International Law Is the Most Appropriate Moral Answer to Territorial Conflicts
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I read with extreme interest Burke A. Hendrix' stimulating article 'International Law as a Moral Theory of State Territory?' I did it with the eyes of an international lawyer open to other disciplines, who does not consider—as would many so-called 'positivists' of our times- that justice and law are two completely different things.

I have decided to give this comment a provocative title. I am not adopting, of course, a corporate attitude, aimed at defending 'my' field at all costs. Indeed, it is my firm belief that international law provides the most appropriate moral answer to territorial conflicts in the world of today. I will try to explain why in a concise way.

At the outset, I would like to stress my agreement with two of the main ideas of the article: 1) the state system is the starting point of any present theory of territory and 2) an acceptable moral theory should provide a common language for solving conflicts. However, contrary to Mr. Hendrix' opinion, my view is that international law constitutes the already available common language he was unable to find elsewhere. Indeed, this idea is far from new. It is the application in the territorial field of the social function the law is called upon to play more generally. All other eventually moral answers, real or imaginary, founded on historic, economic, religious or political considerations, lack the necessary objective character of the law: what is perceived as decisive for one side, is not perceived by the other in the same way. Moreover, who decides that one moral perception is more important than another, that one religion deserves more attention than another, that an economic or security factor raised by one is more important than that invoked by another? Who indeed, is to decide how such decisions are to be taken?

It is my assumption that the configuration of the territories of the countries of the world is the product of history. And history cannot be relived. Is it morally correct that Kuwait has such large oil resources and Jordan none? Is it morally correct that Russia has a bigger territorial surface than China, even though China is the most populated country in the world? Is it morally correct that Argentina has such a fertile and extended land for its relative scarce population whereas Chileans are condemned to live on a tiny strip of territory between the Andean Cordillera and the Pacific Ocean? That some states are generously provided with water, a resource that others cruelly lack? Is it morally correct to take into consideration such features when dealing with a boundary dispute between some of the states mentioned above? By raising these questions, my intention is to show that purely moral considerations cannot offer an adequate explanation of the territorial division of the world and, even less, supply a justification for territorial changes. For it is easy to imagine what would happen if this kind of analysis
were used in order to solve territorial conflicts. In the past, we have already witnessed claims raised on
grounds other than the law, such as the 'Lebensraum' theory, with the consequences we all know. By
saying that, I am not asserting that international law sustains a territorial status quo. International law
does not endorse illegal territorial changes. De facto and de iure situations are not similar and do not
deserve the same legal treatment. The case of Namibia during the last century is a convincing case in
point.

Of course, I am aware that international law can be interpreted in different ways. There are however
limits to that. Like language, the law is necessarily a coherent system. If there are two apparently
contradictory rules, it is necessary to find a rule which resolves this conflict, i.e. by establishing which of
them prevails, or by interpreting them in a harmonious way. The relationship between territorial integrity
and self-determination is an abiding problem of jurisprudence, at least since the emergence of self-
determination as a legal principle. It is probably the most striking model of seemingly contradictory rules
in international law.

The author believes that uti possidetis and territorial integrity on the one hand, and self-determination on
the other, are incompatible if one takes the latter seriously. It is a respectable thesis. Personally, I wrote
exactly the opposite (cf. my publication Possession contestée et souveraineté territoriale (Paris, P.U.F.,

'All peoples have the right to self-determination', proclaim all international instruments related to this
principle, including article 1 common to the International Covenant on Civil and Political Rights and the
International Covenant on Economic, Social and Cultural Rights. Indeed, in order to establish whether a
contradiction between the principles mentioned above exists, one has to define clearly who constitutes
the "self". In other words, who is the holder of the right of self-determination. Neither the objective or the
subjective theories, nor a mix of them, provide a clear-cut answer, applicable in all circumstances. In my
publication, I followed what I called a 'territorialist' approach to define peoples. It comprises uti
possidetis, but goes further. Self-determination outside decolonisation or foreign occupation is vested in
the entire population of an independent state, unless the state itself recognises that it is composed of a
plurality of peoples (as was formally the case of the Constitutions of the former USSR, SFRY and
Czechoslovakia). Subject to this exception, according to international law, the formula is: 'one state,
one people'. This leads to the conclusion that international law does not justify secession within existing
independent states. This does not mean, however, that the international legal system prohibits it. In
general, the question of whether a particular secessionist claim is moral or not, must not be answered
by reference to the rules of international law. There is no discrimination among peoples by stating that.
The 'salt-water' theory, according to which only overseas peoples were regarded as holders of the right
of self-determination, is nothing but a euphemism. It is incorrect to hold that only peoples separated
from the Metropolis by sea were considered 'peoples', whereas peoples subjugated within the territory of the Metropolis - or other states - were not. The distinguishing feature was that colonial peoples were put under a separate and subordinated regime. Individuals belonging to groups or intra-state units having particular cultural, linguistic or religious features were considered in the same situation as the other citizens or units of the state. Soon after the Second World War, enlightened republican colonialists like the French were keen enough to apply to the 'DOM-TOM' the same citizenship scheme as in the 'European' France. British colonialism decided to follow this example only recently, after the 'decolonisation' of Hong-Kong, granting full citizenship to the inhabitants of the last 'confetti' of the former Empire.

Objective/subjective theories are unable to solve the problem of 'infinite divisibility'. Secessionists are at pains to explain why they claim the respect of their territorial integrity (in so doing, denying the right to self-determination of 'peoples' claiming it inside the secessionist entity), rejecting at the same time the right to the territorial integrity of the state from which they want to be separated.

One cannot avoid the crucial issue of territory when dealing with self-determination. There is no possibility of defining the 'self' without previously defining the territorial unit of self-determination. Even if one chooses the will or ethnic, language, religious or other objective or subjective considerations and declares 'let the people decide', it is impossible to avoid answering these questions: where will the voting take place? What will be the territorial scope of the decision of the 'people'? This problem is inescapable: human beings are not only 'political animals': they are also 'territorial' ones. Even nomad populations displacing themselves on a given territory consider it either as their own or belonging to another people. Nomad states, without any territorial basis, however, cannot exist in the present days.

Moreover, defining peoples following this 'territorialist' criteria explains why international law recognises not only the right of territorial integrity to states, but also to peoples who have not yet reached statehood.

By insisting upon international law's failure to respond to some morally justified secessionist claims, Mr Henrix is proposing a valid unilateral 'way out' to the constitutional contract existing within states. But, absent exceptional circumstances, to put an end to a contract, or to modify it, morally requires negotiations and agreement between the parties concerned. In a democratic society in which all citizens are equal in rights, have equal rights to representation and equal access to public goods, the fact of being different from a religious, linguistic or cultural point of view is not enough to justify a unilateral rupture of the constitutional contract. I think that this point was made absolutely clear by the Canadian Supreme Court in its decision of 20 August 1998 concerning the eventual secession of Quebec, which constitutes, to my mind, a major contribution by the Canadian judges to this debate. According to the Court, if a clear majority of Quebecois pronounce themselves in favour of the independence of the
Province, the Federal Government and the Province have to enter into negotiations. The decision is not up to the Quebecois only, but the Federal Government cannot simply ignore their position. The negotiations have to take into consideration all relevant constitutional principles and the interests of all parties concerned. Hence, the issue of the negotiations is not determined beforehand.

Contrary to what the article states, I do not think that self-determination, as embodied in present international law, is a 'once and for all' right. On the contrary, it is a permanent right. Again, the main issue is who is the holder of this right. If one people decided in the past to be incorporated into an existing state, by this act it dissolved itself within another people. In other cases, like some situations of 'free association', peoples having chosen this status in the exercise of their right of self-determination keep their personality and can unilaterally claim to change this situation in the future. Peoples having their own independent state continue to be holders of this right. Like the right of human beings to freedom, it is only when they lose it that they realise its importance.

Thus, in pursuing their own 'moral' territorial objectives, states or other actors have to use the legally available tools. I would say that they can test the conformity of their morality with the morality of the rest of the world by analysing them in the light of the principles of international law. I am not saying that historic, religious, economic, security or other issues are irrelevant for solving territorial conflicts. What I am suggesting is that these considerations cannot be imposed unilaterally or taken into consideration by a judge or arbitrator dealing with law; that they have to be put on the negotiating table and discussed with the other side. As a matter of course, international law does not prevent the parties to a dispute resolving it through negotiations in which both of them raise such arguments and make mutual concessions. Quite the opposite: the peaceful settlement of disputes is an international obligation and negotiation is the first and probably most important means used to reach a solution.

In order to have a complete picture of the answer international law offers to the theory of territory, it is necessary to add the respect of fundamental human rights to the principles of *uti possidetis*, territorial integrity and self-determination. The sum of these provides what I consider to be a satisfactory moral answer. Of course, international law can be improved, and not only in the realm of enforcement. There are for example, some important trends towards the emergence of a principle of democratic government in international law. It is however slightly disappointing that the author, having found international law unable to provide a satisfactory moral answer to territorial matters, does not supply an alternative. Should this comment prove to be insufficiently convincing, it could - hopefully - form the object of Mr Hendrix' next paper.

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