Self-determination of Peoples and Partition of States in Contemporary International Law[i]
Keynote Address

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The Cold War ended symbolically with the fall of the Berlin Wall in 1989. The ensuing demise of the bipolar, Soviet-Western world public order system had as an unintended and certainly unanticipated consequence, the reopening of a veritable Pandora's Box of problems of ethno-cultural conflicts. The impact of the ending of half a century of Cold War-derived curbs on political-cultural self-determination, by ethno-culturally-based communities within existing States, was nowhere more immediate or more marked than in the Balkans. There it was exacerbated by another, not directly related historical question that had nevertheless been widely anticipated: what to do about the multi-national, plural-ethnic, Socialist Federal Republic of Yugoslavia after its strong, charismatic leader over the post-World War II years, Tito, should pass from the political scene, as indeed occurred in 1980. Ten years later, at the time of the fall of the Berlin Wall, in the absence of effective and operational contingency plans on the part of outside, the European Union and also other would be interveners [both state/governmental, but also, and sometimes embarrassingly, some very high profile public personalities who advanced their own solutions] the way was set for a full decade of civil war and carnage, involving the constituent units of that Yugoslav federal state.

Canada, as a bilingual, bicultural (French-English) state in its historical origins and also in its constitutional forms of 1867, had suddenly discovered after celebrating its first century as a union, that it was becoming, almost by accident, or political afterthought, a multi-national, plural-cultural state. By happy, almost passive acceptance for the most part of political leaders of the period, this would proceed as, to use phrase by Martin Buber, a "community of communities", (in Martin Buber's phrase), each retaining its own distinctive cultural heritage and identity to the extent it might wish, rather than becoming a genuine "melting pot"—US style in which cultural particularities would be rapidly assimilated or subsumed under a common, distinct, mainstream national culture. One consequence, in Canadian political terms at least, was that within the Canada-wide Yugoslav diaspora there was distrust and there were different, strongly-held views as to what should be done, throughout the decade-long War of the Yugoslav Succession of the 1990s. Should Canada seek to intervene or not? If so, on what basis, and on whose side? In a curious historical twist, distinctive Croatian-Canadian and Serbian-Canadian

attitudes seemed paralleled and reflected in the public viewpoints of Canadian professional career diplomats in the field, as expressed to the House of Commons Committee on Foreign Affairs, depending on whether those diplomats were accredited to Belgrade or (after Croatia's independence and its recognition by Canada) to Zagreb. It was, no doubt, one of those unintended but always curious historical ironies that, in Ottawa itself, some who had been among the most intransigent in denying to Quebec even a "special" or "particular" constitutional status within the existing Canadian federal system, should be among the first to embrace a Yugoslav solution rooted in the immediate dissolution and break-up (retaining existing, Tito-created territorial boundaries of the constituent republics) of the Socialist Federal Republic of Yugoslavia.

For Canada, and for the Canadian government, which must perforce wrestle with the incidental foreign policy complications and divisions that may occur within any one Canada-based national diaspora, the situation with the former Yugoslavia in the 1990s was not unique. With Sri Lanka, where the de jure government had moved, successfully, to crush a military-based secession from within its minority, Tamil community, there was the embarrassing reality, internationally, for the Canadian government of a very large resident Canadian-Tamil diaspora which was alleged to be actively involved in supporting and financing from Canada the Tamil insurrection and supporting its armed struggle. It is difficult in national constitutional legal terms to control any such activities when the members of the ethno-cultural community have acquired Canadian citizenship in their own right.

In strict International Law terms an element in that difficulty may derive from the historical progression, after World War II and the founding of the United Nations, from an original concept of national self-determination to one that, expressly and in terms, is now re-stated as a "people's" or population-based right.

A critical problem with self-determination as operational International Law principle to guide present-day decision-making is that one finds that the empirical record demonstrates too often that the state's and even United Nations' decisions are made on purely subjective grounds, to accord with the perceived self-interest and advantage of the recognising state or the international agencies involved. In the end, it is the act of recognition by foreign states that will determine whether a new political entity will survive or disappear into the dust-bin of history. When a local, nationalist assembly operating within the present UN-administered territory of Kosovo self-proclaimed its own Unilateral Declaration of Independence (UDI) from the former Yugoslavia, the US government, which had established its own major military air base within the territory, immediately recognised the new entity as a state and brought strong diplomatic pressures on its NATO allies and others to grant their own immediate recognition too. A number of states did, but hardly, as yet, in numbers sufficient to qualify as a form of universal recognition in International Law terms. For a postulated new state, formed from war, landlocked and without much economic viability, the issue can hardly be said to have

been resolved. Kosovo's status in International Law, after the UDI, was the matter of an Advisory Opinion reference by the UN General Assembly to the International Court of Justice. The Court's ruling in July, 2010, on a high "political question" that might, more appropriately perhaps, have been left to the UN's primary law-making institution, the Security Council and/or General Assembly, is, however, hardly enlightening on the substantive International Law merits of the case.

Some Preliminary Conclusions

Partitions are, very rarely, free and consensual exercises in self-determination on the part of "peoples" (ethno-cultural communities) within multi-national or plural constitutional states. The separation of Norway from Sweden in 1905 may be considered as a happy, model example on all sides; and perhaps also, the break-up of post-Communist Czechoslovakia into a Czech Republic and a Slovakian Republic, following the euphoria of the "Velvet Revolution" against four decades of Communist rule. Between the two World Wars, the old League of Nations performed yeoman service in mitigating some of the worst territorial excesses and ethno-cultural iniquities of the imposed Versailles Peace Treaties of 1919, through a well-organised and internationally supervised plebiscite system for politically contested, "mixed-population" territories decided on and established by the Victors at Versailles. Nevertheless, it came too late to be accepted as a reconciliation gesture and was soon lost in the rush to World War II.

1. The time factor is key in the successful achievement of a durable partition, based on ethno-cultural particularism and its recognition in territorial terms. The decolonisation process after World War II stands as an example of what to avoid at all costs. The splitting up of the European colonial empires overseas was delayed by the foot dragging of some erstwhile colonial masters and then resolved, with almost indecent haste and without adequate advance essays in devolution of power and preparation of the former subject peoples for self-government. The Belgian government's tardiness and then effective abandonment of the Congo meant a state succession troubled from the outset, which even a belated UN intervention could not contain. The British ceding of the Imperial Raj in the Indian sub-continent immediately after World War II was also delayed and then rushed, with insufficient and inadequate advance study and preparation resulting in a descent into ethno-cultural violence and bloodshed as the patterns of a rapid transition to partition and separation into two states emerged. The dilemmas for the colonial power were obvious: a Labour government the surprise victors in the general elections held in Great Britain at War's end in Europe in 1945, was committed to decolonisation and to a quick transfer of power within its

five year mandate. But the obvious alternative solution of trying to work out an accommodation, within the one territorial state, between a determinedly secular, Hindu majority and a special Muslim-religion-based, minority, required the time and patience and capacity for compromise to work out special plural-constitutional, federal arrangements largely unknown to British and British-trained specialists of the day. It is widely concluded that the last British Viceroy, Lord Mountbatten, appointed to effect the transfer of sovereignty from the British Raj, was given a "mission impossible" when told by the British government to do so within a scant ten weeks.

2. Imposed peace treaties at the end of wars or similar armed conflicts are not the best sources of territorial solutions to the principle of self-determination of peoples. The US President, Woodrow Wilson, arrived at the Versailles Peace Treaty conference in 1919, armed with the moral authority and prestige of a proclaimed war aim of his government when it entered the conflict in 1917 on the side of the ultimately victorious Triple Entente powers. Instead of a Congress of Vienna-style settlement bringing a hundred years of peace, what emerged was a classic, "Carthaginian Peace" with all spoils to the victors and all burdens to the defeated, and only lip-service to the Wilsonian and US self-determination ideal. The break-up of the multi-racial Austro-Hungarian Empire, proclaimed to be in service to the principle of self-determination of peoples, brought a mass of problems for the politically and economically hardly self-sufficient succession states which, could not by themselves survive the economic disaster of the Great Depression of the end of the 1920s and the early 1930s, and the ensuing political-military run-up to World War II. The basic problem, in effect, how to "correct" the great political blunder made at Versailles, was examined in the Austro-German Customs Union case before the old Permanent Court of International Justice. But the Court's Advisory Opinion ruling made in 1931, decided that it was a high "political question" that was quite beyond the Court's technical skills and processes to resolve, and properly, therefore, in the Court majority's view, the responsibility of the political institutions and leaders.
3. Acceptance of the limits of one's own special institutional competence is at the core of the crucial split within the European Union at the end of the 1980s, as the explosive centrifugal, fissuring forces within the multi-national, federal Yugoslavia created at Versailles in 1919 finally came to a head. It had been an agreed position in the late 1980s and the beginning of the 1990s, between President Mitterrand and Chancellor Kohl that they should act in concert to avoid any over-rapid, "premature" recognition of new breakaway forces within the Yugoslav state that had managed, to survive as a continuing entity until that time. In their position, the French President and the German Chancellor, as the two core Continental European leaders were backed firmly by the then US President,

George H.W. Bush, and by UN Security General Boutros Boutros-Ghali. However, internal political considerations within Germany for Chancellor Kohl, whose government was facing a difficult re-election campaign, caused a rupture in the common French-German-UN front. This resulted in "premature recognition" of Slovenia and Croatia, on the initiative of Austria, Hungary, Italy, and the Papacy, and the decade-long War of the Yugoslav Succession was entered upon. Lord Owen, the former British Foreign Minister, and key member of the UN-sponsored Vance-Owen and Owen-Stoltenberg Plans to fill the emerging power vacuum in the Balkans, has suggested, correctly, that that "premature" recognition action deprived the UN of perhaps the most effective weapon—the granting or withholding of recognition as a state, and the normally concomitant admission as a member state of the United Nations—for compelling the adversaries to come together and to try to reach reasoned accommodations of their conflicting political-territorial claims, without a decade of civil war.

4. Missing in most of the discussions and debate over territorial partition and separation as means of effectuating self-determination of peoples is acceptance of the possibilities and also practical opportunities for achieving the same results or better, through federalism and effective plural-constitutional arrangements within an existing multi-national state. "Anglo-Saxon" federalism, export-style, designed for delivery to overseas imperial colonies approaching self-government and independence, has not always provided the best paradigm-models. It has been reduced, essentially, to a system of horizontal, geographically-based, allocation and distribution of law-making authority and powers, and a full equality in the abstract of all constituent units of the federal system, irrespective of their often radically differing cultures and special socio-economic needs and conditions. It is notable that English-speaking Canada in the aftermath of Quebec's "Quiet Revolution" beginning in the 1950s, had very great difficulty in comprehending, and then accepting and implementing Francophone Quebec's claims for a "special constitutional status", based on its distinctive language and culture, within the Canadian federal constitutional system. This, curiously enough, had not been the case with the Imperial Judicial Committee of the Privy Council, the highest appellate tribunal for the old British Empire and for Canada, as part of that, until abolition of that jurisdiction in 1949 by the Canadian Parliament. Some very enlightened Scottish judges on the Privy Council—Lord Watson, and then his disciple Lord Haldane,—were committed to pluralist philosophical ideals and expressed them in the jurisprudence they rendered on Canadian cases from the late 1890s on through the next succeeding decades.

There are, indeed, many alternative paradigm-models for federalism outside the "Anglo-Saxon" world and for its opening, on a genuinely inclusive basis, to different cultural

systems. It remains one of the regrets in the International Court of Justice ruling in 2010 in the Advisory Opinion on Kosovo Independence that none of the judges adverted to this option in their special Declarations or Separate Opinions accompanying the majority ruling of the Court. There is clearly need for more informed "New Thinking" on Federalism and Plural Constitutionalism as viable options for achieving Self-Determination of Peoples within existing plural-cultural, or plural-national States. It simply is not there in the Court's Official Opinion of Court, and this represents a significant omission for the Court majority once it had decided to venture beyond the "classical", more strictly juridical role as applied by its predecessor, the PCIJ, in the Austro-German Customs Union ruling of 1931. It is also, it may be suggested, a missed opportunity in the challenge today to develop New International Law principles to help resolve, peacefully and through law, that "Clash of Civilisations" that so marks and divides the world community of our times.

Notes

[i] Reference may be made to some of the author's earlier published works, which are drawn on, hereunder, without the need for further citation:

1. *Federal Constitution-Making for a Multi-National World* (1966) [contains brief case-studies, of different plural-constitutional models, from Europe (including Switzerland, Austria-Hungary, Imperial Germany); Asia and Africa (India, South Africa, Nigeria); and mixed, "hybrid" systems (UK & Northern Ireland, Cyprus, Socialist Yugoslavia);
2. *The United Nations and a New World Order for a new Millennium. Self-determination, State Succession and Humanitarian Intervention* (2000);
3. *Self-determination of Peoples and Plural-Ethnic States in Contemporary International Law. Failed States, Nation-building and the Alternative, Federal Option* (2007); [a revised, expanded version of *Lectures to The Hague Academy of International Law, 2002* (2003);
4. The most comprehensive and inclusive examination of the "New Pluralism" in International Law and its expression in international institutional, and also national constitutional, form is contained in the 36-author symposium volume, *Multiculturalism and International Law* (Sienho Yee and Jacques-Yvan Morin (Editors) (2009), (Foreword by Boutros Boutros-Ghali; Introduction by Judge Shigeru Oda).