoma University Press, 1999, p. 69.

107. E. Levinas, Totality and Infinity: An Essay on Exteriority, Springer Science & Business Media, 1979.

108. Whole-ism is equivalent to totalitarianism, in Hanna Arendt, The Origins of Totalitarianism, Harcourt, 1976, p. 465.

109. E. Cassirer, The Individual and Cosmos in Renaissance Philosophy, University of Pennsylvania Press, 1972, p. 86.

110. P. Ibekwe, Wit & Wisdom of Africa, WorldView, 1998, p. 174.

111. E. Levinas, op. cit., supra n. 109, pp. 43, 175.

112. J. Westlake, Chapters on the Principles of International law, Cambridge: At the University Press, 1894, p. 140.

the competition would be made to survive by its self-immunity of charity or benevolence. Thus, the relations between a self and the other would remain competitive, palliatively corrected by "Help me. I'll help you", under individualism. However, the "perpetual competition is dangerous for our relationships with other people as well as the planet"[113].

Actually, however, a self is variously connected with the other. The question is whether the connection is an entitlement or a responsibility for a self. Isn't there a responsibility imposed on a self to accept the difference of the other? Although the law of the right to self-determination and human rights may answer to the question that the acceptance of differences is a self's entitlement, not a responsibility - on the basis of the doctrine of social contract. On the ground of the legal effectiveness of pacta sunt servanda, Hans Kelsen has argued that it is assumed as a premise for the maintenance of the social order[114]. But, the question is asked much before or beyond the premise. The answer may be found in traditional African communities.

In Southern Africa, under the traditional thought of ubuntu[115], it is believed that "I am because we are" or "A man becomes a person through others"[116]. Ubuntu is still applied in the judicial courts of the Republic of South Africa[117]. If "I" is removed from "we", "we" becomes equivalent to others. So, the belief may be rephrased as "I am because others are" or "I am because you are". A self is preceded by the other. It means that a self assumes responsibility to accept deference of the other. The responsibility is not originated from any contract. In this sense, the responsibility may be conceived as unreasonable and excessive[118]. The similar traditional belief to ubuntu may be found all around the African continent[119].

Now the earth is filled with Nation-States intent on assimilating differences to quantify human people, who intrinsically vary by personality, into the abstractness of a nation or a people. Under the assimilated abstractness, a "self" views 'outside' as a simple extension of inside[120], neither the end of a self nor the beginning of the other is realized in self-consciousness. As such, the boundary between a self's egoistic inside and ethical outside is

113. M. Battle, Ubuntu, Seabury Books, 2009, pp. 6-9.

114. H. Kelsen, General Theory of Law and State, Harvard University Press, 1945, pp. 369-370.

115. Ubu refers to being. Ntu signifies becoming or emerging, and originally meant an ancestor who got human society going. Ntu functions, thus, like Higgs boson, which explains the mass of an elementary particle. Ubuntu, or 'being becoming', denotes "a particular action already performed, an enduring action or state of be-ing and the openness to yet another action or state of be-ing", Mogobe Ramose expounds. Its basic insight is said to be "that of suspense of be-ing having the possibility of assuming a specific and concrete character at a given point of time. Because of the suspension of be-ing, no single specificity is guaranteed performance". Idem., "The Philosophy of Ubuntu and Ubuntu as a Philosophy", in The African Philosophy Reader, Coetzee & Roux (eds.), Routledge, 2003, pp. 230-38. Thus, ubuntu addresses the infinite and prolific differences of '-ness', not the immanent or totalitarian sameness of '-ism'. Thus, human beings are, for all eternity, suspended in a state of becoming. B. Bujo, "Ecology and Ethical Responsibility from an African Perspective", in African Ethics, Murove (ed.), University of Kwazulu-Natal Press, 2009, p. 285.
Ubu and ntu of 'ubuntu' are complementary, like the wave and particle of flux. The fluidity is suggestive of rheomode, an experimental flowing language, which would further elucidate ubuntu. Rheomode is exemplified: "Observation is going on", instead of "An observer is looking at an object". It emphasizes a verb, different from the conventional subject-verb-object, because it describes a movement which connects a self with the other. D. Bohm, Wholeness and the Implicate Order, Routledge, 1980, pp. 36-60. In the whole universe, everything is moving. Even discontinuities are complementary with continuities. In death, for example, stillness is not achieved. A dead body will be eroded, decomposed and congealed as some sort of creature in the midst of differences of the other. Rheomode communicates the inter-connected flux in open-minded whole-ness, not in the fragmented segments in closed-minded whole-ism. Thus, 'nothingness' is simply isolated existence. "The significance of wholeness involves that everything is related internally to everything else", David Bohm reminds. In whole-ness alone, what should be complemented by a self for the other, or the whole, is truly cognized. Ibid., p. 149.

116. C. Robb, "Ubuntu: I Am Because You Are", Trive Global, 2017, https://medium.com/thrive-global/ubuntu-i-am-because-you-are-66efa03f2682.

117. Ubuntu is defined and applied in South African courts: Afri-Forum v Malena 2011 (4) All SA 293 (Eq C) para. 18; MEC for Education 2006 (10) BCLR 1237 (N) para. 53; and S v Makwanyane 1995 (6) BCLR 665 (CC) para. 481.

118. Asante in Ghana has an excessive calendar, adaduanan, which literally means 40 days. But a year consists of 378 days, equivalent to 9 cycles of a month consisting of 42 days. Adaduanan thus exceeds 40 days by 2 days. It is a reminder of the excess of time, with which we cannot catch up. T. C. McCaskie, State and Society in Pre-Colonial Asante, Cambridge University Press, 2010, pp. 151-158.

119. In Yoruba's ifá divination, a deity of Èşù, who embodies potentiality, was created by the essence of primal power and creative potential, Olodumare. The religion is monotheistic, though six different nominal designations for the attributes of the Supreme Being have misled Europeans to see it polytheistic. J. Awolalu, Yoruba Beliefs and Sacrificial Rites, Henritta Press, 1981, pp. 28-30. Èşù assumes as many different forms as 256 scriptures, each of which consists of 800 verses, such as a giant in the morning and a dwarf in the evening, and travels instantly even between heaven and earth. Having worked with Olodumare in creating humans, Èşù knows their secrets. So, a client may be guided by Èşù, provided that the sacrifice revealed by a Priest of ifá, babalawo, or "father of secrets", is offered. E. Eze, "The Problem of Knowledge in 'Divination'", in African Philosophy, (ed.), idem., Blackwell, 1998, pp. 174-175. Èşù may be thus compared to ubu, while ifá to ntu. Sacrifice is not denoted to or received by Olodumare, but abstained. An emphasis on the human efforts of suffering sacrifice is represented in the real place-name of Ile-Ife, Yoruba's mythical human cradle and spiritual capital. It is originated in Ilé n fe, meaning "the earth is expanding". The earth, or ilé, may expand if differences are accepted. It opens up a self to the ever expanding whole-ness where self's singular position, i.e. 'what should be done', is found. A. Kila, Ówé, Akada Press, 2003, p. 15.

120. E. Levinas, Entre Nous, Continuum, 1998, p. 11.

blurred. Outside has disappeared[121]. Here the other is conceived as assimilable. How can outside be retrieved? Should ego vanish? No, it should not. If ego vanishes, outside would not be retrieved forever. Instead, ego should be temporarily abstained. Ego can be abstained by accepting difference of the other[122]. If ego is abstained, its self will be freed from egoism, with which a 'pure and innocent' self is filled, 'pure and innocent' in that "Am I right?" is not asked. The vacuum suction of ego's absence would pump up the once abstained ego, which will surely return to ethically advance the self. "To be great is to go on, [t]o go on is to be far, [t]o be far is to return"[123]. Thus, the relations between a self and its ego are complementary. The abstained ego acquires ethics in the midst of the other, just like elementary particles acquire mass in the 'Higgs field'[124]. As by virtue of mass stability is provided and opens the universe as we know it now, so a self is stabilized, matured and then involved in alien matters by virtue of ethics, and a self is blessed. According to Jean-Luc Nancy, it's not until a self is involved in alien matters that the world is opened[125].

Since the other is different from, and therefore unequal to, a self, their relations are always between high and low. A self can be matured if a self respects the other. In African traditional communities, such responsibility was shared, consciously or unconsciously[126], under the ritual of gift giving and hospitality that were originated in the belief of sacrifice, which was "no longer the performance of an act of consciousness"[127]. Gift giving and hospitality were deemed sacrifices for the whole, whereby a community was maintained. Sacrifice worked as a self's useless suffering 'for nothing' in terms of irreplaceable, non-imputable and inescapable 'pre-original' responsibility for the other, pre-original in that it preceded any moral, contract or law[128].

If it were not for the acceptance of difference of the other, a self's life would stop at an utterly meaningless game, or a dreary play. While a self cannot make a difference in its own, it can accept difference and become different from the previous self. That acceptance alone would ensure a self's life in being meaningful.

Why should a self, not others, accept difference first? Desmond Tutu illustrates it through a metaphor: "If you throw a bone to a group of dogs you won't hear them say: 'After you!'"[129]. A self's first acceptance of difference of the other is based on the premise of a self's efforts, with which human development is called into being.

Also in European modernity, a subtle form of gift giving or hospitality is routinely practiced among families, friends or colleagues[130]. It may be an accessible entrance to the temporal abstention of ego. But such practice is usually confined to such intimate others as families and friends, and not extended to the utter strangers whom a self has never met and will never meet. It must be extended to the utter strangers to get a self involved in alien matters. Gift or hospitality must be abandoned under anonymity. However, we will not offer it in that manner. That is why some media, religious or not, is required.

A self's responsibility for the other, i.e. sacrifice, is not only for neighbors but also for strangers. Sacrifice was variously illustrated in African traditional customs[131]. A Southern African Xhosa proverb tells, unyawo alunompumlo, or 'the foot has no nose', signifying that strangers, being isolated from their kin, and thus defenseless, were particularly under the protection of the chief and were accorded special privileges[132]. On the other hand, unlimited assertion of self-interests in disregard of the other would prevent a self from opening up to the complementary relations with others. "Living in

121. M. Hardt and A. Negri, Empire, Harvard University Press, 2000, pp. 186-190.

122. E. Levinus, Otherwise Than Being: Or Beyond Essence, Xanedu Pub, 1998.

123. L. Tzu, Tao Teh Ching, Shambhala, 1990, p. 37.

124. L. Lederman and D. Teresi, The God Particle, Mariner Books, 2006, p. 370.

125. J.-L. Nancy, The Creation of the World, State University of New York Press, 2007, pp. 42-43.

126. J. Zamplene-Rabain, "Food and the Strategy Involved in Learning Fraternal Exchange Among Wolof Children", in French Perspectives in African Studies, (ed.), P. Alexandre, Oxford University Press, 1973, pp. 221-233.

127. Levinas, Entre Nous, Continuum, 1998, pp. 30, 78.

128. Ibid.

129. D. Tutu, "Human Rights in South Africa", Monitor, undated, reproduced in Battle, Ubuntu, Seabury Books, 2009, p. 35.

130. J. Derrida, The Gift of Death, University of Chicago Press, 1995, pp. 29, 70. In this regard, the Book of Covenant introduced "rules of seven": on the 7th day of the week the farmer was to give the day off to his cattle, slaves and the residents alien; in the 7 year the slave should be released without ransom, and the fields should lie fallow so that the poor and animals could eat it (chaps. 21-23). In the Levitucus, after 7-times-7 years all families shall receive the parcels of land due to them (chap. 25). See U. Duchrow and F. Hinkelammert, Property, Zed Books, 2004, pp. 18-21.

131. Venda tells, "A person is born for the other". B. Nussbaum, "Ubuntu", in African Ethics, M. Murove (ed.), University of Kwazulu-Natal Press, 2009, p. 101. Gift giving and hospitality were deemed sacrifice, not for the specific persons, but for the whole, whereby communities were maintained. Gift and hospitality were abstained.

132. Union of Refugee Women v Private Security Industry Regulatory Authority 2007 (4) BCLR 339 (CC) para. 145.

relation with others directly involves a person in social and moral roles, duties, obligations, and commitments which the individual person must fulfil"[133]. Thus, a morality is clearly weighted on the side of duty, i.e. on that which a self has to do for the other.

Complementarity is implied in a Moroccan traditional belief, 'ār, which originally signifies a self's shame because of 'no notice for the other.' According to Westermark, it works as an outside conductor of conditional curses[134]. The responsibility to offer hospitality is connected with 'ār, which is neither founded on any contract nor benevolence, but founded on the acceptance of unreasonable or excessive pre-original responsibility to the other.

Separatists or secessionists should answer the questions regarding the difference of the other. Finally, Arnold J. Toynbee should be cited. He wrote in the wake of an earlier Balkan war, "self-determination is merely the statement of a problem and not the solution of it"[135].

133. K. Gyekye, "Person and Community in African Thought", in The African Philosophy Reader, P. Coetzee and A. Roux (eds.), Routledge, 1998, p. 332.

134. Warring parties had recourse to 'ār "to put a stop to a war between two different tribes". The saintly families of Rgrâga, Šnhâja and Bni Dğōğ had kept a precious sacred letter, but they agreed to settle their conflict by burying it. Next morning, they found a lake, in terms of balaka, or 'blessing', at the place where they carried out their decision. Westermarck, op. cit., supra n. 122, p. 6.

135. A. Toynbee, "Self-Determination", The Quarterly Review, No. 484, 1925, p. 319.

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