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2003

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## DEMOCRATIC PRINCIPLES AND SEPARATIST CLAIMS: A RESPONSE AND FURTHER INQUIRY

DIANE F. ORENTLICHER

Donald Horowitz has grounds for concern about legal innovations that may provide fresh inspiration to separatist movements. It is baffling, however, that he attributes proseparatist views to me. I will try here to clarify the principal sources of misunderstanding and hope, along the way, to deepen our consideration of issues that are well worth further exploration.

Horowitz's commentary proceeds from the basic premise that I propound a right to secede that is unfounded in law. Yet my essay argues that international law is deeply skeptical of secessionist claims—and rightly so.

This misapprehension stems in part from a misreading of the broad lines of my argument. My aim was to explore the implications of democratic principles for separatist claims. As a foundation for this inquiry, I briefly reviewed the evolution of relevant legal doctrine in order to establish several background points: the question I set out to examine—the implications of democratic principles for separatist claims—had scant grounding in international law until quite recently; despite this, diplomatic practice and scholarly opinion have at times foreshadowed views that have gained greater purchase in recent years; finally, the question I explore has become

newly important in the realm of policy making (and not just academic theory) by virtue of recent developments evincing an unprecedented commitment by states to democratic principles. Horowitz apparently mistakes my discussion in this preliminary section, the only portion of my essay he addresses, to be an argument in support of the claim that international law has for some time recognized a right to secede.<sup>1</sup> This was far from my intent.

This initial misunderstanding carries across Horowitz's commentary, leading him to refute a succession of arguments I did not advance<sup>2</sup> while misconstruing those I made.<sup>3</sup> Rather than cite each instance, I hope a few examples will clarify my perspective.

Horowitz challenges what he apparently supposes to be my view of the Paris Peace Conference—that the postwar settlement provides some evidence of a right to secede. Citing my observation that, to the extent consistent with other objectives, the Paris peacemakers were guided by the principle that “boundaries of new and reconfigured states were to be drawn along national lines,” Horowitz tries to show where I went astray: “We have already seen that Wilson’s ideas and the proceedings at Versailles were confused and that decisions went in several directions.” Yet I made plain that the “principle of nationalities” was one of several notions of self-determination applied at Versailles and that the principle of self-determination, however conceived, was given only qualified application there. More fundamentally, my discussion made clear that the peace conference did *not* give rise to a general right of secession or, for that matter, to any other version of a right to self-determination.

Horowitz turns next to my account of the Aaland Islands dispute taken up by the League of Nations in 1920–21. Noting that I “fail[ed] to cite the statement” of a League Commission of Rapporteurs “that was far more definitive” than passages addressing limited circumstances in which secession might be warranted, Horowitz implies that I misread the commission’s conclusions. The statement Horowitz suggests I should have mentioned explains why, in the commission’s view, international law did not recognize a general right of secession for minorities. Yet I stated unambiguously that this and another commission involved in the Aaland Islands dispute “concluded that international law did not recognize a right of national self-determination.” In fact, I introduced my discussion of the Aaland Islands dispute with the claim that its resolu-

tion "put to rest" any possible question about whether international law supported separatist claims under the rubric of self-determination. I did note as well the Rapporteurs' observations concerning circumstances in which secession might be justified. As I have noted, one of my aims in the introductory section of my essay was to track early enunciations of views that now hold greater purchase, and the League commission's observations relating to remedial secession are especially important in this regard.<sup>4</sup>

Horowitz's treatment of the UN General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations makes a useful contribution to an already rich scholarly literature on the subject. Although I disagree with some aspects of his interpretation,<sup>5</sup> I will resist the temptation to engage the point at length here, since I believe that Horowitz's principal argument is with Antonio Cassese, whose views my essay explores. It may, however, be useful to clarify the significance my essay attached to the declaration, since here, too, Horowitz has misunderstood the nature of my argument.

For Horowitz, two questions matter—whether Cassese's interpretation is legally correct and, if so, whether the views Cassese attributes to the declaration have binding force.<sup>6</sup> In assessing the first question, Horowitz is guided principally by the declaration's drafting history. My aims were different. I wanted to explore the implications of a highly influential interpretation<sup>7</sup> that is very much to the point of my inquiry because it explicitly connects separatist claims to democratic principles.

On one point, Horowitz and I have genuinely different views—the persuasiveness of the "democratic entitlement" thesis pioneered by Thomas Franck. Writing in 1992, Franck claimed that democracy "is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes."<sup>8</sup> Horowitz does not discern support for this claim in the practice of states. Yet a breathtaking range of activities backs up Franck's thesis.

In the view of two scholars who have closely studied issues relating to democratic governance and international law, "concerns for democratic legitimacy" have filtered "into virtually every aspect of international legal discourse."<sup>9</sup> For example, in 1993 the European

Union (EU) adopted accession criteria for central and eastern European countries that include a candidate country's having "achieved stability of institutions guaranteeing democracy."<sup>10</sup> In 1995, the EU decided to include in all new treaties with third parties a provision affirming respect for "democratic principles" as an "essential element" of the treaty.<sup>11</sup> Turning to Africa, a basic objective of the African Union (AU) is to "[p]romote democratic principles and institutions."<sup>12</sup> Governments that come to power through unconstitutional means are barred from participating in AU activities.<sup>13</sup>

While the Charter of the Organization of American States (OAS) has long affirmed "representative democracy," the organization has added teeth to this commitment in the past dozen years.<sup>14</sup> In 1991, the OAS General Assembly adopted the Santiago Commitment to Democracy and Renewal of the Inter-American System<sup>15</sup> and a resolution on representative democracy, which called for an immediate response by the Permanent Council in the event of "occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member States."<sup>16</sup> In December 1992, the OAS adopted a protocol to its charter that provides for suspension from participation in the organization of a state "whose democratically constituted government has been overthrown by force."<sup>17</sup>

Alongside these formal policies, states and intergovernmental organizations have committed unprecedented resources to democracy-promoting activities. Over seventy states received electoral assistance from the United Nations from 1992 to August 1999.<sup>18</sup> Between 1990 and 1995, the EU provided electoral assistance to forty-four countries.<sup>19</sup> Experts who have analyzed trends in electoral assistance say that similar statistics could be marshaled for the OAS and the Organisation for Security and Co-operation in Europe.<sup>20</sup> The same period has seen a surge in bilateral assistance aimed at promoting and consolidating democratic government. According to figures compiled by the Organisation for Economic Co-operation and Development, worldwide democracy assistance increased from \$564 million in 1997 to \$1.6 trillion in 2000.<sup>21</sup> One of the largest benefactors of such programs is the United States govern-

ment. Between 1992 and 2001, its Agency for International Development provided \$4.6 trillion in democracy programs.<sup>22</sup> Senior officials of the Clinton administration presented these and related initiatives in terms that go beyond Franck's more modest "emerging" democratic entitlement: "[I]n the twenty-first century, people . . . have a basic right to a form and structure of government that guarantee [civil and political] rights—in other words, they have a right to democracy itself."<sup>23</sup>

Are all countries fully democratic? Of course not, but no proponent of an emerging "democratic entitlement" makes this claim. The sole test of Franck's thesis cannot be to ask whether there are deviations from democratic ideals among some two hundred states. The well-established proposition that international law prohibits torture<sup>24</sup> would fail this test. In a survey of 195 countries covering 1997 to mid-2000, Amnesty International found reports of torture and ill treatment in 150 countries; in more than 70, the reports were "widespread or persistent."<sup>25</sup> At least as important as the number of states deviating from democratic principles are the responses of other states to deviations—thus it is noteworthy that the international community responded vigorously to coups in Haiti and Sierra Leone in the 1990s, approving military intervention to restore deposed leaders<sup>26</sup>—and the broad trend toward democratization in recent decades, reflected most strikingly in the collapse of communism in central and eastern Europe and of military juntas across Latin America.<sup>27</sup>

And so the question today is not whether international institutions and governments are devoting "unprecedented attention to the internal governing structures of states" (clearly they are) or whether this development "has significant implications for the current content and future direction of international law"<sup>28</sup> (surely it does). The issues that now confront us concern the meaning and implications of states' unprecedented commitment to democracy.

While Horowitz and I disagree about the persuasiveness of the "democratic entitlement" thesis, we are in basic accord about where the proper emphasis should lie when it comes to separatist claims. Horowitz says our focus needs to be on internal political arrangements, "not on making exit strategies more plausible." I argue that the international community's newly robust engagement in democracy-promoting activities reflects "a commitment

above all to full participatory rights within established states.”<sup>29</sup> I would still maintain, however, that secession may be warranted in light of democratic ideals in the exceptional case. But Horowitz and I are hardly worlds apart on this point. Horowitz concedes that there may be times when separation can prudently be effected through consent.

Perhaps the deeper issue then, is whether, as Horowitz may believe, we had best resist any inclination to identify principles that explain why, in the exceptional case, separation may be a prudent or legitimate course. I believe that scholars and policy makers should not shrink from addressing the question of whether, in light of states’ deepening commitment to democratic ideals, there are exceptional circumstances in which separation is justifiable. Just as important, we must not hesitate to make clear why democratic principles generally discredit the claims of separatists. We can ill afford to be legal ostriches, hoping that if we ignore this question we will avoid adding further fuel to separatist flames. For if we do not make clear where we stand, it is certain that separatists will step in to fill the conceptual void.

## NOTES

1. Horowitz at times implies that I argued for a general right to secede, while other portions of his commentary suggest that I advocated only a right of remedial secession. Only the latter interpretation has a basis in my essay, though my views on this issue are more nuanced and cautious than Horowitz’s presentation of them.

2. An example is Horowitz’s discussion of “evidence adduced by Orentlicher for a last-resort right to secede grounded in an asserted international-law right to be governed democratically.” “The right is said to derive,” he writes, “in the first instance, from plebiscite practice.” I made no such claim. Instead, after summarizing early international legal responses to separatist claims, I suggested in the passage Horowitz cites that it might be useful to “highlight two possibilities latent” in the preceding overview before proceeding further. Far from claiming that a right to secede derives from plebiscite practice, I made the far more circumscribed observation that “diplomatic practice has at times affirmed the view that contested territorial claims should be resolved through . . . balloting.” At this point in my essay, I did not express an opinion about the merits of this approach.

When I touched on the subject later, I expressed a skeptical view of plebiscites as the principal means of resolving contested separatist claims, though I suggested that balloting may play a legitimizing role within a broader process of negotiation. I noted, for example, that plebiscites played a disastrous role in resolving the disputed status of Bosnia and Hercegovina and provoked sweeping violence in East Timor. More generally, I observed that “[i]n the tense environment surrounding contested separatist claims, winner-take-all plebiscites are almost sure to inflame nationalist passions.”

3. For example, Horowitz implies that I derived a legal right to be ruled democratically from international law’s prohibition of colonization and forcible annexation. But my argument was not framed in the legalistic terms Horowitz evokes. Instead, I invoked the implied premise of international law’s prohibition of colonization and forcible annexation to challenge the belief of many political theorists that democratic principles are wholly irrelevant in assessing separatist claims. My argument here was framed principally in terms of political theory rather than international law.

4. The significance of these views has been widely recognized by scholars of the interwar period. See, for instance, Nathaniel Berman, “‘But the Alternative Is Despair’: European Nationalism and the Modernist Renewal of International Law,” *Harvard Law Review* 106 (1993): 1870–71.

5. One reason is that I believe Horowitz’s analysis does not account for key language in the text of the 1970 declaration. In an analysis that Horowitz generally cites approvingly, James Crawford characterizes the relevant text (as revised somewhat by a later UN document) this way: “In accordance with this formula, a State whose government represents the whole people of its territory on a basis of equality complies with the principle of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity.” James Crawford, “State Practice and International Law in Relation to Secession,” in *British Yearbook of International Law 1998*, ed. Ian Brownlie and James Crawford (Oxford: Clarendon Press, 1999), p. 117. In contrast to Crawford’s formulation, Horowitz’s approach effectively reads out of the text the qualifying language concerning the nature of governments that are “entitled to the protection of territorial integrity.”

6. Horowitz implies that I believe the 1970 declaration reflects customary international law. This is implicit, for example, in Horowitz’s observation that I did not mention a portion of Cassese’s analysis expressing doubt about whether claims that, in Cassese’s view, are implied in the declaration have the status of customary international law; in his observation that “[i]f a General Assembly declaration articulates a particular right, that does not



make it, ipso facto, part of the body of international law"; and in his assertion that the 1970 instrument "has not created any right to secede in customary law, so Orentlicher must look elsewhere for such a right." Yet far from suggesting that the implied claims in the relevant text of the 1970 declaration embodied customary law, I analogized their legal force when the instrument was adopted to that of "a resolution proclaiming a definitive determination of the number of angels who could dance on the head of a pin." I went on to explore the implications for separatist claims of more recent developments in state practice that evince a deepening commitment to democratic government. In light of those developments and my interest in their implications, it seemed worthwhile to consider the influential interpretation of the 1970 declaration, espoused by Cassese and others, linking principles of representative government and the right of states to territorial integrity. In doing so, I never suggested that the provisions of the declaration I addressed had the force of customary law.

7. When, for example, the Canadian Supreme Court addressed the question of whether Quebec was entitled to secede unilaterally, it took the view advocated by Cassese seriously enough to apply it to the question at hand. *Reference re Secession of Quebec*, 1998 S.C.J. No. 61, paras. 130, 134–38. The Canadian court observed that "it remains unclear" whether the view embodied in Cassese's interpretation "actually reflects an established international law standard" (para. 135). The Court found it unnecessary to resolve this question, since, in its view, "the current Quebec context cannot be said to approach" the relevant threshold justifying secession under the 1970/1993 proviso clause (para. 135). Even so, the Court seemed to credit the approach advanced by Cassese and other writers. The Court noted, for example, that the text of a 1993 UN declaration that affirmed (while expanding) the 1970 proviso clause "adds credence to the assertion that . . . a complete blockage [of a people from the meaningful exercise of its right to self-determination internally] may potentially give rise to a right of secession" (para. 134).

8. Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86 (1992): 46. As the title of this article makes clear, Franck framed his thesis in terms of an emerging right to democratic governance and not, as Horowitz implies, in terms of an established "right to live under a democratic regime."

9. Gregory H. Fox and Brad R. Roth, "Democracy and International Law," *Review of International Studies* 27 (2001): 331.

10. *European Council in Copenhagen, 21-22 June 1993: Conclusions of the Presidency*, SN 180/93, p. 12.

11. "On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries," Commission Communication COM(95)216, May 23, 1995.

12. Constitutive Act of the African Union, Lome-Togo, Art. 3(g), June 12, 2000; see also Art. 4(m), which recognizes "respect for democratic principles" as one of the AU's own principles, and the preamble, which affirms the AU's determination to "consolidate democratic institutions and culture."

13. *Ibid.*, Art. 30.

14. For a summary of various iterations of this commitment, see Stephen J. Schnably, "Constitutionalism and Democratic Government in the Inter-American System," in *Democratic Governance and International Law*, ed. Gregory H. Fox and Brad R. Roth (New York: Cambridge University Press, 2000): 156.

15. Organization of American States, Santiago Commitment to Democracy and Renewal of the Inter-American System, OAS GAOR 21st Reg. Sess., OEA/Ser. P/AG doc.2734/91 (June 4, 1991).

16. Organization of American States General Assembly Res. 1080, "Representative Democracy," June 5, 1991; AG/RES. 1080 (XXI-O/91).

17. A more extensive account of institutional and state practice in support of democracy can be found in Fox and Roth, *Democratic Governance and International Law*, and Brian D. Tittmore, "Prohibiting Serious Threats to Democratic Governance as an International 'Crime Against Democracy,'" Council on Foreign Relations, International Task Force on Immediate Threats to Democracy, Sept. 10, 2002.

18. Fox and Roth, "Democracy and International Law," p. 330.

19. *Ibid.*

20. *Ibid.*

21. Organisation for Economic Co-operation and Development Spreadsheet, 2002, retrieved from International Development Statistics Online (IDS/o) Web site: [www.oecd.org/htm/M00005000/M00005347.htm](http://www.oecd.org/htm/M00005000/M00005347.htm).

22. United States Agency for International Development, Democracy and Governance Office, Democracy, Conflict and Humanitarian Assistance Bureau (DCHA), "USAID Democracy Assistance," unpublished spreadsheet on file with DCHA, Aug. 2001.

23. Harold Hongju Koh, "A United States Human Rights Policy for the 21st Century," *Saint Louis University Law Journal* 46 (2002): 325.

24. Judicial affirmations of this proposition include *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/I-T, Judgment, para. 137 (Dec. 10, 1998); *Regina v. Bartle et*

*al.*, [1999] 2 W.L.R. 827, Mar. 24, 1999, reprinted in *I.L.M.* 38 (1999): 589 (Opinion of Lord Browne-Wilkinson).

25. Amnesty International, "Torture Worldwide: An Affront to Human Dignity," 2000, pp. 2–3, retrieved from [www.amnestyusa.org/stoptorture/tortureworldwide.pdf](http://www.amnestyusa.org/stoptorture/tortureworldwide.pdf).

26. See Gregory H. Fox and Brad R. Roth, "Introduction: The Spread of Liberal Democracy and Its Implications for International Law," in Fox and Roth, *Democratic Governance and International Law*, pp. 3, 9.

27. Writing in 1998, Robert Pastor observed that "democracy has spread to 117 countries over the last two decades." Robert A. Pastor, "Mediating Elections," *Journal of Democracy* 9 (Jan. 1998): 154. See also Joshua Muravchik, "Democracy's Quiet Victory," *New York Times*, Aug. 19, 2002.

28. See Fox and Roth, "Democracy and International Law," p. 329.

29. I also wrote that "democratic principles would be thwarted by a rule of international law generally favoring independence for state-seeking groups."