
EDITORIAL

Frontiers of International Law Part One: The Chechen People

Let's assume, if only for the sake of argument, that the Chechen people have the right to self-determination. Since the massive indiscriminate use of military force by Russia in December 1994, it is arguable that the Chechen people's right to internal self-determination has evolved into a right to external self-determination, i.e., into a right to secede from Russia. This is a reasonable assumption as we, as well as others, have pointed out on several occasions.¹ However, the legal analysis has not been taken beyond this point. In this editorial, the legal consequences of the lawful exercise of the right to external self-determination by the Chechen people will be explored, albeit tentatively.

It is well-established that peoples entitled to external self-determination have the right to choose between the establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by that people. The Chechen people have chosen to establish a sovereign and independent state, i.e., the Chechen Republic of Ichkeria. The lawful proclamation of a state is *conditio sine qua non* for the *de iure* emergence of a state. However, the existence of the right of the Chechen people to establish an independent state is not to be confused with the *de facto* emergence of a state. This is determined by the international customary law principle of effectiveness and follows the four accepted criteria for state-

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1. See S.W. Couwenberg, *Staatloos Volk Heeft Zelfbeschikkingsrecht*, NRC Handelsblad, 30 January 1996, at 6; R. Lefeber & D. Raič, *Rusland Verloor Aanspraken pas ná Militair Ingrijpen*, Volkskrant, 14 January 1995, at 14; D. Raič, *Het Internationale Recht en het Tsjetsjeense Conflict, in Conflicten in de Kaukasus en de Rol van de Internationale Gemeenschap* 44-45 (1995); S. Nystén-Haarala, *Does the Russian Constitution Justify an Offence Against Chechnya?*, 1995-2 *Humanitäres Völkerrecht* 104, at 106; and T.N. Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 *Columbia Journal of Transnational Law* 255, at 290 (1995).

hood, i.e., a claim to a defined territory, the presence of a permanent population therein, the exercise of jurisdiction over territory and population by a representative government, and the capacity to enter into international relations. The existence of a state, however, does not depend on the fulfilment of the latter criterion, but on the will of other states to enter into such relations through implicit or explicit recognition. Yet, it is well-established that recognition is not constitutive and does not affect statehood. Therefore, the non-fulfilment of this criterion has no effect on the *de facto* emergence of a state.

The *de facto* establishment of the Chechen Republic of Ichkeria has to be evaluated on the basis of the above-mentioned criteria. Firstly, the territory claimed by the Chechen people comprises the territory of the Chechen Republic defined in Article 65(1) of the 1993 Constitution of the Russian Federation. This claim to a defined territory must be distinguished from the delimitation of the boundaries of the new state. The external boundaries of the Chechen Republic of Ichkeria are delimited by virtue of the principle of *uti possidetis*, pursuant to which internal boundaries of federal states, such as Russia, are transformed into external boundaries at the critical date, i.e., the moment of a lawful secession. Secondly, in 1992, the population of the Chechen Republic of Ichkeria comprised 1,300,000 inhabitants, 56.2% of which were Chechens, 22.3% Russians, 12.5% Ingushen, and 9% other groups.² Of these inhabitants, it can be fairly said that at least the Chechen segment of the population are permanent residents. However, since the use of military force by Russia in December 1994, one cannot assert that there is a government that exercises jurisdiction over said territory and population. In other words, the criterion of effective government has not been fulfilled.

It appears, therefore, that a state has not *de facto* been established by the Chechen people. Although this conclusion seems to be inevitable, it is without prejudice to the *de iure* emergence of the Chechen Republic of Ichkeria. The actual exercise of jurisdiction over a certain territory and population must be distinguished from the title or right to exercise such jurisdiction. The right to external self-determination of the Chechen people, in this case the right to establish a sovereign and independent state, entails, *inter alia*, a title to exercise territorial and personal jurisdic-

2. See J. Steenis, Tsjetsjenen, *Nationaliteiten-paper* No. 13, at 2 (June 1994).

tion over the Chechen Republic of Ichkeria and its inhabitants.

The absence of effective government has not stopped the international community from recognizing the emergence of a new state, as evidenced by recognition of the proclamations of independence made by, amongst others, Bangladesh in 1971, Croatia in 1991, Georgia in 1991, and Bosnia and Herzegovina in 1992. These proclamations took place at a time when there was no effective government. Although the international community has only recognized these states after a certain period of time, and in some cases not until an effective government was established, recognition is always retroactive to the critical date. Yet, recognition of these proclaimed states would have been a violation of the territorial integrity of the parent state and, hence, be unlawful in the absence of a right to external self-determination. Apparently, at the critical date, while not existing *de facto*, these states had emerged *de iure* because of the lawful exercise of the right to external self-determination which has, as its consequence, a title to jurisdiction.³ Thus, the emergence of a right to external self-determination derogates from the fulfilment of the criterion of effective government.

Although the Chechen Republic of Ichkeria has not been recognized as a state by the international community, the title to statehood does not depend on recognition, but flows from the right to external self-determination of the Chechen people. The Chechen Republic of Ichkeria, therefore, exists *de iure*, and is bestowed with sovereignty and all rights and obligations flowing therefrom. Consequently, it is a state occupied by a foreign power. The situation in the Chechen Republic of Ichkeria is not only comparable to East Timor, but also to Kuwait during the Iraqi occupation in 1990-1991. The legitimate government is entitled to exercise the rights of a government-in-exile under international law.

Following this line of reasoning, it is intriguing to take the analysis a step further and to identify the rights and obligations of the members of the international community (other than Russia) with respect to the claim of the Chechen people. In particular, it is interesting to see whether

3. The existence of a right to external self-determination in these cases has been accepted by, e.g., J. Klabbers & R. Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in C. Brölmann, R. Lefeber & M. Zieck (Eds.), *Peoples and Minorities in International Law* 37, at 47-48 (1993); and D. Murswiek, *The Issue of a Right of Secession - Reconsidered*, in C. Tomuschat (Ed.), *Modern Law of Self-Determination* 21, at 31-32 (1993).

they are entitled to promote the right to (external) self-determination, obliged to respect the right to (external) self-determination, and obliged to promote the realization of the right to (external) self-determination of the Chechen people.

Firstly, it must be examined whether the members of the international community are entitled to promote the right to external self-determination of the Chechen people, or, alternatively, whether they are obliged to respect the territorial integrity of Russia. In principle, states are obliged to respect the territorial integrity of other states (Article 2(4) UN Charter). This is only different in the exceptional case that a people has lawfully established an independent state by secession. Then, the dispute between the parent state and the seceding state has become an international conflict and does no longer fall within the domestic jurisdiction of the parent state (cf. Article 2(7) UN Charter). Under these circumstances, the military occupation by Russia of the Chechen Republic of Ichkeria amounts to the use of force against an independent state which is unlawful (cf. Article 2(4) UN Charter). This state possesses the right of self-defence under international law (cf. Article 51 UN Charter). Although the UN Charter itself does not apply to the conflict between Russia and the Chechen Republic of Ichkeria, the same rules are part of customary law.⁴ Since the conflict between Russia and the Chechen Republic of Ichkeria is an international conflict, the international community is entitled to assist the Chechen people to vindicate its rights, not only by issuing political statements, but also by admitting the Chechen Republic of Ichkeria to international organizations (cf. the admission to the United Nations of the Congo, Croatia, and Bosnia and Herzegovina while not being states *de facto*) and even by rendering direct and indirect military support. Moreover, individual members of the international community are not only entitled to resort to retorsions, such as the postponement of the conclusion of agreements with Russia, but also to resort to counter-measures against Russia. In case of violation of an obligation *erga omnes* - and it is not in doubt that the obligation to respect the right to self-determination is an obligation *erga omnes* (see *infra*) - all states are injured and, hence, entitled to resort to counter-measures.⁵

4. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (Merits), 1986 ICJ Rep. 14.

5. See G. Arangio-Ruiz, Fourth Report on State Responsibility, UN Doc. A/CN.4/444/

Secondly, it must be determined whether the obligation to respect the right to (external) self-determination of the Chechen people also extends to members of the international community other than Russia. There is a significant difference in the reasoning of the International Court of Justice (ICJ) on the *erga omnes* character of a norm in the *Barcelona Traction* case and its reasoning on this issue in the *East Timor* case. In the *Barcelona Traction* case,⁶ the Court drew a distinction between obligations of a state towards another state and those towards the international community as a whole (obligations *erga omnes*). In this case, the Court did not identify the addressee(s) of the obligations *erga omnes* it alluded to. In the *East Timor* case,⁷ however, the Court did not take an obligation, but a right as the point of reference for the discussion of the *erga omnes* character of a norm. It concluded that the “assertion that the right of peoples to self-determination [...] has an *erga omnes* character, is irreproachable”.⁸ It would seem, therefore, that the addressee of the obligation to respect the right to self-determination is not merely the parent state, but all members of the international community. Hence, other states have to refrain from activities which undermine the exercise of the right to external self-determination by the Chechen people, such as the provision of military support to Russia to suppress the secession, or the conclusion of treaties with Russia which deal specifically with the territory and/or population of the Chechen Republic of Ichkeria.

It has next to be considered whether the corollary of this right *erga omnes* is an obligation *erga omnes*. If this be the case, the obligation to respect the right to self-determination is not only an obligation of all members of the international community *vis-à-vis* the Chechen people, but also *vis-à-vis* each other. The recognition of the *erga omnes* character of this obligation seems reasonable, if solely for the fact that any people deprived of its right to self-determination has little means to enforce the right itself. The *erga omnes* character of the obligation to respect the right to self-determination has also been the basis for a case brought before the

Add. 2, at 20, para. 128 *et seq.* (1992); and R. Lefeber, *Transboundary Environmental Interferences and the Origin of State Liability*, Chapter 4.4 (forthcoming in 1996).

6. See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 ICJ Rep. 3, at 32, para. 33.

7. *East Timor (Portugal v. Australia)*, 1995 ICJ Rep. 90, at 102, para. 29.

8. *Id.* (emphasis added).

ICJ by Portugal against Australia concerning the non-respect for the right to self-determination of the people of East Timor by Australia. As discussed by Scobbie and Drew in this *Journal*,⁹ for procedural reasons Portugal had to file this claim against Australia instead of Indonesia, even though the latter is the state which unlawfully occupies East Timor.

Finally, it needs to be analysed whether the members of the international community (other than Russia) are obliged to promote the realization of the right to (external) self-determination of the Chechen people. According to the identical Articles 1(3) of the Twin Covenants, the states parties shall not only respect, but also “promote the realization of the right of self-determination”.¹⁰ Again, it should first be established who the addressee of this obligation is, and in particular whether the addressee is solely the parent state or also other members of the international community. In other words, the question arises whether the corresponding right of the obligation to promote the realization of the right to self-determination is a right *erga omnes*. Such a far-reaching conclusion cannot be inferred from the Court’s Judgment in the *East Timor* case, because the obligation to promote the realization of the right to self-determination is not the necessary corollary of that right and is also not supported by state practice. If the promotion of the realization of the right to self-determination would be a right *erga omnes*, all members of the international community would be obliged, firstly, to render assistance to the Chechen people, e.g. by providing direct and indirect military aid, by recognizing the Chechen Republic of Ichkeria, and by admitting this state to international organizations, and, secondly, to force Russia to respect the right to self-determination of the Chechen people, e.g. by the adoption of retorsions and counter-measures. As stated above, there is no, or at least insufficient, practice in support of such obligations, let alone for the *erga omnes* character of such obligations.

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9. See I.G.M. Scobbie & C.J. Drew, *Self-Determination Undetermined: The Case of East Timor*, *infra*, at 185.

10. 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1976); and 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (1976). See also Friendly Relations Declaration, UN Doc. A/RES/2625 (XXV) (1970).