

*A Mixed Blessing: On Exchange of Populated Territories and Self-Determination –
A Comment to 'The Blessing of Departure'*¹

Yuval Shany

Introduction

In a truly thought provoking (as well as provocative) article Timothy Waters is making the following interesting assertions:

- 1) The Lieberman Plan for exchange of populated territories between Israel and Palestine might be feasible ("Objections about feasibility, therefore, are really not based on a belief that transfer is impossible, but a conviction that it is undesirable")
- 2) The Plan is fundamentally different in its object and effect from ethnic cleansing operations and apartheid practices since it "leaves people where they are and moves the borders around them" and it does not raise the same distributive issues raised with regard to the South African Bantustans.
- 3) International law does not bar, in all cases, ethnic based denaturalization not leading to statelessness.
- 4) There is no positive rule of law requiring states to condition transfer of sovereignty over populated area upon the consent of the population of that area.
- 5) While human rights law introduces important limitations upon relationships within the state, "human rights norms do not dictate a particular political dispensation – they do not dictate the shape of any polity"
- 6) The idea of loyalty to the state can play an important part in dividing title to land between rivaling communities, since loyalty and the shared identity and values it assumes serve as preconditions for social cohesion. Hence, a polity has an interest in determining its own citizenry, and, to the degree that citizenry is territory-based, to exclude populations on territorial basis.
- 7) The right of Jews to self determination entitles them to reassess their union with the Arab population of Israel and to secede in effect from the existing broader multi-ethnic state. In fact, the two-state solution confirms the continued relevance of division of communities along ethnic lines in the Israeli-Palestinian context.

While I agree with some of Waters legal assertions – in particular on the permissibility of land transfers against the wishes of the relevant populace in some cases – I strongly disagree with the central point of his analysis, that is, with his conclusion on the lawfulness of denationalization of the residents of any transferred land. I am also concerned by some of the other implications of Waters' approach for the future borders between Israel and Palestine.

¹ Timothy W. Waters, "The Blessing of Departure – Exchange of Populated Territories The Lieberman Plan as an Abstract Exercise in Demographic Transformation, <

1) The Limits of Self-Determination

Waters offers us to treat the self-determination principle as an ongoing right that the dominant group in a given polity may invoke whenever it feels that its interest in maintaining a cohesive society with shared values and identities are compromised by the existing political structure. In Waters' words: "If Israeli Jews no longer believe in that bond, how can one insist that they maintain it?" His solution is an affirmation of a right to secession by Jews from multi-ethnic Israel – a right over which the Arab minority has no veto power.

There are a number of problems with this analysis. First, Waters assumes that international law affords groups a right to secede – "secession is not prohibited by international law, and in practice occurs – under various names – with some frequency". However, this statement might be inaccurate: The mainstream legal view is rather that outside the colonial context, *unilateral* secession is generally impermissible, except in extreme circumstances of oppression or lack of representation in government.² While *consensual* secession may surely take place, if both the seceding and remaining parts of the state agree (as had happened in Czechoslovakia, for example), the right of one group to unilaterally secede from the rest of the country without the consent of groups remaining in the other part of the country is, at best, controversial under existing international law.

This brings me to a more fundamental point. The self-determination principle can act in the life of the international community as a double edged sword. It can legitimize states or de-legitimize them; it may facilitate the creation of stable cohesive political entities or serve as a constant source of instability. The way international law has handled these tensions has been to subordinate the self-determination principle to the territorial integrity principle – the principle that state boundaries should not be changed against the consent of that state (again, except in some extreme circumstances). This serves not only as an expression of preference for stability over change in international relations; it also affects the scope of the self-determination principle itself: Outside the colonial context, the self-determination units *are* the states.³ While self-determination legitimizes the creation of new states (including, Israel, whose establishment derives from the internationally recognize right to self-determination of the Jewish people),⁴ it does not normally confer an ongoing right upon any ethnic group within an existing state. The ongoing existence of the state is presumed to be an appropriate expression of the right to self-determination of its inhabitants, and the independent entitlement of the ethnic groups comprising the state to (re)define their political status is revived only in those extreme cases in which the state has clearly failed to serve their interests (extreme oppression or lack of representation).

This outcome appears to be sensible for a policy-oriented perspective. Whereas Waters' approach enables majority groups to give up on co-existence with other ethnic

² See e.g., *Reference re Secession of Quebec*, 115 I.L.R. 537.

³ See e.g., Crawford, *The Creation of States in International Law* (2nd ed., 2006) 127-128.

⁴ Interestingly enough, Crawford describe the creation of Israel in 1948 as an act of secession from mandatory Palestine. *Ibid*, at 433.

groups and to maintain their separate existence as a potential self-determination entity (a right which the minority group does not have and, in any event, cannot activate against the wishes of the national government), the mainstream legal position, encourages the majority to strive and create together with the minority a new civic identity which transcends above ethnic lines. Particularly, majorities cannot use the threat of exclusion of the minority from the polity as a form of control over the minority, and the two groups must negotiate some *modus vivendi* (or a friendly divorce). The 'locking in' of groups within a single polity thus provides relative permanence and stability to existing states and conveys to the different groups the idea that, from an international perspective, they share a single national identity and, perhaps, a common destiny.

Another implicit assumption in Waters' work is that the majority has a stronger self-determination right than the minority. This is because, as a practical matter, if I am right and secessions require the consent of the government of the state, then only majority-driven secessions are likely to be assured of such consent. Furthermore, such secessions can take place, according to Waters, even at the price of the destruction of the communal links between members of the minority group across the new border – and in fact the destruction of their group identity.

But should the majority be given right of way? One may argue, to the contrary, that human rights, the right to self-determination included, contain a strong anti-majoritarian bias in a sense that they are designed to off-set the control of the majority over the political process. Indeed, I agree with Waters that "control of the state allows the demographic majority to define the agenda, the definitions, and the very meaning of statehood". But if the political process indeed reflects the interests of the majority, then surely there is less of a need to accept a self-determination right to the majority group that is independent from that of the state. So, while I am not arguing that all ethnic groups have no right to self-determination, which can be invoked in extreme cases of oppression or misrepresentation, I would posit that there would be, if anything, greater inclination to accept such claims if made by minority groups, whose control over the political process in a majority based democracy is less tenuous than the majority.

In addition, the application of self-determination is particularly problematic in circumstances where the exercise of a right by one group would entail the destruction of the right of the other group. While Waters is probably right in contenting that the minority cannot have veto power over the majority's right of self-determination, one has to establish that latter's right cannot be fulfilled in ways which do not entail destructive consequences. In other words, one should strive to accommodate the two competing right to self-determination not to accord one decisive preference over the other.

In short, the secession argument can hardly serve as a basis of international legality for the exclusion of a population group from the existing state. While the territory itself may be ceded, in some cases even against the wishes of its inhabitants (e.g., if proper title to the territory belongs to a different state), such an act has to reflect the interests of the state, as opposed, to the interests of one particular group. In addition, like all other state action, it should conform to international law, including international human rights law. So, while there appears to be no international rule

against transfer of territory, international human rights law would appear to prohibit denationalization of the territory's population and the destruction its existence as a unique ethnic group within the state.

Simply put, the status of the territory and the status of the population present separate analytical and legal issues, and the freedom to renounce the territory does not necessarily mean freedom to exclude a population group than enjoys rights of citizenship within the state, which are not strictly territorially based (although the origin of the right to citizenship might have been territorial, its ongoing existence transcends the specific location of the individual citizen). This would mean, as a practical matter, that the population of a transferred area be granted a right of choice, whether to stay on the transferred territory and, perhaps, renounce citizenship, or retain citizenship and, perhaps, move to the remaining area of the state. This conclusion is supported by a recent research law journal paper published in Hebrew.⁵

2) Human Rights Perspectives

Waters submits that "*no one* has the right to live in a *particular* state, with particular borders". In his view, human rights, including the right to equality, are subordinated to the political makeup of the state, which is, in turn, governed by the right to self-determination. Furthermore, since citizenship "also brings obligations and costs" it is sensible to allow states (or in fact, majorities) to shape the citizenry so as to exclude disloyal groups.

Once more, the debate is based on some controversial assumptions. First, Waters seem to conflate citizenship rights and human rights. But the 'social contract'-type arguments which sustain the first notion are mostly irrelevant for the second notion. So, while the state can link some state benefits to 'good citizenship' (e.g., national service) it cannot interfere in the same manner in the fundamental human rights of its inhabitants. The gap between the theories underlying citizenship rights and human rights is particularly relevant for minority groups, such as indigenous peoples, who were incorporated probably against their will into a polity dominated by a different majority group. In such circumstances, the human right to equality would arguably require the state to extend the benefits of citizenship to all residents, regardless of their actual degree of identification with the state. In short, human rights law appears to limit the use of 'loyalty tests', especially with relation to indigenous minority groups.

So, if the Lieberman Plan compromises human rights – the right to equality, the right to self-determination of Israel's Arab population, the right to freedom of movement, etc., perceptions concerning their entitlement to citizenship might be simply irrelevant. Still, admittedly, the move from citizen to human rights does not fully respond to Waters' argument. This is because Waters assumes a hierarchy of rights – the right of the Jews to self-determination is a primordial right that trumps the individual rights of the Arabs. In other words, the enjoyment of human rights is contingent upon an ever-permeable political context.

⁵ Orgad, Rabin and Peled., 'Transfer of Sovereignty over Populated Territories from Israel to the Palestinian Authority: International Law Perspectives', 10 *Mishpat U-Mimshal* 9 (2007)(in Hebrew)

But even if one were to accept the subjugation of individual by collective rights (a proposition which raises a host of moral and legal difficulties – e.g., one can argue that self-determination units serve as a vehicle for promotion of human rights and not *vice versa* and should be subjected to specific human rights norms), Waters' position is still unpersuasive. His position is again premised on recognition of an ongoing right to exercise self-determination and to break existing social frameworks. However, it was already noted that international law does not recognize such a right for ethnic groups that is independent from the state's right (but in truly exceptional circumstances), and the state's exercise of the right cannot promote a specific group agenda nor violate human rights. The general stability considerations mentioned above are therefore reinforced by the need to adequately guarantee human rights and maintain a stable environment for their application. Furthermore, one has to add the human rights implications of any change of the *status quo* to the aforementioned considerations governing the general trade-off between competing self-determination claims of the majority and the minority.

Political Implications

Finally, I would like to present one more thought on the political implications of Waters' position. If one were to accept the ongoing nature of ethnic groups' right to self-determination, which can lead to the reconsideration of existing borders, then why stop with the transfer of some lands pursuant to the Lieberman Plan? Indeed, Waters himself acknowledges that the Jewish settlers in the West Bank might have their own right to self-determination. Also, he questions the lawfulness of their status, he does opine that "self-determination is a radically democratizing and ahistorical doctrine, which suggests that over time, past claims fade before demographic realities." This would seem to suggest that they too can advance their group rights and secede from Palestine.

Furthermore, why stop here? If existing borders do not matter, then, perhaps, Mandatory Palestine or even Palestine and Transjordan is the relevant self-determination unit, which should be reconfigured in light of the (Arab) majority's preference. And what about the Palestinian refugees?

In short, there is a lot to be said for the conservative bias of international law – the preference of stability over change; territorial self-determination over ethnic self-determination and the like. While we should be grateful to Waters for requiring us to rethink of self-determination and its application in the Israeli-Arab context, the alternative he offers seems to me to be unattractive: Not only is the exchange of populated territories and denationalization incompatible with international law; it might also prove to be a recipe for a political catastrophe.