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Special Issue
Borders and Boundaries: Secession in the 21st Century

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In memoriam
Thomas M. Franck
1931-2009

Introduction

Secession: Final Frontier for International Law or Site of *Realpolitik* Revival?

CLIFTON VAN DER LINDEN*

I. Introduction

In its opinion regarding the legality of the secession of Quebec, the Supreme Court of Canada observed that 'the process of [state] recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms.'[1] Mindful of the principle of effectivity, the Court was cautious not to overstate the bounds of legal authority in matters of secession.[2] Nevertheless, the acknowledgement of international law as a constitutive element of state behaviour in matters relating to secession marks a significant departure from conventional *realpolitik* accounts, wherein 'successful revolution begets its own legality.'[3]

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[1] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 143.

[2] One of the tenets of classical international law, the principle of effectivity privileges the territorial situation over appeals to legality. See Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Hampshire: Ashgate, 2008) at 151.

[3] Stanley A. de Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 West. Ont. L. Rev. 93 at 96.

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The Quebec secession reference illuminates the changing dynamics of secession in the post-Cold War era and the growing relevance of international law for political order in the twenty-first century. Appeals to international law have been a mainstay in the political rhetoric of almost every party to secessionist conflict over the past two decades, reflecting the tacit expectation that law should provide a normative framework for secession. Although for decades international law has been applied in the adjudication of independence for colonies, it is increasingly being invoked outside the context of salt-water decolonization.

The rising frequency with which international law is referenced both by secessionist movements and their detractors complicates the legal positivist claim that secession is a purely political matter and, as such, is outside the domain of law.[4] It also mounts a direct challenge to mainstream theories of International Relations, particularly realism, wherein international law is viewed as epiphenomenal to power politics. In the words of Hans Morgenthau, 'Where there is neither a community of interest nor balance of power, there is no international law.'[5] For realists, international law is merely a reflection of the political interests of powerful states and secession is therefore possible only when said interests coalesce with those of separatists or revolutionaries.[6]

Both the realist and the more traditional or conservative legal positivist perspectives assert that unilateral secession cannot be understood as the exercise of an *a priori* legal right or norm; international law merely acknowledges *de facto* political processes that result in the creation or dissolution of states. However, developments in recent cases of secession call this assertion into question. Most prominent among said developments is the uptake of secession within rights discourses, wherein unilateral secession has been posited by Allen Buchanan and other liberal theorists as

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[4] See James Crawford, *The Creation of States in International Law*, 2d ed. (Oxford: Clarendon Press, 2006) at 390, in which Crawford argues that 'secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be regulated internationally.'

[5] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 6th ed. (New York: McGraw-Hill, 1985) at 296.

[6] A similar claim can be made with respect to neoliberal institutionalism, which, along with neorealism, makes up the dominant structural approach to international relations. Like neorealism, neoliberal institutionalism is a rationalist theory in which self-satiated states seek to maximize their utility given exogenously-defined preferences. 'International law, from this perspective, is seen as a set of functional rules promulgated to solve co-operation problems under anarchy.' Christian Reus-Smit, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) at 15 [Reus-Smit].

'the remedy of last resort in conditions in which [a] group is the victim of persistent violations of important rights of its members.'[7] Though the concept remedial secession has broad support in the legal literature, its roots in positive international law are contested. Karen Knop interprets the language of non-discrimination in the United Nations *Friendly Relations Declaration*[8] as offering 'some support to the view of secession as the remedy of last resort for gross inequality of treatment,'[9] but doubts remain as to whether the right to self-determination can be used to legally contravene the territorial integrity norm.[10]

Debates pertaining to the interpretation of laws do little to detract from evidence alluding to the increasing relevance of international legal norms in cases of secession. Indeed it has become customary in recent cases of secession for parties to appeal to international law in an effort to legitimize positions for and against unilateral secession.[11] Furthermore, the request

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[7] Allen Buchanan & Margaret Moore, *States, Nations and Borders: the Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) at 247. For more on remedial right-only theories see Allen Buchanan, 'Theories of Secession' (1997) 26 Phil. & Pub. Aff. 31; Allen Buchanan, *Secession: The Morality of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991). For support of secession in broader liberal theory, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 186, where he argues that 'perhaps we should be more willing to consider secession... It is difficult to see why liberals should automatically oppose such peaceful, liberal secessions. After all, liberalism is fundamentally concerned, not with the fate of states, but with the freedom and well-being of individuals, and secession need not harm individual rights.'

[8] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, GA Res 2625, UN GAOR, 25th Sess., Supp No 28, UN Doc A/8028 (1970).

[9] Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 77 [Knop].

[10] The *Declaration on Friendly Relations* notes that the right to self-determination cannot violate the principle of territorial integrity, which prohibits succession but not decolonization. See Knop, *ibid.* at 75.

[11] In the case of the unilateral declaration of independence of Kosovo by the Provisional Institutions of Self-Government of Kosovo on 17 February 2008, both Russia and Serbia condemned the actions of the PISG primarily on the grounds that they were illegal under international law and a violation of UNSC Resolution 1244 on the deployment of international civil and security presences in Kosovo; see Luke Harding, 'Kosovo breakaway illegal, says Putin,' *The Guardian* (15 February 2008), online: The Guardian <http://www.guardian.co.uk/world/2008/feb/15/russia.kosovo> and 'Kosovo Declares Independence from Serbia,' *Agence France Presse* (17 February 2008), online: Radio Free Europe <http://www.rferl.org/content/article/1079493.html>. The European Union offered a legal counterargument justifying its recognition and support of an independent Kosovar state; see Paul Reynolds, 'Legal furor over Kosovo recognition,' *BBC News* (16 February 2008), online: BBC News <http://news.bbc.co.uk/2/hi/europe/7244538.stm> [BBC]. Furthermore, in his statement recognizing the independence of South Ossetia and Abkhazia, Russian President Dmitry Medvedev cited international law as his justification, writing that 'being guided by the provisions of the UN Charter, the 1970 *Declaration*

made by the General Assembly in 2008 for an advisory opinion from the International Court of Justice regarding the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo marks the first time the ICJ has been asked to rule on the legality of a unilateral act of secession.[12] These facts suggest that, contrary to the claims of realism and legal positivism, international law is no longer epiphenomenal or neutral towards unilateral secession: when it comes to secession in the twenty-first century, international law matters. Specifying how, in which context, and to what extent it matters is the aim of this special issue.

II. International Law and the Politics of Secession

The evidence marshalled in support of international law is dismissed rather uncritically by those who privilege state power and interests as the sole determinants of secession. The arguments proffered by advocates of this perspective include the assumption that the ICJ advisory opinion on Kosovo's declaration of independence will likely have little impact on the recognition of Kosovo and that appeals to international law are commonly characterized as a last resort in the rhetorical caché of weak states. But these perspectives fail to capture the nuances of interests, specifically that:

> Treaties, like other legal arrangements, are artifacts of political choice and social existence. The process by which they are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states.[13]

Even if state actions were reducible to interest-based utility calculations, compliance with international law is not a one-shot game. For a state to violate commitments to which it was legally bound (even if only by virtue of its own consent) would be to incur costs in the form of sanctions for non-

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on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence'; Dmitry Medvedev, 'Statement by President of Russia Dmitry Medvedev, 26 August 2008,' (Moscow: President of Russia), online at <http://eng.kremlin.ru/speeches/2008/08/26/1543_type82912_205752.shtml>.

[12] See *Request for Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 8 October 2008, online: International Court of Justice <http://www.icj-cij.org/docket/files/141/14799.pdf?PHPSESSID=a9e732ae9a6326850edafa38f49f9ce9>; *Kosova Declaration of Independence*, 17 February 2008, online: Republic of Kosovo Assembly <www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> [*Kosova Declaration*].

[13] Abram Chayes & Antonia Handler Chayes, 'On Compliance' (1993) 47 Int'l Org. 175 at 180.

compliance or forfeit potential future returns by compromising the integrity of an international agreement so as to render it ineffectual, thus precluding the state from leveraging said agreement to its benefit in the future. This is in large part the rationalist justification for Louis Henkin's aphorism that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[14] Of course, this argument is more complicated when it comes to secession because, for realists, sovereignty is paramount to all other interests. Accordingly, states will always defect when sovereignty is at stake.

Secession is therefore not only a topical lens with which to examine the interaction of law and politics in contemporary global affairs, but a significant test of the pervasiveness of international legal norms in the contemporary world order. Although a rich line of scholarly inquiry has emerged on the dialogical relationship between international law and international relations in the post-Cold War regime,[15] secession has largely remained a sacred cow for realists, leaving its status as a purely political domain virtually unchallenged in the IR literature. As such, secession is a secure fallback for realists as their positions increasingly come under fire from nascent constructivist approaches.[16] Far from downplaying the role of power, these approaches look beyond its raw materialist dimensions. The late Thomas Franck, for example, viewed power through the lens of legitimacy, observing that the rules of the international system 'display authority *in themselves*, which is to say that they are obeyed despite the fact that the system has no sovereign and no gendarmes.'[17] Franck attributed this 'compliance-pull' to the perceived legitimacy of a given rule and not to a coercive authority.

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[14] Louis Henkin, *How Nations Behave*, 2d ed. (New York: Columbia University Press, 1979) at 47.
[15] See, for example, Michael Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000); Kal Raustiala & Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes *et al*., eds., *Handbook of International Relations* (London: Sage, 2002) 538; David Armstrong, Theo Farrell & Hélène Lambert, *International Law and International Relations* (Cambridge: Cambridge University Press, 2007); Beth A. Simmons & Richard H. Steinberg, *International Law and International Relations* (Cambridge: Cambridge University Press, 2006); Thomas J. Biersteker *et al*., eds., *International Law and International Relations: Bridging Theory and Practice* (London: Routledge, 2007); Friedrich Kratochwil, 'The "Legalization" of World Politics?' (2003) 16 Leiden J. Int'l Law 878; Reus-Smit, *supra* note 6.
[16] *cf* Friedrich Kratochwil, *Rules, Norms, and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) [Franck]; Jutta Brunnée & Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2001) 39 Colum. J. Transnat'l L. 19.
[17] Franck, *ibid.* at 27 [Emphasis in original].

Cognizant of both the present and potential future limitations of international law as they pertain to secession in an anarchical system, this special issue does not seek to unseat power as a basic causal variable in any analysis of secession. Instead it seeks to bring the rather insular discussion on secession into a dialogue with paradigm-shifting developments in the broader IL/IR discourse. The contribution of such an endeavour is multifold. First, secession offers a platform with which to test emergent ideas about the limits and possibilities of international law. Second, it provides a focal point for critical interrogation of the dominant paradigms in both International Law and International Relations. Third, it compels us to ask, à la Martha Finnemore, of what is secession an instance?[18] Is it purely power politics or have international legal norms become sufficiently pervasive as to condition the behaviour of states even in matters directly related to sovereignty?[19] Is legality a necessary or a sufficient condition (if either) for the legitimacy of secession in the twenty-first century? Finally, if international law can indeed assume some normative or regulatory function with respect to secession, its sources, form and prospects merit analysis. These debates and questions are taken on by the contributors to this issue.

III. Contributions on Secession

Perhaps the most ambitious and controversial agenda for international law in this special issue is that set out by *Thomas Grant*, who argues that the United Nations can and should act as arbiter of state succession. Although recognition of the newly created state by the international community as a requisite component in the legality of secession remains in dispute (due to its omission in direct terms from the Montevideo Convention and ergo the classical legal criteria for statehood), in political terms its necessity is almost universally accepted. As membership in the UN General Assembly is the preeminent signifier of international recognition of statehood, the UN can leverage substantial power insofar as it confers legitimacy on newly created states. Grant contends that the UN has not marshalled this power effectively and that, by extending the provisions of decolonization in the *Charter* so as to play a more active role in determining admission to the General Assembly, the UN could assume a regulatory function in future cases of secession.

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[18] Finnemore refers to 'of what is this an instance?' as 'the standard social science question' that drives her research in Martha Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force* (New York: Cornell University Press, 2003) at 12.

[19] This assumes that until now international legal norms have not been pervasive in the postwar international regime, but one might argue that the territorial integrity norm has been a defining feature of said regime.

In keeping with the theme of regulating secession through law, *Miodrag Jovanović* makes a case for embedding a clause on secession in national constitutions. Certainly as a means of avoiding violent conflict related to secession, Jovanović can marshal substantial empirical backing. The secession of Norway from the Kingdom of Sweden in 1905 was justified under the auspices of constitutional law. The Norwegian boycott of the Union cabinet prevented the king of Sweden from performing his constitutional duty to appoint a government for Norway, resulting in the 7 June 1905 proclamation by the Norwegian parliament that 'the union with Sweden under one king is dissolved in consequence of the king's ceasing to function as King of Norway.'[20] Furthermore, the 1991 secessions of Latvia and then Estonia from the Union of Soviet Socialist Republics—as well as the relatively peaceful secession of the twelve remaining republics (with the notable exceptions of Georgia and Azerbaijan)—ostensibly adhered to Article 72 of the USSR Constitution, which 'granted each union republic (but no other sub-federal unit) the right "to freely secede" from the federation.'[21]

In order to make his case, however, Jovanović must contend with the arguments that the constitutionalization of secession is inimical to national constitutional law and irreconcilable with liberal-democratic constitutionalism. He addresses both arguments with a view to setting the parameters for constitutionalizing secession, namely that a minimal liberal-democratic setting would need to be in effect.

It is hardly surprising that Kosovo's unilateral declaration of independence commands a formidable presence in this special issue. Kosovo's secession from Serbia has been mobilized in both scholarly and public discourses to support conventional *realpolitik* approaches to world politics, wherein the actions taken by the Provisional Institutions of Self-Government were possible only as a result of its political and military support from the European Union. These views notwithstanding, both the PISG and the EU sought to justify their respective positions in accordance with international law. In its declaration of independence, the PISG affirmed its intention to 'act consistent with principles of international law.'[22] The EU memorandum on Resolution 1244 went so far as to claim that 'once an entity has emerged as a state in the sense of international law, a political decision

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[20] Cited in Aleksandar Pavokić & Peter Radan, *Creating New States: Theory and Practice of Secession* (Hampshire: Ashgate, 2007) at 72. It should be noted that Allen Buchanan refers to this as a case of consensual, not constitutional secession.

[21] *Ibid.* at 131.

[22] *Kosova Declaration*, *supra* note 12.

can be taken to recognise it.'[23] This statement not only offered a legal justification for the EU's recognition of Kosovo as a sovereign state, but a political statement about the centrality of international law to matters of secession. To that end, as James Mayall argues,

> [t]he Kosovo crisis exposed the sharp conflict between those who view international society within a legalist paradigm and those who insist on the primacy of politics. This dispute is not about the importance of the rule of law to international society but about whether it is to be the servant or master of the state.[24]

In either case, Kosovo's secession may have wide-ranging implications. Already the political repercussions have included Russia's recognition of the independence of South Ossetia and Abkhazia from Georgia and the ensuing military conflict. The consequences for international law rest in large part on the upcoming ICJ advisory opinion on Kosovo, which many see as an opportunity to clarify the rules around secession—including the contemporary relevance of the Montevideo conventions and the role of recognition by the international community in affirming statehood.

Of course, much of the international controversy over Kosovo's secession stems predominately from its challenge to the territorial integrity norm and thus its potential precedent for secessionist movements around the world. Both the PISG and international community members supportive of Kosovar independence strategically invoked the idea that Kosovo, by virtue of its status as a 'special case', should not be considered as precedent in either political or legal domains.[25] This has done little, however, to satisfy questions or quell concerns regarding the ramifications of Kosovo's secession.

Among the possible ramifications of Kosovo's secession is the effect, if any, it may have on the prospects for Palestinian unilateral independence—an issue taken up by *Zohar Nevo and Tamar Megiddo*. They explore

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[23] BBC, *supra* note 11.

[24] James Mayall, 'The Concept of Humanitarian Intervention Revisited' in Mary Buckley & Sally N. Cummings, eds., *Kosovo: Perceptions of War and its Aftermath* (New York: Continuum, 2001) 274 at 274.

[25] The Kosovo Declaration of Independence notes that 'Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,' *Kosova Declaration*, *supra* note 12. The notion of Kosovo as a 'special case' was a mainstay in the rhetoric of supporters of Kosovar secession. An open letter authored by ten former foreign ministers from North America and Europe twice emphasized that 'Kosovo is a unique situation' and 'should not create a precedent for other unresolved conflicts,' Madeline Albright *et al.*, 'Kosovo must be independent,' *New York Times* (15 June 2007), online at New York Times <http://www.nytimes.com/2007/06/15/opinion/15iht-edkosov.1.6153178.html>.

developments in the international law of statehood over the last century and offer an assessment of the degree to which the Kosovo case meets the classical legal requirements for statehood. Arguing that Kosovo does not meet said criteria, Nevo and Megiddo endeavour to unpack the analogies between Kosovo and Palestine, with the understanding that the latter also fails to meet the classical criteria for statehood.

Nino Kemoklidze draws on the Kosovo case in order to develop a cost-benefit analysis of recognizing a right to secession. She suggests that the moral hazard inherent in the international recognition of unilateral secession may in fact exacerbate violence against ethnic minorities and further destabilize already volatile regions. Her findings lend further support to an already burgeoning literature eschewing secession as a means to resolve ethnic conflict, which itself builds on Boutros Boutros-Ghali's assertion that 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.'[26]

The case against enshrining a right to secede in international law is also advocated by Donald Horowitz, who argues that secession

> does not create the homogenous successor states its proponents often assume will be created. Nor does secession reduce conflict, violence, or minority oppression once successor states are established. Guarantees of minority protection in secessionist regions are likely to be illusory; indeed, many secessionist movements have as one of their aims the expulsion or subordination of minorities in the secessionist regions.[27]

While secession, particularly in the context of self-determination, has largely become associated with the liberation of ethnic minorities, Horowitz exposes its accompanying illiberal consequences, among which is the creation of internally displaced peoples and refugees. A proposed remedy to this by-product of secession has been to ground refugee protections in a global rights discourse, but *Shauna Labman* problematizes both the concept and application of a rights-based approach to refugee protection. In arguing that the adoption of a refugee rights regime may actually serve to mobilize groups against refugees, Labman outlines the dialectic between the political and legal dimensions of global rights as they relate to refugee protection.

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[26] Boutros Boutros-Ghali, *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-keeping* (New York: United Nations, 1992) at para. 17.

[27] Donald L. Horowitz, 'A Right to Secede?' in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York: New York University Press, 2003)50 at 50.

IV. Conclusion

After nearly a half-century of relatively stable borders following the Second World War, the rash of secessions since the end of the Cold War has motivated discussions in both International Law and International Relations regarding the conditions by which secession may be possible. Since little if any legitimacy is attributed to unilateral declarations of independence that lack international political support,[28] the strength of the political dimension cannot be overlooked in any analysis of secession.

However, as the contributions to this special issue demonstrate, international law has moved inwards from the periphery of discourses on secession. Though not sufficient, legality is perhaps gradually becoming a necessary condition for secession. The precedent set in referring the Kosovo case to the ICJ speaks to an increasingly relevant norm in international relations in which, in order to be considered legitimate, secession must occur in accordance with international law. This reiterates the assertion that international law matters in cases of secession, but it also provokes questions about both the suitability and effectiveness of international law as a platform for regulating the terms of secession in the twenty-first century.

[28] Unilateral declarations of independence in recent history have been made *inter alia* by the Tamil Tigers in Sri Lanka, the Bougainvilleans in Papua New Guinea, the Mindanao Moros in Phillippines, and the Irian Jaya in Indonesia. None of the declarations have been recognized by the UN General Assembly.

Regulating the Creation of States
From Decolonization to Secession

THOMAS D. GRANT*

How many ages hence
Shall this our lofty scene be acted o'er,
In states unborn and accents yet unknown![1]

I. Introduction

In *The Anarchical Society*, Hedley Bull characterized States as entities 'conscious of certain common interests and common values' which 'form a

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[1] William Shakespeare, *Julius Caesar* (III.i scene.line3-5).

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society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'[2] Such a *society* represents more than a mere *system* of States; the latter refers to interactive States whose actions affect one another and which 'behave — at least in some measure — as parts of a whole.'[3] The community or society of States and its evolving relation to the United Nations since 1945 is the subject of this article. The claim that States remain the primary actors in contemporary international political and legal systems is factually grounded and empirically well-supported. Nevertheless, globalization mounts a number of challenges to this assertion, and for decades scholars have sought to demonstrate how the processes of globalization erode State sovereignty and conduce of a system in which international institutions and global civil society become more significant actors in world politics.

Accounts which continue to posit a monopoly on State creation by powerful States overlook the substantial power that particular international organizations already wield. In both offering and denying membership in the General Assembly, the United Nations in particular plays an important role in the process of conferring (or, at least, affirming) statehood. As holding a seat in the General Assembly is seen as a fundamental signifier of (legitimate) statehood in the contemporary world order, the UN is able to exert considerable influence in setting necessary and sufficient conditions for statehood. Therefore, though the UN may not directly challenge the primacy of the State, it is sometimes said to play a normative role in which it affects intersubjective conceptions of State ontology, thus setting norms for State behaviour and structural limitations around State agency (i.e. 'socializing' States). Even though States indeed remain the primary actors in world politics, the structure, composition and normative content of the State is not self-determined.

In offering a systematic account of the development and practice of the regulatory mechanism governing the creation of new States, this article argues that the United Nations has fostered significant changes in the normative content of the State. It then goes on to offer several tentative

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[2] See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977) at 104.
[3] *Ibid*.

observations about how the UN can serve as an effective regulator of State creation, safeguarding against destabilizing acts of putative State creation and facilitating State-building where secession has occurred and must be accommodated.

Membership of States in the UN is a salient feature of contemporary statehood. Given the nearly universal membership of States in the UN, the existence of a State *outside* the organization is somewhat anomalous. The significance of universal membership is manifold. To achieve universality of membership the UN had to develop administrative processes governing the admission of States to membership under Article 4 of the *Charter of the United Nations* (UN *Charter*) and it, in time, ensured that such processes allowed for the admission of any and all States that sought membership. This has limited the capability of the UN to act in areas such as the promotion of democracy and rule of law: membership of States not committed to advances in such areas impedes the more rigorous promotion of such values. However, universal membership has enhanced the capability of the UN to act as a diplomatic forum and to set norms and standards that have global reach, i.e. to socialize States, at least in the sense of establishing such minimum norms and minimum standards as can be agreed upon by the fundamentally diverse members of the organization. As membership in the UN has become a *de facto* legitimization of statehood, the agency of the UN lies not in deciding whether or not a State should be granted admission to the General Assembly; it now is required to admit a State solely by virtue of its being a State. The agency of the UN is in its capacity to regulate the normative content of the State, i.e. to render decisions as to whether or not the entity seeking admission to the UN actually constitutes a State.

This article proceeds in six parts. The next section identifies the respects in which the homogeneity of States declined in the half-century following adoption of the *Charter*, which suggests that the UN played a significant role in expanding ideas relating to the conditions through which various political entities constitute States. Section 3 offers an overview of the political—i.e. non-legal—factors that contributed to the creation of new States and their structural diversification since 1945. Sections 4 and 5 examine the central role of the *Charter* in regulating decolonization—the 20th-century process that led to the creation of so many new States. Section 6 considers whether the lessons of decolonization could serve as a model for regulating future secessionist claims and, if so, how that might work. Section 7 observes that while the *Charter* contains substantive constraints of a legal character on what applicants may be admitted, the UN in practice no longer observes

these. As a result, UN membership has come to be concomitant to statehood, but the UN has not leveraged the process of admission to give potential new States a particular incentive to delay their independence.

II. States in the UN Era: Relative Homogeneity and its Decline

It can be argued that the UN sought to prescribe the normative content of States from its inception. For reasons of mutual compatibility, institutional efficiency, and territorial demarcation of jurisdiction for trade and commerce, States have emerged as the preferred institutional form.[4] Article 4(1) of the UN *Charter* states that 'Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.' In its advisory opinion on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (1948),[5] the International Court of Justice examined this provision and identified it as a legal regulation. Implicit in the terms as adopted is the assumption that not all States were committed to these terms, and therefore membership in the organization, at least in theory, might be less than universal.[6]

However, the first fifty years of the UN era saw the substantive criteria of Article 4(1) all but disappear from the process of admitting new members. This change, momentous to the interpretation of the *Charter* and to the composition of the UN,[7] took place as the number and heterogeneity of States was increasing. As a consequence, the composition of the UN was transformed. From an organization tightly-knit around a subset of common goals, the UN became a universal body capable of a wider representative function, but not necessarily capable of performing all the tasks originally intended by its founders.

The States adopting the *Charter* intended to establish a permanent assembly of governments for the purpose of oversight and diplomatic

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[4] See Hendrik Spruyt, 'Institutional Selection in International Relations: State Anarchy as Order' (1994) 48 Int'l Org. 527 at 554-55.

[5] 1948 I.C.J. 57 [*Admission* Advisory Opinion].

[6] The difference between Original Members and certain other States was explicit in the Enemy States provisions—*Charter* Arts. 53, 77, 107.

[7] See Thomas D. Grant, *Admission to the United Nations: Article 4(1) and the Rise of Universal Organization* (Leiden: Martinus Nijhoff, 2009).

representation,[8] but they intended the organization to be more than a mere extension of wartime conferences. The inclusion of the Economic and Social Council as a principal organ of the United Nations, and the subsequent development of the human rights treaty system,[9] was to serve an affirmative agenda of securing human dignity through more direct means. The adoption in a UN framework of such international instruments as the *Universal Declaration on Human Rights*, the 1966 Covenants, and other human rights and humanitarian treaties has given a broad meaning to the phrase 'purposes and principles of the Charter.'[10]

To be sure, the States that founded the UN in 1945 recognized that certain differences existed among the Original Members. The Western Allies—the United States, United Kingdom, France, etc.—were democracies, and the Soviet Union was not. The ideological difference between the USSR and the democracies was a problem from the beginning; membership questions in the UN having become entangled in East-West rivalry even before people spoke widely of a Cold War. At the time of the Dumbarton Oaks Conference (August to October 1944), Stalin proposed membership for all the Union Republics of the USSR; Roosevelt's riposte was to propose membership for all the states of the United States.[11] Compromises, however,

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[8] The wide diversity of functions of the Organization are described in the essays comprising Chapter 2 of Franz Cede & Lilly Sucharipa-Behrmann, eds., *The United Nations: Law and Practice* (The Hague: Kluwer, 2001) 57. On one of the most significant functions, see Gerard Hafner, 'Codification and Progressive Development of International Law', *ibid*. at 143-56; Nagendra Singh, 'The UN and the Development of International Law' in Adam Roberts & Benedict Kingsbury, eds., *United Nations, Divided World: The UN's Roles in International Relations*, 2nd ed. (Oxford: Clarendon Press, 1993) 384. Cf Jean-Marc Coicaud, *Beyond the National Interest: The Future of UN Peacekeeping and Multilateralism in an Era of U.S. Primacy* (Washington, DC: United States Institute of Peace Press, 2007) at 82 [Coicaud].

[9] These are addressed comprehensively in chapters in Philip Alston & James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000). On ECOSOC, see Edward C. Luck, 'Prospects for Reform: Principal Organs' in Thomas G. Weiss & Sam Daws, eds., *The Oxford Handbook on the United Nations* (Oxford: Oxford University Press, 2007) 653 [*Oxford Handbook*] at 665-68 (on changes implemented and proposed); Gert Rosenthal, 'Economic and Social Council', *ibid*. 136 at 136-39 (on functions and goals of ECOSOC); Coicaud, *supra* note 8 at 87-89.

[10] A broad meaning certainly has been ascribed to the phrase 'obligations of the United Nations Charter'; the United States, for example, taking the view that 'these obligations embrace not only the maintenance of international peace and security but also observance of human rights': Mr Scranton (USA), UN SCOR, 31st Year, 1972d Mtg., U.N. Doc. S/12229 (15 November, 1976) at para. 124.

[11] Ruth B. Russell (with the assistance of Jeannette E. Muther), *A History of the United Nations Charter* (Washington, DC: Brookings Institution, 1958) at 433-37.

were accepted as necessary in the delicate founding moments of the organization. 'A group of scholars drawing up an ideal world constitution and having no responsibility for concrete tasks,' said A.H. Feller, General Counsel and Director of the UN Legal Department, 'can promulgate what they want. A United Nations Council or Commission must deal with actual problems and must seek workable and acceptable solutions.'[12]

What was true under the *Charter* was true in the preparatory phases leading to its adoption. States adopting the *Charter* knew they faced an historic liability. The League of Nations had failed. By 1945, there was a sense that it was imperative to build a working, global institution. The purpose of such an institution would be to preserve the wartime alliance as a mechanism to avoid repeating the 'untold sorrow' to which the *Charter* preamble refers. And the States adopting the *Charter* knew, from the experience of managing the Alliance during the foregoing several years of joint endeavour, that the UN, if it were to succeed, would have to manage the divergent interests and inclinations of its members.

Even though it was predictable that the differences among its members would limit the UN in certain respects, the founding states, especially the western States, expected the UN to be so constituted as to facilitate consensus—particularly on the core issues of peace and security. All members, original and those later admitted, certainly did not pursue identical international goals or possess identical internal institutions, but they were believed to be similar enough in institutional composition and political interest that the organization could function and expand its activities across diverse fields. The assumption that there existed and would continue to exist at least a minimum degree of homogeneity was predicated in turn on certain prior assumptions about the political character of the Original Members and of non-member States later to be considered for admission. Each of these however proved faulty. Despite the diverse makeup of the original membership of the UN, a number of considerations at the time supported assumptions about the member States' structural similarity and shared political goals.

First, the western allies assumed that the USSR was capable of reform.

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[12] A.H. Feller, 'The United Nations—Appraisal and Forecast' (address to the New York University Institute for Annual Review of UN Affairs, 18 July 1949), printed in (1950/51) 13 *ZaöRV* 57 at 64.

Some western observers went so far as to say that the USSR was in a nascent phase of liberalization.[13] This aspect of the climate of the time is seldom recalled. The Red Army permitted religious observance in its ranks,[14] and Stalin invited reconstitution of the Russian Orthodox Church.[15] Dictatorial control was relaxed, which in turn (if not by design) spurred wartime efficiency.[16] Various international overtures suggested a moderation of Soviet policy.[17] Though internal and external measures alike turned out to be expedients of a totalitarian regime gripped in existential crisis, many in

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[13] Some said it was already there. Sydney & Beatrice Webb, *The Truth about Soviet Russia* (New York: Longmans Green & Co., 1942) at 19-23, 44-50, for example, described the Soviet industrial system and minority rights constitutional provisions as democratic. A survey of American high school seniors in 1945 discovered that 62 per cent 'knew' that the USSR had a policy of equal treatment for minorities—'something of a model for the rest of the world': Richard W. Burkhardt, 'Report on a Test of Information about the Soviet Union in American Secondary Schools' (1946) 5 Am. Slavic & East Eur. Rev. 1 at 12. William Mandel said that there were substantial democratic institutions in the USSR and predicted fully competitive elections to public office after the war: 'Democratic Aspects of Soviet Government Today' (1944) 9 Am. Socio. Rev. 257 at 265-66. Lord Wedgwood saw a post-war Soviet-Western alliance, resulting in the democratization of the former: *Testament to Democracy* (New York: American Chapter, Emergency Council, 1943) at 121. See also Bernhard J. Stern, 'Soviet Policy on National Minorities' (1944) 9 Am. Socio. Rev. 229 at 235 (describing the 'success' of Soviet nationality policy, including supposed wartime devolution of authority to the Union Republics); Frederick L. Schuman, *Soviet Politics at Home and Abroad* (New York: Knopf, 1946) at 612 (predicting democratization in the USSR); Max M. Laserson, *Russia and the Western World: The Place of the Soviet Union in the Comity of Nations* (New York: Macmillan, 1946) at 1-11 (predicting convergence of Soviet and Western interests and modes of government). And such views had started to take shape well before the war: see Norman Davies, *Europe: A History* (Oxford: Oxford University Press, 1996) at 986. The better view, it turned out, was that a 'slackening' of certain Soviet principles had been permitted in the interests of war production and war fighting, not as preamble to wider reform. This was the view suggested by Richard E. Lauterbach, 'Wartime Russia and the Communist Party' (1945) 4 Russian Rev. 11 at 13, 14: 'Being Americans, we are overprone to look for developments in Russia which indicate that the Soviet Union is becoming more like ourselves.'

[14] See Robert R. Wilson, 'Status of Chaplains with Armed Forces' (1943) 37 A.J.I.L. 490 at 492.

[15] Albert Boitier, 'Law and Religion in the Soviet Union' (1987) 35 Am. J. Comp. L. 97 at 112. Respecting the wartime status of the Orthodox Church generally, see Steven Merritt Miller, *Stalin's Holy War. Religion, Nationalism and Alliance Politics, 1941-1945* (Chapel Hill: University of North Carolina Press, 2003) at 109-15 [Miller]; John Shelton Curtiss, *The Russian Church and the Soviet State 1917-1950* (Boston: Little, Brown & Co, 1953) at 290-303.

[16] See observations concerning wartime liberalization and its role in securing victory: Hannah Arendt, 'Reflections on Violence' (1969) 12 New York Rev. Books at n. 32.

[17] E.g. dissolution of the Comintern in 1943: Miller, *supra* note 15 at 110, 173; Robert Beitzell, *The Uneasy Alliance. America, Britain, and Russia, 1941-1943* (New York: Knopf, 1972) at 99. Note, too, Stalin's personal correspondence with the Archbishop of Canterbury: Edward E. Roslof, *Red Priests: Renovationism, Russian Orthodoxy, and Revolution, 1905-1946* (Bloomington: Indiana University Press, 2002) at 193.

the West saw them as promising a fresh direction. Western leaders tended to exaggerate the scope of such developments (in part perhaps in response to sensitivities of their own constituents),[18] and organs of public opinion generally took an optimistic view when describing internal affairs in the Soviet Union during the war.[19] It is not entirely clear whether the West, in its governments or among people at large, recognized the member States of the new organization to be as heterogeneous as they really were.

Second, as it was assumed that the Original Members already did or soon would follow a progressive model, so was it assumed that existing States not yet members of the organization did or soon would as well. Article 4(1) of the *Charter* provides for a substantive evaluation of applications for membership. In theory at any rate, the UN would have excluded States not satisfying the criteria. As membership in the UN was to be valued by States seeking it,[20] the States adopting the *Charter* supposed that prospective new members would adapt their practices and institutions to conform to the *Charter* requirements. The substantive criteria for admission contained in the *Charter* and the mechanisms for filtering compliant from non-compliant applicants were expected, in short, to influence existing States for the better.[21] However, the UN in practice scarcely applied the admission criteria. So the Original Member States supposed that existing non-member States and newly admitted members would eventually conform to their own ideal template of the modern State, and this, like Soviet reform, proved illusory.

Finally, it was assumed that new States that might emerge in the coming decades would demonstrate similar basic socio-political traits to those that already existed. The creation of States in the UN era would take new and unexpected directions, however: there would be more States than anticipated and their heterogeneity in general increased. State creation in the second

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[18] Miller, *supra* note 15 at 223-28.

[19] A study examining the *New York Times* showed that favourable reporting about the USSR increased when the interests of the United States were served by Soviet success—e.g. during the siege of Stalingrad: Martin Kriesberg, 'Soviet News in the "New York Times"' (1946-47) 10 Pub. Opinion Q. 540 at 553-54.

[20] See section 6 below.

[21] And membership itself was envisaged as exerting a socializing force: certainly a just world in greater freedom, the thinking went, would be fostered by involving States in an organization dedicated to that goal. The 'socialization thesis,' however, is difficult to prove: see Grant & Wischik [forthcoming].

half of the twentieth century was driven predominately by decolonization. It had been expected that colonies, as a predicate to the administering powers accepting their independence, would develop the institutions and capacities necessary to sustain liberal democracy. In short, if there was to be an increase in the number of States, these would be liberal democratic States. Again, the Original Member States of the UN in 1945 shared a number of characteristics. Besides being united in the goal of defeating the war machines of Germany and Japan, the Original Member States of the UN were powerful and stable. Whatever their differences, both the Soviet bloc countries and the western democracies possessed effective mechanisms of internal control and of international relations. This was the 'certaine homogénéité d'ordre politico-psychologique' to which Scelle (as agent for France) referred in 1948.[22]

Many of the new States, however, differed considerably from the chief protagonists of the Cold War. Not only were many of the new States small and lacking effective power in international relations, but some were scarcely able to govern themselves. Thanks to the lapse of Article 4(1), all of these States would be admitted as members. To introduce into the UN system a large number of States, the governments of which were both internally and externally weak, was to introduce heterogeneity much more pronounced than was anticipated at the outset.[23]

So the United Nations was less homogenous at its inception than many contemporaries believed; mechanisms that were intended to promote a degree of conformity among existing States failed to do so; and newly emerging States to a considerable degree differed in socio-political terms from the eighty or so States that had existed in 1945.

The appearance of several new States, many of which were weak in their

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[22] *Admission* Advisory Opinion, *supra* note 5; 'Proceedings' (23 Apr 1948 (morning session)), [1948] I.C.J. Pleadings 69.

[23] Dugard, among other writers, has noted that the ex-colonial States present problems of effectiveness: John Dugard, *Recognition and the United Nations* (Cambridge: Cambridge University Press, 1987) at 68-73 [Dugard]. To acknowledge the problems is by no means to adopt a revisionist view as to status—in the manner for example of Kreijen and Yoo: Gerard Kreijen, *State failure, sovereignty and effectiveness; legal lessons from the decolonization of sub-saharan Africa* (Leiden: Martinus Nijhoff, 2004) at 329-62; Memorandum from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Council, Department of Defense, 9 Jan 2002, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, reprinted in Karen J. Greenberg & Joshua L. Dratel, *The torture papers: the road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) at 38, 39.

internal institutions and insecure, was a major development in the international system of the 20th century. It was contrary to a main expectation which had undergirded the UN system and, as such, changed the UN by limiting the organization's effectiveness as an engine for the promotion of human rights and rule of law. It introduced new stresses into international relations, including especially by way of the crisis of the so-called 'failed States.' The potential for State creation, as noted already above, still exists and subject to circumstances may increase over time. It is in view of these considerations that the factors impelling State creation need to be more fully understood and, insofar as possible, regulatory mechanisms implemented. The shift in the composition of States in the UN era to date has been militated in part by a number of sociological and political factors. Yet the increase in the number and heterogeneity of States has not taken place in a legal vacuum. The UN *Charter* has played a role in transforming the community of States since 1945. The extra-legal factors contributing to the transformation may be briefly instanced. Then we may consider the transformative role of the *Charter*.

III. Extra-legal Factors in the Creation and Diversification of States

States are legal entities, and their formation is regulated by international law. James Crawford in the *Creation of States in International Law* is clear about the centrality of law to the creation of States, and the empirical evidence is overwhelming that States are more than simple facts, however important facts may be to their existence. The character of the State as an institution of international law is central to understanding international law and to understanding States in their extra-legal dimensions as well. That there exist extra-legal dimensions to statehood is just as clear, for States are also sociological phenomena—the result of history, culture, politics, economics, and so on. They come into being through extra-legal or pre-legal processes.

Decolonization in the second half of the 20th century led to the creation of a great number of new states. To quote one Indian delegate to the Fourth Committee of the UN in late 1946, 'the right of the natives to election and participation in the administration should be affirmed in detail.'[24] The

[24] *Official Record of the Second Part of the First Session of the General Assembly, Plenary Meetings* (October-December 1946), *Fourth Committee, Trusteeship, Part I* (November-December 1946) UN Doc. A/1/PC/10, 63, 64 at 70 (9 February, 13 December, 14 December, 1946).

delegate also urged that free speech, freedom of religion and anti-racial discrimination guarantees be made through UN conventions. But decolonization and self-government were not promoted by the UN *Charter*, and 'some of the first post-war challenges to colonialism went unsupported by the [UN] despite appeals by nationalist groups seeking self-government and independence.'[25] The early 1950's French resistance to UN discussions or resolutions over Moroccan independence are quintessential examples of this phenomenon.[26] The same occurred in connection with Tunisia.[27] However, by 1960 the UN was prepared to recognize Algeria's right to self-determination.[28]

At least three extra-legal factors may be counted as contributing to the rapid creation of States in the colonial territories after the initial period of hesitancy. First, competition between Russia and America to win favour in Africa, the Caribbean and the Far East (the sites of the majority of the colonies) led each power to depict itself as the better champion of colonial peoples. Thus, whereas colonialism had no ideological champion, decolonization had at least two.[29] This is not to oversimplify and ignore the reality that in the Middle East and in Latin America the United States was 'caught in the ever-present struggle ... of being autocratic abroad and democratic at home.'[30] Any tolerance for European colonialism had to remain *sotto voce*, while stated positions had to be progressive. Second, as soon as a critical mass of ex-colonial countries belonged to the General

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[25] See Neta C. Crawford, *Argument and Change in World Polity: Ethics, Decolonization and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002) at 315 [Neta Crawford].

[26] *Ibid*.; Harold K. Jacobson, 'The United Nations and Colonialism: A Tentative Appraisal' (1962) Int'l Org. 16.

[27] Neta Crawford, *supra* note 25 at 316.

[28] *Ibid*.

[29] This is not to ignore that the United States from time to time advocated one over another prospective independent government, and with the result in certain instances of delays to decolonization: Angola was perhaps an example. And the Soviet Union, in certain instances, protested the independence of dependant territories on grounds, *inter alia,* that they were not self-determination units (for example, see Crawford on the three Associated States promoted to independence from the former Trust Territory of the Pacific Islands; James R. Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford: Oxford University Press, 2006) at 581-84 [James Crawford 2006]); or that they lacked real independence, e.g. Kuwait, about which see remarks of the Soviet representative, Mr Zorin (USSR), UN SCOR, 16th Year, 986th Mtg., (1961) at para. 120.

[30] See F.D. Corfield, chief native commissioner, in *Report on Native Affairs for Kenya: Historical Survey of the Origins and Growth of Mau Mau* (London: Her Majesty's Stationery Office, 1960) at 28; see also James Crawford 2006, *ibid.* at 300.

Assembly, the internal politics of the UN further accelerated the drive for independence. Voting procedures are governed by legal rules and thus are not in themselves an extra-legal factor; but the disposition of a State to exercise its right to vote one way or another is a matter of politics. Newly independent States in the Assembly tended to support those still dependent territories seeking statehood.[31] Third, as already noted, European colonizers were politically, economically, and morally exhausted, leading to abrupt handovers of power to self-governing regimes. The suddenness and disarray of independence in the Congo in 1960, not to mention the support given by European interests to the attempted secession of Katanga, triggered events from which, it may be argued, the country never recovered.[32] The virtual abandonment of East Timor by its Portuguese administrators in 1975[33] invited the decades of occupation and human rights abuse which followed. It suffices to observe that, once something like a collective European decision crystallized to relinquish overseas dominion, there was no uniform approach to foster an orderly succession.

[31] The political shift favouring de-colonization is analyzed, with reference to changes in General Assembly voting pattern, in David A. Kay, 'The Politics of Decolonization: The New Nations and the United Nations Political Process' (1967) 21 Int'l Org. 786 at 804-08 [Kay]. See also Edward T. Rowe, 'The emerging anti-colonial consensus in the United Nations' (1964) 8 J. Confl. Resolution 209.

[32] For a summary of relevant events see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* Judgment of 14 Feb 2002, [2002] I.C.J. Rep. 3 at paras. 6-16, Judge Ad Hoc Bula-Bula, separate opinion.

[33] *East Timor (Portugal v Australia),* [1995] I.C.J. Rep. 90 at paras. 13-16, Judge Skubiszewski, dissenting.

IV. Decolonization under the UN Charter[34]

To develop a comprehensive explanation for the pace and form that decolonization has taken, international law and the institutional framework of the UN must be considered. The UN *Charter* contains provisions for decolonization. This reflects the intent of the States originally adopting the *Charter* to regulate the transition from colonial rule—which is to say that they intended the UN *Charter*, among other things, to provide a legal framework around decolonization. The main provisions concerning colonies are Chapters XI, XII and XIII of the *Charter*. Chapter XI establishes a category, to be called Non-Self-Governing Territories, to consist of territories which have not attained full self-government. That such an approach carried normative overtones—advocating gradual but eventual self-government for most if not all territories—admits of little dispute. L.H. Gann and Peter Duignan argue that this self-determination for former colonies was the natural by-product of economic non-profitability from declining commodity prices, especially in agriculture, and the fact that after World War I the colonial powers were too indebted to police their empires.[35] But it would tell less than the full story to ignore the 'revulsion against imperial ideals' experienced by the cognoscenti in colonial homelands, particularly France and Britain.[36] Among non-economic reasons for decolonization, Neta Crawford's comprehensive list includes the moral and political successes of 'anti-colonial resistance; the delegitimation of racist beliefs; ethical arguments leading to declining support for colonialism within the metropole; and the continuing institutionalization of normative beliefs in, for example, the United Nations Trusteeship System.'[37]

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[34] See Ulrich Fastenrath, 'Chapter XI. Declaration Regarding Non-self-governing Territories' in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed., (Oxford: Oxford University Press, 2002) 1089 [*The Charter of the United Nations*]; Dietrich Rauschning, 'Chapter XII. International Trusteeship System' in *ibid*. 1117; Rudolf Geiger, 'Chapter XIII. The Trusteeship Council' in *ibid*. 1129. See also Thomas D. Grant, 'Extending Decolonization: How the United Nations Might Have Addressed Kosovo' (1999) 28 Ga. J. Int'l & Comp. L. 9 at 26-33 [Grant 1999]; Antonio Cassese, *Self-determination of peoples. A legal reappraisal* (Cambridge: Cambridge University Press, 1995) at 71-89; Dugard, *supra* note 23 at 63-70; Andrés Rigo Sureda, *The evolution of the right to self-determination: a study of United Nations practice* (Leiden: Martinus Sijthoff, 1973) 53-94; Jost Delbrück, 'Selbstbestimmung und Dekolonisation' in Ulrich Scheuner & Beate Lindemann, eds., *Die Vereinten Nationen und die Mitarbeit der Bundesrepublik Deutschland* (Munich: R Oldenbourg Verlag, 1973) 69 [*Die Vereinten Nationen*] at 73-99.

[35] See, e.g. John D. Hargreaves, *Decolonization in Africa* (London: Longman, 1988) at 49.

[36] See L.H. Gann & Peter Duignan, *Burden of Empire: An Appraisal of Western Colonialism in Africa South of the Sahara* (New York: Praeger, 1967) at 73.

[37] See Neta Crawford, *supra* note 25 at 293.

Chapters XII and XIII established the Trusteeship System. These were two separate and concurrent systems, each concerning a particular group of territories. The Trusteeship System by the mid-1990s had settled the matter of the Trust Territories, all of which by then had attained a final status.[38] The Chapter XI system, concerning Non-Self-Governing Territories, continues in operation. States administering territories which have not attained full self-government have certain obligations under Chapter XI. Not only are their inhabitants to be considered 'born free and equal in dignity and rights' (under the 1948 *Universal Declaration of Human Rights*), but as set out in Article 73, the administering powers

> accept as a sacred trust the obligation [among others] … to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

The Trusteeship System also made Trust Territories an object of regulation under the *Charter*. The Trusteeship provisions say that the territories to which they apply shall be promoted either to 'self-government' or to 'independence.' 'Independence' here refers to statehood.[39] Because Chapter XI has been by far the more productive mechanism for State creation[40] and, unlike the Trusteeship system, remains in operation today, Chapter XI merits the greater attention.

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[38] Palau, the last territory subject to the Trusteeship System, elected final status in 1994: *Security Council resolution on termination of the status of Palau as a Trust Territory*, SC Res. 956, UN SCOR, 1994, UN Doc. S/RES/956 (1994); *Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands,* UN SCOR, 49th Sess., Spec. Supp. No. 1, UN Doc. S/1994/1400 (1994). Proposals since then have not resulted in new tasks being assigned to the Trusteeship Council, which, as a principal organ of the United Nations absent *Charter* amendment, will continue to exist, even if unused. See the Maltese proposal—*Letter dated 2 June 1995 from the Permanent Representative of Malta to the United Nations,* UN Doc. A/50/142—and tepid response: Secretary-General, *Review of the Role of the Trusteeship Council: Report of the Secretary-General,* U.N. Doc. A/50/1011 (1 August 1996), discussed in James Crawford 2006, *supra* note 29 at 601. See further Ralphe Wilde, 'Trusteeship Council' in *The Oxford Handbook* 149, *supra* note 9 at 155-56; Kamil Idris & Michael Bartolo, *A Better United Nations for the New Millenium: The United Nations System—How it is now and how it should be in the future* (The Hague: Kluwer Law International, 2000) 35 at 151-52.

[39] Independence is the 'central criterion' of statehood: James Crawford 2006, *supra* note 29 at 62-89.

[40] Over eighty new States emerged under Chapter XI; around a dozen under the Trusteeship system: see tabulation in *ibid.* at 741-56.

Neither the word 'State' nor its cognate 'independence' appears in Chapter XI. It may be said, then, that the creation of new States is not an explicit requirement on the face of this central decolonization provision of the *Charter*. Chapter XI, in other words, does not say that every colony is to become a State. At the same time, Chapter XI says that the States responsible for Non-Self-Governing Territories have duties with respect to the Territories. This is not merely hortatory language; it is the language instead of legal rules ('accept as a sacred trust the *obligation*'). Chapter XI furnishes the outline of a legal mechanism by which certain dependent territories are to be decolonized.

In practice, as already said, decolonization as regulated under the *Charter* would prove the most productive mechanism for State creation in the 20th century—yet Chapter XI, under which the greater number of colonies became States, does not prescribe statehood as the final disposition for colonial questions. It came to be an engine for State creation, because it was implemented in practice in a particular way. This was a matter of legal evolution. The development of *Charter* law was instrumental to an efflorescence of new States under Chapter XI.

In any legal evolution, terms and usages—i.e. words and their customary use or employment—are of central importance. In international law as it concerns decolonization, the right to 'self-government'—the term used in Article 73—is not synonymous with a right to create a new State, and as noted, Chapter XI says nothing about creating new States. Nor is the legal right to 'self-determination' a right to create a new State—even though, as will be seen, in special circumstances self-determination may entail that right. Yet self-determination and its cognates (self-government, etc.) are easily mistaken to be synonymous with State creation. One therefore must specify the legal character of self-determination; and, moreover, the relations between self-determination, State creation, and Non-Self-Governing Territories, if these terms and their mutual relations are to be made intelligible. With these concepts clarified, one then may consider the practice of the General Assembly, in particular how the General Assembly came to decide which territories are to be designated Non-Self-Governing Territories; and what specific obligations the General Assembly interpreted the rather general terms of Chapter XI (e.g. 'to take due account of the political aspirations of the peoples') to impose on member States administering Non-Self-Governing Territories.

1. Self-determination and its limits

Every Chapter XI Non-Self-Governing Territory, by virtue of its status as

such, possesses the right to self-determination. The International Court, in its Advisory Opinion on *The Legal Consequences for States of the Continued Presence of South Africa in Namibia*, was clear on the point: '[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.'[41]

But the words 'enshrined in the Charter of the United Nations' have to be qualified. The *Charter* plainly enough sketches a basic outline of a decolonization system relative to Non-Self-Governing Territories. The *Charter* in this rather general sense indeed 'enshrines' that there will be a decolonization system. The *Charter* does not, however, set out more than a general plan. In short, it does not say what the endpoint of decolonization will be for any given territory or how it will get there. Nor does the *Charter* name the territories subject to the general decolonization plan or otherwise guide the UN in determining which territories these might be. The full mechanism of decolonization and the special application of self-determination that came to be associated with decolonization must be referred to the 'subsequent development of international law.' This took place in large part in the General Assembly.

Before and during the UN era, State practice also further specified the meaning of self-determination in international law. When Wilson adopted the term 'self-determination,' diplomats like Robert Lansing feared that it entailed an unlimited invitation to dependent peoples to break off and establish new states.[42] If that is really what self-determination meant in law, then it must be evaluated with some caution. Institutionally there are good

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[41] *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16 at para. 52 [*Namibia* (ICJ)]. See also *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 at para. 55 [*Western Sahara* (ICJ)]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 88.

[42] Lansing's remark is widely-quoted:

> The phrase is simply loaded with dynamite. It will raise hopes which can never be realised. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realise the danger until too late to check those who attempt to put the principle in force. What a calamity that the phrase was ever uttered! What misery it will cause!

Robert Lansing, *The Peace Negotiations, A Personal Narrative* (Port Washington, NY: Kennikat Press, 1921) at 97-98.

reasons for communities to aggregate in larger groups and for existing groups not to fracture into smaller ones. The very definition of self-determination, moreover, was a source of much contention: 'UN delegates ... debated the meaning of self-determination, with [developing world and socialist States] favouring an anti-colonial definition of external self-determination, and [the more affluent Western states] promoting internal self-determination or democracy as paramount.'[43]

The diplomats' fear however was misplaced, for the right to self-determination as a matter of general application under law was to be viewed by States as considerably narrower than what the looser vocabulary of politics or statecraft might have suggested. It is now well-established that self-determination as a right is not the same thing as self-determination as a principle.[44] Self-determination does not, as a right, in all circumstances mean a right to independence. Only in special circumstances does self-determination equate to State creation. The right to self-determination is better expressed as a right to participate, on a basis of equality and fairness, in the government of a State. According to the Supreme Court of Canada in the *Quebec Secession Reference*,

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[45]

More will be said shortly about the right to secession, such as it is. The main point of immediate interest is that self-determination was not introduced into the *Charter* as an unlimited license allowing every group to choose to which State it wishes to belong. If the State to which a group belongs at present is satisfying its obligations to the group, then it is as part of that State that the group exercises the right to self-determination.[46]

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[43] See Neta Crawford, *supra* note 25 at 316-17.

[44] Hurst Hannum, *Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 48-49 [Hannum].

[45] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 126 [emphasis in original]. See also paras. 122, 127-30 [*Quebec Secession Reference*].

[46] Article 25 of the *International Covenant of Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [*ICCPR*], sets out particular rights of citizens.

The attachment of the condition that the State satisfy its obligations means, for at least some groups in some circumstances, that there is an alternative to remaining part of the existing State. An obligation breached entails a remedy.[47] As said, self-determination can involve State creation. There are two main situations in which self-determination may equate to a right to create a new State.

First, independence (i.e. statehood) may be, *in extremis*, the only remedy by which to secure the right to self-determination. The usual situation is that in which a community, existing within an already-established State, exercises its right to self-determination by participating in the government of the State. By and large, though not always, the community (a people) is likely do so in the company of other groups, and only the will of all the groups in the State controls the disposition of the State. (This is not to discount the disproportionate influence retained by the elites in effectuating favourable changes or maintaining the status quo.[48]) If the constitutional order in the

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These well may be taken as necessary, if a state is to satisfy its obligations relative to internal self-determination:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
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> (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) to have access, on general terms of equality, to public service in his country.

Further provisions concerning a right to participation in government include Art. 5(c) of the *Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660. U.N.T.S. 210, 220 (entered into force 4 January 1969); Art. 13 of the *African Charter on Human and People's Rights*, 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 1520 U.N.T.S. 217, 248 (entered into force 21 October 1986); Arts. 2 & 3 of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN GAOR, 47th Sess., Annex, Agenda Item 97b, UN Doc. A/RES/47/135 (1992); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN GAOR, UN Doc. A/CONF.157/23 (1993) at para. 2; Arts. 15 & 20 of the Council of Europe, *European Framework Convention for the Protection of National Minorities*, 1 February 1995, C.E.T.S. No. 157, 2151 U.N.T.S. 246, 250, 251 (entered into force 1 February 1998); multiple provisions of *Inter-American Democratic Charter*, OAS, General Assembly, 28th Spec. Sess., OR OEA/Ser.P/AG/Res.1/XXVIII-E/01 (2001).

[47] *The Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, (1925), P.C.I.J. (Ser. B) No. 3 at 21; *The Factory at Chorzów (Claim for Indemnity) (Merits)*, (1928) P.C.I.J. (Ser. A) No. 17 at 29.

[48] See Neta Crawford, *supra* note 25 at 257; Campbell L. Upthegrove, *Empire by Mandate: A*

State prevents a people from participating in the government of the State, then their right to self-determination is exercised, in the first instance, by using pacific means to change the national constitutional order so as to allow them to participate. International law says little, if anything, about the processes by which the national constitutional order in such cases is to be changed.[49] Cases arising under Article 25 of the *ICCPR*, e.g. *Marshall v. Canada (Mi'kmaq case),*[50] suggest that national authorities retain extensive, if not total, discretion as to the processes.

Where all peaceful attempts at changing the national constitutional order fail, and especially where the group is subject to gross violations of fundamental rights (e.g. genocide), then the group may, possibly, exercise self-determination in a different way. The group, in extreme circumstances of a denial of self-determination in which peaceful change within the existing State has proved unattainable, may exercise self-determination by breaking off and establishing its own State. This is the possibility of 'remedial secession.' It is an exceptional situation, and it rarely arises. Kosovo would appear to be an example—and the slowness and complexity entailed in its eventual separation from Serbia goes to illustrate the presumption against independence as a remedy.[51] The threshold condition is that the incumbent

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History of the Relations of Great Britain with the Permanent Mandates Commission of the League of Nations (New York: Bookman Associates, 1954).

[49] See generally Thomas M. Franck & Arun K. Thiruvengadam, 'Norms of International Law Relating to the Constitution Making Process' in Laurel Miller & Louis Aucoin, eds., *Framing the State in Times of Transition: A Comparative Study of Constitution Making Processes* (Washington, D.C.: United States Institute of Peace, forthcoming); and Vivien Hart, 'Constitution Making and the Right to "Take part" in a "Public Affair"', in *ibid*.

[50] See especially para. 5.5:

> It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).

UN Human Rights Committee, Communication No. 205/1986, 43rd Sess., UN Doc. CCPR/C/34/D/205/1986 (1991) at 40.

[51] The Security Council in authorizing the UN administration of Kosovo was clear that Serbia's right to preserve its territorial integrity is presumptive. The Council '[r]eaffirm[ed] the

State has failed to satisfy its obligations to a group, and the best efforts of the group to secure its right to participate on a basis of equality and fairness in the government of the State are to no avail. When those efforts are met with even more serious violations of the group's rights, then self-determination is perhaps realized only by breaking away and establishing a new State. Independence remains the exceptional remedy, and to assert it a group must overcome the presumption, vigorous in all events, that favours preserving the territorial integrity of existing States.[52]

Obviously it is less than likely that social, political and economic circumstances in *all* colonies were such as to justify secession under a standard as exacting as that posited under the rubric of remedial secession. In some colonies, the alien administration was characterized by atrocity; but it was not in all colonies that the alien administration perpetrated genocide. The range was considerable. Yet the UN decolonization process, as regards most of the territories with which it has dealt, has created independent States as its result. There is, then, a second situation in which self-determination

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commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia'; *Resolution 1244*, UN SCOR, 4011th Mtg., UN Doc. S/RES/1244 (1999), preamble [*Resolution 1244*]. The international civil presence constituting the interim administration for Kosovo was described as providing for 'substantial autonomy' (*ibid.* at para. 10) or 'substantial self-government' (*ibid.*, Annex 2 at para. 8), which was deliberately to avoid saying that the territory had acquired a right to independence.

The United States position has evolved with changes in the territory itself. The view eventually took shape among American policy makers that independence is the appropriate final status for Kosovo. See U.S., *The outlook for the independence of Kosova: hearing before the Committee on Foreign Affairs*, 110th Cong., 1st Sess., (2007). The Contact Group (France, Germany, Italy, Russian Federation, United Kingdom, and United States with participation of the European Union) in 2006 under UN Special Envoy Martti Ahtisaari began a process respecting final status. The deadline for the process was 10 December 2007. The deadline passed without result. The declaration of independence came after that. See generally Ambassador Frank Wisner, Secretary of State's Special Envoy for Kosovo Final Status Talks, 'Kosovo Final Status Issues', (Foreign Press Center Briefing), (4 April 2007), online: <http://merln.ndu.edu/archivepdf/EUR/State/82674.pdf >; International Crisis Group, *Kosovo's Final Status* (August 2007), online: <http://www.crisisgroup.org/home/index.cfm?id=3225>; Daniel Serwer, 'Kosovo: Breaking the Deadlock' (September 2007), online: U.S. Institute of Peace <http://www.usip.org/resources/kosovo-breaking-deadlock>. For an earlier review, see Epaminontas E. Triantafilou, 'Matter of Law, Question of Policy: Kosovo's Current and Future Status under International Law' (2004) 5 Chicago J. Int'l L. 355.

[52] The Advisory Proceedings on the Unilateral Declaration of Independence of the Provisional Institutions of Self-Government of Kosovo well may produce substantial indications of State practice on the status of a principle of remedial secession.

may equate to a right to create a new State: a Non-Self-Governing Territory as of right may choose independence in the final settlement of its international legal status. The General Assembly established this position by developing Chapter XI in a particular way.

2. The General Assembly develops the law: options for final status and setting the pace of decolonization

Non-Self-Governing Territories, through the development of the law of the UN *Charter* in the resolutions of the General Assembly, came to be a case for the special application of the right to self-determination. The people of a Non-Self-Governing Territory, as indicated by the International Court, possess the right *ipso facto*. In itself, this does not distinguish the people of a Non-Self-Governing Territory from other peoples. As already noted, all peoples possess the right to self-determination.

The distinguishing characteristic of the Non-Self-Governing Territory is that the people of such a territory, without any special showing of fact, have the right to establish a new State. For the people inhabiting a Non-Self-Governing Territory, in contrast to other peoples, the presumption against independence as a remedy is displaced. By its very designation, a Non-Self-Governing Territory is a territory to which self-determination applies. This is subtly, but crucially, different, from saying simply that a group in a territory enjoys the right to self-determination. It says, instead, that the group constituting the population of a Non-Self-Governing Territory not only has the right to self-determination (as all groups do), but that it has the right *as pertains to the territorial unit so designated.* The people of a Non-Self-Governing Territory alone control the destiny of the territory.[53] Though the right of self-determination belongs to all communities existing within established States, it does not entail a right for every group in every territory to dispose of the territory as it wishes. It is through their entitlement to control a designated territory—without deference to any existing State or to any other group—that the people of a Non-Self-Governing Territory come to possess a right to elect statehood as final disposition. In the other situation, instanced above, in which self-determination may involve a right to independence, the group claiming the right faces the formidable hurdle of showing that the State to which it belongs has committed such gross

[53] To paraphrase Judge Dillard in his Separate Opinion in the *Western Sahara* Advisory Opinion, *supra* note 41 at 122, who had said, 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people.'

violations of basic human rights as to have forfeited the usual conserving power of sovereignty.

The designation of a territory as a Non-Self-Governing Territory is therefore a special juridical event, for it removes the presumption of territorial integrity by cognizing the colonial territory as legally distinct from the territory of the administering State.[54] This is the significance of Chapter XI as it has been developed by the General Assembly. All peoples have a right to self-determination; but the people of a Non-Self-Governing Territory, by virtue of the designation of their territory as colonial, to create a new State need simply give free expression to their desire to do so.[55]

Two main resolutions of the General Assembly developed this area of *Charter* law and resulted in the special right described above. Each resolution merits consideration. First, the General Assembly in 1960 adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (*Colonial Declaration*).[56] In the *Declaration* the matter was taken up, of what status a colony might elect. The *Colonial Declaration* called on States 'to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire.' In terms similar to the Bandung Conference of 1955, the *Declaration* condemned colonialism as a 'denial of fundamental human rights' (individual right) and condemned it as 'alien subjugation, domination, and exploitation' (collective right). While this perhaps indicates a preference for independence, the *Colonial Declaration* does not make independence a requirement in so many

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[54] See *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)*, [2001] I.C.J. Rep. 40 at para. 447, Judge Ad Hoc Torres Bernárdez, dissenting.

[55] *Western Sahara* (ICJ), *supra* note 41 at para. 55. A related effect of the designation is that the inhabitants of a Non-Self-Governing Territory indeed are a 'people' for purposes of self-determination, as distinguished from undifferentiated elements of a larger population. This establishes a position that, in other situations, can be contentious: Hannum, *supra* note 44 at 34-36, 45-46.

[56] GA Res. 1514(XV), UN GAOR, 15th Sess., Agenda Item 87, UN Doc. A/RES/15/1514 (1960). Abstaining were Australia, Belgium, the Dominican Republic, France, Portugal, Spain, South Africa, the United Kingdom, and the United States. On the *Declaration* generally see Patrick Thornberry, 'The Principle of Self-determination' in Vaughan Lowe & Colin Warbrick, eds., *The United Nations and the Principles of International Law: Essays in memory of Michael Akehurst* (London: Routledge, 1994) 175 at 178-79 [Thornberry]. The drafting history is set out by Kay, *supra* note 31 at 789-93.

words.[57] It is noteworthy that the *Declaration* describes colonialism as a violation of both collective and individual rights. The 'legal value' in 'the doctrine of fundamental rights' has cut across areas to include 'human rights' as varied as 'self-preservation, respect, international commerce, independence, and equality.'[58] In addition, it has 'made States more willing to accept the paramountcy of international legal rules.'[59]

A further resolution of the 1960 session was more specific. General Assembly Resolution 1541(XV) of 15 December 1960[60] declared a set of principles respecting decolonization. Principle VI says:

> A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
>
> (a) Emergence as a sovereign independent State;
> (b) Free association with an independent State; or
> (c) Integration with an independent State.

This was a crucial statement. Principle VI of Resolution 1541 makes clear that a people, existing as a colony dependent on a foreign State, may elect any one of three distinct statuses as its final disposition. It is here that the General Assembly made clear that independence is a status which the Non-Self-Governing Territory may elect in final settlement of the administering power's obligations under Chapter XI. The General Assembly also made clear that there exist two other options which settle those obligations. Non-Self-Governing Territories thus came to have the right to freely elect their final status when exercising their right to self-determination.[61] The

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[57] Nor does the language of para. 3 of Common Article 1 of the 1966 Covenants:

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3,5 (entered into force 3 January 1976) [*ICESCR*]; *ICCPR*, *supra* note 46. The United States is party to *ICCPR*; and has signed but not ratified *ICESCR*.

[58] See Bengt Broms, 'The Doctrine of the Fundamental Rights and Duties of States' in Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects* (Leiden: Martinus Nijhoff: 1991) 57.

[59] *Ibid*.

[60] *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, GA Res. 1541(XV), 15th Sess., (1960).

[61] Notice the addition in the *Friendly Relations Declaration* of a fourth choice, 'any other political status':

> 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

administering power discharges its obligations—for purposes of Chapter XI—by respecting and implementing the final status so elected.

The International Court of Justice, in the advisory opinion on *Western Sahara* (1975), affirmed that the disposition of a colonial relationship may entail any one of the designated final statuses,[62] and independence has not been the choice in practice of every Non-Self-Governing Territory electing its final disposition. A number of territories have preferred associated statehood.[63] Palau, the Marshall Islands, and the Federated States of Micronesia are cases in point. Tokelau, one of the sixteen territories still inscribed on the list of Non-Self-Governing Territories, held a referendum in February 2006, in which its inhabitants considered free association with New Zealand as a possible final status; the Tokelauans chose not to change their relation to the administering State at all, and so Tokelau remains a Non-Self-Governing Territory.[64] Independence was the final disposition preferred by the majority of Non-Self-Governing Territories between 1945 and the present, but this was a choice of disposition adopted by the communities concerned.[65] Statehood, then, is not the only disposition available to the

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> freely determined by a people constitute modes of implementing the right of self-determination by that people.

The principle of equal rights and self-determination of peoples, in *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971) [*Friendly Relations Declaration*].

[62] *Western Sahara* (ICJ), *supra* note 41 at para. 57. See also *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application by the Philippines for Permission to Intervene)*, [2001] I.C.J. Rep. 575 at para. 12, Judge Ad Hoc Franck, separate opinion.

[63] For a definition and extended analysis, see Masahiro Igarashi, *Associated Statehood and International Law* (Leiden: Martinus Nijhoff, 2002). See also James Crawford 2006, *supra* note 29 at 625-33; Hannum, *supra* note 44 at 384-89.

[64] See Deputy-Secretary General, News Release, DSG/SM/280, UN Doc. GA/COL/3129, 'With 16 Territories Still to Decide Future, United Nations Work for Decolonization Remains Unfinished, Says Deputy Secretary-General in New York Remarks' (23 February 2006).

[65] The optional character of independence was explicit in the *Charter* as respected the other, now closed, category of dependent territory, Trusteeship Territories. Article 76(b), under Chapter XII, specifies as one of the purposes of the Trusteeship System

> to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.

The conjoiner 'or' between 'self-government' and 'independence' reflects the intention of the

sixteen territories remaining on the list of Non-Self-Governing Territories—or to territories that might in the future be treated as Non-Self-Governing.

As Chapter XI says nothing as to the final disposition that will satisfy the obligation of administering States to promote their colonies to 'self-government,' so too is it silent as to the timing of final disposition. Venezuela, in its submission in the *Competence of the General Assembly* advisory proceedings, put it as follows:

> [L]a Charte confirme l'existence du système de gouvernement des territories non autonomes, et cependant personne ne pourrait soutenir… que ces territories doivent être rendus immédiatement indépendants… ce qui serait une veritable transgression des dispositions de la Charte [!][66]

A position that the Non-Self-Governing Territories 'should be rendered independent immediately' did not follow from the *Charter* text. It is again to the practice of the General Assembly that one must turn for the fuller development of the law of decolonization.

The General Assembly introduced the idea, and, arguably, turned it into an imperative of collective action, that colonies elect their final disposition without delay. Paragraph 5 of the *Colonial Declaration* requires that '[i]mmediate steps … be taken'. Subsequent resolutions call for 'immediate and total application' of the *Declaration*.[67] The *Colonial Declaration* also made clear that the internal conditions of a dependent territory are not to be pleaded as grounds for delaying independence. Paragraph 3 of the *Declaration* states, 'Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.' The word 'pretext' might leave some room for interpretation: perhaps if

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States adopting the *Charter* to design a decolonization process without prejudice as to the precise form of final disposition. And the inclusion under Chapter XII of a more explicit statement of possible end-points to decolonization reflects the distinct nature of Trusteeship Territories. Though the location of sovereignty in any colonial situation is likely to be hard to state with certainty, it was often supposed that Mandates, or at least A Class Mandates, possessed sovereignty and were, in some sense, international legal persons, even if 'submerged' or with many incidents of their rights exercised by another State. This position continued, when mandated territories were transferred to the UN Trusteeship System in 1945. As such, the territories under Trusteeship were more readily presumed to be on a course toward statehood. The inclusion of independence as an option for Trust Territories in the text of the *Charter* itself may be explained on this ground.

[66] *Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] I.C.J. Pleadings 152.

[67] E.g. *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1956(XVIII), UN GAOR, (1963) at para. 4.

'inadequacy of … preparedness,' rather than a contrived ground for delay (i.e. a 'pretext'), was a real fact in the territory in question, then a delay might be countenanced. That is not, however, how the Assembly in subsequent practice interpreted it. Rapid decolonization was required, and this was joined to a widespread preference in the territories in question for independence over other forms of final status.

It was not a necessary result of the *Charter* that decolonization took place so rapidly; or a necessary result that the vast majority of colonial territories became States. The *Charter* dictates neither pace nor final destination. The results in practice were contingent upon interpretations developed after 1945, especially in the General Assembly, and upon political considerations wholly or partly exogenous to the *Charter*. Such political factors worked in combination with the legal interpretations arrived at by the General Assembly and expressed in the *Colonial Declaration*, Resolution 1541, and contemporaneous resolutions. The *Charter* sets out a general framework for decolonization, but the determinants of the precise contour that decolonization in practice assumed are found elsewhere.

A further matter, not specified in the *Charter*, is the modality by which particular territories are to be inscribed on the so-called decolonization list—the list of territories declared Non-Self-Governing Territories for the purposes of Chapter XI and thus exercising self-determination on the special terms described. How the General Assembly eventually specified both a modality and criteria for designating territories as Non-Self-Governing has been a central feature in the role of the UN as a regulator of State creation.

V. Regulating Latter-day Decolonization

John Dugard, in the book based on his 1986 Lauterpacht Memorial Lecture, was right when he said that 'it is unlikely that the founding fathers of the Charter could have foreseen the changes which have been effected in the field of colonialism under the mantle of the Charter's carefully phrased provisions.'[68] It would ignore the history to say that a stable continuation of the *Charter*'s decolonization system is all but certain. As noted, sixteen territories remain on the decolonization list. Most are small islands.[69] Like

[68] Dugard, *supra* note 23 at 64.

[69] This is different from saying that they are unimportant. The exclusive economic zones which extend from the baselines of small island States are already of economic and political

the Non-Self-Governing Territories already having attained final status, these may elect any one of the three forms of final status enumerated under Principle VI of General Assembly Resolution 1541. That is how self-determination has been operationalized under Chapter XI of the *Charter*. When considering the remaining territories on the decolonization list, a question is presented: are these territories to be the last? To answer the question, it is necessary to return to the questions set out immediately above: how has it been decided so far which territories to inscribe on the decolonization list as Non-Self-Governing Territories? What are the criteria for treating a territory as non-self-governing for purposes of Chapter XI? Because every Non-Self-Governing Territory may, of right, become a State, the process by which a territory becomes a Non-Self-Governing Territory is of considerable importance in regulating the creation of States.

1. Determining the territories subject to the decolonization system

The territories ascribed non-self-governing status have to date been those of the classic colonial type. As such, they are a closed set. Nobody expects European colonial empires to be resuscitated[70] and the supply of classic colonial territories thus to be refreshed. By contrast, groups of human beings dissatisfied with existing government constitute, if not an unbounded set, then a category of considerable extent. Asking whether further territories are to be inscribed on the decolonization list is therefore the same as asking whether the status of Non-Self-Governing Territory, with its attendant special entitlement to form a new State, is to be extended to groups in territories other than those of the classic colonial type.

An account is necessary of how the colonial territories came to be the

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importance. If exploitation of deep sea resources increases significantly, then the importance of some Non-Self-Governing Territories would increase. Following admission of several small island States to the UN, I noted a legal problem that might surface in this connection: see Thomas D. Grant, 'States Newly Admitted to the United Nations' (2000) 39 Colum. J. Transnat'l L. 177 at 191. See also Commonwealth Heads of Government Meeting, Malta (25-27 November 2005), 'Gozo Statement on Vulnerable Small States' at para. 6, online: <http://www.humanrights initiative.org/cwhr/decdoc/2005/gozo_statement_on_vulnerable_small_states.pdf>. An agenda item on the interests of small island States was proposed, but held in abeyance, at the twelfth session of the Conference of the Parties to the UN Framework Convention on Climate Change, 'Report of the Conference of the Parties' (6-17 November 2006) UN Doc. FCCC/CP/2006/5 (2007) at paras. 21-24. The Conference is the international organization established under Article 7 of the *Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 164 (entered into force 21 March 1994).

[70] Pace Gérard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Martinus Nijhoff, 2004).

ones subject to Chapter XI. Decolonization to date has involved classic colonies—that is to say, colonies of European powers not contiguous to the colonizing State. The so-called 'salt water rule' was itself a development of UN practice, rather than a proposition etched in the *Charter*. The rule, in short, was as follows: to classify as a colony for purposes of the *Charter*, a territory must be an overseas colony—a colony separated from the administering State by the sea. The rule was alluded to, for example, in Principle I under General Assembly Resolution 1541 (1960): 'The authors of the *Charter* of the United Nations had in mind that Charter XI should be applicable to territories which were then known to be of colonial type.' Principle IV under the same resolution stated, '*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.'

Yet, it will be noted, the term 'geographically separate' in Resolution 1541 obtains its content from practice and from the phrase 'should be applicable to territories which were then known to be of colonial type.' Territories 'known to be of colonial type' in 1945 were the overseas territories of the European powers and of the United States. It was in this way that the resolution incorporated the salt water rule: the 'separate' to which Principle IV referred meant 'separate' by virtue of non-contiguity, such as the non-contiguity of France and the Territory of the Afars and the Issas[71] or of the Netherlands and West Irian.[72] However, the words 'geographically separate,' in a plain reading, could mean separate by virtue of land rather than sea; and, perhaps, even by administrative boundaries, rather than distance. The ICJ Advisory Opinion of 1971 on Namibia contains a suggestion, perhaps, of how the definition of 'colony' might be broadened. South Africa took the position that it was not answerable to the Trusteeship Council for its administration of Namibia, the former German colony that had been placed under South African control after World War I pursuant to the mandatory provisions of the League of Nations Covenant. The Court rejected that 'considerations of geographical contiguity' (as between South Africa and Namibia) prevented application of the Trusteeship System.[73] This was a case with many particularities, and the Court was guided by the

[71] Independence in 1978 as Djibouti: <http://www.un.org/en/members/index.shtml>.
[72] Irian Jaya (or West Papua) incorporated into Indonesia in 1963 after UN interim control.
[73] *Namibia* (ICJ), *supra* note 41 at para. 54.

special status of South West Africa as a former Mandate of the League of Nations. But pleadings of special status are not likely to have been exhausted by the winding up of the Trusteeship System.

It has been pointed out elsewhere that decolonization under the UN *Charter* in its short history already has gone through several stages.[74] The first was based on voluntary participation. States which were in possession of colonies in 1946 were invited to submit lists of them, and States which did so did so at their own election. By listing a territory as a colony, the administering State acknowledged that it was under the obligation, set out in *Charter* Article 73(e), to transmit information to the Secretary-General concerning the listed territory.[75] Thus at first each colonial power was left to apply Chapter XI according to its appreciation of the characteristics of the territories for which it was responsible.

The next stage began when the General Assembly undertook to extend the role of the UN in decolonization. Writers rightly have identified this as one of the major examples of the constitutional development of the *Charter*.[76] The Assembly determined in 1960 that certain dependant territories were to be treated as Non-Self-Governing Territories for purposes of Chapter XI, even though the administering power had not acknowledged them as such.

This development, significant in the legal history of decolonization, was a response to the problem of the overseas territories of Portugal and Spain. The two Iberian States had insisted that their overseas territories were legally integral provinces, not colonies.[77] From a political standpoint, it was clear

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[74] Grant 1999, *supra* note 34 at 33-39.

[75] *Transmission of Information Under Article 73e of the Charter*, GA Res. 66(I), UN GAOR, (1946).

[76] E.g. Ralph Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (Leiden: Martinus Nijhoff, 2005) at 188-95.

[77] According to the Portuguese permanent representative,

> Portugal does not administer any territories covered by Article 73, sub-paragraph (e), of the Charter… Thus the Portuguese people, by strength of spirit, not by force of arms, became one people dispersed throughout four continents, and kept a genuine feeling of community united by the same national faith. This social reality cemented by centuries, this absolute unity of the Portuguese people, makes us a certainly unusual example of an egalitarian, multi-racial society, corresponding with a political unity of all territories … The Portuguese estate is a unitary republic with only one Supreme Court which secures the equal interpretation of the law to all. There is only one national Assembly elected by direct universal suffrage. As a final result of these realities, the sovereignty of the Portuguese nation is one and indivisible, and it cannot, therefore, acknowledge any specific international status which would differentiate between parts of the same national territory.

Dr J. Socrates Da Costa (Portugal), UN GAOR, 14th Sess., 823d Plen. Mtg., (1959) at paras. 188-

that this was a fiction, for the territories in question did not participate in Portuguese or Spanish government on anything like an equal footing with the contiguous provinces. If self-determination is a viable currency in this discourse, then so is self-representation in the workings of one's national political process, which of course was not the case for the African territories or Portugal and Spain. Regarding Portugal in the mid-1950's, Kenneth Maxwell has observed that 'the large surplus from the African territories would be painful to lose.'[78] Portugal and Spain both posited fictive constitutional relations so as to retain it.

But the purported internal legal disposition was soon to be placed under international scrutiny. The General Assembly appointed a Special Committee to examine the case of States refusing to transmit information, and 'to enumerate the principles which should guide Members in determining whether or not an obligation exists to transmit information called for in Article 73e.'[79] The Special Committee adopted a report, setting out proposed principles to guide member States in determining whether an Article 73(e) obligation pertained to a given territory.[80] The principles recommended in the report were the basis for the main provisions of General Assembly Resolution 1541 in which a definition is elaborated of 'Non-Self-Governing Territory.'

The next step was to apply the provisions in actual cases. The General

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89. Spain, for its part, said

> Spain possesses no Non-Self-Governing Territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain. Consequently, the Spanish Government does not regard itself as affected by Article 73 which refers to Non-Self-Governing Territories, of which there are, legally speaking, none within the Spanish administrative system.

Communication to the Secretary-General from the Permanent Representative of Spain, UN Doc. A/C.4/385 (1958).

[78] See Kenneth Maxwell, 'Portugal and Africa: the Last Empire' in Prosser Gifford & Wm. Roger Louis, eds., *The Transfer of Power in Africa: Decolonization 1940-1960* (New Haven: Yale University Press, 1982) at 337-38, 347-48.

[79] *General questions relating to the transmission and examination of information*, GA Res. 1467 (XIV), UN GAOR, 855th Plen. Mtg., (1959) at para. 1.

[80] *Report of the Special Committee of Six on the Transmission of Information (Non-Self-Governing Territories)*, UN Doc. A/4526 (3 October 1960) a.i. 38. The members of the Special Committee were India, Mexico, Morocco, Netherlands, United Kingdom, and United States: see Report at para. 2.

Assembly did this when it adopted Resolution 1542. Applying the provisions set out in Resolution 1541, the General Assembly, in Resolution 1542, determined that the colonial territories of Portugal constituted Non-Self-Governing Territories for the purposes of Chapter XI.[81] This was the first time a colonial power came to be subject to an Article 73(e) obligation to transmit information relative to its colonies as against its own position that it was not required to designate them as non-self-governing. The General Assembly, in the words of the International Court of Justice, from that point forward 'reserve[ed] for itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter.'[82] What initially had been a voluntary determination for each colonial power to make, from 1960 onward equally belonged to the functions of the General Assembly. For colonial powers that insisted that a territory like Mozambique could be a province of Portugal, this was a consequential development.[83]

The following observations may be made, with respect to the development of the decolonization provisions of the UN *Charter* to date:

(i) The elements that have gone to identifying a territory as one appropriate for designation as a Non-Self-Governing Territory ('geographically separate and ... distinct ethnically and/or culturally

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[81] *Transmission of Information Under Article 73e of the Charter*, GA Res. 1542(XV), UN GAOR, 15th Sess., (1960). Spain just before had relented and agreed to list its colonies for Chapter XI purposes: *ibid*., preamble. The Portuguese territories listed in Resolution 1542were the Cape Verde Archipelago; Guinea (Portuguese Guinea); São Tomé and Príncipe, and their dependencies; São João Batista de Ajudá; Angola, including the enclave of Cabinda; Mozambique; Goa and dependencies ('State of India'); Macau and dependencies; and Timor (East Timor) and dependencies: *ibid*., at para. 1. Portugal in November 1966 would seek to have UNESCO request an advisory opinion on the treatment of its colonies. No opinion was requested: *The Law and Practice of the International Court, 1920-2005,* Vol. I: The Court and the United Nations, 4th ed. (Leiden: Martinus Nijhoff, 2006) at 338.

[82] *Case Concerning East Timor (Portugal v Australia)*, [1995] I.C.J. Rep. 90 at para. 31.

[83] The most recent non-voluntary listing is that of New Caledonia, on which France now is obliged to transmit information: *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 41/41(A), UN GAOR, 41st Sess., UN Doc. A/RES/41/41 (1986). Technically, this was a reinscription on the list of Non-Self-Governing Territories, as France had listed New Caledonia in 1946. Reinscription was judged necessary, because France had ceased to transmit information concerning the territory. The tendency of the General Assembly to extend its earlier interpretations of decolonization may be seen again in the language of paragraph 3 of the resolution, by which the Assembly '[a]ffirms the inalienable right of the people of New Caledonia to self-determination *and independence* in accordance with resolution 1514 (XV)' [emphasis in original]. A right to independence, as noted above, is not explicit in Article 73.

from the country administering it') in a general way support a position that the territory does not constitute part of the administering power for juridical purposes.

(ii) The formal identification of the territory as a Non-Self-Governing Territory, whether by the administering power or by the General Assembly, has the effect of crystallizing the position that it does not form part of the administering power for juridical purposes.

(iii) The actual characteristics of the territory and the legal construction applied to it under Chapter XI, taken together, have the corollary that to terminate colonial rule is not to derogate the territorial integrity of the administering power.

(iv) The corollary (non-derogation of territorial integrity) in turn has a significant result, for it facilitates the transformation of those colonies inscribed on the list of Non-Self-Governing Territories into new States.

The decolonization process, central to re-shaping the State system in the half century following World War II, started with the *Charter*, but the *Charter* did not determine its manner of implementation. Another factor was at work. Indeed, decisions reached over the first fifteen years of the UN era and chiefly in the General Assembly were central to determining how in practice decolonization would transpire. When considering how future developments in UN policy and *Charter* law might affect the State system—and how they might affect the stability of individual States in the system—the significant effect which practice has had on the implementation of the decolonization regime to date should be kept in mind.

2. Beyond decolonization: a right to secession?

That the territorial integrity of a State is presumptively non-derogable is well-established. It is indeed axiomatic. The *Friendly Relations Declaration*, in its provisions on a principle of self-determination, is a significant statement of the position:[84]

[84] On the *Declaration* generally, see Sir Ian Sinclair, 'The Significance of the Friendly Relations Declaration' in Vaughan Lowe & Colin Warbrick, eds., *The United Nations and the Principles of International Law: Essays in memory of Michael Akehurst* (London: Routledge, 1994) 1; and 'Principles of International Law Concerning Friendly Relations and Cooperation among States' in M.K. Nawaz, ed., *Essays on International Law in Honour of Krishna Rao* (Faridabad: Thomson Press, 1975) 107. And compare Article 1 of the 1966 Covenants. Frowein commented on the

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[85]

Self-determination therefore, according to the *Declaration*, is not to 'authoriz[e] or encourage[e] … dismember[ing]' a State. This is to state the axiom. But the *Declaration* contains a limiting clause: the presumption of territorial integrity is subject to the words 'conducting themselves in compliance … [etc]' and 'possessed of a government …'. That is to say, either of two situations may qualify the presumption of territorial integrity: (i) where a State does not 'conduct[] itself in compliance with the principle of equal rights and self-determination;' or (ii) where government has disappeared altogether. Each situation may be briefly considered.

The Supreme Court of Canada, in the *Quebec Secession Reference*, suggested that the *Friendly Relations Declaration*, where the former situation pertains, might furnish a basis for creating a new State outside the classic colonial context.[86] That situation did not however obtain in Quebec. Canada did not breach the principle of equal rights and self-determination in its treatment of the inhabitants of Quebec. 'The population of Quebec,' said the Court, 'cannot plausibly be said to be denied access to government.'[87] The Court nevertheless acknowledged the position that, where there has been 'a complete blockage' of internal avenues for participation, a group may have a right to establish a new State.[88]

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relation in the *Declaration* between the prohibition against use or threat of force and liberation movements fighting colonial domination: Jochen Abr Frowein, 'Friedenssicherung durch die Vereinten Nationen' in *Die Vereinten Nationen* 45, *supra* note 34 at 50-51.

[85] The principle of equal rights and self-determination of peoples in the *Friendly Relations Declaration*, *supra* note 61. Further resolutions concerning a situation in which a question of territorial integrity might arise likewise tend to affirm the right of the existing State to preserve its territorial integrity, e.g. *Resolution 1244*, *supra* note 51, preamble para. 10; *ibid.*, Annex 2 at para. 8.

[86] *Quebec Secession Reference*, *supra* note 45 at paras. 133-35.

[87] *Ibid.* at para. 136.

[88] *Ibid*. at para. 134. See also Patrick Thornberry on the limiting clause in the *Friendly Relations Declaration*, which, while noting the objections, he says possibly furnishes a legal basis for secession: Thornberry, *supra* note 56 at 181-83. Cf Dietrich Murswiek 'The Issue of a Right to Secession Reconsidered' in Christian Tomuschat, ed., *Modern Law of Self-Determination*

The position would have little practical effect under international law, however, unless international law—and the mechanisms of the UN which give decolonization law operation—are able to take cognizance of such circumstances of domestic government as amount to '[non-]compliance with the principle of equal rights and self-determination.' Under the first exception, the predicate to the unilateral declaration of independence of a community as a new State outside the colonial context is misconduct on the part of the incumbent State in the discharge of its internal functions of government, where the misconduct rises to the level of an international law violation. It once was the position that the way in which a State arranges its internal affairs, including how it treats its minorities and other groups, is not a matter for international law. While the exclusivity of the domestic jurisdiction of a State remains in significant part intact—it is authoritatively stated in UN *Charter* Article 2(7)—modern practice has qualified it.[89] International jurists have recognized,[90] and State practice reflects,[91] that the

(Dordrecht: Martinus Nijhoff, 1993) 21. The modern position relative to secession under international law is set out in detail in James Crawford 'State Practice and International Law in Relation to Secession' (1998) 69 Brit. Y.B. Int'l L. 85. For citations to further works on the scope of a possible right to secession, see Hannum, *supra* note 44 at 49, n. 166.

[89] On the growth of international law rules and principles qualifying the exclusivity of national jurisdiction, see José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005) 156 [Alvarez]; Raymond Goy, *La Cour internationale de justice et les droits de l'homme* (Brussels: Nemesis, 2002); and, generally, essays in Colin Warbrick & Stephen Tierney, eds., *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (London: British Institute of International and Comparative Law, 2006).

[90] E.g. Judge Jessup in his Separate Opinion in *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, [1962] I.C.J. Rep. 319 at 425:

> One type of illustration of this principle of international law is to be found in the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human beings in another country. In some instances States have asserted such legal interests on the basis of some treaty, as, for example, some of the representations made to the Belgian Government on the strength of the Berlin Act of 1885, concerning the atrocities in the Belgian Congo in 1906-1907. In other cases, the assertion of the legal interest has been based upon general principles of international law, as in remonstrances against Jewish pogroms in Russia around the turn of the century and the massacre of Armenians in Turkey. [citations omitted]

[91] Salient instances include Haiti (generally and with respect to its elections), Iraq (with respect to Kurdistan), and Serbia (with respect to Kosovo). Consider also international statements respecting Turkey and Russia, e.g. Council of Europe, Interim Resolution CM/ResDH (2007)25, 4 Apr 2007 (on Cyprus, including the *Xenides-Arestis* case); 'Violations of the ECHR in the Chechen Republic: Russia's compliance with the European Court's judgments,' Secretariat

conduct of governments in their internal affairs can be a matter of international interest. It is increasingly so. A State or multilateral organization is no longer debarred from expressing the judgment that a State in its conduct on its own territory has breached an international obligation implicating Chapter VII[92]—or has acted in violation of a principle such as non-discrimination.[93] A judgment to the effect that government in a particular State, for example, discriminates on the basis of religion or race, is thus now available—indeed, in practice, has been available, if not so often used, for some time.[94] On the terms of the *Friendly Relations Declaration*, at any rate, such a judgment may qualify the presumption that the borders of a State are not to be changed without the State's consent.[95]

There is also the second situation suggested in the *Friendly Relations Declaration*—that in which a State no longer has a functioning government at all ('… possessed of a government …' being a characteristic of the States to which is owed an obligation to respect territorial integrity). The recognition

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Memorandum CM/Inf/DH (2006)32, 12 June 2007.

[92] As in SC Res. 688, UN SCOR, 2982d Mtg., UN Doc. S/RES/0688 (1991), the first by the Security Council declaring that violations of human rights and humanitarian law in the territory of one State pose a threat to international peace and security.

[93] It has been over a generation since the United Nations system reached the judgment that Apartheid in South Africa was a breach of the principle of self-determination: *International Convention on the Suppression and Punishment of the Crime of Apartheid*, GA Res. 3068(XXVIII), UN GAOR, UN Doc. A/C.3/SR.2004 (1973) However, the individuals whose rights were breached constituted the people of all South Africa—itself a self-determination unit. The course to be taken, it was clear from the start, was revision of South African government, not dismemberment of South Africa. Indeed, partition was a tool of the architects of Apartheid, their handiwork the unlawful Homeland 'States.'

[94] Consider, e.g. GA Res. 917(X), UN GAOR, 10th Sess., (1955) at para. 4 in which the General Assembly

> [e]xpress[ed] its concern at the fact that the Government of the Union of South Africa continues to give effect to the policies of *apartheid*, notwithstanding the request made to it by the General Assembly to reconsider its position in the light of the high principles contained in the Charter and taking into account the pledge of all Member States to promote respect for human rights and fundamental freedoms without distinction as to race.

[95] Alvarez makes the related observation that the expansion of human rights has resulted in the expansion of 'the boundaries of the permissible UN intervention': *supra* note 89 at 169. It is also the case that in international investment disputes international standards may apply to the conduct of a State within its own borders toward a foreign investor. Consider the interpretation of fair-and-equitable treatment clauses in a number of arbitral awards: OECD, Directorate for Financial and Enterprise Affairs, Working Papers on International investment, No. 2004/3, 'Fair and Equitable Treatment Standard in International Investment Law,' online: OECD <www.oecd.org/dataoecd/22/53/33776498.pdf>.

of the constituent republics of the former Socialist Federal Republic of Yugoslavia as independent States in the early 1990s was said not to derogate the territorial integrity of the Federal Republic: the State had ceased to exist, so it had no integrity to protect.[96] What was just as clear, if not more so, was that the federal organs of the government of Yugoslavia had ceased to function, with the result that there was no single governmental structure effective over Yugoslavia as a whole.[97] Other States have continued to exist as States, and for lengthy periods, with no effective national government. Somalia is a present-day example.[98]

So far, the main situation in which a people have a presumptive right to create a new State is the situation dealt with under Chapter XI of the *Charter*. Apart from Trusteeship Territories, it is the only such situation.[99] The extent of the circumstances, however, where creating new States might be an option should not be assumed to meet its limit in Chapter XI as presently applied. Hector Gross Espiell, writing as Special Rapporteur on the Right to Self-Determination, described the right as having limited scope—i.e. 'a right of people under colonial and alien domination.'[100] But even in that cautious formulation, the possibility of extension is implicit, for 'colonial' and 'alien' domination are distinguished, the latter, arguably, encompassing situations

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[96] The position that Yugoslavia had disintegrated was central to *Completion of the process of the dissolution of the SFRY*, Opinion No. 8 (1992), 31 I.L.M. 1521 (European Arbitration Commission). The position in turn rendered moot the question of territorial integrity.

[97] The breakdown of federal structures was the factual predicate to the conclusion in Opinion No. 8, *ibid.*, that Yugoslavia as a State had ceased to exist. It was to take this observation a step further, to conclude from it that the SFRY had ceased to exist as a State.

[98] To support the position that the asserted statehood of Somaliland (a province of Somalia) does not derogate the territorial integrity of Somalia, the argument has been made that the disappearance of effective government in Somalia had an effect on Somalia similar to that of the disappearance of Yugoslav federal institutions—i.e. the extinction of the State. It also has been argued that Somaliland, because it was a Non-Self-Governing Territory separate from the rest of Somalia, has retained an original right to independence under Chapter XI. See generally Anthony J. Carroll & B. Rajagopal, 'The Case for the Independent Statehood of Somaliland' (1993) 8 Am. U.J. Int'l L. & Pol'y 653.

[99] A people may create a new State, where the existing State agrees to that course of action (e.g. the independence of the Union Republics of the USSR in 1990-91). This license results from the consent of the existing State; the people have no presumptive right to statehood in that situation. Within the limits of *jus cogens* and of any particular obligations to third States, the State may agree to whatever new position it wishes.

[100] *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev. 1, UN Sales No. E.79.XIV.5 (1980).

in addition to the colonial situations recognized as such at the beginning of the *Charter* era. The two situations noted above—gross violation by the government of the rights of certain inhabitants in the State and disappearance of government altogether—are those to which one speculates a special *Charter* right to statehood might someday extend. The flexibility of the *Charter* provisions for decolonization, as demonstrated in practice to date, suggests the possibility of such extension.

The main indication that extending decolonization might be possible is the extent to which States and international organizations are prepared now to scrutinize matters earlier thought to belong exclusively to domestic jurisdiction. As scrutiny over internal conduct increases, so increases the number of situations in which the relevant facts now may be cognized to exist at an international level. This does not mean that international law is poised to dispense with the presumption of territorial integrity. A step nevertheless has been taken toward qualifying a once-absolute limit on international law as against domestic jurisdiction. Speculation thus is invited, as to what the practical consequences would be for the State system, if further steps followed, leading in time to an extension of decolonization to include a wider variety of situations.

To extend the decolonization provisions of the *Charter* could well promote the creation of new States. After all, most of the territories subject to Chapter XI eventually became States. If a rule took root that decolonization under Chapter XI is the only situation in which self-determination equates to a right to create a new State, then the UN equally could impede the process of State formation: the General Assembly will not always (or even often) contain the majority requisite to adopt a resolution inscribing a territory on the list of Chapter XI territories. Present-day cases illustrate the balance of opinion. Some scores of States recognize Kosovo as a State, but not enough to prevent the General Assembly from requesting an Advisory Opinion of the International Court on the lawfulness of Kosovo's declaration of independence.[101] Scarcely any States recognize Abkhazia or

[101] *Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law*, GA Res. 63/3, UN GAOR, 63d Sess., Agenda item 71, UN Doc. A/RES/63/3 (2008). The request was that the ICJ 'render an advisory opinion on the following question: Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?' Note, however, that Norway both recognizes Kosovo and favoured the advisory request.

South Ossetia as states.[102] The tendency within the Assembly is conservative. If it were agreed that the Chapter XI process is exclusive of any other in the field, then the UN would be the exclusive regulator of State creation, and it likely would exercise its competence in a correspondingly conservative way.

Given the chance to regulate the process of State creation comprehensively, the UN's response was equivocal. On the one hand, it came to admit any and all new States; on the other hand, it established independence as a right only for certain territories. The *Colonial Declaration* and associated resolutions were comprehensive with regard to colonies, but these are a class of territories clearly finite on present terms. The *Friendly Relations Declaration* suggests certain principles relative to self-determination, but it is a far cry from a regulatory framework for State creation. The member States did not wish the decolonization provisions of Chapter XI to reach beyond the existing colonial territories as these were traditionally defined.[103]

Yet circumstances of social change, politics, or economics could of their own force lead to a proliferation of new States. As shown by the modern instances of State creation (and putative State creation), the forces impelling such changes in territorial organization well may continue whether or not the *Charter* attempts to institutionalize them. Cases ranging from the rejected independence of the South African 'Homelands' and of Turkish Cyprus to the increasingly entrenched independence of Kosovo have continued to arise, notwithstanding the absence of a single legal mechanism to regulate them.

The Chapter XI process is an institutional mechanism expressly designed to regulate the winding down of a particular form of territorial relationship,

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[102] Russia recognized them (and had been their patron since the early 1990s): 'Russia recognises Georgian rebels' (26 August 2008), online: BBC News <http://news.bbc.co.uk/2/hi/in_depth/7582181.stm>.

[103] Belgium in 1952 proposed that colonial territories might include territories geographically contiguous to the administering State. To apply Chapter XI only to classic European colonies, Belgium said, would 'discriminate to the disadvantage of many peoples which are not yet completely self-governing.' The welfare of subject peoples certainly was not the real motivation behind the proposal. It appears instead to have been intended as a spoiler to dissuade member States from applying Chapter XI at all, in the hope that, in the event of the still-birth of the UN's decolonization programme, Belgian colonialism in Africa would be overlooked. The proposal was rejected: Marjorie Whiteman, *Digest of International Law*, vol. 13 (Washington, DC: U.S. Government Printing Office, 1963-73) at 697-98.

namely colonial control, and its main result has been the creation of new States. The process is unlikely to extend to other situations, such as secessionist claims within an existing, consolidated State territory. However, Chapter XI does not exhaust the mechanisms by which the UN can regulate the creation of States. To be sure, an expanded Chapter XI process would be a direct mechanism to regulate State creation; but at least one other UN process also could influence, if not directly regulate, the accession of a territorial community to independence and the creation of States.

VI. Admission of States and Creation of States

Among the most sought-after international public goods that a new State pursues is UN membership.[104] UN membership, by the logic of the *Charter*, is conclusive as to the statehood of the entity admitted—a point on which the International Court was clear in the *Bosnian Genocide* case.[105] Membership brings security;[106] it brings access to multilateral diplomacy;[107] it brings

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[104] Some of the general problems for a putative State of being excluded from the UN are discussed by Johan D. Van Der Vyver, 'Self-Determination of the Peoples of Quebec under International Law' (2000) 10 J. Transnat'l L. & Pol'y 1 at 35-36.

[105] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)*, [1996] I.C.J. Rep. 595 at para. 19:

> The Court notes that Bosnia and Herzegovina became a Member of the United Nations following the decisions adopted on 22 May 1992 by the Security Council and the General Assembly, bodies competent under the Charter. Article XI of the Genocide Convention opens it to 'any Member of the United Nations'; from the time of its admission to the Organization, Bosnia and Herzegovina could thus become a party to the Convention. Hence the circumstances of its accession to independence are of little consequence.

Yugoslavia had argued that the Bosnian declaration of independence was unlawful and thus Bosnia was not a State:

> The Federal Republic of Yugoslavia contests the legitimacy of the Applicant… [The] secession of the "Republic of Bosnia-Herzegovina" [was] carried out in contravention of the Constitution of this former Yugoslav Republic, as well as the rules of international law.

Rodoljub Etinski (Agent for the FRY), Written Observations of the Federal Republic of Yugoslavia (*Genocide* case) (9 Aug 1993) p 6 ¶ 6. <http://www.icj-cij.org/docket/files/91/13583.pdf> See also ibid Annex 1 p 16 setting out international opinion that recognition of Bosnia was 'premature.' The Yugoslav argument was confused by its mixture of references to the statehood of Bosnia and the credentials of the Bosnian government, which Yugoslavia argued also should have been rejected. Respecting the competence of the Bosnian government, see *Preliminary Objections* at para. 44: 'at the time of the filing of the Application, Mr. Izetbegovic was recognized, in particular by the United Nations, as the Head of State of Bosnia and Herzegovina.'

[106] Consider the response to the invasion of Kuwait: SC Res. 660, UN SCOR, 2932 Mtg., UN Doc.

introductions to the network of global aid and credit institutions.[108] Membership is the starting point for inclusion in the international trade regime and for protection of intellectual property rights.[109] The significant involvement of the UN in maintenance of the international security architecture, including administration of territory, is a project in which a State may participate more readily after admission.[110]

S/RES/0660 (1990); SC Res. 661, UN SCOR, 2933d Mtg., UN Doc. S/RES/0661 (1990); SC Res. 662, UN SCOR, 2934th Mtg., UN Doc. S/RES/0662 (1990); SC Res. 678, UN SCOR, 2963d Mtg., UN Doc. S/RES/0678 (1990). To be sure, it is hard to conceive any other response to the unlawful invasion and forcible annexation of a State—which suggests that the security of Kuwait in 1990-91 may be referred to its statehood. This still, if slightly less directly, refers security to UN admission, for, as already noted, admission is conclusive of that status.

[107] A point Dugard makes in noting the function of the UN as a centre of multilateral diplomacy: Dugard, *supra* note 23 at 77-78.

[108] On the position of the IMF and World Bank within the UN system generally, see Ngaire Woods, 'Bretton Woods Institutions' in *Oxford Handbook*, *supra* note 9 at 233-53. See also Bartram S. Brown, 'IMF governance, the Asian financial crisis, and the new financial architecture' in Sienho Yee & Wang Tieya, eds., *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (London: Routledge, 2001) 131. The question of State access to finance is not limited to international public institutions: private institutions, too, are unlikely to enter into credit relations with entities—or with private parties within the territory of entities—whose international legal status is insecure. This has been a consideration in seeking a resolution of the status of Kosovo.

[109] Stephen Zamora, 'Economic Relations and Development' in Christopher C. Joyner, ed., *The United Nations and International Law* (Cambridge: Cambridge University Press and American Society of International Law, 1997) at 232, 239-58, 280-85.

[110] The States directly involved in discharging the UN mandate for Kosovo are UN member States. Italy, however, upon being designated administering State for the Trust Territory of Somaliland in 1950, was not. This was an anomalous situation referable to the necessity of regularizing the Italian administration in the Horn of Africa. Italy had been charged with the administration of the Trust Territory by *Trusteeship Agreement for the Territory of Somaliland Under Italian Administration*, GA Res. 442(V), UN Doc. A/5/442 (1950) (approving the Trusteeship Agreement). Article 86 of the *Charter* makes provision for membership in the Trusteeship Council only of member States of the UN. This presented a question as to the legal basis for Italy's designation as a State responsible for a Trust Territory and for Italy's participation in the Trusteeship Council. By TC Res. 310(VIII) (23 February 1951), (9-1:2, USSR against, New Zealand and United Kingdom abstaining), the Trusteeship Council requested that the General Assembly include the matter of Italy's participation in the agenda. France proposed a draft GA resolution which would refer to UTC Res. 310(VIII) and to Italy's 'exercising its responsibilities towards the United Nations as an Administering Authority' under Chapters XII and XIII. The draft '[c]onsider[ed] that Italy should be enabled to exercise those responsibilities with complete effectiveness': UN Doc. A/C.4/L.142 (26 November 1951). This is the language which the General Assembly adopted shortly afterward: *Question of the full participation of Italy in work of the Trusteeship Council*, GA Res. 550(VI), UN GAOR, (1951) also called on the Security Council to

In light of the multiple dimensions of UN membership as an international public good, if no substantive limit is placed on admission, then the incentive for independence is increased. By contrast, if the United Nations makes clear that to obtain admission, more is needed than a mere assertion of eligibility, then a mechanism will have been introduced to slow the steps of a community to independent statehood. Slowing the steps to independence in turn presents the possibility that greater prudence be exercised in adopting a claim to separation. Communities could not take admission for granted, and, perhaps, in considering the possibility that they would remain outsiders to the principal international organization, they would be less precipitous in their drive for statehood.

The problem of 'failed States'—better termed a problem of failed governments—has a shared history with the admission practice of the UN. The notable increase in the number of new States from the 1950s through the 1970s was the result of decolonization, a process fostered by the Chapter XI process, as the section above described. But Chapter XI was not the entire story, for each new State was admitted to the UN almost immediately upon independence. This was a persuasive, albeit tacit, guarantee that independence would not result in international isolation. The crisis of the new States thus bears this connection to the admission practice of the UN: under-capacity in their institutions has been a central problem for many of the new States, and the criteria for admission include ability to carry out the obligations contained in the *Charter*. On a strict reading of the *Charter*, it was not a necessary outcome that every State with an under-effective government be admitted as a Member.

Independence in the 'strenuous conditions of the modern world,' to which Article 22(1) of the *Covenant of the League of Nations* memorably referred, is less secure if the multilateral guarantees that are entailed by

address the application of Italy for admission to membership in the UN—which suggested that full participation in the Trusteeship Council indeed under *Charter* Article 86 was only for States members of the UN. Italy remained however a non-member State. The solution for the Trusteeship Council was to adopt Supplementary Rules granting Italy the right to participate without vote on proceedings relative to the Somaliland Trust Territory and general questions of the International Trusteeship System: UN Doc. T/847 (adopted 20, 21 & 23 February 1951) as drafted by a Trusteeship Council special committee, the Committee on Rules of Procedure (Argentina, Australia, Belgium, Iraq, Thailand, US). The Committee had been set up expressly to deal with the question of Italian participation. This improvised solution may be taken as illustrating the proposition, to be considered at greater length below, that it is necessary for the efficient functioning of an organization for it to include the States appropriate to the tasks it exists to fulfil: admission follows the task.

admission to the Organization are withheld. Communities, even if possessing a legal right to statehood, well may hesitate to exercise that right if it is not, in practice, guaranteed that they will be admitted to the UN. Admission, then, could be used as a regulatory mechanism to discourage precipitate declarations of independence. But the result would be categorical, each time the mechanism was used: a new State would either be included or it would be excluded. Insofar as a new State is a sociological fact, as well as a legal construction, the further problem would be presented, that the mechanism, deployed in the hope of averting precipitous *future* State creation, would leave particular new States in a relative isolation.

VII. Conclusion: The United Nations as Regulator of State Creation

The United Nations came into being as a standing institution at a time when a small handful of States exercised a preponderant influence in international relations. The Allied powers in World War II had acted in concert against a common foe and were united in building an apparatus to guarantee lasting peace. The main States which established the UN in 1945 possessed unity of purpose. Many contemporaries believed that they were similar in structure and internal politics as well. The observed characteristics of the founding States of the UN to some extent justified such belief. These were large States with significant military-economic resources. Of the five principal allies, even the ones in comparative decline, France and Britain, possessed enormous colonial empires, globe-spanning military commitments, and industrial capacity placing them in the first tier. As for the other States, these, too, at least could be relied upon as long-standing members of the international community: the lesser Allied powers like Poland, the Netherlands or Denmark and the World War II neutrals like Sweden, Portugal or Argentina (not all of which would be included as Original Members) held firm control of their own territories and the populations and resources that these contained. What such States might have lacked in size, they possessed in permanence and a fixed place in the international relations of the day.

Though the end of the war brought a restoration of effective independence to most of the States that had been occupied since 1939,[111] it

[111] The exceptions were the Baltic States Estonia, Latvia, and Lithuania. On their re-emergence in the 1990s, see Thomas D. Grant, 'United States Practice Regarding Non-Recognition of the

did not, immediately at least, bring about the creation of new States. Fifty-one States comprised the Original Members of the United Nations. Somewhat fewer than eighty States existed in 1945 in total.[112] The thirty years that followed however would witness a major increase in the number of States. By the 1970s, there would be twice as many as at the beginning of the UN era. How the increase occurred in number and political diversity of States holds current as well as historical interest.

As discussed in this article, the United Nations played a central role in State creation during the post-war period. What the organization might do in the years ahead in this field merits consideration, for the potential for the creation of States has not disappeared. The putative separations of Abkhazia and South Ossetia from Georgia are two illustrations; another is the more entrenched independence of Kosovo: it is striking that two of the cases at present before the International Court, one contentious and one advisory proceeding, stem from the situations in these territories.[113] A host of other post-Cold War cases of the Court also arise out of difficulties which attended the creation of new States.[114] Yet not every situation in which a new State might emerge presents the likelihood of political crisis or legal dispute. The sixteen remaining Non-Self-Governing Territories[115] possess as of right the option to independence. The potential for dispute as respects those territories is relatively small, in view of their special juridical status and its

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Annexation of the Baltic States, 1940-1991' (2001) 1 Baltic Y.B. Int'l L. 23.

[112] James Crawford 2006, *supra* note 29 at 187.

[113] *Case Concerning Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provision Measures, Order of 15 October 2008 [*Georgia v. Russian Federation* (15 Oct. 2008)], online: ICJ <http://www.icj-cij.org/docket/files/140/14801.pdf>; *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Order of 17 October 2008, online: ICJ <http://www.icj-cij.org/docket/files/141/14813.pdf>.

[114] E.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavi*a), Merits (26 February 2007) at paras. 88-99, online: ICJ <http://www.icj-cij.org/docket/files/91/13685.pdf>; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections (18 November 2008) at paras. 43-51, online: ICJ <http://www.icj-cij.org/docket/files/118/14891.pdf>.

[115] These are American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, Saint Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, and Western Sahara: *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN GAOR, 60th Sess., Supp. No. 23, UN Doc. A/60/23. See also *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 60/119, UN GAOR, 60th Sess., UN Doc. A/RES/60/119 (2006).

well-settled incidents. With respect to Western Sahara, dispute has been violent and intractable,[116] but this is the exception in that closed category of territories. Where systematic treatment does not extend, however, the potential for dispute is considerably greater, and it is peaceful change that will more likely be the exception.

The creation of a new State, in the best of circumstances, can upset expectations embedded in the legal order. An international law of State succession sets out rules to mitigate the harm,[117] but actual modern cases of State succession have involved considerable difficulty for the people caught up in them. The emergence of Pakistan from the partition of India was perhaps the most severe case; a great deal of property and vast numbers of lives were lost.[118] The problem of nationality and statelessness presented itself in the separation of Eritrea from Ethiopia.[119] Putative separation of northern Cyprus from the Republic of Cyprus has been attended by population displacements and conflict over property.[120] The conferral of Russian Federation passports on the inhabitants of Abkhazia and South Ossetia has involved compulsion, designed, evidently, to rid the territories of individuals having allegiance to the (still) territorial State, Georgia.[121] Such

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[116] See generally *Report of the Secretary-General on the situation concerning Western Sahara*, UN SCOR, 2008, UN Doc. S/2008/251, and in particular para. 66 referring to the 'political impasse.'

[117] The International Law Commission has completed work on three major branches of the topic of State succession: with respect to treaties; with respect to matters other than treaties; and with respect to nationality of natural persons. For draft articles and commentaries see, respectively, *Yearbook of the International Law Commission 1974*, Vol. II, Part 1 (New York: UN, 1975) at 174-269; *Yearbook of the International Law Commission 1981*, Vol II, Part 2 (New York: UN, 1982) at 20-112; *Yearbook of the International Law Commission 1999*, Vol. II, Part 2 (New York & Geneva: UN, 2003) at 23-47. The *Vienna Convention on Succession of States in Respect of Treaties*, 1946 U.N.T.S. 3, (1978) 17 I.L.M. 1488, was adopted 23 August 1978 and entered into force 6 November 1996. A *Convention on Succession of States in Respect of State Property, Archives and Debts*, UN Doc. A/Conf.117/14, was adopted 8 April 1983 and has not yet entered into force.

[118] Consider the many cases arising out of partition of India: e.g. *Kumar Jagadish Chandra Sinha v. Commissioner or Income Tax* (1955), 23 I.L.R. 112 (Calcutta H.C.), Chakravarti C.J. and Lahiri J.; *Ram Narain v. Central Bank of India Ltd.* (1951), 18 I.L.R. 207 (Punjab H.C.), InFalshaw J.

[119] See Eritrea-Ethiopia Claims Commission, *Partial Award: Civilian Claims – Eritrea's Claims 15, 16, 23, 27-32*, (2004) at 37 (findings E(1) & E(2)), online: <http://www.pca-cpa.org/upload/files/ER%20Partial%20Award%20Dec%2004.pdf>. The Claims Commission determined that Ethiopia 'erroneously depriv[ed] at least some Ethiopians who were not dual nationals of their Ethiopian nationality' and Ethiopia 'arbitrarily depriv[ed] dual nationals who remained in Ethiopia during the war of their nationality.'

[120] See e.g. *Xenides-Arestis v. Turkey*, no. 46347/99, [2005] E.C.H.R. at paras. 9-10.

[121] *Georgia v. Russian Federation* (15 Oct. 2008), *supra* note 115 at para. 21 (especially subparas. (d)

measures are breaches of basic human rights.

Moreover, the emergence of new States in many instances has destabilized regional and general international relations. The new States of the Balkans constituted Europe's chief political irritant in the late nineteenth and early twentieth centuries. The rise of independent States in the Near East in the wake of the Ottoman State and League Mandates is the starting point for understanding some of the most vexing twenty-first century crises. The winding down of Yugoslavia has been a violent process, its final steps still not completely settled. State creation can be peaceful like that of the Czech and Slovak Republics—offspring of a 'Velvet Divorce'—but at least as often in modern times, when the UN decolonization system did not apply, it has been otherwise. The question this article has presented is whether an international mechanism exists that could regulate State creation and in so doing reduce the risks that seemingly inhere in that process.

Sections 4 and 5 above have considered the role that the UN played in decolonization. Decolonization resulted in the creation of a great many new States. Problems of effective capacity presented themselves in connection with a number of new States thus created but, considering the large number of States created in this way in which separation from the administering power was essentially peaceful, the UN-guided process would appear to have had a salutary effect. As Section 5 concluded, however, decolonization concerns a closed category of cases.

Though the General Assembly played an active role in the early 1960s in elaborating the decolonization process, the legal developments of that time took place within a clear and accepted conception of how far decolonization would go. Belgium's attempt in the 1950s to prevent a 'salt water' limit from being incorporated into the law of decolonization was rejected without hesitation.[122] When it comes to a new era of State creation, whose limits are not self-evident, there is at present little likelihood that a UN political organ would act to apply decolonization as a UN regulatory tool.

And this brings the consideration of State creation back to membership admission. Section 6 gave an overview of the multiple reasons that States seek UN membership. UN membership is an international public good. States have come to assume that UN membership is available to any community constituting a State, and so its value as a public good has

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and (e)).

[122] See *supra* note 103.

perhaps been obscured. Yet its value remains, and in this the UN holds a potential source of influence over the creation of States. A practice that assures admission to any and all States, to be sure, does not test the potential regulatory effect of that influence. It could be that a more conservative approach to admission would not deter independence but would, instead, bring about reversion to a community order in which a significant number of States existed outside the UN. For reasons alluded to above, this would not be desirable: the UN performs its chief function now by including all, or nearly all, States in its membership. But to conduct admission with more exacting attention to the criteria of *Charter* Article 4 would not necessarily be to keep States out.

Charter Article 4, in the early days of the *Charter*, seemed to be accompanied by a potent regulatory apparatus. In particular, there was the Committee on Admission of New Members. The Committee still exists, but it has long ceased to adopt anything other than *pro forma* statements accepting applications to membership.[123] In the early days, however, the Committee on Admission subjected certain applications to scrutiny. Jordan, Mongolia, and Albania, in particular, received extended questionnaires from the Committee. Each questionnaire had been drafted with a view to ascertaining the fitness of the applicant for admission under *Charter* Article 4, and each was particularized to acknowledge the problems that applicant presented.[124]

In short, there is a subjective element allowing the requisite flexibility to turn aside States that do not comply with human rights and other requirements deemed indispensable by the UN Committee on Admission. Nothing in the *Charter* would prevent a return to this early practice: it was abandoned without formal decision, and it had been adopted likewise. Nor

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[123] Roger O'Keefe, 'The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States,' (2001) 1 Baltic Y.B. Int'l L. 167 at 170–71; Konrad Ginther 'Article 4' in *The Charter of the United Nations* 185, *supra* note 34 at para. 34; Sydney D. Bailey & Sam Daws, *The Procedure of the United Nations Security Council*, 3d ed., (Oxford: Clarendon Press, 1998) at 339–44.

[124] For the questionnaire to Jordan (Transjordan), see *Letter from the Chairman of the Committee on Admission of New Members to the Representative of the Hashemite Kingdom of Transjordan in New York*, UN SCOR, 1st Year,.2d Ser., Supp. No. 4, Annex 7, App. 18 (1946) at 143. For Mongolia, see UN SCOR, 1st Year, 2d Ser., Supp. No. 4, App. 12 at 123–24. For Albania, see *Letter from the Chairman of the Committee on Admission of New Members to Colonel Tuk Jakova, Minister of State of the Albanian People's Republic dated 9 August 1946 and the Reply Dated 14 August 1946*, UN SCOR, 1st Year, 2d Ser., Supp. No. 4, App. 7 at 91–92.

are the exact formalities of admission, subject only to the broad parameters of Article 4, inflexible as a matter of the procedure of the principal organs; the Rules of Procedure of the General Assembly and of the Security Council have been amended before and they can be amended again.[125] Other international organizations, like the Council of Europe, when doubts have arisen as to the compliance of an applicant to the provisions of the constitutive instrument, have required the applicant to adopt undertakings in response. Human rights guarantees,[126] changes in treaty practice,[127] and institutional reform[128] number among the undertakings applicants have adopted.

States are likely to continue to emerge which raise objections from other States and which present genuine concerns over regional stability or precedential effect. The United Nations has already used a special system of decolonization to subject a significant episode of State creation to a degree of institutional and legal control. The Organization well could extend that system, though political constraints suggest it will not: Chapter XI and Trusteeship, even if a more general regulatory apparatus is latent in them, appear in the end to have been a sort of insolvency regime for European empire. The United Nations also well could adapt its own admission procedures, by establishing new, binding commitments on the States it decides to admit. This multi-linear and multi-causal sequence can be undertaken so as to make manifest that the creation of new States is not an unregulated event but, instead, a process governed by law.

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[125] The Security Council adopted Provisional Rules of Procedure at its 1st meeting and amended the Rules at its 31st, 41st, 42nd, 44th and 48th meetings, on 9 Apr, 16 and 17 May, 6 and 24 June 1946; 138th and 222nd meetings, on 4 June and 9 Dec 1947; 468th meeting, on 28 Feb 1950; 1463rd meeting, on 24 Jan 1969; 1761st meeting, on 17 Jan 1974; and 2410th meeting, on 21 Dec 1982: UN Doc. S/96/Rev.7. For the Rules of Procedure of the General Assembly, as amended, see UN Doc. A/520/Rev.15 (31 December 1984).

[126] On Russia's on-going obligation to observe such guarantees, see Council of Europe, Committee of Ministers, Interim Resolution CM/ResDH(2009)43 (19 March 2009). The Resolution was adopted after the European Court of Human Rights' decision in *Timofeyev v. Russia*, no. 58263/00, 23 October 2003 (no. 58263/00; judgment of 23 October 2003; final on 23 January 2004) insisted on the execution of domestic judicial decisions without delay.

[127] Respecting Monaco and its treaty relations with France as these related to Council membership, see James Crawford 2006, *supra* note 29 at 328.

[128] For example, the Council of Europe after Turkey's admission continued to monitor the relation between the military and the institutions of civilian government: Reports adopted under Article 30, cases in which a friendly settlement has been achieved, *Netherlands v Turkey*, (1985) Y.B. Eur. Conv. H.R. 150.

Can Constitutions Be of Use in the Resolution of Secessionist Conflicts?

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I. Introduction

From the 1980s onward, political philosophers have offered a more rigorous treatment of the phenomenon of secession, concentrating largely on moral

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justifications of the *unilateral* right to secession.[1] In doing so, they have been more interested in justifying a *moral claim-right* to secede, which implies 'a correlative obligation on the part of others not to interfere with the attempted secession', than in grounding a *moral liberty-right* or a mere permission to secede.[2] It is Allen Buchanan who should be credited not only with having provided us with the aforementioned important distinction, but also with having classified all the normative work on unilateral secession,[3] as well as with having created, in 1991, the first systematic account of this topic.[4]

Buchanan also introduces the concept of *consensual* secession, which 'results either from a negotiated agreement between the state and the secessionists (as occurred when Norway seceded from Sweden in 1905) or through constitutional processes (as the Supreme Court of Canada ... envisioned for the secession of Quebec).'[5] What political philosophy and theory have to address in this set of cases are the following questions: can *consensual* secession be considered recommendable for all countries faced with secessionist movements; should constitutional strategy for coping with secessionist conflicts be perceived as an instrument of a just institutional arrangement; would placing a right to secession into the founding document of a state be compatible with the values of liberal-democratic constitutionalism?

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[1] See, e.g. Harry Beran, 'A Liberal Theory of Secession' (1984) 32 Pol. Stud. 20; Anthony H. Birch, 'Another Liberal Theory of Secession' (1984) 32 Pol. Stud. 596.

[2] Buchanan rightly observes that determining whether states and international organizations should refrain from interfering with a group's unilateral attempt to secede from a parent state requires entering into 'the domain of the philosophy of international law', which implies reflection on the nature and purposes of the international legal system, including the role of states, and of international commitment to the preservation of their territorial integrity; Allen Buchanan, 'Secession' in Edward N. Zalta, ed., *The Stanford Encyclopaedia of Philosophy*, (Spring 2007 ed.) [Buchanan 2007], online: <http://plato.stanford.edu/archives/spr2007/entries/secession>. For one such inquiry into the domain of the philosophy of international law, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination—Moral Foundations for International Law* (Oxford: Oxford University Press, 2003) [Buchanan 2003].

[3] He initially divides all normative theories into two groups—Remedial Right Only Theory and Primary Right Theories. The former theory argues that a group has a right to secede unilaterally only if it has a just cause. The latter theory consists of two sub-groups—Ascriptive Group Theories, which state that groups with ascriptive characteristics (typically nations) have a right to secede irrespective of injustices; and Associative Group Theories, which focus on the voluntary political choice of any group to terminate its political affiliation with the state; Allen Buchanan, 'Theories of Secession' (1997) 26 Phil. & Pub. Aff. 31.

[4] Allen Buchanan, *Secession: The Morality of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991) [Buchanan 1991].

[5] Buchanan 2007, *supra* note 2.

This article will dwell exactly on these issues. I will first argue that the constitutionalization of secession would be adequate only in countries that can be said to meet the 'minimal liberal-democratic setting' requirement. This is simply because the *necessary prerequisite* of the constitutionalization of secession is that in a given polity constitution is not treated as 'a dead letter', so that constitutionalism—as a set of specific liberal and democratic principles and practices—is taken seriously. I will further argue that although the right to secession is not completely alien to constitutional law—as is commonly assumed—its introduction into the constitutional order of a state is *only one possible strategy* that, under certain circumstances, stems not so much from justice as from reasons of political prudence. Finally, I will try to demonstrate that such a strategy would not contradict liberal-democratic constitutionalism; especially that version which, along with classical values, propounds multiculturalism, respect for ethnocultural diversity, and self-determination rights.

II. Secessionist conflict as political conflict

Let me start with the nature of secessionist conflict as a form of political conflict. Claus Offe distinguishes between three forms of conflicts that should be mitigated by state and legal instruments. The two traditional forms are *ideology-based* and *interest-based* conflicts over rights and resources, and the means for coping with these are various constitutionally guaranteed political and social rights. However, along with these two types of conflicts, the contemporary state has also to manage far more intractable *identity-based* conflicts over group recognition and respect.[6] Offe says that 'the antidote that constitutional democracies have available in order to cope with this type of conflict is group rights.'[7]

Without now entering the discussion over the plausible social and collective psychological incentives for secessionist mobilization,[8] it seems

[6] Claus Offe, '"Homogeneity" and Constitutional Democracy: Coping With Identity Conflicts Through Group Rights' (1998) 6 J. Pol. Phil. 113 at 121.

[7] *Ibid*. at 123.

[8] As early as in the mid 1970s, Birch convincingly argued that it made more sense to treat social factors, such as ethnocultural loyalty and secessionist movements, 'as given' and 'natural', than to interpret them as mere 'dependent variables', explained 'in terms of political discrimination, economic exploitation, relative deprivation, and so forth.' He also emphasized that the extent to which ethnocultural minorities were content with their situation of political integration in a larger state depended on the balance of sacrifices and benefits that vary from place to place and from time to time; Anthony H. Birch, 'Minority Nationalist Movements and Theories of Political Integration' (1978) 30 World Politics 325 at 333-4.

obvious that the secessionist struggle inherently falls into this last category of conflicts, insofar as it presupposes—at least in the secessionists' perception—the ultimate lack of state recognition of and respect for the group to which those proposing secession belong. Furthermore, as pointed at by Heraclides, there are three elements which are 'fundamental and independent variables' without which any form of secession 'is inconceivable, indeed nonsensical.' These are: (*a*) a territorial base for collectivity, (*b*) the existence of a sizeable human grouping that perceives itself as distinct, and (*c*) the type of relationship between the centre and this collectivity.[9] Consequently, if this sort of identity-based conflict[10] is at all to be addressed by constitutional means, it would be in the form of the group or collective right to secession.[11]

Secessionist politics may take various forms. Norman defines these politics as 'a continuous spectrum of activities' that might range

> from the legally innocuous activity of advocating secession to the legally and morally dubious activities of unilateral declarations of independence (UDIs) and armed insurrection, encompassing in between the creation of political parties with secessionist platforms, the contesting of elections by such parties, their organizing referendums on independence when they form regional governments, and so on.[12]

The very aspiration of a territorially-concentrated population to challenge the authority of the central state and to eventually move the internationally

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[9] Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (London: Frank Cuss, 1991) at 13.

[10] Even though there are certain political theories of secession that deny that groups based on nationality and ethnocultural identity are superior to other allegiances and identities (see e.g. David Copp, 'Democracy and Communal Self-Determination' in Robert McKimm & Jeff McMahan, eds., *The Morality of Nationalism* (Oxford: Oxford University Press, 1997) at 278), they largely disregard the empirical counter-evidence that every serious secessionist movement in recent history has involved ethnoculturally distinct groups. Hence, secessionist conflict is almost inherently identity-based conflict involving ethnocultural majority and minority(ies). Cf. Monty G. Marshall & Ted Robert Gurr, *Peace and Conflict 2005: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy*, (College Park, MD: CIDCM, 2005), online: <http://www.systemicpeace.org/PC2005.pdf>.

[11] Buchanan says that right to secession is 'a right, ascribed to a group, to engage in collective action whose purpose is independence from the existing state, where the coming to be independent includes the taking of territory'; 1991, *supra* note 4 at 75. There should be no principal distinction between the concepts of group and collective rights. On the legal nature of this type of rights, see Miodrag A. Jovanović, 'Recognizing Minority Identities Through Collective Rights' (2005) 27 Hum. Rts. Q. 625.

[12] Wayne Norman, 'Domesticating Secession' in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York & London: New York University Press, 2003) 193 at 203 [Norman 2003].

recognized borders 'inward', where there were none before, is certainly a reason for a major political conflict between the central state and its periphery. However, it might take a long time before this conflict turns into some more virulent form. As the recent history of certain Western liberal-democracies—most notably those with federal or federal-like structures—demonstrates, activities of credible pro-secessionist political organizations do not necessarily imply that disputes with respect to the future of a common state will move from the realm of politics into the realm of violence. In spite of all this, constitutional mechanisms are rarely used for regulating the terms of secessionist politics and for determining 'the issue of all issues'—whether a part of the territory will be separated from its parent state. Is this vigilance justified?

III. Is secession alien to constitutional law?

In a recently conducted comparative study, the European Commission for Democracy Through Law (Venice Commission) investigated issues of self-determination and secession as addressed by the constitutional law of Council of Europe member and applicant states, as well as South Africa and Kyrgyzstan. The results of the study reveal that although it would be an 'understatement' to say that secession is 'inimical to national constitutional law', none of the studied constitutional acts 'expressly employs the term "secession" to proscribe the phenomenon itself or its preparatory acts.' Instead, it is commonly taken that the prohibition of secession stems from other constitutional provisions referring to: indivisibility of the state (for example, Spain, Italy); state unity or/and national unity (for example, South Africa, Moldova); and, more commonly, territorial integrity (for example, Albania, Hungary, Lithuania). Where the external aspect of self-determination, that is, the status of a people in relation to another people or state, is explicitly stipulated in constitutional documents, it is almost exclusively done so as to express the right of that state 'to independence vis-à-vis the outside world' (for example, Germany, Croatia, Slovenia). The overall assessment of the Commission is that 'in very general terms secession is alien to constitutional law'.[13]

This allegedly self-evident conclusion might, however, prove to be only partially accurate. First, there are several historical and current examples of

[13] European Commission for Democracy Through Law, *Self-Determination and Secession in Constitutional Law* (Report adopted by the Commission at its 41st meeting, Venice, 10–11 December 1999), CDL-INF (2000) at 2.

secession clauses in constitutional systems even in Europe, as well as in other parts of the world.[14] Examples from the past include: (*a*) Chapter X of the 1947 Constitution of The Union of Burma;[15] (*b*) the Soviet Union's 1990 *Law Concerning the Procedure of Secession of a Soviet Republic From the Union of Soviet Socialist Republics*, grounded in Article 72 of the 1977 Soviet constitution that stated: 'Each Union Republic shall retain the right freely to secede from the USSR';[16] (*c*) a similar draft law proposed at the beginning of the conflict in the former Yugoslavia, which was supposed to be founded on the non-normative ideological proclamation contained in the 1974 Constitution's Basic Principles (Chapter I, para. 1) solemnly proclaiming the right of all Yugoslav nations to self-determination, including the right to secession;[17] and (*d*) Article 60 of the *Constitutional Charter of the State Union of Serbia and Montenegro*, on the basis of which the smaller unit adopted the detailed legal procedure to eventually effectuate its constitutional right to secede and become an independent state.[18]

Present examples include: (*a*) the 1983 Constitution of St. Kitts and Nevis,[19] (*b*) the 1994 Constitution of The Federal Democratic Republic of

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[14] All the mentioned cases are elaborated in more detail in c. IV of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach.*

[15] However with this example, in Duchacek's words, 'constitutional theory failed in reality' because different ethnic groups 'have engaged in constant guerrilla fighting', which eventually led to the instigation of the military regime that is still in power; Ivo D. Duchacek, *Power Maps—Comparative Politics of Constitutions* (Santa Barbara, Oxford: ABC – Clio Press, 1973) at 118.

[16] In Cassese's opinion, the significance of the aforementioned law lies in the fact that 'it was the first piece of national legislation regulating the right of secession in a detailed way'; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 265-6.

[17] 'The peoples of Yugoslavia, proceeding from the right of every people to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, together with the nationalities with whom they live, have united in a federal republic of free and equal nations and nationalities and created a socialist federative community of working people.' On the treatment of the secession issue in the constitutional documents and theory of the former Yugoslavia, see Peter Radan, 'Secession and Constitutional Law in the Former Yugoslavia' (2001) 20 U. Tasm. L. Rev. 181.

[18] More about the legal framework and the whole referendum process in Montenegro in Miodrag A. Jovanović, 'Consensual Secession of Montenegro—Towards Good Practice?' in Aleksandar Pavković & Peter Radan, eds., *On the Way to Statehood: Secession and Globalisation* (Aldershot: Ashgate, 2008) 133.

[19] On the background of this case of the constitutionalization of secession, see e.g. Ralph R. Premdas, 'Self-Determination and Decentralisation in the Caribbean: Tobago and Nevis' (2000) at 1, online: University of the West Indies <http://www.uwichill.edu.bb/bnccde/sk&n/

Ethiopia[20], as well as (*c*) provisions of the *Northern Ireland Act 1998* that clearly operate as a part of the United Kingdom's constitutional law and stipulate the right of this province to unite with the Republic of Ireland.[21] Finally, Article 50 of the *Consolidated Version of the Treaty on EU*, part of the *Lisbon Treaty*, like its failed constitutional predecessor contains the so-called 'withdrawal clause', which regulates the exit-option from the European Union.[22]

However, apart from these explicit constitutional provisions on the right to secession, the exit option might be sometimes *read into* the meaning of the constitutional text, by means of a non-positivist approach of 'broad constitutionalism.'[23] This became obvious in particular after the famous *Quebec Secession Reference* of the Supreme Court of Canada.[24] Sujit Choudhry and Robert Howse argue that the Court took the *dualist approach* in interpreting the Canadian Constitution.[25] In exceptional cases, like the one that was before the Court, a non-positivist approach rests on an idea of *constitutional evolution* (the Constitution as a 'living tree'[26]), which does not sharply differentiate between constitutional amendment and constitutional hermeneutics, and which is grounded in underlying, unwritten constitutional principles. In the Canadian context, the Court found that there were four such principles: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.[27] After reconsidering the

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conference/papers/RRPremdas.html>.

[20] See e.g. Ahmednasir M. Abdullahi, 'Article 39 of the Ethiopian Constitution on Secession and Self-Determination: A Panacea to the Nationality Question in Africa?' (1998) 31 Verfassung und Recht Übersee 440 at 454.

[21] Tierney argues that, concerning the British constitutional concept of parliamentary sovereignty and supremacy, the UK Parliament could, legally speaking, override the results of the pro-secession poll. 'In political terms, however, the pressure to pass the legislation promissed in the Northern Ireland Act 1998, s 1(2) would, in the circumstances of a Yes vote, be overwhelming'; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004) at 288.

[22] For an analysis of the initial provision, which remained largely intact in the subsequent documents, see Raymond J. Friel, 'Providing a Constitutional Framework for Withdrawal From the EU: Article 59 of the Draft European Constitution' (2004) 53 I.C.L.Q. 407.

[23] See Alexander Reilly, 'Constitutional Principles in Canada and Australia: Lessons From the Quebec Secession Decision' (1999) 10 Pub. L. Rev. 209 at 211.

[24] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*]

[25] Sujit Choudhry & Robert Howse, 'Constitutional Theory and the Quebec Secession Reference' (2000) 13 Can. J. L. & Jur. 143 at 157ff.

[26] *Quebec Secession Reference*, *supra* note 24 at para. 52.

[27] *Ibid*. at para. 32.

operation of these principles, the Court came to several important conclusions. Namely, it noted that the Canadian federation was, in principle, not indissoluble,[28] and moreover, that such a political outcome was attainable through a constitutional amendment procedure.[29] However, the Court strongly underlined the necessity of prior negotiations between all relevant political actors; that is, the federal government, Quebec, other provinces, and, possibly, Aboriginal peoples.[30] After this decision, some commentators cautiously conclude that it 'creates a quasi-constitutional right to secession',[31] while others more courageously argue that Canada has actually recognized a 'constitutionally mandated process for bringing about the secession of one or more of its provinces or states.'[32]

At this point, it is also interesting to note the fairly neglected reasoning of the French *Conseil constitutionnel* in certain constitutional rulings concerning the secession of the overseas territories from metropolitan France. This might be intriguing simply because France is widely perceived as a country that vigorously protects its constitutional categories of state indivisibility (Article 2 of the Constitution of France) and territorial integrity (Article 5). In their thorough analysis of French constitutional interpretation and practice with respect to this sensitive issue, Alain Moyrand and A. H. Angelo conclude that gaining independence by the overseas territories has been taken 'by the Constitutional Council as being compatible with the constitutional principle of the indivisibility of the state.' However, these authors stress that

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[28] 'The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada'; *ibid.* at para. 92.

[29] 'It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada ... The amendments necessary to achieve a secession could be radical and extensive'; *ibid.* at para. 84.

[30] 'The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire'; *ibid.* at para. 88.

[31] Daniel Weinstock, 'Constitutionalizing the Right to Secede' (2001) 9 J. Pol. Phil. 182 at 188 [Weinstock 2001].

[32] Peter Leslie, 'Canada: The Supreme Court Sets Rules for the Secession of Quebec' (1999) 29 Publius 135 at 135.

> the word "right" in conjunction with the term "secession" bears little relationship to reality even though a number of writers speak of it. If it is true that overseas territories can evolve to a status of independence ... this procedure does not mean that its operation is for the peoples concerned a right.

The possibility of secession is rather 'a discretionary matter for the government of the Republic which will be decided on the basis of political judgment. And so the term "right" ought not to be understood as referring to a legal regime of secession.'[33]

Nevertheless, it was the practice of the *Conseil constitutionnel* itself that subsequently made room for a plausible wider applicability of this approach to constitutional interpretation, specially designed to handle the issue of decolonization. René Capitant introduced in 1966 a special constitutional doctrine, adopted by the *Conseil constitutionnel*, which eventually enabled certain overseas territories to acquire independence not through the original constitutional path,[34] but through the one created on the basis of an 'inventive' reading of Article 53(c). In the eyes of certain French scholars,[35] this doctrine provides for the legal possibility for any part of the French territory, including the metropolitan one, to secede. Namely, this provision, placed within Title VI (*Treaties and International Agreements of the Constitution*), reads as follows: 'No cession, exchange, or adjunction of territory shall be valid without the consent of the populations concerned.'

What Capitant's doctrine in essence assumes is that the transfer of title over the overseas territory to the local people (secession) might be construed to fall under the category of 'cession', even though the Constitution explicitly says that this shall be done only by means of treaty. The problem is that at the moment of putative cession no internationally recognized state, with

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[33] Alain Moyrand & A. H. Angelo, 'International Law Perspectives on the Evolution in Status of the French Overseas Territories' (1999) 5 Rev. jur. Polynésienne 49 at 52, online: <http://www.upf.pf/Revue-no-5-1999.html?lang=fr>.

[34] The overseas territories could simply reject the Constitution by referendum on 28 September 1958, and become immediately independent (Guinea was the only territory to do that), or by virtue of Article 76, they could change their status within the period of four months from the date of the promulgation of the Constitution. Though this article did not lead directly to independence, it nevertheless opened the path to it, since member states could accede to independence by putting into operation procedures set out in Art. 86 of the Constitution (no overseas territory chose this option); *ibid*. at 53.

[35] Moyrand & Angelo mention François Luchaire, Dominique Rousseau, and Léo Hamon.

which such a treaty might be concluded, exists yet.[36] On the basis of this reasoning the aforementioned legal scholars argue that, if it is admitted that the term 'cession' in article 53(c) can be interpreted as opening room for the legislator to reduce the national territory for the benefit of an existing state (cession *stricto sensu*) or even to create one (cession in the broad sense, that is, secession), 'it is difficult to see why the notion of territory in article 53 relates in the first case to any part of the territory of the Republic and in the second case only to overseas territories.'[37]

Whether this interpretation might be endorsed in a putative case of secession from metropolitan France is certainly arguable.[38] However, what this piece of French constitutional hermeneutics, along with other stated examples, demonstrates is that although referred to by the Venice Commission as belonging to an alien species, secession has more than once visited the planet of constitutionalism. Hence, the next sections of this article will more thoroughly explore the relationship between these two phenomena by trying to answer the following fundamental questions: does the right to secession indeed belong in the founding document of a state? Which values of liberal-democratic constitutionalism, if any, might be protected in the case of the constitutionalization of secession?

IV. Constitutionalism and secession—a reassessment

As Ulrich K. Preuss has demonstrated by comparatively examining the world's most influential traditions of constitutionalism—that of Great Britain, the United States of America and France—it is very hard to conceive of 'a clear cut, unambiguous and undisputed idea of constitutionalism.'[39] We

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[36] The *Conseil constitutionnel* explicitly accepted this interpretation in its decision of 30 December 1975 (Décision n° 75-89 DC), in connection with the accession to independence of the Comores: 'considering that the provisions of this article [53, last paragraph] must be interpreted as being applicable not only in the hypothesis where France will cede territory to a foreign state or acquire a territory from a foreign state but also where the territory will cease to belong to the Republic in order to become an independent state'; *ibid*. at 55.

[37] *Ibid*. at 56.

[38] Admittedly, the *Conseil constitutionnel* stated in its subsequent decision of 2 June 1987 (Décision n° 87-226 DC) that the process of self-determination of peoples is 'specifically provided for the overseas territories by the paragraph 2 of the preamble'. In its decision of 9 May 1991 (Décision n° 91-290 DC), *Conseil constitutionnel* recalled again 'that the Constitution of 1958 distinguishes the French people from the peoples overseas to whom the right of free determination is recognised'; *ibid*. at 56.

[39] Ulrich K. Preuss, 'The Political Meaning of Constitutionalism' in Richard Bellamy, ed., *Constitutionalism and Democracy: American and European Perspectives* (Aldershot: Avebury, 1996) at 24.

are today witnessing constitutionalism as a concept 'burgeoning and spreading to parts of the world where it was previously unimaginable',[40] causing some authors, like Bruce Ackerman, to speak of 'the rise of world constitutionalism'.[41] At the same time, it is obvious that 'the history of modern constitutionalism is a history still in need of writing.'[42] At the beginning of the new century we may nonetheless legitimately ask ourselves, together with Thomas Fleiner, 'whether British constitutionalism born in the enlightenment period of the 17th century will be replaced by some new constitutional theories mainly targeting multiculturalism, globalisation, universality of human rights and democracy.'[43]

In his illustratively named paper 'Ageing Constitution', Fleiner suggests that the answer to the aforementioned question must be affirmative and that, consequently, constitutional drafters should have in mind several precepts for a modern world of tomorrow. He argues that constitutions should, first, 'provide tools for conflict management among the diversities of society.' Hence, besides individual liberties and rights, their objective should also be peace among different communities. Second, they should shift their attention from the principle of the general universality of human rights to ask, 'to what extent particularities may be universally acceptable'. This necessarily implies taking seriously the issue of collective rights. Third, democracy should be understood not just as a mechanism for achieving efficient and legitimate government, but as the framework for the realization of the rights to self-determination and local self-government. Fourth, modern constitutions have to 'reconsider the principle of representation as part of the modern global communication society.' Finally, constitutional drafters of tomorrow have to extend their horizons beyond the nation state, and to situate their concerns for democratic legitimacy, rule of law, and accountability at the regional and international level.[44]

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[40] Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michael Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy (Theoretical Perspectives)* (Durham & London: Duke University Press, 1994) at 51 [Henkin].

[41] One of the central tenets of Ackerman's article is to underline the rising significance of the comparative constitutional approach—both for scholars and judges—and to criticize Americans for failing to observe this trend; Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Va. L. Rev. 771.

[42] Horst Dippel, 'Modern Constitutionalism, An Introduction to a History in Need of Writing' (2005) 73 Legal Hist. Rev. 153 at 168.

[43] Thomas Fleiner, 'Ageing Constitution', paper presented at the Concluding Conference of Summer University, Institute of Federalism, 14 September 2001, at 3 [Fleiner].

[44] *Ibid*. at 14-15.

Another challenge to the classical doctrine of constitutionalism comes from the German scholar Erhard Denninger, who suggests that traditional basic values of Western constitutionalism, emanating from the French revolutionary slogans—*liberté*, *égalité*, *fraternité*—are today to be supplemented with new, post-modern constitutional paradigms—*security*, *diversity* and *solidarity* (*Sicherheit*, *Vielfalt* und *Solidarität*).[45] He underlines that these paradigms 'ought not to be misunderstood as "basic values" for a new generation of constitutional texts', but rather 'as constitutional ideals', which 'bear the character of a more or less *concrete Utopia*.'[46] Louis Henkin also points out that besides being embedded in and reinforcing traditional values of popular sovereignty, representative democracy, separation of powers, limited government, and protection of individual rights, constitutionalism nowadays 'may also imply respect for "self-determination"—the right of "peoples" to choose, change, or *terminate* their political affiliation.'[47] Consequently, it seems that we are witnessing a theoretical shift in the study of constitutionalism, a shift that is largely triggered by the need of societies to meet the challenges and demands of new times.

Provided that the new precepts of constitutionalism are indeed multiculturalism, respect for diversity and self-determination[48]—and I believe that one may find credible indicators that this is indeed the worldwide trend—and notwithstanding the fact that certain states did or do

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[45] See, Johannes Bitzer & Hans-Joachim Koch, eds., *Sicherheit, Vielfalt und Solidarität. Ein neues Paradigma des Verfassungsrechts? Symposium zum 65. Geburtstags Erhard Denningers am 20. Juni 1997*, (Baden-Baden: Nomos, 1997).

[46] Erhard Denninger, '"Security, Diversity, Solidarity" Instead of "Freedom, Equality, Fraternity"' (2000) 7 Constellations 507 at 519 (emphasis in original). For a critical stance, see, Jürgen Habermas, 'Remarks on Erhard Denninger's Triad of Diversity, Security and Solidarity' (2000) 7 Constellations 522.

[47] Henkin, *supra* note 40 at 42 (emphasis mine).

[48] For obvious reasons, this paper cannot go into a deeper discussion over the core principles of liberal-democratic constitutionalism. Yet, even authors like Rosenfeld, who proceed from a rather traditional understanding of constitutionalism as requiring the imposition of 'limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights', argue that the underlying 'constitutional identity' of the contemporary state has to be understood as a complex 'interplay between identity and diversity', between individuals and collectives, majority and minority(ies); Michael Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity' in Michael Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy (Theoretical Perspectives)* (Durham & London: Duke University Press, 1994) at 7. This, on the other hand, does not mean that they would be ready to fully endorse the reading of constitutionalism advanced in this article. See e.g. Rosenfeld's critique of Denninger's 'post-modern constitutional paradigms'; Michael Rosenfeld, 'American Constitutionalism Confronts Denninger's New Constitutional Paradigm' (2000) 7 Constellations 529.

provide for a constitutional right to secession, does it still follow that such an instrument of constitutional law is compatible with liberal-democratic constitutionalism?

Cass Sunstein believes that it is not. At just about the same time as Buchanan published his book on secession, in which one chapter was devoted to the possible constitutionalization of secession,[49] Sunstein published an article sending a completely opposite message. There, he claims that despite the fact that secession might sometimes be justified as a matter of politics or morality, 'constitutions ought not to include a right to secede.'[50] His objection is grounded in the normative concept of constitution as a specific *precommitment strategy* to a certain course of action. The central goal of constitution is, thus, 'to ensure the conditions for the peaceful, long-term operation of democracy in the face of often persistent social differences and plurality along religious, ethnic, cultural, and other lines.'[51] In that respect, the role of constitution might be compared to that of marriage, insofar as the political community ought not be divisible for the simple reason 'of current dissatisfaction, but only in extraordinary circumstances'. Providing an exit option only in exceptional cases can, in turn, 'serve to promote compromise, to encourage people to live together, to lower the stakes during disagreements, and to prevent any particular person from achieving an excessively strong bargaining position.[52] Consequently, the ultimate objective of the supreme law, according to Sunstein, is to 'prevent the defeat of the basic enterprise'.[53] A constitutional right to secession would, on the other hand, produce just the opposite effects, insofar as it would

> increase the risks of ethnic and factional struggle; reduce the prospects of compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.[54]

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[49] Buchanan 1991, *supra* note 4 at 127-49.
[50] Cass R. Sunstein, 'Constitutionalism and Secession' (1991) 58 U. Chicago L. Rev. 633 at 634 [Sunstein 1991].
[51] Cass R. Sunstein, *Designing Democracy— What Constitutions Do* (New York: Oxford University Press, 2001) at 96 [Sunstein 2001a].
[52] Sunstein 1991, *supra* note 50 at 649.
[53] *Ibid*. at 633.
[54] *Ibid*. at 634.

Furthermore, Sunstein argues that if the right to secede is justified as a remedy for oppressive and discriminatory practices towards a sub-state group—and this is a largely exploited argument in moral theories of secession, especially in Buchanan's—then the same objective might be promoted through other means, such as federalism, checks and balances, entrenchment of civil rights and liberties, and judicial review. And, 'if these protections are inadequate, it is highly doubtful that a qualified right to secede will do the job.'[55] Finally, if the ultimate goal of a sub-state group's protection is unattainable through the mentioned measures, then the preferred solution is again not the constitutionalization of secession, but a negotiated agreement or a right of revolution. These two options 'would provide a remedy against most of the relevant abuses without raising the continuous risks to self-government that would be created by a constitutional right to secede.'[56]

The two scholars that have most forcefully tried to refute this position are Daniel Weinstock and Wayne Norman. They claim, albeit using somewhat different lines of argumentation, that a constitutional right to secession should be treated as a relevant institutional response to secession politics and as compatible with constitutionalism.[57] Weinstock's point of departure is radically different from that of Sunstein. First, he proceeds from a different normative concept of constitution. In Weinstock's opinion, the key role of the constitution is to create institutions that will 'block the destructive potential' of certain 'passions and interests to which humans are prey', and to channel 'them in socially productive directions.'[58] Second, in an attempt to justify a constitutional response to the secession controversy, Weinstock takes an even broader 'two-stage view', insofar as he distinguishes between the *abstract question* of whether a group possesses a moral right to secede and the *legal question* of whether it ought to be granted such a right in internal or

[55] Sunstein 2001a, *supra* note 51 at 112.
[56] Sunstein 1991, *supra* note 50 at 635.
[57] Weinstock's key articles are: 'Toward A Proceduralist Theory of Secession' (2000) 13 Can. J. L. & Jur. 251 [Weinstock 2000]; and Weinstock 2001, *supra* note 31. Norman's main works in this field are: *Negotiating Nationalism—Nation-Building, Secession and Federalism in the Multinational State* (Oxford: Oxford University Press, 2006) [Norman 2006], Norman 2003, *supra* note 12; 'Secession and (Constitutional) Democracy' in Ferran Requeio, ed., *Democracy and National Pluralism* (London & New York: Routledge, 2001) 84 [Norman 2001a]; and 'The Ethics of Secession as the Regulation of Secessionist Politics' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 34 [Norman 1998].
[58] Weinstock 2001, *supra* note 31 at 192.

international law.[59] This issue is analyzed through lenses of the general *normative* claim 'that there is a case to be made for making legal provision for people to engage in behaviour they have no moral right to engage.' This claim is justified provided that the following three conditions are satisfied: (*a*) *the inevitability condition*, which says that irrespective of legal regulation, it is 'overwhelmingly likely' that people will engage in the given behaviour; (*b*) *the moral threshold condition*, which requires that the said behaviour does not imply 'violation of an absolute moral prohibition'; and (*c*) *the consequentialist condition*, which assumes that the consequences of legally unregulated behaviour 'are likely to be worse' than in the opposite case of properly defined legal confines for the behaviour in question. After testing this model on the issue of secession, Weinstock concludes that 'prudent' constitution-makers will have good reasons to enact a 'judiciously formulated' secession procedure.[60]

Furthermore, Weinstock tries to refute Sunstein's opinion that such a right would have undesirable consequences.[61] Namely, Sunstein argues that in the case of constitutionalization potential secessionists would be tempted to use the threat of secession as the strategic tool of their everyday politics (*blackmail threat*), while the state—that is, the majority population, faced with the possibility of disintegration—would in return nip in the bud every request for territorially based self-government (*threat of oppression*). Contrary to this, Weinstock stresses that the unregulated state of this issue, common for the vast majority of present constitutions, makes the costs of raising secessionist threats quite low. First, since no sanction is attached to the making of such threats, they could be freely used in everyday politics, even for gaining advantages on some unrelated policy debates.[62] Second, in such a situation, 'there are no limits on the frequency with which the threats are made.' Accordingly, 'a carefully regulated right to secede actually removes

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[59] *Ibid*. at 182-6.

[60] *Ibid*. at 188.

[61] In a direct debate with Weinstock, Sunstein says: 'It is plausible to fear that any effects in "steadying the hand of trigger-happy secessionists" would be much more than counter balanced by the legitimating effects of a secession right'; Cass Sunstein, 'Should Constitutions Protect the Right to Secede—A Reply to Weinstock' (2001) 9 TJ. Pol. Phil. 350 at 355 [Sunstein 2001b].

[62] Dion reports that 'in Canada in recent years, political figures in different provinces have brandished the threat of secession to make their case in connection with such current issues as a budget deficit, a budget surplus, a scholarship program, health care funding, dwindling salmon stocks, ratification of the Kyoto Protocol, and so on'; Stephane Dion, 'Democratic Governance and the Principle of Territorial Integrity' (2003), online: Government of Canada Privy Council Office, Intergovernmental Affairs <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&Page=archive&Sub=Articles&Doc=20030716-eng.htm>.

some of the incentives which are presented to political actors in an unregulated state.'[63] In addition, those who hold that the mere existence of such a legal provision would endanger the stability of the state tend to exaggerate the power that legal norms might have 'in generating motivation *de novo*.' In fact, 'they assume that once we have decided that there are reasons for a legal system to grant a right, it will simply state, without further qualification, that the right exists. And of course, such a coarse instrument as the simple recognition of a right can have quite disastrous consequences.' This is why Weinstock eventually calls for the 'judicious formulation of the procedure which must be followed to avail oneself to the right.'[64] In sum, Weinstock convincingly demonstrates that, in the context of a major secessionist conflict, not constitutionalizing the right to secession might actually lead to exactly those undesirable consequences that Sunstein attaches to the constitutional right to secession, e.g. interethnic struggle, blackmail and strategic behaviour, reduced chances for compromise.

Norman develops both pragmatic and normative grounding for the constitutionalization of secession. In the introductory part of his article on domesticating secession, Norman qualifies as 'curious' the fact 'that the most enthusiastic case for constitutionalizing the right of secession has been made by theorists with little sympathy for secessionists (at least for those in a reasonably just democratic state).' While making the case for a constitutional right to secession, proponents of this idea at the same time 'hope that the groups entitled to secede will not want to take advantage of this opportunity.' In fact, what they commonly suppose is that entrenching the secessionist clause in a constitution 'can make secession and the disruption of secessionist politics *less*, not more, likely.'[65]

However, in the last instance, 'whether secessionist politics would be more likely to be *fuelled* or *choked* by "legalising" secession ... is a question for political psychology and sociology.'[66] In polities that are not seriously

[63] Weinstock 2001, *supra* note 31 at 188.
[64] *Ibid*. at 196.
[65] Norman 2003, *supra* note 12 at 193 (emphasis in original). Glaser, for instance, believes that he managed to prove that 'it is logically possible for liberal egalitarians to recognise and oppose secession more-or-less simultaneously, depending on who it is that they are addressing (the existing state or the secessionists), whether they are talking about the right to secede or the worthiness of a choice in favour of secession, and whether they are discussing the legitimacy of opposing a secession or the legitimacy of the means that might be employed to suppress it'; Daryl J. Glaser, 'The Right to Secession: An Antisecessionist Defence' (2003) 51 P Pol. Stud. 369 at 383.
[66] Norman 2001a, *supra* note 57 at 87 (emphasis in original).

exposed to secessionist pressures, the constitutionalization of secession might prove to be a fuelling mechanism, whereas in those states that face a credible secessionist threat, such a rule might function as a choking mechanism. And, in Norman's opinion, it will primarily serve that role 'by being more demanding than the implicit "democratic" threshold of a simple majority which secessionist leaders would insist upon in the absence of a formal constitutional provision.'[67]

Consequently, the central tenet of the normative part of Norman's justification concerns the genuine value of the rule of law approach in this subject matter. Since it is empirically confirmed that secessionist politics will occur, even in well-established and fairly just liberal democracies and irrespective of the constitutional prohibition or silence, he argues that it is the logic of constitutionalism itself that requires clear rules in this political game. The reason for this is that, 'if unchecked, this political contest can eventually find itself progressing into an arena where there are no clear or agreed rules for deciding the winner of the contest.' This contest 'can look like an ordinary democratic process all the way along; but without any rules for an end-game it will have to end up as mere power politics (or potentially worse), not constitutional democracy.'[68]

This is certainly not the only normative justification for the constitutionalization of secession. In fact, Norman points out that making such a case requires a unique 'normative cocktail', made up 'of considerations of justice and minority rights, democracy, recognition, stability, pragmatism and group-interest.' This cocktail 'need not look arbitrary', and Norman thinks that 'there are grounds for believing that, at least under favourable conditions, representatives of national minorities and majorities could agree on both a clause and its moral and political rationale.'[69]

The issue of whether the right to secession was inherent to the constitutional order of a federal state was widely debated in American antebellum constitutional theory, and it was only after the defeat of the secessionist South that it largely, though not completely, disappeared from the theoretical discourse. As this brief summary demonstrates, the constitutionalization of secession is again one of the hotly discussed topics among political theorists and scholars of constitutional law. While it is too

[67] *Ibid*. at 88.
[68] Norman 2006, *supra* note 57 at 196.
[69] *Ibid*. at 215.

early to conclude whether the arguments in favour of the constitutionalization of secession will significantly affect constitutional practice, it is at least obvious that this theoretical position is gaining more credibility, which was up until recently hardly imaginable.

V. Why consent to a constitutional clause on secession?

In this section, I present my own case in favour of the constitutionalization of secession. In doing so, I follow the general lines of Weinstock's and Norman's reasoning. Nevertheless, the differences between our approaches lie in the nuances of the structure of argumentation. In that respect, the first caveat concerns the fact that not all states exposed to secession politics are equally good candidates for this institutional approach. It is recommended only for polities that meet *the 'minimal liberal-democratic setting' requirement*.[70] These are polities in which, generally speaking, political power is peacefully transferred through free and democratic elections, where there is a widely shared support for the democratic regime—including the commitment of all relevant political actors to nonviolent strategies for the realization of their goals—and where fundamental individual rights and vital minority rights are constitutionally guaranteed and effectively protected.[71]

However, even if this precondition exists, the *key question* remains: why would a liberal-democratic state in the first place constitutionally consent to an exit option for its constituent parts? I will argue that there are several reasons stemming not so much from *normative necessity* (that is, justice), but rather from *political prudence*.[72] Let me, for that matter, import from the well-developed literature in democratic transition and consolidation the notion of the 'stateness problem'. In dealing with polities that are in the process of democratization, Juan J. Linz and Alfred Stepan note that 'in some parts of the world, conflicts about the authority and domain of the *polis* and the

[70] A list of countries that might qualify under the mentioned conditions for the constitutionalization of secession would, for example, be more extensive than Norman's, since this author restricts his case to 'just, democratic constitutional orders'; Norman 2003, *supra* note 12 at 85.

[71] The more elaborated list of conditions that indicate the presence of the 'minimal liberal-democratic' requirement can be found in c. I of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach*.

[72] This would be one of the major differences between Norman's and my approach, even though, as we saw, Norman does not disregard pragmatic and prudential considerations at all. On the other hand, political prudence in this case is deeply connected to, if not rooted in, several normative explanations about the phenomenon. Furthermore, my approach clearly differentiates from Weinstock's more broad 'two-stage view'.

identities and loyalties of the *demos* are so intense that no state exists. No state, no democracy.'[73] In other words, consolidation of a liberal-democratic regime is next to impossible in the context of 'stateness problem', that is, unregulated questions of the proper territorial unit of democratization and the community of persons whom one owes the ultimate loyalty. But what happens if things go the other way, as is actually the case with certain states? What if a stable liberal-democratic state is faced with the *credible possibility*[74] of 'stateness problem'? Would such a state be *morally obliged* to let go those who do not consider it 'our own state' anymore and who do not perceive some fellow citizens as belonging to 'us'? The answer to this question largely depends on normative considerations about the sources of political authority.[75] However, as I already indicated, irrespective of the normative stance one may take in this case, I assume that, in the aforementioned circumstances, it would be *politically prudent* for such a liberal-democratic state to establish, in advance, clear rules under which the exit option might eventually be constitutionally exercised by a seceding group.

1. Avoiding the Impasse of Ungovernability

Systematic neglect of the possible rise of secessionist sentiment amongst a population that is territorially concentrated might lead the central government into an *impasse of ungovernability*. In order to elucidate this argument, let me employ Judith Shklar's well-known distinction between obligation and loyalty. Generally speaking, every governing process is based upon political obligations, that is, 'laws and lawlike demands, made by public agencies.' In liberal-democratic states, the reasons for accepting or rejecting these obligations 'are said to derive from consent, explicit or tacit'. Hence, '[t]he very word legitimacy reminds us of the law-bound character of

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[73] Juan J. Linz & Alfred Stepan, 'Toward Consolidated Democracies' (1996) 7 J. Democ. 14 at 14.

[74] What may count as 'credible possibility' is a completely contextually-bounded, empirical question, which in the last instance should be recognized as such by the political leadership of a state.

[75] In political philosophy, one may come across several theories about the ultimate source of the political authority of state. These include *consent*, *political benefits*, *fairness*, and *natural duty* theories, as well as certain hybrid ones. For a brief sketch of the main ideas and deficiencies of each one of them, see e.g. Christopher Heath Wellman, 'Toward a Liberal Theory of Political Obligation' (2001) 111 Ethics 735. Only the pure consent model of political obligation might imply *prima facie* moral obligation on the part of a state to allow secession of a group of people that withdraw their consent. This was indicated by Harry Beran, as early as 1977, in his article 'In Defense of Consent Theory of Political Obligation and Authority' (1977) 87 Ethics 260 at 266, and he later defended it in a more thorough way. For a critique of this implication of the consent theory on the issue of secession, see Buchanan 1991, *supra* note 4 at 70-3.

political obligation.'[76] However, whereas political obligation has 'rational rule-related character', loyalty 'is deeply affective and not primarily rational.' In comparison to fidelity, which is given to individuals, loyalty represents 'an attachment to a social group.'[77] Consequently, she comes to the conclusion that the difference between political obligation and loyalty emerges as soon as the question arises of whether one should or should not obey. In such situations, 'we cannot ignore the difference and the ways in which loyalty can both sustain and undermine public rules.'[78] The aforementioned 'stateness problem' can be defined precisely as a situation in which the loyalty towards a certain group—most often one with a distinct ethnocultural character[79]—outweighs the loyalty towards the state as a whole, in such a way that the decision not to obey laws and law-like demands made by the larger state is primarily driven by the emotional stance that the issuing authority is no longer 'our' state.[80] When the described situation involves a substantial portion of the population that is territorially concentrated, one may speak of the impasse of ungovernability.

As noted, two former communist federations—the Soviet Union and Yugoslavia—had actually tried to legally regulate the intensified secession politics of their federal units, but the reaction was belated. Both federal countries had already reached the point of no return and were not able to control the situation on the ground.[81] Canada came on the verge of

[76] Judith N. Shklar, 'Obligation, Loyalty, Exile' (1993) 21 Pol. Theory 183 at 183.
[77] *Ibid*. at 184.
[78] *Ibid*. at 187.
[79] Shklar draws a rather general conclusion that loyalty towards ethnoculturally-based nationality and political obligation towards state 'must conflict, because there is no single territorial state, except perhaps Iceland, that is not multiethnic and multinational or could be or have been'; *ibid*. at 186.
[80] Unlike Norman, I do not think that the Rawlsian concept of justice would be of much help in addressing the problem of secessionist politics in multinational states; cf. Wayne Norman, 'Justice and Stability in Multinational Societies' in Alain-G. Gagnon & James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) at 108 [Norman 2001b]. In fact, I subscribe to Ewin's opinion that traditional contract theories are not very helpful in clarifying cases of secession crisis. Namely, these theories 'can really play no useful part until we know who the potential contracting parties are or who it is with whom we are deciding or not to consent.' Consequently, he argues that 'loyalty is in some ways a more basic part of the social glue than is any contractual calculation'; Robert Ewin, 'Peoples and Political Obligation', (2003) 3 Macq. L. J. 13 at 19, 20.
[81] As Monahan and Bryant note in discussing these cases: 'We do not suggest that prior agreement on the process of secession would have avoided these consequences. We do believe, however, that the absence of such a consensus made some form of impasse virtually

experiencing a similar sort of impasse of ungovernability[82] while passively waiting for the 1995 referendum results in Quebec. This was the reason why two years before the Supreme Court's *Quebec Secession Reference* Patrick J. Monahan and Michael J. Bryant, in their intriguing article 'Coming to Terms With Plan B: Ten Principles Governing Secession', suggested to the Canadian public that

> like homeowners who purchase fire insurance even though they believe the risk of fire may be remote, prudent Canadians should contemplate the possibility of the dismemberment of their country in the hope of containing the calamity and rebuilding a new country if the worst should come to pass.[83]

Before reaching the 'terminal phase' of the governing process, liberal-democratic states might utilize various means—even coercive ones, as in the case of the United Kingdom's policies towards Northern Ireland—in order to prevent the aforementioned scenario. However, at some point in time it becomes prudent for a larger state to control the erupting secessionist politics by providing a legal path for the exercise of the exit option. In that respect, the UK government entitled the Secretary of State for Northern Ireland, under the *Northern Ireland Act 1998*, to issue an order directing the holding of a referendum if 'it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.'[84] I believe that avoiding the impasse of ungovernability was precisely the major incentive for this move.

2. *Excluding Decisive Interference of International Actors*

One of the advantages of the constitutionalization of secession consists in preventing the *extreme and decisive interference of international actors*. The basic assumption is that any state would rather take more than less control over its own internal affairs, and that, after all, states still assume the primary responsibility for the overall well-being of their citizens. This is so even in the area of human rights protection, where states most often tend to abdicate

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unavoidable'; Patrick J. Monahan & Michael J. Bryant, 'Coming to Terms With Plan B: Ten Principles Governing Secession' (1996) 83 C.D Howe Inst. Comm. 1 at 20 [Monahan & Bryant].

[82] Certainly, with the notable exception of any violent actions taken on the ground, as was particularly the case with the former Yugoslavia.

[83] Monahan & Bryant, *supra* note 81 at 6.

[84] *The Northern Ireland Act 1998* is available at <http://www.hmso.gov.uk/acts/acts1998/19980047.htm>.

their responsibilities—the fact of which has led to the internationalization of the human rights regime in the past few decades. Discussing the activism of the global human rights movement, Ignatieff stresses that 'it is utopian to look forward to an era beyond state sovereignty', because we actually have to 'appreciate the extent to which state sovereignty is the basis of order in the international system, and that national constitutional regimes represent the best guarantee of human rights.' Consequently, '[i]t can be said with certainty that the liberties of citizens are better protected by their own institutions than by the well-meaning interventions of outsiders.'[85]

An alternative to the internal management of the secessionist conflict would be to leave its resolution to the international community.[86] As for the current international legal treatment of secession, even Buchanan—as the staunch propagator of this approach—plainly acknowledges, 'existing international law regarding secession is dangerously flawed.'[87] Detmar Doering, for his part, notes that the present practice of international law concerning recognition of secession resembles a 'game of lottery'. He finds three deficiencies in that practice: (*a*) non-existence of legal instruments and institutions to evaluate secessionist activities and their legitimacy; (*b*) ongoing primacy of the state as a protector of rights, which is accompanied by the international legal principle of 'non-interference'; and (*c*) the fact that the international community 'is composed of member-states with their own interests and equipped with very varying degrees of power to push through these interests.' In the end, 'power, not rights decides the issue.'[88]

The international involvement in the secession crisis in the former Yugoslavia powerfully demonstrates that the lack of an adequate and timely internal, constitutional response to secessionist politics might indeed trigger an extreme and decisive interference of international actors.[89] To be sure, the

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[85] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton and Oxford: Princeton University Press, 2001) at 35.

[86] The other alternative, today less likely in liberal democracies, would be 'to argue that the national government will resist secession under any and all circumstances, even to the point of using military force'; Monahan & Bryant, *supra* note 81 at 21.

[87] Allen Buchanan, 'A Principled International Legal Response to Demands for Self-Determination' in Igor Primoratz & Aleksandar Pavkovic, eds., *Identity, Self-Determination, and Secession* (London: Ashgate, 2006) at 139. Hence, he delivers the proposal for a thorough moral reform of international law; Buchanan 2003, *supra* note 2.

[88] Detmar Doering, 'Secession Rights in a Liberal Perspective', paper presented at the Liberal Think Tank in Dakar, Senegal, 23 October 2003, at 4.

[89] See, e.g. Peter Radan, *The Break-up of Yugoslavia and International Law* (London and New York: Routledge, 2002).

former Yugoslavia was not a liberal-democratic state, and I do not imply that the scenario from that case would be repeated in the context of a more stable liberal-democratic polity.[90] However, it also cannot be denied that such a state would exercise much stronger control over the whole issue by constitutionalizing the secession procedure than in the absence of clearly established internal rules. Instead of letting the power politics of international actors prevail in deciding the secession crisis, constitutional rules on secession might in fact influence the more principled stance of international actors with respect to recognition policy, inasmuch as only those entities that successfully overcome constitutional hurdles could legitimately claim international recognition by existing states.[91]

3. *Enhancing Political Stability*

The third argument is that the legal regulation of this otherwise explosive political issue may in the long run even *contribute to the political stability* of a state. In Norman's opinion, legally prescribed procedural hurdles, which 'would make secession difficult but not impossible', would primarily serve not to rule out the possibility of secession but simply to distract regional political leaders to use secessionist politics 'to bolster their demands for more autonomy.' Simultaneously, 'the central government might be willing to accord more autonomy to the region in the first place if it could be assured that this would not make secession more likely.'[92] Similarly, Weinstock argues that one of the 'pragmatic virtues' of the constitutionalization of secession might be that it would 'alter the relevant actor's motivations in a

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[90] However, the tactic of 'internationalization' was already taken up by the Government of Quebec, which in 1992 commissioned a report, prepared by five well-known international law experts, on the issue of this federal unit's international borders in the event of its independence. The study was written by Allen Pellet (who also served as Badinter's international law consultant in the case of former Yugoslavia) in close collaboration with Thomas M. Franck, Rosalyn Higgins, Malcolm N. Shaw, and Christian Tomuschat; *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty* (Report prepared for Québec's Ministère des relations internationales, 1992) trans. by William Boulet, online: Independence of Québec <http://english.republiquelibre.org/Territorial_integrity_of_Quebec_in_the_event_of_the_attainment_of_sovereignty>. The underlying idea of this move was, at least in part, to instigate a wide international academic debate about the borders of a would-be independent Quebec, and the pro-independence camp gained initial advantage by the mere fact that widely recognized international scholars argued in favour of territorial inviolability of this federal unit's borders.

[91] A potentially new moment for the internationalist strategy might come with an advisory opinion of the International Court of Justice, which has to address Serbia's question 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'

[92] Norman 2001b, *supra* note 80 at 107-8; cf. Norman 2003, *supra* note 12 at 223-8.

unity-promoting manner.'[93] He believes that 'in many relatively just and prosperous multinational states, one of the principal irritants creating secessionist feeling is precisely the fact that the right to secede does not exist.' When such a clause is incorporated into the supreme law, one may expect that the potential right-holders would more easily avail themselves to 'a cold and lucid cost/benefit analysis of the relative advantages of seceding or remaining within the larger state', and that in relatively fair and well-off liberal democracies this analysis would most often 'favour remaining.' Simultaneously, in the same context, central authorities 'will be less tempted to ride roughshod over the collective rights of minority nations than it would be if it felt it could do so with impunity.'[94]

Furthermore, from all we empirically know about secessionist movements around the globe, it seems arguable that when clear and legitimate rules are in place, the uncertainties and risks of violence—as a regular accompanying phenomenon of secession politics—will be significantly minimized.[95] This is not to suggest that all potential violent conflicts would be prevented by a mere constitutionalization of secession procedure, especially in those states where such a regulation is not embedded in the minimal liberal-democratic societal and institutional setting. However, in cases where these requirements are met, constitutionalizing the right to secession would knock the bottom out of the arguments of those secessionists who would be prepared to use violent means, claiming that their political goal is impossible to be realized through regular channels of democratic politics—as might currently be the case with certain followers of the Basque separatist movement in Spain.[96] Consequently, removing the possible causes of group dissatisfaction and hostility enhances the prospects for stability of the given polity.

VI. Protecting the values of liberal-democratic constitutionalism

If in the aforementioned circumstances political prudence points to the direction of the constitutionalization of secession, this still does not imply that such an institutional response is compatible with liberal-democratic

[93] Weinstock 2000, *supra* note 57 at 261.
[94] *Ibid.* at 262.
[95] Cf. Norman 1998, *supra* note 57 at note 41.
[96] Moreover, the route of political violence can easily gain currency after the ban of those Basque political parties, which are supposedly connected to the ETA terrorist activities. See Leslie Turano, 'Spain: Banning Political Parties as a Response to Basque Terrorism' (2003) 1 Int'l J. Const. L. 730.

constitutionalism per se. Hence, the fundamental question is which values of liberal-democratic constitutionalism, if any, might be protected in the case of the constitutionalization of secession. I believe that there are at least three such values. I will briefly sketch each one of them.

1. The Rule of Law Value

As for the first of these values, proponents of the constitutionalization of secession maintain, I believe with good reason, that taking this issue from the sphere of power politics and putting it within the established legal framework 'would ensure that there was never a break with the rule of law.'[97] In particular, a constitutional right to secession would promote *legal certainty*, as the vital part of the rule of law concept, insofar as 'it would regulate a form of politics by specifying clear criteria for success and failure.' In that respect, a secession clause would have a similar purpose as constitutional rules on elections and the amending procedure.[98] Consequently, as Norman points out, this institutional devise may not only 'minimise the risk of violence, but beyond that it can be thought of as an almost intrinsically worthy aim in a constitutional democracy.'[99]

Whereas some opponents of the constitutionalization of secession are ready to admit that—especially in the liberal democracies of today—the moral right to secession 'is so deeply embedded that it cannot be easily overridden',[100] they are not willing to provide this recognized moral right with constitutional protection. Instead, they try to justify this somewhat contradictory position by pointing to the 'real question'; that is, 'whether a constitutional right to secede would significantly increase the level of secession activity, or whether a constitutional ban on secession would significantly decrease the level of such activity.'[101] However, from all we know from the real-life experience of liberal democracies, 'secessionist politics will occur anyway, regardless of legal silences and prohibitions'.[102] If that is the case, there are good reasons to believe that its occurring in a legal vacuum will be far more detrimental than were it to occur within a well crafted legal procedure.

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[97] Norman 2001a, *supra* note 57 at 91.
[98] Norman 1998, *supra* note 57 at 48.
[99] Norman 2001a, *supra* note 57 at 91.
[100] Kai Nielsen, 'Liberal Nationalism, Liberal Democracies, and Secession' (1998) 48 U.T.L.J. 253 at 253.
[101] Sunstein 2001b, *supra* note 61 at 353-4.
[102] Weinstock 2001, *supra* note 31 at 196.

2. The Extension of Democratic Rights Value

As for the second value, one should be aware of the fact that in most Western states, which are commonly considered to be stable liberal democracies, it is possible to locate credible, even parliamentary represented, political organizations that propagate secession. This means that the said democratic systems, as a rule, do allow secessionists to organize and electorally compete, as long as they use non-violent means for the realization of their political goals. Hence, Norman accurately observes 'the difficulty of fixing an arbitrary stopping point for the legality of secessionist politics.' For, 'if it is permissible to advocate secession, to form parties with secessionist platforms, to have those parties form provincial governments', then it is hard to understand why the right to secession itself would not be legalized as well.[103]

To illustrate how odd the current situation is, let us imagine a polity whose major source of energy comes from a nuclear power plant. In that state, however, also exists a credible anti-nuclear power movement. Suppose that the state allows this movement to politically organize and to participate in elections, and to represent its views in the national parliament. Let us now assume that this state's constitution has an explicit ban on closing the nuclear power plant. How meaningful could the political activities of the aforementioned movement be in the given political setting?

To use this case as an analogy with an unrecognized constitutional right to secession might at first glance appear simplified, since virtually no constitution has an explicit ban on secession. However, this absence of prohibition is due to the fact that constitutional drafters around the world still hold to Lincoln's saying that '[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments.'[104] Consequently, parliamentary-represented secessionist parties in liberal-democracies without a constitutionalized right to secession eventually come very close to the described position of the anti-nuclear movement.

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[103] Norman 2003, *supra* note 12 at 207.

[104] Abraham Lincoln, *The Collected Works, Vol. 4*, (New Brunswick: Rutgers University Press, 1955) at 252. After all, the Canadian Supreme Court acknowledged that Quebec's secession would not contradict the concept of *constitutionalism* as such, but that it would not be possible unless if the current constitution is amended as to allow for such a possibility.

Finally, liberal-democratic constitutionalism codifies democratic rules of the game, inasmuch as it defines who can vote and on what issues.[105] Accordingly, in the context of the already recognized democratic potential of secessionist political parties, putting the exit option on a voting menu would represent nothing more than the extension of already existing democratic rights.

3. The Peace Among Communities Value

In the first post-Cold War decade, not inter-state conflicts but 'ethnonational wars for independence ... were the main threat to civil peace and regional security'.[106] Most of these conflicts involved ethnocultural (minority) groups waging war with the central state. Therefore, in the present-day world national peace is no longer secure if only inter-individual relations are pacified, as once presumed by Hans Kelsen.[107] In order to prevent such violent conflicts, the state has to appease *inter-group tensions* as well. The further difficulty, in that respect, stems from the fact that the central state is often perceived by minorities not as a neutral and impartial peace-maker, but as an active player, representing a dominant ethnocultural group. Even liberal-democratic states are commonly portrayed in such a way by ardent supporters of local secessionist movements. 'This outbreak of nation-consciousness', Thomas M. Franck writes, 'increasingly manifests itself in efforts to secede from, or bring about the disintegration of, multinational civil societies and established states.'[108]

Consequently, one of the roles of contemporary constitutions is exactly to 'provide tools for conflict management among the diversities of society.'[109] As already indicated, a constitutional right to secession should not be understood as an instrument that could be directly derived from the principle of 'ethnocultural justice'.[110] To the contrary. Even Norman

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[105] Richard Bellamy & Dario Castiglione, 'Constitutionalism and Democracy—Political Theory and the American Constitution' (1997) 27 Brit. J. Pol. Sci. 595 at 595.

[106] Cf. Monty G. Marshall & Ted Robert Gurr, *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (College Park, MD: CIDCM, 2003) at 1, online: <http://www.systemicpeace.org/PC2003.pdf>.

[107] Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944) at 4.

[108] Thomas M. Franck, *The Empowered Self—Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999) at 21.

[109] Fleiner, *supra* note 43 at 14.

[110] Will Kymlicka, 'Nation-Building and Minority Rights: Comparing East and West' (2000) 26 J. Ethnic & Mig. Stud. 187.

explicitly acknowledges: 'I am not arguing that a just multinational federal constitution *must* contain a secession clause but only that such a clause is potentially beneficial in a number of ways that matter in multinational democracies.'[111] That is, in certain circumstances—for instance, in the context of the substantial constitutional refounding of a state[112]— a secessionist clause might be a tool to enhance the peace among major communities.

VII. Conclusion

This article tries to show that the constitutionalization of secession should not be discredited as incompatible with liberal-democratic constitutionalism, at least with that form of constitutionalism that takes seriously certain imperatives of the new century, such as multiculturalism, respect for ethnocultural diversity, and self-determination. After all, the issue of whether the right to secession was inherent to the federal form of state was widely debated in American antebellum constitutional theory. It was only after the defeat of the secessionist South that it largely, though not completely, disappeared from the theoretical discourse. Consequently, this topic is certainly not novel for constitutional scholars, at least for those of federal or federal-like countries. These polities are still the ones most affected by secessionist politics, and hence are probably the best candidates for the constitutionalization of secession.[113] The position taken here is not to be equated with the stance that federal units are inherently vested with the right to unilaterally withdraw from the larger state, but with the one that holds that such a constitutional option *might be deliberated* between the centre and the periphery.[114]

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[111] Norman 2003, *supra* note 12 at 227 (emphasis in original).

[112] Cf. Norman 2006, *supra* note 57 at 210.

[113] In the absence of such a constitutional clause, the specific institutional capacity of a federal unit to produce a secession crisis might easily become a strategic advantage if it wants to become an independent state. In such a scenario, the central state—even the liberal-democratic one—may no longer be the sole master of its internal political dynamics. Further, in the post-Badinter era, which brought with it the impression 'that the internationally recognized statehood of a federal state is somehow less solid than that of a unitary state' (Hurst Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 Transnat'l L. & Contemp. Probs. 69), this might even open the room for the internationally brokered break-up of the respective polity. This is probably why all stated examples of the constitutionalization of secession come from federal or federal-like countries. For more detail see c. II of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach.*

[114] Hence my recommendation throughout the article to constitutional drafters and statesmen that this strategy might at times be prudent *does not* imply the suggestion that this clause should be *imposed* by the central state. To the contrary, the legitimacy of this clause, as of any other

Finally, if such a clause is incorporated in the constitutional system of a state, I argue that the *procedural* model of constitutionalization is preferable to the *substantive* one, where secessionists would have to demonstrate that they have been treated unjustly by the state. The most important advantage of the procedural model is that it largely avoids plausible conflicts over the legal interpretation of stipulated conditions for secession.[115] This procedural model will have to deal with a number of serious issues, such as the definition of the potential bearer of the right to secession, the appropriate territorial unit for the exercise of such a right, the problem of the 'recursive secession' of dissenting minorities in a seceding area, the clarity of the referendum question, the eligibility to vote, the majority threshold and so on. However, to tackle all these issues here would be to go outside the intended scope of this article,[116] which is to demonstrate that the constitutionalization of secession is not only at times a prudent strategy to cope with secessionist conflicts, but it is the one that is compatible with the new precepts of liberal-democratic constitutionalism.

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clause in a liberal-democratic constitution, will largely rest on the approval of all relevant stake-holders. Nevertheless, nobody can deny that in the present state of affairs, when constitutions worldwide are commonly silent on this subject-matter, the mere willingness of the central state to avail itself to such a procedure might represent a significant starting advantage in the deliberation process. This, in turn, might directly influence the final design of a secession clause.

[115] If substantive criteria are adopted, 'secessionists and unionists are likely to disagree about what kind of incidents or events can give just cause to secede, about whether such events have occurred, about whether they have been or could be rectified as measures short of secession, about whether the particular violations were significant enough to justify secession etc'; Norman 1998, *supra* note 57 at 50.

[116] For a detailed analysis how one plausible procedural framework for the constitutionalization of secession might look like, see c. V of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach*.

Lessons From Kosovo
The Law of Statehood and Palestinian Unilateral Independence

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I. Introduction

On 17 February 2008, the Republic of Kosovo declared independence. This declaration was met with mixed international reaction, and raised questions regarding the international law of statehood. At the heart of the controversy over Kosovo lie concerns as to the possible effect and precedential value that the case of Kosovo may have on this body of international law. In this paper we examine the international law of statehood as it has developed over the last century. We then go on to analyze the particular circumstances of Kosovo, and the degree to which it fulfills the legal requirements for statehood. Next, we attempt to define the possible implications of the recognition of Kosovo as independent on the law of statehood. Finally, we examine whether such implications may have affected the prospects of a unilateral declaration of independence by the Palestinian Authority.

II. The International Law of Statehood

1. The Classical Conditions for Statehood: Effectiveness

Statehood is the primary form of legal personality in international law, affording an entity exclusive competence regarding its internal and external affairs.[1] Despite the lack of a 'generally accepted and satisfactory legal definition of statehood,'[2] states have long acknowledged the existence of other states by means of recognition.[3] Recognition is today predominantly considered declaratory and not constitutive.[4] This may indicate that the recognition by other states that an entity has conformed to the requirements of statehood carries significant weight in borderline cases.[5]

The most accepted formulation of criteria for statehood is found in Article 1 of the 1933 *Montevideo Convention on the Rights and Duties of States*, which stipulates the following conditions for statehood: '(a) a permanent

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[1] UN *Charter*, art. 2(1), 2(7); *Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the Unites Nations*, G.A. Res. 2625, UN GAOR, UN Doc. A/5217 (1970) 121 [*Declaration on Friendly Relations*].

[2] James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006) at 37 [Crawford 2006].

[3] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 42 [Higgins 1994].

[4] On the various formulations of the constitutive and declaratory approaches to recognition, see Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1948) at 38-63.

[5] *Opinion No. 8, Conference on Yugoslavia* (1992) 92 I.L.R. 199 at 201 [*Opinion No. 8*]; Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 189, 369 [Shaw 2003].

population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.'[6] The principle underlying these criteria is the effectiveness of the territorial unit; namely, its ability to function as an independent self-governing entity.[7]

The 'permanent population' qualification has been understood to require a stable community of any size, residing in a given territory. Similarly, the 'defined territory' of a state may be extremely small, fragmented, or even an enclave within another state. Furthermore, precise demarcation of boundaries is not necessary.[8] The 'government' requirement refers to the effective exercise of authority with respect to persons and property within a territory, while the 'capacity to enter into relations' is the right and ability to exercise that authority with respect to other states.[9] Together, these last two requirements form the central condition of effectiveness, which is assessed formally and substantively.[10]

2. Trends and Additional Considerations: Legality and Legitimacy

A survey of the relevant international practice reveals a number of cases in which the Montevideo requirements were not the only considerations applied by states. Entities which did not fully meet the classical criteria were at times recognized as independent, while in other cases, entities which seemed to fulfill the criteria were denied such recognition. An emerging set of additional considerations, based on principles of legality and legitimacy, had a decisive effect on recognition of independence in these cases.[11] After briefly outlining these principles, we turn to past cases demonstrating their application.

a. Legal Principles Affecting Statehood

The legal principle which has had the most profound impact on the willingness of states to recognize an entity's statehood is the principle of self-determination. This principle originated as the basis for state demands of

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[6] *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19; Crawford 2006, *supra* note 2 at 46.
[7] Crawford 2006, *ibid*.
[8] Crawford 2006, *ibid*. at 46-47, 52; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 70 [Brownlie]; *North Sea Continental Shelf* (Germany/Denmark) [1969] I.C.J. Rep. 3 at para. 46.
[9] Crawford 2006, *supra* note 2 at 55, 62-66.
[10] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963) at 25-26; Crawford 2006, *supra* note 2 at 67-89.
[11] Shaw 2003, *supra* note 5 at 178; Brownlie, *supra* note 8 at 70; Crawford 2006, *supra* note 2 at 97-99.

equal rights, specifically in the context of decolonization.[12] It has broadened over time to include post-colonial contexts.[13] The exercise of the right to self-determination does not necessarily compel the establishment of a new state; it may be exercised 'internally' within a state, for example, through autonomy or certain cultural rights.[14]

International law is reluctant to recognize a general right to 'external' self-determination (i.e. unilateral secession from a state), as it is at odds with the fundamental principle of territorial integrity.[15] However, certain circumstances arguably establish a right to 'remedial secession'.[16] The 1970 *Declaration on Friendly Relations*, while upholding the principle of territorial integrity, implicitly acknowledges an exception to its protection when a government denies a people the right to self-determination and equality.[17] This is further supported by the Supreme Court of Canada in its reference decision regarding Quebec.[18] Consequently, some writers have argued that international law allows for 'remedial secession' in exceptional circumstances,[19] for example, when a minority residing in a defined territory is persistently denied the right to internal self-determination, or when grave human rights violations indicate that internal solutions are not possible.[20]

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[12] UN *Charter*, art. 1(2), 55, 73(b) & 76(b); Crawford 2006, *supra* note 2 at 114; Higgins 1994, *supra* note 3 at 111-14. See also *Declaration on the Granting of Independence to Colonial Countries and People*, GA Res. 1514 (XV), UN GAOR, UN Doc. A/4684 (1961) 174.

[13] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S 171, art. 1; Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 65-66, 118-24 [Cassese].

[14] *Declaration on Friendly Relations*, *supra* note 1; David Raič, *Statehood and the Law of Self Determination* (The Hague: Kluwer Law International, 2002) at 226 [Raič].

[15] UN *Charter*, art. 2(4); Crawford 2006, *supra* note 2 at 390.

[16] Raič, *supra* note 14 at 324, 332; Lee C. Bucheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) at 220.

[17] *Declaration on Friendly Relations*, *supra* note 1; *cf. Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23 at para. 2; *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, 24 October 1995, GA Res. 50/6 , UN GAOR, UN Doc. A/RES/50/49.

[18] *Re Secession of Quebec* (1998), 115 I.L.R. 537 at para. 130 (Canada, S.C.); see also *Loizidou v. Turkey*, no. 15318/89, [1996] VI E.C.H.R. 2216 at 2241, Wildhaber J., concurring opinion.

[19] Christian Tomuschat, 'Secession and self-determination' in Marcelo G. Kohen, ed., *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 41 [Tomuschat]; John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in Kohen, *ibid*. 94 at 109-10 [Dugard & Raič].

[20] Dugard & Raič, *ibid.* at 109.

Other writers have denied the existence of a right to remedial secession, pointing to a lack of international practice and *opinio juris.*[21]

The effect of the principle of self-determination on the law of statehood is such that in cases where the right to self-determination of a people is recognized, it may mitigate the necessary level of fulfillment of the classical criteria of statehood, especially in the context of decolonization.[22] It may also be seen as a prerequisite to statehood, rendering invalid the establishment of a state in violation of this right.[23]

Another legal principle which has gained importance with regard to the law of statehood is the requirement to adhere to peremptory norms of international law. When a state is founded through a breach of a peremptory norm of international law, other states are arguably obligated to not recognize it.[24]

Further considerations are based on notions of legitimacy, as may be evidenced by the guidelines on recognition of new states, adopted by the European Community in 1991, which conditioned the recognition of new states on their establishment of democratic institutions and respect for human rights.[25] However, it is doubtful whether these suggested requirements have become peremptory norms disqualifying an already recognized entity's statehood.[26] Nevertheless, they may have an impact on the willingness of states to recognize new entities.

b. Relevant Past Cases

While each case of the attainment of statehood is unique, it is interesting to focus on cases where statehood was attained despite deficiencies with regard to the classical criteria. In some cases the principles mentioned above may have played a role. For our purpose, it would be specifically helpful to

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[21] Cassese, *supra* note 13 at 118-24; Crawford 2006, *supra* note 2 at 417-18; also see Rosalyn Higgins, 'Postmodern Tribalism and the Right to Secession, Comments' in C. Brölmann *et al*. eds., *Peoples and Minorities in International Law* (Dordrecht: Nijhoff, 1993); but see Raič, *supra* note 14 at 362-66.

[22] Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986) at 151-62.

[23] Shaw 2003, *supra* note 5 at 184-85.

[24] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), art. 41(2); UN *Charter*, art. 2(4); Crawford 2006, *supra* note 2 at 155. The non-recognition of the Bantustan states, set up by South Africa in pursuit of its apartheid policy, is considered to be a manifestation of this principle.

[25] *Opinion No. 4, Conference on Yugoslavia* (1992), 92 I.L.R. 173.

[26] Crawford 2006, *supra* note 2 at 155.

examine cases that share certain characteristics with Kosovo or Palestine. Among several examples, the following cases warrant special attention.

In 1971, the Bangladesh secessionist movement was brutally repressed by the Pakistani government in a campaign that included severe human rights violations. In response, Indian army forces invaded Pakistan, effectively paving the way for Bengali independence.[27] The case of Bangladesh has been used to support the possibility of remedial secession, aided by foreign military might, in light of political repression and grave human rights violations.[28]

The most prevalent case of the creation of new states in recent decades is that resulting from the dissolution of federative states: the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY).[29] The previously constituent units were internationally recognized as new states because the federal entity no longer existed[30] and thus its integrity no longer warded protection. However, the emergence of these former federal states as independent states did not fulfill all existing aspirations for independence. Other groups, demanding independence through further disintegration, were not recognized at that point. Kosovo, as will be discussed below, is one example; Chechnya is another. An autonomous region within the Russian Soviet Federated Socialist Republic, Chechnya's declaration of independence in 1991 was not recognized by Russia, which later forcefully regained control over it. The international response focused on condemnation of the Russian Federation for conducting human rights violations, and not on support for the Chechen demand for independence.[31]

Eritrea was granted autonomy under the Ethiopian crown by the UN General Assembly.[32] In 1962, Ethiopia abolished Eritrean self government, inciting a war between the Ethiopian government and the Eritrean People's Liberation Front (EPLF). In 1991, The Ethiopian People's Revolutionary Democratic Front, an Ethiopian movement, succeeded in overthrowing the Soviet-backed regime of Mengistu Haile Mariam. The transitional government in Ethiopia agreed that Eritrea, effectively controlled by the EPLF by then, had a right to determine its status in a plebiscite. Finally, in

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[27] Tomuschat, *supra* note 19 at 29-30.

[28] Raič, *supra* note 14 at 338-41. See Crawford 2006, *supra* note 2 at 141, 393. Admittedly, Bangladesh was only admitted to the UN after being recognized by Pakistan in 1974.

[29] Crawford 2006, *supra* note 2 at 395.

[30] *Opinion No. 8*, *supra* note 5 at 202.

[31] Tomuschat, *supra* note 19 at 31; Crawford 2006, *supra* note 2 at 408-10.

[32] GA Res. 390 A(195), UN GAOR, 5th Sess. (1950).

1993, Eritrea achieved independence.[33] This is a case where the revoking of a prior autonomy led, admittedly only after years of fighting and a change of government in Ethiopia, to international recognition of secession.

In Timor Leste (East Timor) independence was declared after the Portuguese withdrawal in 1975.[34] However, Indonesia immediately seized control. The UN Security Council and General Assembly affirmed the East Timorese right to self-determination, denouncing the Indonesian occupation,[35] but did little else,[36] despite grave violations of human rights. Following a 1999 referendum, the UN established the United Nations Transitional Authority for East Timor (UNTAET),[37] in order to guide the reconstruction of an independent state after the Indonesian 'scorched earth' withdrawal.[38] Timor Leste serves as a case in which a people, whose right to self-determination was recognized in the context of decolonization, was then subject to occupation and human rights violations. The international community recognized its right to self determination and formed a UN administration, guiding it towards self-government.

c. International Law of Statehood Prior to Kosovo

The above description of the evolution of the international law of statehood could possibly support an argument asserting that the classical criteria are no longer relevant, and that currently they serve only as rhetoric masking the real political or other motives of states when considering recognition of new entities. It is our position, however, that this underestimates the continued importance and influence of the classical criteria. Rather, we submit that while the classical criteria still form the initial and basic normative requirements for assessing statehood, their complete fulfillment is no longer the only yardstick. The classical criteria remain important because they fundamentally capture the elements essential for an entity to effectively function as a state. Therefore, an entity striving for statehood and not meeting the classical criteria must present compelling additional considerations in order to be recognized. The introduction of these additional criteria to the law of statehood does not, however, imply complete

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[33] Tomuschat, *supra* note 19 at 28; Crawford 2006, *supra* note 2 at 402.
[34] GA Res. 1542 (XV), UN GAOR, UN Doc. A/4684 (1960).
[35] SC Res. 384, UN SCOR, UN Doc. S/RES/384 (1975); GA Res 3485 (XXX), UN GAOR, 30th Sess. (1975).
[36] Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008) at 178-80 [Wilde].
[37] S.C. Res. 1272, UN SCOR, UN Doc. S/RES/1272 (1999).
[38] See Wilde, *supra* note 36 at 180-88; Matthias Ruffert, 'The Administration of Kosovo and East-Timor by the International Community' (2002) 50 Int'l & Comp. L.Q. 613.

abandonment of the classical criteria. An indication of their continued relevance can be found in the international community's efforts to ensure eventual achievement of effectiveness in recognized entities whose effectiveness is deficient.[39]

Having briefly outlined the development of the law of statehood and a number of relevant cases, we now turn to examine the circumstances leading up to the Kosovo declaration of independence in order to better ascertain if Kosovo can be seen as the continuation of a trend of application of the additional considerations.

III. Kosovo's Declaration of Independence and the Classical Criteria

1. *Historical Background*[40]

a. *Kosovo Before 1999*

Kosovo is considered by Serbs to be the birthplace of their state and culture. However, as a result of centuries of Albanian immigration under Ottoman rule, its population is comprised today of 90% ethnic Albanians and only 6% ethnic Serbs.[41] With the establishment of the SFRY, Kosovo was defined as an autonomous region within the constituent Republic of Serbia and not as a constituent Republic of itself, despite such aspirations of the Kosovar Albanians. In 1974, a new constitution granted Kosovo greater autonomy within the SFRY and rights almost equal to those of the constituent republics. However, in 1989, Slobodan Milošević, the new Yugoslav President, abolished Kosovo's autonomy. In 1991, the Kosovo local assembly declared Kosovo independent. In response, the assembly was dissolved, and many Albanian government employees were fired. The break-up of the SFRY, the ensuing Bosnian wars and the negotiations towards the 1995 Dayton agreements ending the wars did not affect the status of Kosovo.[42]

b. *International Intervention*

In 1998, in response to attacks by the separatist Kosovo Liberation Army (KLA), Serbia unleashed a brutal campaign in Kosovo, described by some as

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[39] See *supra* note 37; Jean D'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement' (2007) 20 Leiden J. Int'l L. 649 at 654 [D'Aspremont].

[40] See generally Iain King & Whit Mason, *Peace at Any Price: How the World Failed Kosovo* (Ithaca: Cornell University Press, 2006) [King & Mason]; Alex J. Bellamy, *Kosovo and International Society* (New York: Palgrave Macmillan, 2002).

[41] 'Kosovo', online: Government of Kosovo <http://www.rks-gov.net/en-US/Republika/Kosova/Pages/default.aspx>.

[42] Crawford 2006, *supra* note 2 at 408; SC Res. 777, UN SCOR, UN Doc. S/RES/777 (1992).

'ethnic cleansing', and resulting in the displacement of hundreds of thousands.[43] International mediation efforts lead to the proposed 'Rambouillet Accords', which called for Kosovar autonomy and deployment of peace-keeping North Atlantic Treaty Organization (NATO) troops. Serbia (then the Federal Republic of Yugoslavia, FRY) rejected the proposal. Following the rejection, a 78-day NATO bombing campaign brought about the withdrawal of Serbian forces from Kosovo on 10 June 1999. The same day, the UN Security Council passed Resolution 1244 deciding on the deployment of an 'international security presence' (the Kosovo Force, KFOR) and an 'international civil presence' in Kosovo (UN Mission in Kosovo, UNMIK). UNMIK was charged with providing an interim administration for Kosovo, facilitating Kosovar 'substantial autonomy' and 'meaningful self-administration'. Resolution 1244 also mandated, without setting a deadline, a political determination of a final status. On the other hand, the Resolution's preamble reaffirmed the 'sovereignty and territorial integrity' of the FRY.[44]

In 2001, UNMIK issued Regulation No. 2001/9[45] which outlined and created the Provisional Institutions of Self Government (PISG), including an elected assembly. As the PISG were slow in assuming 'functional responsibilities', and following an outbreak of sectarian violence within Kosovo in March 2004, UNMIK together with Kosovo's Provisional Institutions published the Kosovo Standards Implementation Plan, detailing concrete steps to be taken in eight fields, including building of democratic institutions, rule of law and freedom of movement.[46] Addressing the issue of political dialogue between Serb and Kosovar working groups which had begun at a 2003 EU summit, The Plan described the dialogue as one that must be 'restarted' and must first focus on practical immediate issues such as missing persons, displaced persons returns and transportation. The report mentioned no progress towards a political determination of the final status of Kosovo as envisioned by Resolution 1244.

c. The Lead-up to the Unilateral Declaration of Independence

In a 2005 declaration, France, Germany, Italy, Russia, the UK and the USA set parameters for the desirable final status of Kosovo, which included

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[43] *ICRC Position Paper on the Crisis in Kosovo* (1998), 325 I.R.R.C. 725; 'Nato's Role in Relation to the Conflict on Kosovo', online: NATO <nato.int/kosovo/history.htm>.
[44] SC Res. 1244, UN SCOR, UN Doc. S/RES/1244 (1999), preamble, paras. 9-11.
[45] Regulation No. 2001/9, *On a Constitutional Framework for Provisional Self-Government in Kosovo*, UN Doc. UNMIK/REG/2001/9 (2001), online: <www.unmikonline.org/regulations/2001/reg09-01.htm>.
[46] *Kosovo Standards Implementation Plan*, 31 March 2004, online: <www.unmikonline.org/pub/misc/ksip_eng.pdf>.

protection of human rights and democracy, and stated that Kosovo could not return to the pre-1999 situation and not be partitioned or form a union with any other state.[47] Later talks on Kosovo's future mediated by the Secretary General Special Envoy to Kosovo, former Finnish president Martti Ahtisaari, eventually failed, leading him to conclude that an agreed settlement would be impossible. In March 2007, Ahtisaari presented the Security Council with the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan), claiming that 'the only viable option for Kosovo is independence, to be supervised for an initial period by the international community'.[48] The Security Council failed to reach an agreement regarding the proposal. Albanian leaders in Kosovo accepted the proposal, while Serbian leaders rejected it. A new round of 'intensive engagement' in August 2007 also failed.[49] On 17 February 2008, the Assembly of Kosovo declared the independence of The Republic of Kosovo. The declaration fully accepts 'the obligations for Kosovo contained in the Ahtisaari plan' and declares Kosovo a democratic, secular and multiethnic republic.[50] Kosovo's assembly also adopted a new constitution which, while establishing Kosovar institutions, also included provisions maintaining the precedence of the Ahtisaari plan and the supreme authority and status of the international civilian and military presence.[51]

2. The International Reaction to the Declaration of Independence

Kosovo's declaration of independence received a mixed reaction. Some sixty states have so far formally recognized Kosovo. Among these were the USA, a majority of the European Union, as well as a majority of NATO members.[52]

Serbia deemed the declaration a forceful and unilateral secession of part of its territory, in violation of Security Council Resolution 1244, and therefore null and void.[53]

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[47] *Guiding Principles of the Contact Group for a Settlement of The Status of Kosovo,* online: <www.unosek.org/docref/Contact%20Group%20-%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf>.

[48] *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, 26 March 2007, UN Doc. S/2007/168 at para. 5 [*Special Envoy Report*].

[49] *Report of the Secretary General on the United Nations Interim Administration in Kosovo*, 12 June 2008, UN Doc. S/2008/354 at para. 3 [*Secretary General Report*].

[50] *Kosovo Declaration of Independence*, 17 February 2008, online: Republic of Kosovo Assembly <www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> [*Kosova Declaration*].

[51] *Constitution of The Republic of Kosovo*, arts. 143, 146, 147, 153 & 161, online: <http://kushtetutakosoves.info/?cid=2,1> [*Kosovo Constitution*].

[52] See online: <www.rks-gov.net/sq-AL/Pages/ShtetKaneNjohurKosoven.aspx>.

[53] *Letter of the Permanent Representative of Serbia to the United Nations Secretary-General*, 19 February 2008, UN Doc. S/2008/111 [*Letter of the Permanent Representative of Serbia*].

Serbian-backed resolution referring the following question to the International Court of Justice (ICJ): 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with International Law?'[54] The Russian Federation and the People's Republic of China are also firm opponents of Kosovo's independence,[55] and a number of EU member states, such as Spain, Cyprus and Slovakia, expressed disapproval of Kosovo's unilateral declaration.[56] Commentators interpreted this disapproval as related to domestic concerns.[57] Even supporters of Kosovo's independence have found it necessary to emphasize the uniqueness of the case of Kosovo, saying it is *sui generis* and does not create a precedent.[58]

UN Secretary General Ban Ki-moon, despite initially expressing support of the Ahtisaari plan,[59] subsequently clarified that the UN and its mission are officially 'status neutral'. He did, however, announce an 'adjustment to the structure and profile of UNMIK', introducing more EU involvement in Kosovo's administration through the European Union Rule of Law Mission in Kosovo (EULEX), justifying it under Resolution 1244.[60] Serbia and Russia objected, declaring the restructuring an improper bypass of Resolution 1244.[61]

3. Kosovo and the Classical Criteria for Statehood

If Kosovo were to be assessed solely according to the Montevideo requirements, it would be difficult to find that it has attained statehood. While its population and small territory seem to easily fulfill the requirements of a 'permanent population' and a 'defined territory', the

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[54] GA Res. 63/3, UN GAOR, UN Doc. A/RES/63/3 (2008). On 8 October 2008, the UN General Assembly passed a

[55] *Letter of the Permanent Representative of the Russian Federation to the United Nations Secretary-General*, 19 February 2008, UN Doc. S/2008/108; UN SCOR, 5839th Mtg., UN Doc. S/PV.5839 (2008), at 6-7 [SC 5839th Mtg.].

[56] Reuters, 'Spain Says Won't Recognise Kosovo Independence', 18 February 2008, online: <www.reuters.com/article/latestCrisis/idUSBRB000542>.

[57] Christopher J. Borgen, 'Kosovo's Declaration of Independence: Self Determination, Secession and Recognition' (2008), 12 ASIL Insights, online: ASIL <http://www.asil.org/insights080229.cfm>.

[58] *Cf. Special Envoy Report*, *supra* note 48 at para. 15; US State Department, 'The Case for Kosovo', online: <state.gov/p/eur/ci/kv/c24701.htm> ['The Case for Kosovo'].

[59] *Letter of the Secretary-General to the President of the Security Council*, 26 March 2007, UN Doc. S/2007/168.

[60] *Secretary General Report*, *supra* note 49 at paras. 14-16; *Cf. Council Joint Action on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo*, 4 February 2008, 2008/124/CFSP.

[61] SC 5839th Mtg., *supra* note 55; Reuters, 'Russia: UN chief exceeded authority over Kosovo', 2 July 2008, online: <www.reuters.com/article/latestCrisis/idUSL02700778>.

requirements of 'government' and 'capacity to enter into relations with other states' seem more problematic. While UN and EU reports indicate significant progress in Kosovar institution-building, they also point out substantial shortcomings. Kosovo has formed a functional assembly and established a police force; however, other powers, such as the primary responsibility for law and order, customs or monetary policy, are still in the hands of international representatives. Local administration is still weak and ineffective; assessed in 2007 at 45 percent effectiveness by the World Bank Institute.[62] The presence of international forces is still substantial; including some 13,000 NATO KFOR soldiers and some 1,600 law enforcement and justice EULEX personnel.[63] Kosovo's dependence on an international presence is acknowledged by proponents of its independence, and by Kosovar leaders, who have incorporated it into the constitution.

Similarly, with regard to the 'capacity to enter into relations with other states', as so many of Kosovo's institutions rely on the foreign presence, its ability to independently commit itself to any undertakings in its international relations is, at best, partial. Furthermore, even in this context, Kosovo's constitution recognizes the final authority of the head of the international military presence and the international civilian representative in military and civilian issues respectively.[64]

Thus, the requirements of government and capacity to enter into relations with other states are not completely fulfilled, and Kosovo does not seem to meet the classical criteria for statehood.

However, proponents of Kosovar independence do not view these deficiencies as detrimental. Instead, they suggest that the international presence and the continuing process of institution-building ensure Kosovo's ability to become a viable independent entity, thus meeting the criteria. They point out that further development would only be possible when a final

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[62] *Secretary General Report*, *supra* note 49 at paras. 2, 17, 31-32; UNMIK, *Kosovo in February 2008*, online: <www.unmikonline.org/docs/2008/Fact_Sheet_February_2008.pdf>; European Union: European Commission, *Kosovo (under UNSCR 1244) 2007 Progress Report*, 6 November 2007, SEC (2007) 1433.

[63] *KFOR Contributing Nations and Troop Numbers*, online: NATO <www.nato.int/kfor/structur/nations/placemap/kfor_placemat.pdf>; *Report of the Secretary-General on the United Nation's Interim Administration Mission in Kosovo*, 10 June 2009, UN Doc. S/2009/300, at para. 6; Branislav Krstic, 'EU Mission Deploys in Kosovo Amid Tight Security', 9 December 2008, online: Reuters <www.reuters.com/article/latestCrisis/idUSL9673723>.

[64] *Special Envoy Report*, *supra* note 48 at paras. 11-13; *Kosova Declaration*, *supra* note 50 at paras. 3 & 5; *Kosovo Constitution*, *supra* note 51, arts. 143, 146, 147, 152, 153, but see 161; *Secretary General Report*, *supra* note 49 at paras. 14-16.

status is reached.[65] Finally, the international presence can be viewed as facilitated by Kosovar consent, thus indicating—and not disproving—its sovereignty. Nevertheless, objectors could argue that the fact that Kosovar authorities are devoid of constitutional capacity to demand the withdrawal of international forces, coupled with the fact that these forces hold discretionary authority to intervene in Kosovo's internal affairs, constitute a clear lack of independence, rendering its statehood questionable under the classical criteria.[66] In conclusion, if the classical criteria were the only considerations, it would seem that Kosovo's opponents hold the stronger argument.

IV. Possible Consequences of the Recognition of Kosovo

This section examines possible considerations beyond the Montevideo criteria, such as those raised by the states that have recognized Kosovo's independence, which may have played a role in the Kosovo case, and which may affect future cases.[67]

1. *Can the Kosovo Case Serve as a Precedent? The* Sui Generis *Argument*

An oft-mentioned argument against recognition of Kosovo is that it would create a dangerous precedent for secessionist movements undermining the fundamental principle of territorial integrity. Serbian president, Boris Tadić, argued that the Kosovo declaration of independence 'runs afoul of the first principle of the Charter of the United Nations – the sovereign equality of all Member states' and warned: 'there are dozens of other Kosovos in the world, and all of them are lying in wait…'[68]

Anticipating such an argument, the Ahtisaari Plan and the Kosovo declaration of independence both emphasize that Kosovo is a 'unique case' that 'does not create a precedent for other unresolved conflicts.'[69]

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[65] *Special Envoy Report*, *supra* note 48. It should be noted that some Kosovar leaders have recently expressed the position that the international administration has completed its mission and should leave Kosovo. See Reuters, 'Kosovo President Asks UN to End its Mission', 22 April 2009, online: <www.reuters.com/article/latestCrisis/idUSVAS243336>.

[66] Crawford 2006, *supra* note 2 at 71-72.

[67] See Section II.

[68] SC 5839th Mtg., *supra* note 55.

[69] *Special Envoy Report*, *supra* note 48 at para. 15; *Kosova Declaration*, *supra* note 50, preamble.

involvement and administration in Kosovo which denied Serbia a role in its governance since 1999; the existence of a comprehensive framework for independence; failure of the negotiations with Serbia, and more.[70]

There are several problems with this *sui generis* argument which contends that Kosovo cannot serve as a precedent for other cases. First, asserting that Kosovo's independence cannot serve as a precedent does not itself prevent Kosovo from becoming one. Moreover, what seems to be the reluctance of states grappling with secessionist movements to recognize Kosovo for fear of creating a precedent, may in itself serve as an indication of its precedential potential.

Second, one cannot claim that a situation is unique due to certain circumstances and deny a similar legal outcome in a similar case. At the very least, if an entity demanding independence can prove that its circumstances are similar, or even more favourable, than Kosovo's, then it would have a strong argument for independence.

Third, if we look to past cases where independence was sought, such as Timor-Leste, Bangladesh, Eritrea and the dissolution of the USSR, we find similar circumstances, indicating that Kosovo's characteristics are not as exceptional as argued. In some cases, such as Timor-Leste, where international administration was established following human rights violations, the result was independence. In other cases such as Chechnya, despite similar characteristics to the Kosovo case such as human rights violations and the dissolution of a federative state, independence was not attained. While no case is a carbon copy of Kosovo, there may be a sufficient number of similar cases in international law to view Kosovo as the most recent case in a series, indicating a trend, albeit not uniform, in the international law of statehood.

This position is echoed by Kosovo's supporters, who list a number of special circumstances that justify supporting Kosovo's secession, such as an independence from Georgia, Russia compared to Kosovo, the similar consensual collapse of the SFRY, grave human rights violations, international minority in the general population but a majority within a specific region; historical autonomy; the occurrence of human rights violations necessitating

[70] 'The Case for Kosovo', *supra* note 58; SC 5839th Mtg., *supra* note 55 at 8, 12; *Kosova Declaration*, *supra* note 50, preamble; Also see Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008), 12 Max Planck U.N.Y.B. 1 at 21.

an international (Russian) involvement; and the lack of prospects for reaching an agreed solution.[71]

In sum, it is clear that Kosovo has already had significant influence in international legal discourse. Hence, analyzing the different factors affecting its claim would be useful for assessing future cases.

2. Additional Considerations of Significance in the Kosovo Case

a. Human Rights Violations and Remedial Secession

If Kosovo is to be recognized as independent, this could serve as support for the argument that remedial secession can lead to lawful recognition and statehood under international law. Kosovo is a case where a distinct minority group, after being stripped of its autonomy, seeks to exercise its right to self-determination externally within a certain territory in which it forms the majority. Furthermore, the grave violations of human rights in Kosovo in 1998-99 may be seen as preventing a realistic prospect of finding an agreed solution within the borders of Serbia.[72] These circumstances would seem to fulfill the requirements raised by supporters of remedial secession.[73] Kosovo would then join the cases of Bangladesh and Eritrea in supporting the existence of state practice allowing remedial secession.

b. Federation Dissolution

Another possible framework through which Kosovo's independence may be deemed legitimate is that of the dissolution of a federal state. Those who support this notion would view Kosovo as a final belated step in the dissolution of the SFRY. However, this view is problematic as Kosovo was not a constituent republic of the SFRY, but only an autonomous region within the Republic of Serbia. Moreover, during the significant years of SFRY's breakup, Kosovo was not recognized as independent and was considered an integral part of Serbia. Hence, in order to support Kosovo's independence under this framework, one would have to suggest that the SFRY's dissolution created a right to external self-determination not only for the constituent republics, but also for additional national groups comprising it, even at a price of further fragmentation. The underlying logic of this position would be that, as the federal state is disintegrating in any case, the

[71] Security Council, 5969th Mtg., UN Doc. S/PV.5969 (2008).
[72] *Special Envoy Report*, *supra* note 48 at para. 5.
[73] See Section II.2.a.

protection of its territorial integrity is no longer relevant. This view is not supported by practice, as indicated by the case of Chechnya.[74]

c. The Significance of International Involvement and Administration

Supporters of Kosovo's independence point to the international involvement as strengthening its claim for independence, and as reflecting an international position that Kosovo should no longer be governed by Serbia in light of past violence and present stagnation. Moreover, the international involvement in the administration and institution-building in Kosovo may be considered as an important assurance that it will eventually fulfill the classical criteria for statehood.[75] If this is accepted, Kosovo would join Timor-Leste as a case where international administration and guidance in institution-building promoted the international recognition of statehood.

It is further argued that paragraph 11(a) of Resolution 1244, which states that Kosovo's substantial autonomy within the Federal Republic of Yugoslavia is merely an interim phase, places no limits on Kosovo's status outcome and allows for independence. This view is further reinforced by the fact that even the Secretary General-appointed envoy, whose mandate was established in Resolution 1244, supports the independence of Kosovo due to the failure of the negotiations.[76]

On the other hand, the opponents of Kosovo's independence view the international involvement as forbidding Kosovo to declare independence unilaterally. They point to the language of the preamble of Resolution 1244 that explicitly reaffirms the sovereignty and integrity of the Republic of Serbia (then, FRY), suggesting that any solution must be brought before the Council.[77]

d. Deadlocked Negotiations: a Last Resort?

Another argument used by supporters of Kosovo's independence is that, since the political process envisioned by Resolution 1244 has failed, independence is the only viable final status solution. An important component of this argument is a view expressed by Ahtisaari, according to which Kosovo's progress is inhibited by the political stagnation and instability caused by the uncertainty as to its future. This is reflected, for example, in Kosovo's difficulty in attracting foreign investment. [78]

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[74] Crawford 2006, *supra* note 2 at 406-08; see also the case of Republica Srpska, *ibid*.
[75] SC 5839th Mtg., *supra* note 55 at 12-13, 19; *Special Envoy Report*, *supra* note 48 at para. 5.
[76] *Ibid*.
[77] SC Res. 1244, *supra* note 44, preamble; *Letter of Permanent Representative of Serbia*, *supra* note 53.
[78] *Special Envoy Report*, *supra* note 48 at para. 16.

may be argued that an inability to reach an agreed solution may support an argument for the right to unilateral independence.[79]

e. Avoiding Destabilization

The Ahtisaari Plan claims that reintegration of Kosovo into Serbia is not a viable option. In addition to mentioning the history of enmity between Kosovar Albanians and Serbs, it explains that the existing reality of the past eight years in which Serbia has not exercised any governing authority over Kosovo is irreversible. The report asserts that a return of Serbian rule over Kosovo, regardless of the degree of autonomy Kosovo would enjoy, would be unacceptable to the vast majority of the people of Kosovo and would provoke violent opposition.[80] The assumption at the root of this argument is that in a case where reaching an agreed solution is impossible, the solution causing the least violence and unrest should be chosen.

f. Additional Factors

Another possible factor that may strengthen a claim for independence is the existence of a comprehensive framework for the attainment of independence and continued institution-building: the Ahtisaari Plan. The existence of a detailed plan, which together with UNMIK's Kosovo Standards Implementation Plan form a comprehensive roadmap for institution building and increasing government functionality, may help alleviate doubts that Kosovo will meet the traditional requirements of statehood in the near future. This notion is reinforced by the professed support of the plan in the Kosovo Constitution.[81]

A further legitimizing factor for Kosovo's claim is the fact that the Kosovo Constitution creates a democratic multiethnic state and includes a commitment to the protection of human rights.[82] The commitment to democratic institutions is significant in terms of legitimacy especially in light of the past human rights violations in Kosovo under Serbian rule, as well as past attacks directed against the Serb minority in Kosovo by Kosovar Albanians.[83]

Thus, it

[79] *Cf. Kosova Declaration*, *supra* note 50.
[80] *Special Envoy Report*, *supra* note 48 at paras. 6-7.
[81] *Kosovo Constitution*, *supra* note 51, preamble.
[82] *Ibid*.
[83] King & Mason, *supra* note 40 at 276.

g. Conclusion: What Does It All Mean?

In sum, if the independence of Kosovo is to be recognized, it is reasonable to argue that the factors presented in this section have had a role in overcoming deficiencies with regard to fulfillment of the classical criteria of statehood. These factors—self-determination, a history of human rights violations, federal dissolution, international involvement and administration, deadlocked negotiations, the hope to avoid further destabilization, the existence of a comprehensive plan and the adoption of democratic institutions—all possibly serve as components of a principle of legitimacy. While it is likely that none of these factors can independently change the legal outcome, it is possible that together they may have a cumulative impact, allowing a claim for independence to overcome deficiencies in the fulfillment of the classical criteria.

V. Palestine: Before and After Kosovo

Analyzing the case of Kosovo, we found that it does not meet the classical criteria for statehood. We thus outlined possible additional considerations and circumstances which may nevertheless support international recognition of its independence. In this section, we first examine whether the Palestinian Authority (PA) meets the classical criteria of statehood. Later, we try to determine whether the possible new legal guidelines arising from the Kosovo case affect the prospects of a Palestinian unilateral declaration of independence.

Clearly, the cases of Kosovo and Palestine are not perfectly analogous, and each has its own unique characteristics. However, both strive for independence and do so within the legal framework of the international law of statehood. Thus, if the case of Kosovo has made an impact on this body of law or highlighted existing trends, we argue that the PA may benefit from such developments, notwithstanding possible differences in context or background between these cases.

Our reason for focusing on the PA is its likelihood to declare unilateral independence and to perhaps benefit from whatever precedential value Kosovo has.[84]

[84] Reuters, 'Palestinian PM sets 2-Year Target for Statehood', 22 June, 2009, online: Ha'artez <haaretz.com/hasen/spages/1094781.html> ['Palestinian PM sets 2-Year Target for Statehood'].

1. Does the Palestinian Authority Meet the Classical Criteria of Statehood?

The Palestinian population in the West Bank and Gaza Strip fulfills the requirement of a 'permanent population'[85] and is recognized as such by the international community,[86] including Israel.[87] The territory internationally regarded and accepted when considering Palestinian statehood[88] is the West Bank and the Gaza Strip, occupied by Israel in 1967. This would seem to be a sufficiently coherent territory, as its imprecise demarcation, limited size and fragmentation do not defeat the requirement.[89]

On the issue of effective government, the common view seems to be that the PA does not fulfill the criterion. Crawford supports this conclusion by pointing out that the PA's control is over a population and not over a territory.[90] Others[91]

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[85] John Quigley, 'Palestine: the Issue of Statehood' in Sanford R. Silverburg, ed., *Palestine and International Law* (Jefferson: McFarland & Company, 2002) 37 at 44 [Quigley]; James Crawford, 'Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States' in Guy S. Goodwin-Gill & Stefan Talmon, eds., *The Reality of International Law* (Oxford: Clarendon Press, 1999) 95 at 111 [Crawford 1999]; Francis A. Boyle, 'The Creation of the State of Palestine' (1990) 1 Eur. J. Int'l L. 302 [Boyle]; Tal Becker, 'International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas', online: Jerusalem Center for Public Affairs <jcpa.org/art/becker1.htm> [Becker].

[86] Council of League of Nations, *Mandate for Palestine*, arts. 2 & 3, online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Mandate+for+Palestine.htm>; GA Res. 181, UN GAOR, 2d Sess., UN Doc A/RES/181 (1947); GA Res. 21/43, UN GAOR, 45th 43rd Sess, UN Doc A/RES/43/21 (1988).

[87] *Camp David Accords*, Israel and Egypt, 23 September 1978, Section A, online: <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Camp%20David%20Accords> [*Camp David*] and *Declaration of Principles on Interim Self-Government Arrangements*, Israel and PLO, 13 September 1993, art. 1, online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm> [*DOP*];

[88] *Ibid*.; *The Wye River Memorandum*, Israel and PLO, 23 September 1998, Sections IV & V, online: <www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Wye%20River%20Memorandum>; *The Initiative of the Saudi Crown Prince Abdullah*, and *the Performance-based Roadmap to a Permanent Two-state Solution to the Israeli-Palestinian Conflict* [*Roadmap*] adopted by SC Res. 1397, UN SCOR, UN Doc. S/RES/1397 (2002) and SC Res. 1515, UN SCOR, UN Doc. S/RES/1515 (2003), respectively.

[89] Crawford 2006, *supra* note 2 at 46-47, 52; but see Glenn E. Robinson, 'The Fragmentation of Palestine' (2007), 106 Current History 421 at 425-26 [Robinson]; *Case Concerning Sovereignty Over Certain Frontier Land (Belgium/Netherlands)*, [1959] I.C.J. Rep. 209 at 212-13, 229; *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, Merits, [1960] I.C.J. Rep. 6 at 27.

[90] Crawford 1999, *supra* note 85 at 120-22.

[91] Omar M. Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period' (1997), 26 Denv. J. Int'l L. & Pol'y 27 at 86 [Dajani]; Becker, *supra* note 85; but see Quigley, *supra* note 85 at 51; Boyle, *supra* note 85 at 301-03.

Palestinian hands are derived from agreements and not from an independently constituted Palestinian mandate.[92]

While some believe the formal limitations on the PA's governmental capacity, set by the Israeli-Palestinian agreements, may no longer be valid,[93] these limitations are coupled by a practical dependency on Israel. Israel collects the tax revenues that comprise two thirds of the PA budget; the Palestinian economy is very dependent on the Israeli market for employment; the PA does not have its own infrastructure and receives its electricity and fuel from Israel; and Israel controls all exits and entrances to the PA.[94] Furthermore, Israel has not refrained from using its power over the PA, or applying pressure on its leaders, especially after the Hamas ascendance to power in 2006.[95]

emphasize the fact that control over material issues, as well as relational control, was left in the hands of Israel in the Israeli-Palestinian Agreements, and Gaza Strip and the Palestinian Liberation Organization (PLO)-controlled West Bank,[96] further weakening the PA's governmental capacity. Furthermore, after the swearing-in of the Hamas government in 2006, the Israeli cabinet froze all Palestinian tax revenues collected by Israel, pending Palestinian approval of the *Roadmap* prerequisites, such as combating terrorism.[97] In 2007, after declaring the Gaza Strip a 'hostile entity', the Israeli cabinet also significantly reduced the supply of electricity and fuel to Gaza.[98]

The World Bank Institute has ranked the PA very low on all governance dimensions. Political Stability and Lack of Violence/Terrorism, and

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[92] *DOP*, *supra* note 87, Annex II, art. 3(b); *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, Israel-PLO, 28 September 1995, art. 1(1) 1(5), online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> [*Interim Agreement*].

[93] *Cf.* Geoffrey R. Watson, 'The Wall Decisions in Legal and Political Context' (2005), 99 A.J.I.L. 6 at 22-24 (arguing against this notion) [Watson].

[94] Neill Lochery, 'The Politics and Economics of Israeli Disengagement, 1994-2006' (2007), 43 Middle Eastern Studies 1 at 14-15 [Lochery]; Robinson, *supra* note 89 at 422.

[95] Robinson, *ibid*. at 421.

[96] See generally, Robinson, *ibid.* at 423.

[97] Israel Cabinet Decision 4705, 19 February 2006, art. A(1) online (in Hebrew): <www.pmo.gov.il/PMO/Archive/Decisions/2006/02/des4705.htm>; *Roadmap*, adopted by SC Res. 1551, *supra* note 88.

[98] Israel Security and Policy Cabinet Decision., 19 September 2007, cited in HCJ 9132/07 *al-Bassiouni et al. v. Prime Minister* (Unpublished, 27 January 2008), at para. 2 (Israel, S.C.) [*al-Bassiouni*].

Government Effectiveness were assessed in 2007 at an average of 10% effectiveness.[99]

In sum, even if one were to consider the PA's formal scope of authority as sufficient in principle, the events of recent years have significantly undermined even the control formally possessed. In the current politically divided situation, it seems that neither Hamas nor the PLO can claim to control the entire designated Palestinian territory. While this is not a necessary condition, it may weaken, to some extent, the possibility of seeing the criterion of government fulfilled.[100]

With regard to the requirement of 'capacity to enter into international relations', the Oslo Declaration of Principles and the Interim Agreement explicitly exclude 'foreign relations' from the PA's formal jurisdiction. [101]

Moreover, it is the PLO[102] and not the PA, which has been the representative of the Palestinian people in the UN since 1974, holding observer status under the title 'Palestine' following the 1988 declaration of independence by PLO leaders.[103] Thus, today, when the PLO no longer fully controls the entire Palestinian population and territory, the Hamas-controlled sectors are not represented internationally. Furthermore, many states refuse to engage in any way with the Hamas government and leaders.[104] This raises further questions as to the Palestinian capacity to conduct international relations.

As mentioned, recognition may carry significant weight, and compensate for a non-decisive fulfillment of the Montevideo conditions. Today, while supportive of future Palestinian independence, many states and international bodies do not view the PA as a state. This view is implicitly expressed by the

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[99] Online: <info.worldbank.org/governance/wgi/pdf/c238.pdf>.
[100] See Robinson, *supra* note 89 at 424-26.
[101] *DOP*, *supra* note 87, art. IV & Annex II, art, 3(b); *Interim Agreement*, *supra* note 92, art. IX(5); Crawford 1999, *supra* note 85 at 120-22; Dajani, *supra* note 91 at 87.
[102] *National Covenant of the Palestine Liberation Organisation*, 28 May 1964, online: <www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/11+National+Covenant+of+the+Palestine+Liberation+O.htm>; see also *Palestine National Council: Charter (1968),* reprinted in Walter Laqueur & Barry Rubin, eds., *The Israel-Arab Reader*, 6th ed. (New York: Penguin Books, 2001) 117 [Laqueur & Rubin].
[103] Quigley, *supra* note 85 at 41; GA Res. 3236, UN GAOR, 29th Sess. (1974); GA Res. 3237, UN GAOR, 29th Sess. (1974); see also SC Res. 607, UN SCOR, UN Doc. S/RES/607 (1988); GA Res. 43/177, UN GAOR, 82nd Mtg. (1988); Crawford 1999, *supra* note 85 at 111.
[104] US Department of State, *Country Reports on Terrorism (2008)*, Chapter 6, online: <state.gov/s/ct/rls/crt/2007>; European Union Council Decision 2008/583/EC, 15 July 2008, OJ L 188, online: <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:188:0021:0025:EN:PDF>.

Roadmap, which set Palestinian statehood as one of its goals. By consenting to the *Roadmap*, the PA itself, as well as the Security Council, Israel, the EU and the US, recognized the same.[105] In addition, many scholars read the ICJ Advisory Opinion regarding *The Wall* as founded on an evidentiary finding that the PA is a non-state entity, thus bringing about the rejection of Israel's claim of self-defence.[106] Furthermore, the PA and PLO's demands for state immunity in municipal courts were rejected by US and Israeli courts, which refused to acknowledge the PA as a state.[107] Interestingly, while considering *The Wall*, the ICJ allowed Palestine to submit written submissions and appear before it;[108] the ICC may follow suit.[109]

An opportunity to assess the international recognition of Palestinian statehood, prior to creation of the PA, arose after the 15 November 1988 PLO declaration of Palestinian independence.[110] The UN General Assembly, while affirming the declaration as the implementation of Resolution 181 and of the Palestinian 'need' to 'exercise sovereignty over their territory', did not admit 'Palestine' as a member.[111] Furthermore, while some states established missions in the Palestinian territories, these were not 'embassies',[112] and other states refused to recognize Palestinian independence, for, amongst other reasons, its refusal to recognize Israel.[113] Some writers have since seen this international recognition, coupled with the implied Israeli acknowledgment of Palestinian self-government since 1993, as providing

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[105] *Roadmap*, adopted by SC Res. 1551, *supra* note 88; Israeli Cabinet Decision 1996, 6 June 2004, online (in Hebrew): <www.pmo.gov.il/PMO/Archive/Decisions/2004/06/des1996.htm>.

[106] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 139 [*ICJ Wall Advisory Opinion*]; *cf.* Higgins J., separate opinion at paras. 34-35, *ibid.*; Michla Pomerantz, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial' (2005), 99 Am. J. Int'l. L. 26 at 26-27.

[107] *Ungar v. Palestinian Liberation Org.*, 402 F.3d 274 (2005), at 32-34 (U.S.A.), and the authorities mentioned there; HCJ 4060/03 *Palestinian Authority v. Dayan* (unpublished, 17 July 2007) (Israel, S.C.).

[108] *Written Statement Submitted by Palestine* (2009), online: <http://www.icj-cij.org/docket/files/131/1555.pdf>; Watson, *supra* note 93 at 22-24.

[109] Marlise Simons, 'Palestinians Press for War Crimes Inquiry on Gaza', 10 February 2009, *The New York Times*, online: <nytimes.com/2009/02/11/world/middleeast/11hague.html>.

[110] *Palestine National Council: Declaration of Independence (November 15, 1988)*, reprinted in Laqueur & Rubin, *supra* note 102 at 354-58.

[111] GA Res. 43/177, *supra* note 103; Crawford 1999, *supra* note 85 at 111.

[112] Dajani, supra note 91 at 60; Quigley, *supra* note 85 at 47.

[113] Quigley, *ibid.* at 42; Boyle, *supra* note 85 at 301-03; Crawford 1999, *supra* note 85 at 115-16; *Country Cooperation Strategy for WHO and the Occupied Palestinian Territory 2006-2008*, UN. Doc. WHO-EM/ARD/018/E/R (2005) 9.

evidence for Palestinian statehood.[114] This uncommon position seems rather unconvincing.[115]

In sum, it seems that while the PA has been active internationally, it does not have 'formal independence', nor does it seem to have the capacity to effectively govern, necessary under the classical criteria.[116] Nevertheless, it is important to note that following the 2005 Israeli disengagement,[117] Israel no longer views itself as an occupier of the Gaza Strip.[118] This may be used as a springboard for a Hamas or an all-Palestinian declaration of independence in the future, due to the fact that, at least in the Gaza Strip, no other sovereign entity now claims control. On the other hand, as stated above, Palestinian control there is also, at best, questionable. In conclusion, if the classical criteria were the only yardstick for appreciation, it would seem that the PA does not meet the prerequisites for statehood. We next turn to examine whether additional considerations and circumstances, which may support international recognition of Kosovar independence despite deficiencies in the classical criteria, may also play a role in the Palestinian context.

2. Additional Considerations

Arguably, some elements present in the Kosovo case are also evident in the Palestinian context and may have implications for a possible Palestinian unilateral declaration of independence.

a. Self-determination

The Palestinian people's right to self-determination was recognized internationally as early as 1947, in General Assembly Resolution 181 which envisioned two states in the territory of Mandatory Palestine: a Jewish state and an Arab state.[119] Following the 1967 war, Security Council Resolution 242 emphasized the inadmissibility of acquisition of territory by war, and demanded the '[w]ithdrawal of Israeli armed forces from territories occupied', which included the West Bank and Gaza.[120]

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[114] Quigley, *ibid*; Boyle, *ibid*.
[115] Watson, *supra* note 93 at 23.
[116] Crawford 2006, *supra* note 2 at 66; Shaw 2003, *supra* note 5 at 181-82.
[117] Lochery, *supra* note 94 at 7, Israel Cabinet Decision 1996, *supra* note 105.
[118] HCJ *al-Bassiouni*, *supra* note 98 at para. 12; Yuval Shany, 'Far Away, So Close: The Legal Status of Gaza After Israel's Disengagement' (2006), International Law Forum, The Hebrew University of Jerusalem, Research Paper No. 12-06, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923151>.
[119] GA Res. 181, *supra* note 86, art. I.A.1
[120] SC Res. 242 , UN SCOR, UN Doc. S/RES/242 (1967), preamble & art. 1; this was reaffirmed in SC Res. 338, UN SCOR, UN Doc. S/RES/334 (1973), art. 2.

indicate a possible international recognition of a Palestinian right to statehood, coupled with discontent with Israeli claims over the territories occupied. The 1978 Camp David Accords and the 1995 Israeli-Palestinian Interim Agreements later recognized the legitimate rights of the Palestinian people and envisioned some degree of autonomy for the Palestinians in the West Bank and Gaza.[121] Finally, the US sponsored *Roadmap*, adopted by the Security Council and Israel,[122] reflects the widely held international view that the Palestinians may eventually exercise their right to self-determination externally, i.e. by means of an independent state in the West Bank and Gaza. When compared to pre-independence Kosovo, it seems that a Palestinian right to external self-determination enjoys broader support, possibly indicating that even a unilateral declaration of independence would be recognized, despite deficiencies in fulfillment of the classical criteria. Possible resentment of unilateral declaration may be further mitigated in light of the fact that Palestinian statehood does not require secession and disintegration of a state, but rather the end of a frowned-upon occupation.

b. Remedial Secession

While Kosovo may be seen as a case clarifying the conditions and legality of remedial secession, such a development would not seem to affect the Palestinians, as remedial secession is not the suitable framework. The Palestinian territories are not a constituent unit of any sovereign state: Israel does not claim sovereignty, and Egypt and Jordan long ago forfeited any claims over Gaza and the West Bank.[123] In any case, it is questionable whether the Palestinian case meets the conditions for remedial secession, which may have crystallized in Kosovo, specifically the severity of human rights violations and deadlocked negotiations. Nevertheless, it is possible that international abhorrence of Israel's Operation in Gaza in December 2008[124] might serve to support a claim of human rights violations justifying unilateral independence. Moreover, Hamas's control of Gaza may indicate the weak prospects of eventually reaching an agreed solution. These Resolutions

However, this framework may be relevant as indicating that the Palestinian starting point is even more favourable than that of Kosovo, still considered by Serbia to be an integral part of its territory. If Kosovo sets a

[121] See *supra* note 92.
[122] See *supra* note 105.
[123] *Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan*, Israel and Jordan, 26 October 1994, art.3, online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+ Process/Israel-Jordan+Peace+Treaty.htm>; *Camp David*, *supra* note 87, Section A.
[124] SC Res 1860, UN SCOR, UN Doc. A/RES/1860 (2009).

precedent for remedial secession, one may argue that in similar circumstances, an entity whose territory is not subject to competing claims of sovereignty, would *a fortiori* have a stronger argument.

c. International Involvement and Administration

As in the case of Kosovo, the international involvement in the Palestinian future is significant. On the one hand, the international position regarding the Palestinian future is that of a 'two state solution', determining that the Palestinians should be independent. In this regard the Palestinians are better situated than Kosovo was before its declaration. However, the international position still stipulates certain prerequisites, at least at this stage, including reaching an agreed solution with Israel.[125] In other words, while independence is internationally acceptable, a unilateral declaration of independence would not necessarily find favour. Moreover, the existence in Kosovo of a comprehensive plan for institution-building and achieving government capacity is not paralleled in the Palestinian context, a fact which may decrease the willingness to acknowledge its independence.

The nature and scope of international involvement is also different. In Kosovo, an international administration was fully responsible for all aspects of government; in the PA, despite substantive aid and guidance, international involvement does not reach similar magnitude. This difference may be significant, as the international community does not have the assurances it had in Kosovo of the continued development of government institutions ultimately leading to effectiveness.[126]

d. Deadlocked Negotiations

While in the Kosovo case it was contended that negotiations had reached a dead end,[127] it is doubtful whether this is the case with regard to the Palestinians. Today, talks have not been renewed since Binyamin Netanyahu's return to power following the January 2009 parliamentary election.[128]

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[125] See *supra* note 88; *ICJ Wall Advisory Opinion*, *supra* note 106 at para. 162.
[126] D'Aspremont, *supra* note 39 at 654, 658.
[127] *Special Envoy Report*, *supra* note 48 at para. 3.
[128] 'Full text of Netanyahu's Foreign Policy Speech at Bar Ilan', 14 June 2009, online: Ha'aretz <http://www.haaretz.com/hasen/spages/1092810.html>; Kahled Abu Toameh, 'PA: Netanyahu has Buried Peace Process', 14 June 2009, *The Jerusalem Post*, online: <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1244371096340>.

negotiations failed despite good faith engagement on their part.[129] They may even enjoy more support than did Kosovo, since the final outcome of Palestinian statehood is commonly accepted today. The claim would be even stronger if made by a unified Palestinian leadership.

e. Additional Considerations: Democracy and Human Rights

An issue which may tip the scale of international recognition of a unilateral Palestinian declaration is the character of the state established. PLO leaders, and in particular its present leaders, Mahmoud Abbas and Salam Fayyad, enjoy international sympathy, as opposed to Hamas leaders, who are viewed as extremists.[130] Thus, it may be reasonable to conclude that a PLO declaration of independence of a state committed to democracy and the protection of human rights will be acknowledged more easily than a similar Hamas declaration. As mentioned, the Kosovar constitution is committed to multiethnic democracy, guaranteeing human rights and minority rights. This may have served to mitigate certain obstacles hampering its recognition. A Palestinian commitment to democracy and human rights may have a similar effect.

VI. Conclusion: Palestine and Legitimacy

Examination of factors existing in the Kosovo case shows that, in some regards, the Palestinian case is in a more favourable position. For instance, no other entity claims sovereignty over its territory and the eventual outcome of statehood is widely accepted. However, it seems that at this stage, several obstacles still stand in the way of a Palestinian unilateral declaration of independence. As the underlying principle of these additional considerations is legitimacy, and as the feasibility of an agreed solution with Israel is not yet refuted, unilateralism may—at present—be detrimental to Palestinian independence.

However, this conclusion may change with time under a certain confluence of circumstances: failure of negotiations despite good faith engagement on the Palestinian side; genuine progress and democratic institution-building, and commitment to the protection of human rights, especially under international guidance. Finally, it seems that a crucial factor influencing the likelihood of international recognition would be the reconciliation of Palestinian political factions into a unified PLO-led

A scenario in which efforts to reignite the stagnated negotiations reach a dead end is not unimaginable. In such a case, a Palestinian unilateral declaration of independence may find more sympathy, provided that the Palestinians are able to convince the international community that the

[129] 'Palestinian PM sets 2-Year Target for Statehood', *supra* note 84.

[130] Robinson, *supra* note 89 at 422; see *supra* note 104.

leadership, accepting the PA's international obligations, formally recognizing the existence of Israel and committed to peaceful coexistence.

The legal status of Kosovo, following its unilateral declaration of independence and the international mixed reaction to it, is not yet clear. The legalization of the question of recognition, which has long been thought to be one of fact and policy, evidenced by the referral of the Kosovo case to the ICJ, is an intriguing trend and the decision will hopefully shed light on this issue.

A recognition of Kosovo as independent will contain lessons for others. It may support the position that certain factors beyond the Montevideo criteria have been established. The circumstances present in Kosovo—self-determination, a history of human rights violations, federal dissolution and the hope to avoid destabilization, international involvement and administration, deadlocked negotiations, the existence of a comprehensive plan and the adoption of democratic institutions—may affect conclusions regarding statehood elsewhere. If we examine the existence of these emerging considerations in the Palestinian case we find that in some respects, a Palestinian claim to independence may have even better prospects than Kosovo, given that the internationally accepted solution envisions an independent State of Palestine. Nevertheless, the prospects for a Palestinian unilateral declaration of independence finding sympathy seem weaker, as the international community has not yet lost hope of achieving a negotiated solution between Israel and the Palestinians, and in light of unsatisfactory Palestinian governance. These suggest that unilateral independence would not find international recognition at present. However, if future negotiations prove fruitless, and the PA, as the sole legitimate representative of the Palestinian people, exhibits willingness to achieve governance goals, such a declaration may be met with international acceptance.

The Kosovo Precedent and the 'Moral Hazard' of Secession

NINO KEMOKLIDZE*

I. Introduction

Kosovo's declaration of independence on 17 February 2008 and the support it has received from the overwhelming majority of Western countries has raised some serious concerns in many parts of the world where states suffer from protracted secessionist movements. Azerbaijan, Georgia, Moldova, and Russia have been particularly alarmed by Kosovo's Western-backed quest for full independence from Serbia as they face secessionist tendencies within

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their own state boundaries. Political analysts in these countries and elsewhere[1] have argued that Kosovo will have a 'demonstration effect' and will set a precedent for other secessionist movements in different parts of the world.[2]

As recent developments in the Caucasus have demonstrated, these fears are not altogether irrational. Following the Georgian-Russian military confrontation in August 2008, on 26 August, Russian President Dmitry Medvedev signed a decree officially recognizing the independence of Georgia's two break-away regions—South Ossetia and Abkhazia.[3] 'The peoples of South Ossetia and Abkhazia have every right to gain independence,' declared the Federation Council speaker Sergei Mironov one day earlier, 'and one of the main legal principles for recognizing independence is the fundamental principle of international law—the right of people to self-determination.'[4]

However, in addition to evoking the ideas of 'the free will of the people' and 'the right of peoples to self-determination' to justify their recognition of Georgia's breakaway territories, Russian officials have also emphasized the importance of what the academic literature on self-determination and secession identifies as the 'remedial' right to secession—secession justified as

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[1] Among others in Cyprus, Greece, Romania, Slovakia, and Spain—the member states of the European Union (EU) that have not recognised Kosovo's independence.

[2] The claim of precedent is that Kosovo would be 'the first subfederal unit of the communist federations [Czechoslovakia, Yugoslavia and the USSR] to be considered for international recognition'; Rick Fawn, 'The Kosovo–and Montenegro–Effect' (2008) 84 Int'l Affairs 269 at 280 [Fawn]. Before that, 'only entities named as republics within these three federations have gained international recognition'; thus, analysts fear that Kosovo 'will create a universal standard that can and must be applicable to other such entities'; *ibid.* at 280-1. They further fear that a proliferation of secessions would lead to 'balkanization'–an emergence of small, weak states, which could destabilise the international states system; Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, Conn.: Yale University Press, 1978) at 28 [Buchheit]. See also: Alexis Heraclides, 'Secession, Self-Determination and Nonintervention: In Quest of a Normative Symbiosis' (1992) 45 J. Int'l Affairs 399 at 408; Christopher Heath Wellman, 'A Defense of Secession and Political Self-Determination' (1995) 24 Phil. & Pub. Affairs 142 at 161; Margaret Moore, 'Introduction: The Self-Determination Principle and the Ethics of Secession' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) at 4 [Moore].

[3] 'Russia's President Dmitry Medvedev Recognized the Independence of South Ossetia and Abkhazia' *Pravda* (26 August 2008), online: Pravda <http://english.pravda.ru/russia/kremlin/26-08-2008/106214-russia_ossetia_abkhazia-0> [Pravda].

[4] 'Russian Parliament Recognizes South Ossetia, Abkhazia Independence' *Huliq* (25 August 2008), online: HuliqNews <http://www.huliq.com/5/66830/russian-parliament-recognizes-south-ossetia-abkhazia-independence>.

a remedy to certain injustice(s).[5] Accusing Georgia's President Mikheil Saakashvili of ethnic cleansing and genocide of ethnic Ossetians, President Medvedev claimed this to be one of the primary justifications of his decision to recognize South Ossetian and Abkhazian independence. 'Saakashvili chose genocide to fulfil his political plans,' said Medvedev, 'Georgia chose the least human way to achieve its goal—to absorb South Ossetia by eliminating a whole nation.'[6]

The rhetoric of the Russian political establishment regarding Georgian 'genocide' and 'ethnic cleansing' of Ossetians during the August 2008 events is not surprising.[7] Since the 1990s, there has been an 'attempt to link recognition of new states to the protection of human rights and specific guarantees for minorities.'[8] As a result, there has also been 'a change in the legitimising strategy adopted by the leaders of unrecognised states'[9] as well as by the leaders of the states who are willing to recognize them. Before, the claims to independent statehood were mainly justified based on the right to national self-determination with an emphasis on 'communal identity and

[5] The most prominent advocate of this right is Allen E. Buchanan who has coined the term Remedial Right Only theories of secession. See, for instance his *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview, 1991) and 'Theories of Secession' (1997) 26 Phil. & Pub. Affairs 30 [Buchanan 1997]. Remedial Right Only theorists emphasize different sets of injustices in order to justify a group's right to remedial secession. Along with human rights grievances, they also point to the importance of certain historical, economic, and cultural grievances. Among others, see Anthony H. Birch, 'Another Liberal Theory of Secession' (1984) 32 Pol. Studies 596 at 599 [Birch]; Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale J. Int'l L. 177 at 189; Anthony Matthew, 'Bougainville and Papua New Guinea: Complexities of Secession in a Multi-Ethnic Developing State' (2000) 48 Pol. Studies 724.

[6] Pravda, *supra* note 3. Although there was no full-blown military confrontation in Abkhazia in the summer 2008 (though some analysts were predicting violence in Abkhazia as opposed to South Ossetia), Russia's recognition of Abkhazian independence can be considered as a 'preventive' action so that Abkhazia 'would never again have to endure what he [Medvedev] described as oppressive Georgian rule'; Clifford J. Levy, 'Russia Backs Independence of Georgian Enclaves' *The New York Times* (26 August 2008), online: The New York Times <http://www.nytimes.com/2008/08/27/world/europe/27russia.html> [Levy].

[7] Throughout this article, by 'August events' I refer to the military confrontation in South Ossetia in August 2008 when Georgian armed forces tried to retake control over South Ossetia's capital Tskhinvali, evoking Russian military response and the so-called Five-Day War between these two countries, followed by Russian recognition of South Ossetian and Abkhazian independence as well as its occupation of some of the territories in Georgia proper.

[8] Hurst Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 Transnat'l L. & Contemp. Probs 57 at 69.

[9] Nina Caspersen, 'Separatism and Democracy in the Caucasus' (2008) 50 Survival 113 at 114 [Caspersen].

historic continuity.'[10] Increasingly, this argument has been combined with a claim to remedial secession.[11]

The proponents of remedial secession argue that a group has a 'unilateral right to secede' (that is 'the right to secede without consent or constitutional authorization') if a group's physical survival is threatened by actions of the state (such as genocide and/or ethnic cleansing) or it suffers 'continuing' and 'drastic' violations of basic human rights.[12] In this way, according to remedial rights theorists, the international community will be able to better protect the rights of ethnic minorities against state-perpetrated violence.[13]

However, close examination of the cases of Kosovo (formerly Autonomous Province of Kosovo in Serbia) and South Ossetia (a *de facto* autonomous district (*Oblast*) of Georgia) stimulate alternative conclusions based upon the broader consequences and deeper realities of such actions.[14] The question I address in this article is whether, in most cases, the negative consequences of recognizing a right to secession in the twenty-first century outweigh the benefits, suggesting that recognition of such a right should not be allowed.[15] I focus on an internationally *recognized* right to secede (whether

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[10] *Ibid.*

[11] As Cheterian notes, in Kosovo as well, 'the EU has been arguing that ethnic repression (Serb repression of Kosovo Albanians under Milosevic) justify the legitimacy of a territorial entity, and not ethnic separatism, or national self-determination'; Vicken Cheterian, 'Impact of Kosovo Recognition on the Caucasus Conflicts' (2009 forthcoming) at 5, brackets in original [Cheterian 2009 forthcoming].

[12] Allan E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) at 331 [Buchanan 2004]; Birch, *supra* note 5 at 599; Buchanan 1997, *supra* note 5 at 37. As Buchanan argues, in this case the right to secede is 'understood as a remedial right only, a last-resort response to serious injustices'; Buchanan 2004 at 331.

[13] Buchanan 2004, *ibid*.

[14] Because the major military stand-off between Russia and Georgia took place in South Ossetia, I limit the focus of this article on that particular case; although the case of Abkhazia will also be mentioned at times throughout the article.

[15] Some scholars use the terms 'secession' and 'partition' interchangeably; I, however differentiate between them and adopt Kaufmann's definition of these terms, according to which partition is understood as 'separation[] jointly decided upon by the responsible powers: either agreed between the two sides (and not under pressure of imminent military victory by one side), or imposed on both sides by a stronger third party'; Chaim Kaufmann, 'When All Else Fails' (1998) 23 Int'l Security 120 at 125 (parentheses in original). On the other hand, secession is understood 'as new states created by the unilateral action of rebellious ethnic group'; *ibid.* My main concern in this article is secession and not partition, as defined above.

moral or legal[16]), understood as the right to be *recognized* as a legitimate sovereign state. Thus, when referring to the 'moral hazard' of secession in this article, I refer to the moral hazard of international *recognition* of unilateral secession.

From my investigation I conclude that rather than protecting ethnic minorities from state perpetrated violence, remedial secession may further foster violence by unintentionally creating a so-called moral hazard. By raising expectations that in cases of severe state violence the likelihood of recognizing a group's right to secede from the host state increases, remedial secession may, in fact, unintentionally encourage further violence. Although secession may be morally justified under certain conditions, recognizing this as a group's right could have unintended negative consequences that should not be underestimated.[17]

Of course, the idea of the moral hazard of secession is not new, having been examined in some depth by various scholars; although most of the work in this direction has focused more on humanitarian intervention than on secession *per se*.[18] The topic of the Kosovo precedent has also been very

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[16] In doing so I acknowledge that the questions of legitimacy can be decided on moral or legal grounds, or a mixture of both.

[17] In this way, my argument draws on the consequentialist ethics. Unlike a deontological view of morality, which suggests that 'some acts are morally obligatory regardless of their consequences for human weal or woe', consequentialism, as the term suggests, makes moral judgements based on the possible *consequences* of certain actions; Robert G. Olson, 'Deontological Ethics' in P. Edwards, ed., *The Encyclopedia of Philosophy* (New York: Macmillan & The Free Press, 1967) at 343. In other words, 'the only relevant factor deciding whether any action or practise is morally right or wrong is its overall consequences'; Anthony Ellis, 'Utilitarianism and International Ethics' in Terry Nardin & David Mapel, eds., *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992) at 158.

[18] Alan J. Kuperman is among those who have written extensively on the moral hazard of humanitarian intervention. Among others, see his *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington, D.C.: Brookings Institution Press, 2001); 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans' (2008) 52 Int'l Studies Q. 49 [Kuperman 2008a]; and 'Mitigating the Moral Hazard of Humanitarian Intervention: Lessons from Economics' (2008) 14 Global Governance 219 [Kuperman 2008b]. In fact, his very broad definition of 'humanitarian intervention', encompassing 'any international action that is primarily motivated by the humanitarian desire to protect civilian targets of state violence,' also includes 'recognising independence of secessionist entities'; Kuperman 2008a at 51-2. James D. Fearon addresses the issue of moral hazard of secession more directly when outlining the perverse consequences of partition; see 'Separatist Wars, Partition, and World Order' (2004) 13 Security Studies 394 [Fearon]. On the moral hazard of humanitarian intervention, see also Diana Johnstone, 'Notes on the Kosovo Problem and the international Community' (1998), online: University of the West of England <http://www.ess.uwe.ac.uk/Kosovo/Kosovo-controversies2.html> [Johnstone]; Timothy W. Crawford, 'Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement Failed' (2001) 116 Pol. Sci. Q. 499 [Crawford]; Christopher

prominent among academic, journalistic, and political circles.[19] However, while many have argued either in favour of or against the applicability of the Kosovo precedent to the South Ossetian case, the moral hazard of secession in the cases of Kosovo and South Ossetia has thus far remained underspecified. In demonstrating the causal linkages between the recognition of Kosovo's independence and the August 2008 events in Georgia, I argue that the moral justification cited in support of the recognition of Kosovo—that after suffering 'genocidal violence' at the hands of the Serbs, the Kosovar Albanians could no longer reside peacefully side-by-side with the Serbs in a single political entity—has (unintentionally) created suitable political conditions for a moral hazard in another region.[20]

In the following section, I first examine some of the challenges created by secession that the international community is facing. I focus on the problems of recognizing a new political entity in an international system, and touch upon the ambiguity and ambivalence that surrounds international law on secession. Next, I define the concept of the moral hazard of secession before explaining how the recognition of Kosovo perpetuates the conditions of moral hazard. I also outline some of the other problems associated with remedial secession. Finally, in the concluding section I offer an overview of alternate solutions to full-fledged independence that could be used to meet the needs of ethnic minorities.

II. Complexities of Secession

1. Problems of Recognition

Even though there is much discussion in contemporary politics about 'globalisation, the erosion of the state and the increasing irrelevance of territory,' recognition of a political entity as a legitimate sovereign state (*de jure* independence) remains 'the top prize' for every secessionist movement.[21] However, despite numerous attempts to explain and analyze the right of different ethnic groups to self-determination, there is no systematic approach to this issue in international law. There is much inconsistency in both the

Marsh & Mark Heppner, 'When Weak Nations Use Strong States: The Unintended Consequences of Intervention in the Balkans' (2003) 31 Nationalities Papers 281 [Marsh & Heppner].

[19] Among others, see: Sebastian Schaffer, 'The Kosovo Precedent – Directly Applicable to Abkhazia and South Ossetia' (2009) 3 Caucasian Rev. Int'l Affairs 108; Dominik Tolksdorf, 'Kosovo Precedent – Applicable Many Parts of the World, But Not Directly in the South Caucasus' (2009) 3 Caucasian Rev. Int'l Affairs 103.

[20] By the term genocidal violence Kuperman (2008a) refers to both genocide and ethnic cleansing; *supra* note 18 at 50. In this article I use this term in the same way.

[21] Caspersen, *supra* note 9 at 113.

question of whether national self-determination also means a right to secession and of under what conditions a state should be granted legal (*de jure*) recognition.[22]

Many argue that the idea of self-determination was first born during the American and the French Revolutions.[23] The principle of national self-determination as a moral issue dominated much of Europe's politics throughout the nineteenth century (especially its latter half), but it was not until World War I that its impact on international law and international relations was really felt.[24] In this regard, American President Woodrow Wilson's articulation of the concept of national self-determination in his famous Fourteen Points speech in 1918 is of particular importance.[25] However, even then, self-determination remained a political *principle*, as opposed to a legal *right*, and was followed only when powerful players in world politics so desired.[26]

It was only during the post-World War II period that 'international conventions established the *right* of peoples to national self-determination.'[27] What followed in the decades to come was the era of decolonization which saw the emergence of some fifty new states as a result of the rapid and uncontrolled disintegration of European colonies, especially in the 1960s and

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[22] See Lung-chu Chen, 'Self-Determination as a Human Right' in William Michael Reisman & Burns H. Weston, eds., *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal* (N.Y.: Free Press, 1976) at 216 and Benyamin Neuberger, 'National Self-Determination: Dilemmas of a Concept' (1995) 1 Nations & Nationalism 297 at 298 [Neuberger].
[23] Hurst Hannum, 'International Law' in Alexander J. Motyl, ed., *Encyclopedia of Nationalism* (London: Academic Press, 2001) at 406-7 [Hannum 2001].
[24] *Ibid.* at 407.
[25] See Woodrow Wilson, 'The Fourteen Points' in P. Williams, Donald M. Goldstein & Jay M. Shafritz, eds., *Classic Readings and Contemporary Debates in International Relations,* 3rd ed. (Belmont, CA: Thomson Wadsworth, [1918] 2006) and Umozurike Oji Umozurike, *Self-Determination in International Law* (Hamden, Conn.: Archon Books, 1972). There is much debate about what exactly Wilson meant by 'national self-determination'. Many argue that Wilson viewed national self-determination as 'the right of communities to govern themselves, not the right of every ethnos to its own polity' as it was originally understood, especially in the East European context (Allen Lynch, 'Woodrow Wilson and the Principle of "National Self-Determination": A Reconsideration' (2002) 28 Rev. Int'l Studies 419 at 435). For a similar point see also Elie Kedourie, *Nationalism,* 4th ed. (New York: Collier, 1993).
[26] Hannum 2001, *supra* note 23 at 407.
[27] Neuberger, *supra* note 22 at 298 (emphasis original). It started with the inclusion of the principle of self-determination in the UN Charter and reached its peak in subsequent UN resolutions. See, for instance, Article 1(2) and Article 55 of the UN Charter and the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*.

70s.[28] As a result, the right to self-determination was now applied 'not to ethnic or national groups, but, rather, multi-ethnic people under colonial rule'[29] and the right to secession was exclusively associated with the process of decolonization.[30]

The end of the Cold War in 1991 brought a dramatic increase in the elaboration of the human rights language and major alterations to the political map of the world. Since then, the persuasiveness of secessionist movements and 'successful attempts at secession' has indeed been unprecedented.[31] However, as Taras and Ganguly point out, the multitude of successful secessions following the dissolution of the Soviet Union and Yugoslavia 'signalled a modification of the international normative regime on secession only to the degree that it formally recognised the consequences of a political bloc losing the cold war [*sic*]' and in general, international law remained largely mute on the issue of a group's right to secede.[32]

By the end of the 1990s, however, the events that unfolded in Kosovo raised some hopes that the era of this uncertainty was over. Not only was Kosovo considered to be an example of a successful humanitarian intervention, but at that time, a possible case of remedial secession. Although

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[28] Istvan Bibo, *The Paralysis of International Institutions and the Remedies: A Study of Self-Determination, Concord among the Major Powers, and Political Arbitration* (Hassocks [England]: Harvester Press, 1976) at 31. However, even though the formation of these new states was 'reflecting the *right* of self-determination,' in practise, little has changed 'in the technique of applying the *principle* [of self-determination]'; *ibid.* (emphasis added). For instance, these former colonies were not allowed to adjust their new borders according to ethno-linguistic distributions; rather, they were left with the frontiers created at the time of their original conquest (*ibid.*)–a practise continued after the collapse of the Soviet Union and the disintegration of Yugoslavia.

[29] Moore, *supra* note 2 at 3. In other words, as Hannum (2001) argues, there was a paradigmatic shift from 'ethnic (or religious, linguistic, or cultural) self-determination' of the post-World War I period to 'territorial self-determination' in the post-World War II era; *supra* note 23 at 410 (brackets in original).

[30] Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' in Mortimer N. S. Sellers, ed., *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (Oxford; Washington, D.C.: Berg, 1996) at 38.

[31] Allen E. Buchanan, 'Democracy and Secession' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) at 14. Bangladesh is a good example of how few exceptions there have been from the application of the above-mentioned 'colonial-territorial right to self-determination' in the second half of the twentieth century; Hannum 2001, *supra* note 23 at 412. Between the years 1945 and 1990 Bangladesh was the *only* successful separatist movement that acquired internationally recognised independence, when it seceded from Pakistan in 1971; Raymond C. Taras & Rajat Ganguly, *Understanding Ethnic Conflict: The International Dimension* (New York: Longman, 2005) at 53 [Taras & Ganguly].

[32] Taras & Ganguly, *ibid.* at 53. See also Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (Totowa, N.J.: F. Cass, 1991) at 22 [Heraclides 1991].

originally the independence of Kosovo was not explicitly supported by Western nations this became the policy a decade later.[33] The Western states, however, have continuously stressed the unique nature of Kosovo (so-called *sui generis*) and have argued that its recognition as a sovereign state will not be considered as a precedent for any future decision-making.[34]

What, one may ask, is so unique about the case of Kosovo? Coppieters argues that the recognition of Kosovo is exceptional but by no means unique: 'unique cases do not refer to general principles, whereas exceptions do. Exceptions are rule-bound.'[35] He asserts that the case of Kosovo is 'an exception to the general rule of territorial integrity' and that it is '[d]ue to the lack of clear principles justifying the recognition of a unilateral declaration of secession … that the EU [and the rest of the Western world] is talking in terms of a unique case.'[36]

However, despite the West's insistence on the uniqueness of Kosovo, the Russian government has justified its recognition of South Ossetian and Abkhazian independence on very similar grounds. The majority of the political West defends its recognition of Kosovo's independence by citing the injustices done to the Kosovars by the Milosevic regime.[37] Further, the

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[33] Marsh & Heppner, *supra* note 18 at 288. Marsh and Heppner believe that the main reasons behind this change of policy are those ugly events that surrounded Kosovo at the end of the 90s: 'if Serbs and Kosovo Albanians could not live in peace before, how can they do so following all of the bloodshed? … recent atrocities are not easily forgotten'; *ibid.* Cheterian, however, asserts that the main reason is to be found in Western fears that if a political solution to the Kosovo question was not found immediately, the situation there could deteriorate and further destabilize not only Kosovo itself but neighbouring fragile states as well. Renewed unrest in Kosovo in March 2004 further confirmed these fears; *supra* note 11 at 4. See also, Jake Lynch, 'Kosovo Riots Renew Old Debates' (19 March 2004), online: BBC News <http://news.bbc.co.uk/1/hi/world/europe/3550789.stm>.

[34] Bruno Coppieters, 'The Recognition of Kosovo: Exceptional but not Unique' in *What is 'Just' Secession? (Is Kosovo Unique?),* European Security Forum Working Paper No. 28 (February 2008) at 3 [Coppieters]. Thus, as Coppieters points out, the West's decision to recognise Kosovo's declaration of independence in 2008 is very different from the decision of 1999 regarding NATO's intervention in the Balkans. Back then, many Western states 'were eager to discuss a reform of the international legal framework for international humanitarian intervention, in the light of general moral principles'; *ibid.* at 6. At present, however, the West 'has no interest in loosening the validity of the principle of territorial integrity, which is the inevitable result of such a normative discussion on the question of secession'; *ibid*.

[35] *Ibid.* at 3.

[36] *Ibid.* at 3-4. Cheterian is more bold in arguing that '[w]hat was so special about Kosovo was not the nature of the conflict and the legitimacy of the case of Kosovo Albanians for self-determination, but the fact that the province was in Europe, and the deep involvement of NATO and EU countries to stabilize and govern the region'; *supra* note 11 at 4.

[37] See Marsh & Heppner, *supra* note 18 at 288; Coppieters, *supra* note 34; Fawn, *supra* note 2; Cheterian, 2009 forthcoming, *supra* note 11.

Western leaders have argued 'that the recognition of Kosovo is in accordance with the wishes of the people of this territory, the stability of the region and even with the real interests of Serbia.'[38] Similarly, Russian officials have argued that Ossetians and Abkhazs could no longer reside side-by-side with the Georgians under one state after President Saakashvili's attempts 'to eliminate a whole nation' of South Ossetia.[39] As President Medvedev argued, '[t]here was a special situation in Kosovo, there is a special situation in South Ossetia and Abkhazia. Speaking about our situation, it is obvious that our decision is aimed at preventing the genocide, the elimination of a people, and helping them get on their feet.'[40]

As I argue in the next section, the above-mentioned statements by the Russian officials indicate a serious moral hazard that may arise from evoking a right to secede in response to human rights violations. Even if not legally binding, remedial secession justified on the basis of averting genocide or ethnic cleansing of minority groups may do more harm than good, and its consequences should not be understated.[41]

2. *Moral Hazard of Secession*

The term moral hazard is adopted from the field of economics where it refers to 'the phenomenon in which the provision of protection against risk (often by insurance) unintentionally promotes irresponsible or fraudulent risk-taking, and thereby perversely increases the likelihood of the undesired outcome.'[42] Similarly, international recognition of secession may create moral hazard by promoting irresponsibility and/or a deliberate 'fraud' on the part of political and/or military elites. As Kuperman argues, political elites of different ethnic minorities, for instance, may decide to secede from the host state even if they are well aware that the state will prevent their secession

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[38] Coppieters, *supra* note 34 at 4.

[39] Pravda, *supra* note 3.

[40] Levy, *supra* note 6. Medvedev was also quoted saying that the recognition 'was not an easy choice, but it is the only possibility to save the lives of the people [of South Ossetia and Abkhazia]'; Pravda, *supra* note 3. Mironov has also stated that Russia considered 'recognition of the independence of Abkhazia and South Ossetia as a necessary condition to ensure security for these nations'; Pravda, *supra* note 3. See also 'Russia Recognizes Abkhazia, South Ossetia' *Radio Free Europe/Radio Liberty* (26 August 2008), online: Radio Free Europe/Radio Liberty (RFE/RL) <http://www.rferl.org/content/Russia_Recognizes_Abkhazia_South_Ossetia/1193932.html>.

[41] Birch argues along the same lines that before the international community endorses the right to secession as a remedy to an existing and/or past wrong, it should consider seriously 'the possibility that righting it might lead to another wrong'; *supra* note 5 at 602.

[42] Kuperman 2008a, *supra* note 18 at 50 (parentheses in original).

and engage militarily.[43] This decision may be made even when the elites are aware that a group has no capacity to defend against state retaliation. In this way they may be provoking a state (even if unintentionally) to use force and violence against its ethnic minorities. In another scenario, a group may intentionally provoke the state to engage in fierce fighting by deliberately attacking it, knowing that retaliation on behalf of the state may involve violence against the group's civilians.[44]

Based on extensive fieldwork and information gained from interviews with the top ranking commanders of the Kosovo Liberation Army (KLA), Kuperman has long identified and raised awareness of the moral hazard of humanitarian intervention in the case of Kosovo and elsewhere.[45] He asserts that the KLA deliberately sought the escalation of violence in 1998, provoking Milosevic's regime to ethnic cleansing of Kosovar Albanians.[46] This resulted in growing media attention which in return boosted support of the international community towards the Kosovars, ultimately ending with NATO's military intervention in Serbia on their behalf.[47]

Of course, the KLA could not have been certain about the prospect of international intervention; but its expectations derived mainly from the events of the earlier years of the 1990s, in particular the case of Bosnia.[48] As many analysts have pointed out, there is significant circumstantial evidence to suggest that the settlement on Bosnia reached at the 1995 Dayton Accords further intensified Kosovo's drive for independence.[49] Moreover, the lesson of that agreement for the Kosovars seemed to be that civilian suffering, killing and displacement were more likely to attract Western support and attention than non-violent means of resistance.[50]

Exactly the same problems arise when it comes to the moral hazard of secession. The point here is that, as Marsh and Heppner argue, the 'irredentist groups in one part of the world seem to take cues from the

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[43] *Ibid.* at 51.

[44] *Ibid.*

[45] See *supra* note 18.

[46] Kuperman 2008a, *supra* note 18.

[47] Kuperman (2008a) dismisses all the other hypotheses as to why Kosovars switched from earlier pacifist strategies to violent means and argues that the only rationale in the KLA's, at first glance suicidal, actions in the late 1990s was a clear prospect of outside humanitarian intervention on their behalf; *supra* note 18. See also Johnstone, *supra* note 18; Crawford, *supra* note 18; Marsh & Heppner, *supra* note 18; Simon Jenkins, 'NATO Prepares to Reap the Balkan Whirlwind' (21 March 2001), online: MonteNet <http://www.montenet.org/2001/jenkins.html>.

[48] Kuperman 2008a, *supra* note 18 at 61.

[49] See Marsh & Heppner, *supra* note 18 at 281; Fearon, *supra* note 18 at 406.

[50] Crawford, *supra* note 18 at 504.

successes and failures of other groups in what are perceived similar situations.'[51] In a 1996 Report from a roundtable held by the United States Institute of Peace, in conjunction with the US State Department, Carley affirmed that '[s]ecession can be a legitimate aim … in response to gross and systematic violations of human rights.'[52] The problem, as Fearon comments, is that making the implicit criterion for international recognition of secession 'some level of violence and chaos gives the leaders of nationalist insurgencies an incentive to reach for this level.'[53] And as I show below, it also creates an incentive for important regional and international players to manipulate many of the world's 'unsettled conflicts',[54] and to use the different inter- and intra-ethnic disputes in strategic regions to their advantage. The events that unfolded in Georgia in August 2008 are a good example of this.

III. The Recognition of Kosovo as Perpetuating the Conditions of Moral Hazard

As Amnesty International highlights, 'the exact circumstances surrounding the onset of hostilities in August 2008 in South Ossetia remain the subject of dispute … [and] … numerous alleged facts and figures have been extremely difficult to independently verify.'[55] Thus, at this point and without access to

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[51] Marsh & Heppner, *supra* note 18 at 281.

[52] Patricia Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession* (Washington, D.C.: United States Institute of Peace, 1996) at vii. On this report see also Jeremy R. Smith, 'The Return of the Referendum: Self-Determination, International Organisations, and Disputed territories in the South Caucasus and Moldova' (2006) 11 European Research Working Paper Series, The University of Birmingham.

[53] Fearon, *supra* note 18 at 406.

[54] A term used by Fawn instead of 'frozen conflicts'. The latter, he argues, does not reflect the real situation on the ground which is often far from being static and 'frozen'; *supra* note 2 at 269.

[55] Amnesty International, *Civilians in the Line of Fire: The Georgia-Russia Conflict* (London: Amnesty International Publications, 2008) at 6. There has been much controversy over who started the August war. The Georgian parliament set up a temporary commission to investigate the circumstances that led to the war. Its report, published on 18 December 2008, concluded that the 'well prepared and planned intervention was conducted in Georgia from Russian side. However, the Commission also revealed significant failures of the Government of Georgia, National Security policy performance and management and military management'. For more on this, see 'The War between Russia and Georgia, Its Initial Conditions, Chronology, Legal Evaluation and Deficiencies Revealed in Activities of the Government of Georgia', *Parliament of Georgia* (18 December 2008), online: Parliament of Georgia <http://www.parliament.ge/index.php?lang_id=ENG&sec_id=1315&info_id=22018>. The EU, on the other hand, began its own investigation by launching the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) headed by Swiss diplomat Heidi Tagliavini, who in 2002-06 served as the Head of the United Nations Observer Mission in Georgia (UNOMIG).The results of the IIFFMCG's findings were published on 30 September 2009. On the one hand the report accuses Georgia of starting the hostilities in South Ossetia; on the other hand, Russia is also

primary sources and materials, the real motives of the leaders on each of the three sides involved (Georgian, Ossetian, and Russian) can only be speculated upon. Therefore unlike Kuperman,[56] who conducts in-depth interviews with the top ranking KLA military commanders and bases his argument that the KLA deliberately sought the escalation of violence in 1998 on those sources, I am unable to provide such empirical evidence.

The official Russian version of the story holds that Georgia conducted 'genocide' in South Ossetia, indiscriminately killing and injuring the civilian population, many of whom had Russian passports; therefore, Russia was defending its innocent citizens and was reacting to a Georgian 'invasion' of South Ossetia.[57] Georgian authorities, on the other hand, argue that their actions were in defence of Georgian villages in and near South Ossetia that were subjected to intensified raids from Ossetian paramilitaries in the weeks preceding the war. As then Georgian Prime Minister Lado Gurgenidze declared, '[Georgian] Government troops were forced to launch measures for the establishment of peace in the region after separatist forces responded to President Saakashvili's peace initiatives by shelling Georgian villages.'[58]

The situation in the region had indeed escalated to its worst point since summer 2004 when clashes between Georgians and Ossetians left dozens dead. According to Financial Times reporters, '[m]ost accounts agree that it

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accused of violating laws of war and perpetuating war crimes against Georgian civilians. The overall conclusion of the commission, however, seems to be that '[w]hile it is possible to identify the authorship of some important events and decisions marking its course, there is no way to assign overall responsibility for the conflict to one side alone. They have all failed'; *Independent International Fact-Finding Mission on the Conflict in Georgia*, (September 2009) at 32, online: <http://91.121.127.28/ceiig/pdf/IIFFMCG_Volume_I.pdf>. For more on the commission and its report see <http://91.121.127.28/ceiig/Index.html>.

[56] See Kuperman 2008a, *supra* note 18.

[57] Vicken Cheterian, 'The August 2008 War in Georgia: From Ethnic Conflict to Border Wars' (2009) 28 Central Asian Survey 155 at 156 [Cheterian 2009]. How South Ossetians ended up with Russian passports is of course another matter which is beyond the scope of this article. It is interesting to note here though that there is no mention among Russian politicians of continuous human rights abuses in Chechnya, one of the federal republics within Russia itself. As some analysts argue, human rights abuses there have been at on no lesser a scale, if not more so than in Bosnia or Kosovo; Anthony Loyd, *My War Gone By, I Miss It So* (Penguin Books: London, 1999). When trying to explain why Chechnya did not deserve the same right of secession as South Osssetia or Abkhazia, the Russian foreign minister, Sergey V. Lavrov declared: 'You know what they [Chechens] did to their own place … They turned it into a place where international terrorists were feeling at home'; therefore, it was necessary for Russia to re-take control over the territory; Levy, *supra* note 6.

[58] 'Peace Enforcement Measures Underway in S. Ossetia – PM' *Civil.Ge* (8 August 2008), online: Civil.Ge Daily News Online <http://www.civil.ge/eng/article.php?id=18952&search=lado%20gurgenidze>.

was South Ossetian separatists who committed the first act of escalation when they blew up a Georgian military vehicle on August 1, wounding five Georgian peacekeeping troops.'[59] However, Georgia responded with fierce measures as well, killing six South Ossetian militiamen.[60] This was the start of the unofficial fighting in South Ossetia—at least a week before the deadly fighting broke out on 7 August 2008 when small arms fire between Georgian troops and Ossetian paramilitaries gave way to heavier weapons like mortars and grenade launchers.[61] According to the Georgian side, however, the most decisive factor in triggering the assault on Tskhinvali on the night of 7 August were reports received regarding the movement of some 150 Russian military vehicles from North Ossetia (one of the federal republics of the Russian Federation) into neighbouring South Ossetia.[62] It was because of this 'clear-cut invasion', according to President Saakashvili, that 'we started to open fire with artillery, because otherwise they would have crossed the bridge and moved into Tskhinvali.'[63]

One way or another, as Belton *et al.* argue, the Kremlin's reaction was very swift.[64] In fact, '[s]o swift ... that some analysts believe that, while it did not appear to precede the Georgian assault on Tskhinvali, as Mr Saakashvili claims, it may have been planned in advance, with Mr Saakashvili simply falling into a well prepared Russian trap.'[65] Weeks (and even months) before the onset of violence, political analysts who closely followed the events in the Caucasus raised alarms regarding the possible escalation of violence in the region. They argued that Moscow might have 'already made a tentative political decision to commence serious military action in Abkhazia and/or

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[59] Catherine Belton, Jan Cienski, Charles Clover and Dan Dombey, 'Countdown in the Caucasus: Seven Days that Brought Russia and Georgia to War' *Financial Times* (26 August 2008) [Belton *et al.*], online: Virtual Collector <http://virtualcollector.blogspot.com/2008/08/countdown-in-caucasus-seven-days-that.html>.

[60] *Ibid.*

[61] *Ibid.* See also C. W. Blandy, 'Georgia and Russia: A Further Deterioration in Relations' (2008) 08/22 Advanced Research and Assessment Group Caucasus Series at 6 [Blandy 2008]; Cheterian 2009, *supra* note 57 at 159.

[62] Cheterian 2009, *supra* note 57 at 161. See also Belton *et al.*, *supra* note 59.

[63] Belton *et al.*, *supra* note 59. The Kremlin of course denies these accusations and argues that it only crossed the Roki tunnel, connecting North and South Ossetia, after the initial Georgian assault on Tskhinvali; *ibid.*

[64] *Ibid.*

[65] *Ibid.* See also Cheterian 2009, *supra* note 57 at 163; C. W. Blandy, 'Provocation, Deception, Entrapment: The Russo-Georgia five Day War' (2009) 09/01 Advanced Research and Assessment Group Caucasus Series [Blandy 2009].

South Ossetia in the coming months' and that 'Western indifference may be ill-timed.'[66]

In a number of reports prepared for the Defence Academy of the United Kingdom, C. W. Blandy gives a detailed account of various incidents—what he calls 'the series of "provocations"' between Russia, Georgia and its break-away regions—preceding the outbreak of violence in South Ossetia in 2008.[67] In spring 2008, Russia significantly increased its military presence in the North Caucasus, conducting a major military exercise—Kavkaz-2008—and setting up encampments throughout the Transcaucasus Highway from Vladikavkaz to the Roki tunnel on the border between North and South Ossetia.[68] Knowing that a heavily-armoured Russian force was positioned right at the entrance to the Roki tunnel, South Ossetian leaders further increased night-time raids on Georgian villages situated within and outside the conflict zone.[69] The main purpose of such activities indeed seemed to be to provoke 'a hasty, hot-tempered overreaction' from the Georgian side.[70] In the aftermath of the Five-Day war, Whitmore came to a similar conclusion that there were 'mounting indications that Russia had been planning an attack on Georgia in advance, and was just waiting for a pretext to carry it out.'[71] The 'pretext' came when on August 7, the Georgian President made a fatal decision to commence artillery bombardment of Tskhinvali and the civilian population of the city came under intense fire.[72]

Further, as Cheterian points out, '[t]he August war came at a moment of acute tension between Russia and the West.'[73] The Russian leadership has continuously opposed Ukraine's and Georgia's aspirations to join the NATO

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[66] Pavel Felgenhauer, 'The West Is Confused About What To Do in Abkhazia' (2008) 5 Eurasia Daily Monitor–The Jamestown Foundation. See also Vladimir Socor, '"De-Recognition" of Georgia's Territorial Integrity Disqualifies Russia As "Peacekeeper"' (2008) 5 Eurasia Daily Monitor–The Jamestown Foundation; Thomas de Waal, 'Bullies of the Caucasus' (15 May 2008), online: Institute for War and Peace Caucasus Reporting Service <http://www.iwpr.net/?p=crs&s=f&o=344630&apc_state=henpcrs>.

[67] Blandy 2008, *supra* note 61 at 6. See also Cheterian 2009, *supra* note 57 at 164.

[68] Blandy 2009, *supra* note 65 at 3. For a detailed timeline of these and other events in the Caucasus from April to September 2008 see Mark A. Smith, 'A Russian Chronology: April-June 2008 Foreign Policy' (2008) 08/25A Advanced Research and Assessment Group Chronology Series and 'A Russian Chronology: July-September 2008' (2008) 08/27 Advanced Research and Assessment Group Chronology Series.

[69] Blandy 2009, *supra* note 65 at 6.

[70] Blandy 2008, *supra* note 61 at 9.

[71] Brian Whitmore, 'Scene at Russia-Georgia Border Hinted At Scripted Affair' (23 August 2008), online: RFE/RL <http://www.rferl.org/content/Russia_Georgian_Scripted_Affair/1193319.html>.

[72] Blandy 2009, *supra* note 65 at 7.

[73] Cheterian 2009, *supra* note 57 at 164.

Membership Action Plan (MAP) that was discussed at the April 2008 NATO summit in Bucharest, Romania. The United States' intentions to establish a missile defence shield in Eastern Europe (the Czech Republic and Poland) also served as a contributing factor to these growing tensions.[74] However, as Cheterian argues, '[w]ithout taking into account the events of Kosovo in February 2008, it is difficult to understand the Russo-Georgian war six months later.'[75] Some analysts go even further, suggesting that it was Kosovo's recognition as an independent state by the US and key European states that 'provided Moscow with an opportunity to manipulate the Georgian-Abkhaz [and Georgian-South Ossetian] dispute[s] to the detriment of Georgia and its Western allies.'[76]

Careful examination of the events that *preceded* the outbreak of violence in South Ossetia in August 2008, and the rhetoric of Russian, Ossetian and Abkhazian leaders prior to and during the conflict, leads me to the conclusion that Western recognition of Kosovo's unilateral declaration of independence, and the implicit moral criteria justifying this recognition as a result of the injustices done to the Kosovars by the Milosevic regime, may have unintentionally created suitable political conditions for a moral hazard in South Ossetia. In other words, to use Kuperman's term, it may have encouraged 'fraudulent risk-taking'[77] on behalf of South Ossetian leaders while giving ample opportunity for the Russian political and military establishment to manipulate the political situation in Georgia in a way that would lead to a military conflict there.

Russian politicians and analysts have continuously voiced their concerns publicly regarding the possible dangers associated with recognizing Kosovo's independence. In early February 2008, then Russian President and current Prime Minister Vladimir Putin openly warned the international community that 'Western recognition of Kosovar independence would be met by intensified Russian support for irredentism in South Ossetia.'[78] Six

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[74] *Ibid.* See also Blandy 2008, *supra* note 61 at 1.

[75] Cheterian 2009, *supra* note 57 at 164.

[76] Blandy 2008, *supra* note 61 at 2. See also Cheterian 2009, *supra* note 57 at 163.

[77] Kuperman 2008a, *supra* note 18 at 50.

[78] Christopher Hitchens, 'Great Moscow Circus' *The Australian* (22 August 2008), online: The Australian <http://www.theaustralian.news.com.au/story/0,25197,24220348-7583,00.html>. Within a few weeks following Kosovo's declaration of independence, Russian political analyst and former director of the Regional Centre of the Organization for Security and Co-operation in Europe (OSCE) Mission in Kosovo Vladimir Kozin further noted that by recognizing '[t]he self-proclaimed "independence" … of Kosovo, the West … has created an extremely dangerous precedent for the whole system of international relations and has already complicated the political-military situation [within as well as outside the region]'; Vladimir Kozin,

months later when justifying his recognition of South Ossetian and Abkhazian independence, President Medvedev 'left no doubt that the decision was in part retaliation for the West's support … for the independence of Kosovo from Serbia, which Russia had opposed.'[79]

This further points to the dangers arising from the potential instrumentalism of remedial secession; powerful regional and/or international players in world politics may use this right as an instrument to advance their own geopolitical interests rather than to protect ethnic minorities. In this way, although the international community might have regarded Kosovo as 'a one-time-only approach', it turned into 'a precedent-setting case',[80] the consequences of which are far-reaching and will be hard to reverse in the future.

IV. A Survey of Possible Alternative Solutions

Advocates of the remedial secession theory argue that making state sovereignty conditional upon respecting the human rights of minorities (or in fact of all citizens) at all times, would keep the state conscious that if it fails to do so, the consequences may be humanitarian intervention and/or recognition of minority groups' rights to leave the union.[81] Sovereignty should indeed be conditional and the international community should be able to 'withdraw support for the territorial integrity of the existing state' if the state fails 'to satisfy the conditions upon which its rightful control of the territory depends.'[82] However, there are other, more effective and less hazardous methods that the international community could use to ensure states respect the human rights of all their citizens and adequately address the social-political and economic grievances of minority ethnic groups.[83]

The threat of humanitarian intervention of the West on behalf of Kosovar Albanians did not prevent Milosevic from perpetrating more violence in the hope of maintaining control over Kosovo. Moreover, it left the region with 10,000 deaths and about a million Kosovar Albanians, Serbs and Roma subject to ethnic cleansing. As some would argue, rather than saving lives, the threat of humanitarian intervention in Kosovo may have caused more

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'"Independent" Kosovo: Dangerous Precedent' (28 March 2008) [translated by author], online: Krasnaya Zvezda <http://www.redstar.ru/2008/03/28_03/3_02.html>.

[79] Levy, *supra* note 6.

[80] Caspersen, *supra* note 9 at 113.

[81] Buchanan 2004, *supra* note 12 at 336.

[82] *Ibid.*

[83] See Fearon and Kuperman, *supra* note 18.

suffering and destruction.[84] In the same way, I argue that rather than preventing states from perpetrating violence against their ethnic minorities, remedial secession may cause more harm than good. Instead, the international community could use other methods to avert the damage caused by oppressive regimes. As Kaufman argues, if used appropriately, 'substantial financial incentives – aid, trade, and membership in international institutions' could be utilized in order to persuade states to address the legitimate grievances of their minority groups.[85] Ethnic groups should not be given the impression that violence is 'an intermediate stage on the road to recognition of the right of self-determination' and secession.[86]

Alternatively, liberal theorists of secession argue that the international community should make available a right of secession that is not strictly a remedial right.[87] They assert that claims about the degree of disruption that would result from granting statehood to even such small-scale actors as Kosovo and South Ossetia, have generally been exaggerated by state actors; after all, there are quite a few examples of small states that function perfectly well.[88] According to these accounts such a right would, instead, provide 'an effective check on the tyranny of the majority.'[89] On the contrary, however, opponents of the remedial right to secede argue that if the right to secede is readily available, it 'might prove too great a temptation to the minority in moments of heated dispute or political disappointment.'[90] It may also prove 'too great a temptation' to the dissatisfied political leadership of the minority group who would rather be the leaders of independent states than governors of regions within host states.

By outlining a largely anti-secessionist argument I by no means justify 'the tyranny of the majority'. Any acts of oppression or discrimination of any sort directed towards minorities within a host state should be strictly condemned by the international community. In fact, in such circumstances,

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[84] Kuperman 2008a, *supra* note 18 at 66.
[85] Kuperman 2008a, *supra* note 18 at 73.
[86] Veton Surroi, 'The Albanian National Question: The Post Dayton Pay-Off' (May 1996) 41 War Report cited in Kuperman 2008a, *supra* note 18 at 70.
[87] In other words, the members of a seceding group need not suffer any injustices in order to earn the right to secede. See Harry Beran, 'A Liberal Theory of Secession' (1984) 32 Pol. Studies 21 and 'More Theory of Secession: A Response to Birch' (1988) 36 Pol. Studies 316 [Beran 1988]; David Miller, *On Nationality* (Oxford: Clarendon Press, 1995); Daniel Philpott 'In Defence of Self-Determination' (1995) 105 Ethics 352; Moore, *supra* note 2.
[88] Taras & Ganguly, *supra* note 31 at 55. Lichtenstein, Luxemburg, Monaco, Andorra, San Marino and Vatican City would be examples from Europe.
[89] Beran 1988, *supra* note 87 at 319.
[90] Buchheit, *supra* note 2 at 29.

these minority groups may indeed have every right to leave the union. However, I also argue that consequences are morally relevant and before endorsing the right to secede, it is important that the international community carefully balances 'the good against the evil.'[91] Close examination of the nexus between the cases of Kosovo and South Ossetia leads me to the conclusion that the possible outcomes of recognizing a right to secession are graver than the possible outcomes of available alternatives.

Rather than foolhardily endorsing the right to secede, more attention and resources need to be devoted towards devising and/or strengthening various institutional arrangements within states that would accommodate minority needs. Such institutional mechanisms include but are not limited to: (*a)* territorial and cultural autonomies, (*b*) federalism—division of powers of a state between a central (federal) government and its territorial subdivisions,[92] (*c*) condominium—'the principle of two states *sharing* sovereignty over a territory.'[93]

Of course each of the above-mentioned institutional mechanisms is not without problems and cannot be considered as a 'cure-all prescription.'[94] The major problem with granting a large degree of self-rule to territorially concentrated groups and setting up regional autonomies, for instance, is that the line between self-rule and central-rule becomes rather blurred and raises the question of when the demands for more 'home-rule' end.[95] In other words, these institutional devices may become the very first steps towards

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[91] Warren S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing' (1989) 98 Phil. Rev. 287 at 287. In this way, as already mentioned earlier, by raising awareness of the negative consequences of secession, I am setting up a consequentialist argument. As Jackson states, '[c]onsequentialism approaches the question of whether an action is right or wrong in terms of a comparison of the possible outcomes of the action with the possible outcomes of each available alternative to that action'; Frank Jackson, 'Decision-Theoretic Consequentialism and the Nearest and Dearest Objection' (1991) 101 Ethics 461 at 462. I approach the question of whether there can be an internationally recognized right to secede in a similar way.

[92] Myron Weiner, 'Peoples and States in a New Ethnic Order?' (1992) 13 Third World Q. 317 at 332 [Weiner].

[93] *Ibid.* (emphasis in original).

[94] Svante E. Cornell, 'Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective' (2002) 54 World Politics 254 at 247.

[95] Michael Hechter, *Containing Nationalism* (New York: Oxford University Press, 2000) at 141. The same can be argued in regards to ethno-federalism, 'whose boundaries are designed to coincide with ethno-linguistic concentrations' of the population; Jack L. Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (New York; London: Norton, 2000) at 327. In all these cases certain steps are taken towards institutionalising ethnicity, by which, as Snyder argues, a state instantly puts itself in danger of 'unnecessarily politicising and locking in inimical cultural distinctions'; *ibid.* at 40.

an ultimate secession of the region. Moreover, in a heterogeneous state, granting autonomous rights to one group always carries a risk that other minority groups might also demand the same rights, thus, creating another set of moral hazards.

However, as Kuperman argues, the best way to lower the risk of moral hazard is to 'aid[] non-violent protest groups rather than rebels.'[96] No state will ever be able to please everyone at the same time. There will always be groups that will fail to persuade the majority on certain issues and that will be dissatisfied with certain policies. But if they have a right to voice their grievances through political channels, the resort to violence will be a far less appealing option.[97] Thus, if there is a genuine commitment on all sides of the conflict, the above-mentioned institutional devices 'can be effective instruments for satisfying nationalist aspirations for decentralisation and self-government without redrawing international boundaries.'[98]

Heterogeneity should not be viewed as intrinsically prone to violence, and secession should not be seen as a means to create more homogeneous, and therefore more stable and peaceful communities. In the world which is home to over six billion people and where more than 90 percent of the world population lives in multinational or multiethnic states,[99] it would be impossible to create (and sustain) states with single ethnic, religious, or linguistic groups.[100] Thus, the prospects of 'internal' self-determination[101] should be given priority and explored fully, despite some drawbacks.[102]

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[96] Kuperman 2008b, *supra* note 18 at 231.

[97] See Buchheit, *supra* note 2; Heraclides 1991, *supra* note 32; Allan E. Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism Has to Say' in Margaret Moore & Allen E. Buchanan, eds., *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003).

[98] Weiner, *supra* note 92 at 332. As Weiner affirms, it is of crucial importance that the international community emphasizes the fact that 'modern states need not be centralised, that centralism has outlived its usefulness'; *ibid*.

[99] Thomas Fleiner, *et al.*, 'Federalism, Decentralisation and Conflict Management in Multicultural Societies' in Raoul Blindenbacher & Arnold Koller, eds., *Federalism in a Changing World, Learning From Each Other: Scientific Background, Proceedings, and Plenary Speeches of the International Conference on Federalism 2002* (Montreal; London: McGill-Queen's University Press, 2003) at 197.

[100] In fact, a nation-state in its classic understanding of a state comprised of a single nationality is very rare. While the number of potential nations is very high, currently there are less than 200 sovereign states in the world, out of which one can only identify around 15 states in which state and nation completely coincide; see Neuberger, *supra* note 22 at 299 and Ruth Lapidoth, *Autonomy: Flexible Solution to Ethnic Conflicts* (Washington, D.C.: United States Institute of Peace Press, 1997) at 47 [Lapidoth 1997].

Alongside the development of more flexible institutional mechanisms to accommodate conflicting ethnic claims, it is also necessary to use the term sovereignty in a more flexible way. As Lapidoth argues, 'in a case of diffusion of power, both the central government and the regional or autonomous authorities could be the lawful bearer of a share of sovereignty, without necessarily leading to the disappearance or dismemberment of the state.'[103] What many analysts often forget is that the idea of sovereignty understood 'in its classic connotation of total and indivisible state power has been eroded by modern technical and economic developments and by certain rules of modern constitutional and international law.'[104] For instance, membership in supranational organizations, such as the EU, has had an enormous impact on the notion of sovereignty and 'has gradually reduced the substantive amount of powers implied in [it].'[105]

Gottlieb further argues in favour of opening up new political space to accommodate separatist demands.[106] He proposes the so-called 'states-plus-nations approach'–'the extension of the international system of states to make room also for a system of nations.'[107] Gottlieb affirms that '[t]his can occur through the gradual opening of international organisations' to include nations (alongside states) as its members and granting them 'new international status … albeit in a manner that does not require the creation of

[101] 'Internal' self-determination deals 'with the internal structure and politics of the state,' such as the internal constitutional framework, democratic rule or autonomous and federal arrangements within a state; Neuberger, *supra* note 22 at 299.

[102] This further raises the issue of whether it is at all in the international community's self-interest to do so–to support decentralisation of a state and to encourage states to 'meet the demands of … pacifist groups'; Kuperman 2008b, *supra* note 18 at 231. After all, the resources that need to be invested have to come from somewhere and without an immediate threat there seems to be no reason for the international community to 'invest' in state-building process. I, however, argue that it *is* in the self-interest of the international community to act before the conflict has escalated into violence. In this way, it would avoid thousands and sometimes, millions of refugees and internally displaced people fleeing civil wars and various ethnic conflicts. Also, the international community already spends significant resources on different peace-building operations and post-war reconstruction projects in many parts of the world, many of which could be avoided if half of those resources were dedicated to strengthening capacity of non-discriminatory institutions in these states during the pre-war period that will be able to guarantee equal rights for all citizens.

[103] Ruth Lapidoth, 'Sovereignty in Transition' (1992) 45 J. Int'l Affairs 325 at 345 [Lapidoth 1992].

[104] *Ibid.*

[105] *Ibid.*

[106] Gidon Gottlieb, *Nation Against State: A New Approach to Ethnic Conflicts and the Decline of Sovereignty* (New York: Council On Foreign Relations Press, 1993) at 3-5.

[107] *Ibid.* at 3.

new territorial states.'[108] For some, such an approach is largely utopian. As Taras and Ganguly argue, '[m]ixing state entities with nonstate ones while not ordering them in a hierarchy seem[s] both common sense and an unrealistic expectation.'[109] Nevertheless, even they admit that 'in the face of intractable ethnic conflicts,' coming up with creative solutions is both important and necessary and 'imagining new structures for organising peoples is not without merit.'[110]

One of the gravest consequences of Kosovo's Western-backed independence, however, is that it cuts short any further discussion about the above-mentioned 'new structures' for organizing nations and states. Moreover, it undermines the idea of autonomy (or federalism) as a conflict-solving tool.[111] As Coppieters comments, it is going to be more and more difficult now to convince secessionist movements such as the ones in South Ossetia and Abkhazia of why federal models are appropriate for them while considered inappropriate in other cases, such as the one in Kosovo.[112]

V. Conclusion

The post-Cold War period has seen a dramatic increase in demands from ethnic minorities for 'representation, recognition and sovereign power based on "national geo-bodies".'[113] Some argue that these ethnic minorities are the 'victims of modern geography.'[114] Others assert that such (often unlimited) demands for more rights 'by aggrieved (or greedy) groups … go well beyond protection of minority identity.'[115] The question of how 'to discriminate between insurgent groups that have legitimate grievances and those that do not' remains unresolved and continues to be one of the most significant and pressing dilemmas in both international law and international relations.[116]

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[108] *Ibid.* Weiner argues along the same lines that '[p]art of the solution may lie in finding ways to provide international standing to ethnic groups short of state sovereignty … through representation for ethnic groups within regional and international organisations'; *supra* note 92 at 332.

[109] Taras & Ganguly, *supra* note 31 at 56.

[110] *Ibid.* See also Weiner, *supra* note 92 at 332.

[111] Cheterian 2009 forthcoming, *supra* note 11 at 6.

[112] Coppieters, *supra* note 34 at 5.

[113] Carl Grundy-Warr, 'Lost in Sovereign Space: Forced Migrants in the Territorial Trap' (2002) 11 Asian & Pacific Migration J. 437 at 442.

[114] *Ibid.*

[115] Hurst Hannum, 'Territorial Autonomy: Permanent Solution or Step toward Secession?' in Andreas Wimmer, *et al.*, eds., *Facing Ethnic Conflicts: Toward a New Realism* (Lanham: Rowman & Littlefield Publishers, 2004) at 277 (parentheses in original).

[116] Buchanan 2004, *supra* note 12 at 10.

This article has addressed the hotly debated issue of secession and the complexities associated with the right to secede. The question posed is whether the consequences of recognizing a right to secession are too great to allow it as a right. The main focus is on an internationally *recognized* right to secede, whether moral or legal, and the question is examined through the cases of Kosovo and South Ossetia. Kosovo is particularly pertinent, having been one of the most controversial cases of secessionist movements in Europe. Its declaration of independence in February 2008 has been rigorously backed by the majority of Western states, and as of July 2009 Kosovo is recognized by 62 states out of the 192 UN member states.[117] South Ossetia is important in this regard because its recognition (together with Abkhazia) by Russia, one of the major players in international politics, represents the most recent successful attempt at secession.[118]

In both of these cases, the primary ground for recognizing these break-away regions as independent political entities (at least implicitly if not explicitly) has been gross human rights violations by the central governments of Serbia and Georgia. The terms 'genocide' and 'ethnic cleansing' have been used extensively when talking about these conflicts. This is not surprising, given that secessionist groups often 'seek to advance the most morally persuasive case justifying ... [their] ... actions and objectives.'[119] Claims of discrimination, oppression, and tyranny seem to provide the most morally persuasive 'grounds for leaving a union' and in this way, Kosovo has indeed been a major 'point of reference.'[120]

Based upon careful research and analysis of the cases outlined above, I have concluded that the consequences of recognizing a right to secession could, in most cases, be too great for international law to allow this as a right.

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[117] To date, the last country to recognize Kosovo's independence is Dominican Republic (on 11 July 2009). Further, 22 out of the 27 EU member states have also recognised Kosovo. For more information on who has recognised Kosovo as an independent state see <http://www.kosovothanksyou.com/>.

[118] Nicaragua is another UN member state that recognized South Ossetia and Abkhazia as independent states on 5 September 2008. However, the country's legislature has yet to ratify the recognition. See Brian Whitmore, 'A Year After the War, South Ossetia and Abkhazia Seek Different Paths' (6 August 2009), online: RFE/RL <http://www.rferl.org/content/A_Year_After_The_War_South_Ossetia_And_Abkhazia_Seek_Different_Paths/1794249.html>. Following Russia and Nicaragua, on 10 September 2009 the Venezuelan President Hugo Chavez also recognised Abkhazian and South Ossetian independence during his visit to Moscow. See 'Chavez Recognizes Abkhazia, S. Ossetia's independence', *Press TV* (10 September 2009), online: Press TV <http://www.presstv.ir/detail.aspx?id=105861&sectionid=351020704>.

[119] Taras & Ganguly, *supra* note 31 at 54.

[120] *Ibid.* See also Caspersen, *supra* note 9 at 113.

I have argued that Kosovo's Western-backed move towards independence has raised expectations that in cases of severe state violence the likelihood of recognizing a group's right to secede from the host state increases. The political rhetoric of Russian officials regarding Georgian 'genocide' and 'ethnic cleansing' of Ossetians, and parallels drawn between these two cases, indicate that Kosovo's declaration of independence in February 2008 may have (unintentionally) created suitable conditions for a moral hazard in Georgia a few months later. Both Kosovo and South Ossetia have been considered by the West and Russia respectively as 'one-time or otherwise special exception[s].'[121] However, as Fearon comments, it is unclear '[h]ow many one-time exceptions or special circumstances can be declared.'[122]

Thus, drawing on the consequentialist view of morality, I have argued that before the international community recognizes a group's right to secede from a host state, the consequences of that recognition and the possible harm it may cause should be carefully weighed against the consequences of available alternatives. Further, I have also argued that not only the consequences but also the conditions that give rise to secessionist movements should be studied carefully. Oppression and discrimination of ethnic minorities within a state should be addressed at an earlier stage before the situation has escalated rather than after violence has already erupted. The international community should also more rigorously encourage the use of various institutional arrangements available. Using these mechanisms, the prospects of internal self-determination should be explored fully.

As a step towards the future, the international community should be willing to recognize that the notion of sovereignty may be split into various components, which may be present or absent in varying degrees.[123] It is possible, and necessary, to use the term sovereignty in a more flexible manner, in order to find a compromise between the conflicting concepts of sovereignty and territorial integrity on the one hand, and national-self-determination and the right to secession on the other.

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[121] Fearon, *supra* note 18 at 413.

[122] *Ibid*.

[123] Lapidoth 1997, *supra* note 100 and Lapidoth 1992, *supra* note 103.

Globalizing Rights and Going Wrong
The 'Right' Path to Refugee Protection?

SHAUNA LABMAN*

I. Introduction

The call has gone out for a conception of rights detached from the sovereign state. In essence, it is a call for 'global rights.'[1] At the same time, a rights-based approach to the refugee regime is increasingly commonplace.[2] This article connects the call for global rights to the refugee rights context. Global rights could enable recognition of refugee rights in the absence of a sovereign. Would global rights effect greater refugee protection? Are rights-based arguments the appropriate approach for securing dignified refugee protection? Are rights the right path to protection? The answer here is no.

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[1] I use the terms 'global rights,' 'globalized rights,' and 'globalizing rights' to loosely connote the movement of rights away from their attachment to sovereign states. How the arguments for such global rights are construed will be explored in the substance of the article.

[2] See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007); Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008) [Haddad]; James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge; New York: Cambridge University Press, 2005) [Hathaway 2005]; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford, New York: Oxford University Press, 2007).

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The danger is that rights go wrong.[3] Anti-rights and counter-rights mobilization and discourse mean that the attainment of rights risks reverberating against the rights claimant. Rather than protection, a rights claim risks vilification of the refugee and a diminished willingness on the part of the state to protect. The purpose of this article is to suggest that focusing on a globalized rights claim is not the best strategy; rights are not the right path to refugee protection.

The understandable draw of a rights-based stance is that it adds a concrete assertion of legal obligation and accountability to refugee protection. It further adds dignity to the demand. There is an entitlement to rights. There is equality. Stuart Scheingold suggests this is the 'call of the law.' The assertion of a right implies a legitimate and dignified reciprocal relationship that is societal and not personal.[4] The current, alternative calls in refugee protection are for compassion, humanitarianism and morality.[5] Such claims lack reciprocity and are founded on personal need. Need implies inequality whereas rights are grounded in equality.[6] So long as refugees seek only compassion they remain dependent, often invisible, outsiders in the realm between the persecuting and protecting countries. The call of the law offers the possibility of entrance and protection.

Refugees do not lack rights. The legal rights of refugees are set out in the 1951 *Convention relating to the Status of Refugees* (1951 Convention).[7] These rights, while refugee-specific, are informed by broader human rights.[8] The refugee problem is often conceived as an issue of rights; the violation of rights and the need for rights to be respected.[9] Article 33(1) of the 1951

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[3] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Ann Arbor: University of Michigan Press, 2004), xxxii [Scheingold].

[4] *Ibid.* at 58.

[5] See Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws in Canada and Australia*, (Vancouver: UBC Press, 2005) [Dauvergne 2005]; Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) at 195 [Gibney 2004].

[6] Dauvergne 2005, *ibid.* at 174.

[7] *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954).

[8] Hathaway 2005, *supra* note 2 at 8. Hathaway interprets the 1951 Convention rights through (near) universally applicable international human rights as established in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, as opposed to other regional and specialized norms.

[9] Erika Feller 'Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come' (2006) 18 Int'l J. Refugee L. 509 at 518 [Feller].

Convention enshrines the right of non-refoulement in signatory states.[10] As the cornerstone of the refugee regime, non-refoulement is the refugee's right not to be sent back to the country from which he or she has fled. Once this right is triggered, the 1951 Convention sets out other rights that accrue as the refugee re-establishes in a new state.[11] A sovereign state is therefore required to trigger the protection offered by the 1951 Convention. The dilemma faced by refugees is that they exist between sovereigns.[12] The difficulty is that the 1951 Convention does not equip the refugee with the right to travel to the new state. The refugee challenge is one of rights realization.[13]

Getting 'there' is the impossible dream for most refugees. While signatory states grant refugee status and sometimes citizenship to refugees who reach their shores, other states, often overwhelmed by refugees and determined to discourage future flows, have not signed the 1951 Convention. According to the United Nations High Commissioner for Refugees (UNHCR) the global refugee population was 11.4 million at the close of 2007.[14] More than six million refugees, over one half of the global population, are now in 31 different protracted situations,[15] meaning that refugee populations of 25,000 persons or more have been in exile in a developing country for five years or more.[16] Matthew Gibney terms this uneven distribution the 'tyranny of geography'[17] and has more recently accused Western states of a containment policy through 'engineered

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[10] Article 33(1) of the 1951 Convention provides: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

[11] Hathaway divides and approaches the rights according to when they are triggered: upon de jure or de facto state *jurisdiction*, upon physical presence in state's *territory*, upon *lawful presence* within the territory, upon authorization to *lawfully remain* in territory, and upon *durable residence*: 'An attempt is instead made to grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present. While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state'; Hathaway 2005, *supra* note 2 at 154.

[12] Haddad, *supra* note 2.

[13] Feller, *supra* note 9 at 518.

[14] UNHCR, *Statistical Yearbook 2007* [UNHCR *Statistical Yearbook 2007*], online: <http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>.

[15] *Ibid.*

[16] *Ibid.* UNHCR numbers exclude Palestinian refugees who fall under the separate mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

[17] Gibney 2004, *supra* note 5 at 195.

regionalism.'[18] Whether by geographic tyranny or engineered intent, too many refugees are left with no access to solutions or anywhere to assert their rights. UNHCR states simply: 'Refugees trapped in these forgotten situations often face significant restrictions on their rights.'[19] As Hannah Arendt recognizes, statelessness and refugeehood create conditions in which individuals seem to exist without the 'right to have rights.'[20] As so many sit in what UNHCR recognizes to be 'a long-lasting and intractable state of limbo,'[21] the call for globalized rights grows louder.

Understanding the globalized rights call requires a focus on the seemingly growing potential for a conception of rights in a space not tied to statehood as a method for achieving those rights. I utilize the methodological lens of law and geography to illustrate this potential. Stepping beyond this threshold challenge of feasibility, I next review a select strand of American rights scholarship to demonstrate the dangers behind rights advocacy and attainment. Past incidents of refugee rights claims illustrate the point. Finally, the anti-rights and counter-rights mobilization and discourse in Australia and Canada that arise when asylum-seekers approach their borders reveal the failings of the rights-based approach. These lessons of the past reinforce my argument that while globalized rights may be increasingly possible in migration, they are not the right path to protection.

II. Rights: Theoretical Foundations

1. Changing Space, Sovereignty and Rights

The refugee's dilemma is based on borders. It is in the space between borders that refugees are unable to realize their rights. Forced to flee beyond the borders of his or her home country, the refugee has no right to a new country. It is also at, and within, these borders that the disciplines of law

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[18] Matthew J. Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone & Felicity Rawlings-Sanei, eds., *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007) 57.

[19] UNHCR, *The State of the World's Refugees 2006* (2007 ATCR Agenda Item 4a) at 105.

[20] Hannah Arendt, *The Origins of Totalitarianism*, rev. ed. (San Diego: Harcourt Brace & Company, 1979) at 296. Arendt earlier explains at 291-2, 'The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own governments and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.' See generally 290-302.

[21] Executive Committee of the High Commissioner's Programme, *Protracted Refugee Situations*, 30th Mtg., EC/54/SC/CRP.14 (10 June 2004) at para. 3.

and geography traditionally meet. Law tends to give little thought to geography beyond as a backdrop to disputes[22] or marker of differences.[23] Law and geography intersect but fail to interact. Within this static intersection, rights serve to outline the legal distinctions in social and physical space.[24] Both immigration and refugee law are premised on the gradual allocation of rights with growing attachment to the state.[25] Catherine Dauvergne conceives of rights in concentric circles: 'The closer one is to belonging to the nation, the more rights one has in the migration realm. Citizenship is the centre of the circle, where one has the full bundle of rights.'[26] Rights both mark and are marked by distinctions between insider and outsider, citizen and non-citizen, right-holder and non-right-holder.

The critical intermingling of law and geography challenges this traditional stance and shifts how both space and law are conceived. As conceptions of space and law change, rights are altered. Through a critical and transdisciplinary approach, Nicholas Blomley's work uses 'legal geographies – representations of the spaces of social and political life,'[27] to challenge perceived closures and 'institutional categorization' between law and geography.[28] He suggests the potential of a critical legal geography to explore 'the legal production of space, the law-space-power relation, and the link between legality and locality.'[29] The effect of such work is to blur the distinctions between insider and outsider. As law and space are perceived to interact, rather than intersect, the potential for the collision of legal orders arises.[30] As collision occurs, the implication is that rights can neither contain nor be contained.

Just as Blomley seeks to challenge categorizations and closures, Neal Milner and Jonathan Goldberg-Hiller argue through this spatial account that rights can be reimagined. They interpret growing notions of a globalized world as signifying a reimagining of reality, and suggest that as people

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[22] Keith Aoki, 'Space Invaders: Critical Geography, the "Third World" in International Law, and Critical Race Theory' (2000) 45 Vill. L. Rev. 913 at 937 [Aoki].
[23] Nicholas Blomley, *Law, Space and the Geographies of Power* (New York: Guilford Press, 1994) at 25 [Blomley].
[24] Neal Milner and Jonathan Goldberg-Hiller, 'Reimagining Rights' (2002) 27 Law & Soc. Inquiry 339 at 363 [Milner & Goldberg-Hiller 2002].
[25] See Hathaway 2005, *supra* note 2; Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 Theor. Inq. L. 389.
[26] Dauvergne 2005, *supra* note 5 at 171.
[27] Blomley, *supra* note 23 at 25.
[28] *Ibid.* at 37.
[29] *Ibid.* at 45.
[30] Milner & Goldberg-Hiller 2002, *supra* note 24 at 362-3.

reimagine reality they find themselves reimagining law as well.[31] This suggests that as understandings of space are changed by globalization, law and legal rights are also changed. Milner and Goldberg-Hiller explore the 'multiple sources of authority from which rights can be imagined and community boundaries redrawn.'[32] Connecting back to the geographic lens, the interaction of law and space highlights the complex indeterminacy of political boundaries.[33] Sovereignty and the state are thus implicated in the critical reimagining of law and geography. Keith Aoki notes that with pure—Blomley would say closed—legal analysis, 'boundaries often reduced complex questions about distribution and access to resources … into mere formalistic exercises in identifying boundaries.'[34] In contrast, some of the work he surveys—albeit with respect to race—uses geography to 'see beyond the formal artifice of nation-state sovereignty.'[35] Thus we see recognition of this fundamental shift from sovereign-based analysis to a globalized conception from diverse perspectives, each of which is using a geographic lens to 'spatialize'[36] their arguments and push legal boundaries.

The concept of globalized space is thus invading our imaginations and affecting our ideas of the attachment of rights to citizenship. Dauvergne, for example, argues there is growing potential for rule of law to become 'unhinged' from the nation.[37] She examines globalization's influence on sovereignty and the rule of law in migration and points to the few instances in refugee claimant cases where the executive was forced to meet higher standards of procedural fairness than judicial deference would previously have required.[38] To even make such an argument shifts the meanings of migration and nationhood. Fixed definitions are subverted.[39] Building on this shifting reality is the idea that the world has changed at the close of the twentieth century. There is arguably a greater porousness to borders.[40]

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[31] *Ibid.* at 356-7.
[32] Jonathan Goldberg-Hiller and Neal Milner, 'Rights as Excess: Understanding the Politics of Special Rights' (2003) 28 Law & Soc. Inquiry 1075 at 1109 [Goldberg-Hiller & Milner 2003].
[33] Aoki, *supra* note 22 at 938.
[34] *Ibid.* at 937.
[35] *Ibid.* at 950.
[36] Blomley, *supra* note 23 at 8.
[37] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008) at 171 [Dauvergne 2008].
[38] *Ibid.* at 175. Dauvergne recognizes locating rule of law's legitimacy in this global transformation is a 'crucial issue' and makes clear that her argument is not 'for and about human rights'; *ibid.* at 183, 184.
[39] Milner & Goldberg-Hiller 2002, *supra* note 24 at 343.
[40] Aoki, *supra* note 22 at 914.

Globalization seemingly makes movement more fluid and less containable.[41] Scholars are increasingly responding to this phenomenon by rethinking and questioning notions of space and sovereignty.[42] This idea of rethinking space and transforming ideas about sovereignty opens up the potential for globalized rights. And yet, this potential expansion serves also as a warning, as the desire for sovereign stability remains.

While globalization causes the rights discourse to transcend states and span boundaries, these same boundaries paradoxically not only retain but reinforce their significance.[43] The sovereign state reacts against the porousness of its borders.[44] With migration law, particularly in its response to refugees, the border becomes the 'last bastion of sovereignty' in the state's battle to preserve its status[45] against the pressures of globalization. Migration's key role thus results from the juxtaposition of the quest for globalized rights against a correlated increased need for the state to assert itself and defend its sovereignty. While many aspects of state control fall away to globalized regulation, borders remain an area of national lawmaking—and therefore control—as well as a mechanism for the state to assert its identity.

Within this push-and-pull tension of globalization, the assertion of globalized rights remains vague and the likelihood of its realization challenged by reactions to its own growing strength. Milner and Goldberg-Hiller, for example, are unequivocal that current 'understanding moves away from state-centered and formal notions of rights,'[46] but they are less clear as to what the understanding is moving toward. The dilemma may be that rights discourse is tied to its evolution in international law where rights tend to be broadly enunciated but not clearly defined.[47] Observations on globalized rights amount not to an actualization of these rights but to a

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[41] Stephen Castles, 'The factors that make and unmake migration policies' (2004) 38 Int'l Migration Rev. 852.

[42] See Aoki, *supra* note 22 at 956. The assertion that borders are increasingly porous is a contested claim and the counter-arguments will, to an extent, be explored in the following paragraphs.

[43] Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8 Theor. Inq. L. 489 at 490.

[44] See, for example, Milner and Goldberg-Hiller's recognition of the particular pertinence of their reimagined rights argument to migration law; Milner & Goldberg-Hiller 2002, *supra* note 24 at 364.

[45] Dauvergne 2008, *supra* note 37 at 169.

[46] Milner & Goldberg-Hiller 2002, *supra* note 24 at 341.

[47] Dauvergne 2005, *supra* note 5 at 183.

growing global 'rights consciousness.'[48] And thus, while academics and others in the West are thinking more globally, so too are the waiting refugees who have grown conscious of the potential of rights to offer them dignity, equality and protection.

Implicit in the potential for rights to become global is the abandonment of the idea that rights must attach to a sovereign state. With such a reconceptualization of rights in a globalized space, the possibility arises for refugee rights realization in the absence of a sovereign. Global rights in this context, however, remain in the early stage of consciousness and far from attainment. Despite the *Universal Declaration of Human Rights*' proclamation that human rights are universal, indivisible and inalienable,[49] many remain condemned to 'a position, outside as it were, of mankind as a whole.'[50] The remainder of this article seeks to illustrate that even upon achievement of realizable, global rights, refugees may find themselves further condemned and in an impossible conundrum.

2. *The Politics of Rights*

In order to reflect upon the consequences of success in the achievement of global rights, I must now retract to a specifically spatially-located analysis. Scheingold's seminal work *The Politics of Rights* is conscious of space in the confined and particular example of the United States of America. While it is the tradition, culture and American consciousness that concern Scheingold, these characteristics nonetheless exist in and are created by the carefully demarcated and defended borders that define the American space.

Scheingold situates himself firmly within the American tradition—both the 'distinctively American faith in the law'[51] and the American system of court-based litigation. In 1974 he challenged the American devotion to law with his exploration and explosion of the myth of rights*:* 'The assumption … that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and finally, that

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[48] Michael McCann explains: '*Legal (or rights) consciousness* in this sense refers to the ongoing, dynamic process of constructing one's understanding of, and relationship to, the social world through use of legal conventions and discourse'; Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, IL: University of Chicago Press, 1994) at 7 (emphasis in original) [McCann].

[49] *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948).

[50] Hannah Arendt, *Responsibility and Judgment*, rev. ed. (New York: Schocken Books, 2003) at 150.

[51] Scheingold, *supra* note 3 at 21.

realization is tantamount to meaningful change.'[52] The myth, Scheingold argued, was not only misleading but distracting. He suggested the legal framework led to over-simplified tunnel vision and an exaggerated role for lawyers and litigation in effecting social change.[53] Scheingold's argument is that a rights-based strategy for political change fails. In his clearest terms, the myth of rights is 'all promise and no delivery.'[54]

Scheingold's myth can be understood as an expression of rights consciousness. His politics of rights is a constitutive theory of law in that it views the 'mythical and ideological properties of rights' as constitutive of social practice.[55] His warnings as to the inherent danger and mythical disenchantment of rights therefore urges consideration in understanding the push for rights in a globalized context. On its face, however, a globalized rights discourse appears to leave Scheingold's analysis behind as a dated and particularized approach that lacks the spatial fluidity to transfer to an international discussion. For Scheingold the myth of rights is premised on the link between litigation and remedies with social change. Globalization has broken this litigation link. Court mandated remedies and declarations of rights are no longer the aim of many rights advocates. NGOs now protect and promote human rights through creative non-legal advocacy avenues.[56] The call for rights has taken on a more amorphous shape. Milner and Goldberg-Hiller note how the world has changed since Scheingold's work was first published:

> Rights frequently lose their formal institutional anchors in these transpositions. Their dynamics do not depend on the existence of courts that can declare them and states that can enforce them. Instead, rights work through yet-little-understood processes involving discourse strategies, borrowing, adjusting, adopting, threatening, and convincing in a context that differs significantly from the rights revolution that so much informs the civil rights and communitarian debates.[57]

Does Scheingold's analysis, therefore, retain relevance in the globalized rights context?

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[52] *Ibid.* at 5.

[53] *Ibid.*

[54] *Ibid.* at xvii.

[55] *Ibid.* at xxi.

[56] Elizabeth McWeeny, President of the Canadian Council for Refugees, has noted: 'Advocacy NGOs seek protection and sustainment of human rights through political initiatives, international and national agreements and policies, donorship, and solution building'; Elizabeth McWeeny, 'North-South Dialogues in Forced Migration' (2007) 24 Refuge 11 at 12.

[57] Milner & Goldberg-Hiller 2002, *supra* note 24 at 341.

A second edition of Scheingold's work was published on its thirtieth anniversary in 2004. Scheingold titled his preface 'The New Politics of Rights.' In it he addresses the scholarship that has developed around, or as a challenge to, his original argument. Scheingold's review is openly non-exhaustive[58] and it does not take account of how globalization has released rights, in the imagination at least, from state control. Scheingold admits the dynamic evolution of rights from what he originally envisaged and recognizes attempts to 'expand the meaning of rights beyond its traditional boundaries.'[59] His reference is not, however, to the actual boundaries of the state. While he accepts the critique that his original discussion neglects a 'polyvocal' legal consciousness, the acknowledgement of the 'polyvocality of legality' remains situated in the United States.[60]

Scheingold does refer to non-American research, but his geographic lens expands only to other distinct and closed-societies and not to a globalized perspective.[61] The closest Scheingold comes to addressing global rights is in his recitation of Susan Coutin's research findings on cause lawyering for Central American immigrants that moved beyond the court and took on a transnational character.[62] That the example comes out of a migration context is yet further support for the arguments in the preceding section of a growing global consciousness, particularly attached to migration. In concluding his preface, Scheingold offers his vision of what a complete work on the 'new' politics of rights would look like. He suggests, without elaboration, that 'it would be comparative and empirical – reaching beyond the U.S. experience to analyze rights in other national settings, and in transnational settings as well.'[63] There is thus an acknowledgment here that rights can detach from litigation and movements may be transnational.

Likely near the same time that Scheingold was drafting his preface,[64] Milner and Goldberg-Hiller made a more direct link between American rights scholarship and the global expansion of rights consciousness in their

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[58] Scheingold, *supra* note 3 at xxi.

[59] *Ibid.* at xxiii, xxxiii.

[60] *Ibid.* at xxiv.

[61] Scheingold notes: 'Comparable findings have emerged from research in Latin America (Meili 1998), Israel (Morag-Levine 2001), and Japan … (Kidder and Miyazawa 1993)'; *ibid.* at xxxix.

[62] *Ibid.* at xxxviii.

[63] *Ibid.* at xlii.

[64] While the argument in Milner & Goldberg-Hiller 2002, *supra* note 24 ('Reimagining Rights') is not noted, Scheingold does cite both Goldberg-Hiller's 2002 work *The Limits of Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbour: University of Michigan Press, 2002) [Goldberg-Hiller 2002] and Neal Milner's article 'The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation' (1986) 8 Law & Pol'y 105 in his preface.

review of texts by Davina Cooper, Eve Darian-Smith and Carl Stychin.[65] By studying authors not associated with American rights research they sought to expand the applicability of rights discourse.[66] Having de-linked rights from court-based litigation, they suggest that the authors examined draw new links between global, national and local rights politics.[67]

Stychin's work focuses on the discourses of citizenship and nationhood employed by gays and lesbians to reimagine identity.[68] His is an exploration of how pressure to conform to international standards led to domestic legal changes. Davina Cooper's collection of disparate studies on the construction and contestation of 'excessive governance' is linked by a concern with space, belonging and the role of law.[69] For Milner and Goldberg-Hiller, Cooper's work is a pertinent contrast to American rights research. Rather than being driven by litigation, they note that in Cooper's case studies, 'rights move in and out of the picture in all sorts of interesting ways that she can tap into because she does not assign the state any privileged place in her analysis, even while she recognizes the special attributes state institutions may have.'[70] Finally, Darian-Smith uses the Channel Tunnel as a material representation of 'a reordering of power relations between local, regional, national, and transnational entities through its disruption of an idealized national landscape.'[71] Milner and Goldberg-Hiller see the relevance of her research in the observations that '[c]ontemporary changes in landscape that are propelled by globalization and new sources of nonsovereign legal authority are all signaled by the physical presence of the [Channel] tunnel's terminus.'[72] Darian-Smith's description of the legal problematic encompasses the concern of all three authors surveyed as well as the surveyors themselves:

> … it is not appropriate to analyze national versus transnational processes as though they were distinct, opposing, and mutually

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[65] Milner & Goldberg-Hiller 2002, *ibid*. See Davina Cooper, *Governing Out of Order: Space, Law, and the Politics of Belonging* (New York: Rivers Oram Press, 1998) [Cooper]; Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in New Europe* (Berkeley and Los Angeles: University of California Press: 1999) [Darian-Smith]; Carl Stychin, *A Nation By Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press: 1998) [Stychin].

[66] Milner & Goldberg-Hiller 2002, *ibid.* at 339.

[67] *Ibid.*

[68] Stychin, *supra* note 65 at 15. See also Milner & Goldberg-Hiller 2002, *ibid.*

[69] Cooper, *supra* note 65 at 7-21. See also Milner & Goldberg-Hiller 2002, *ibid.* at 348.

[70] Milner & Goldberg-Hiller 2002, *ibid.* at 349.

[71] Darian-Smith, *supra* note 65 at 193. See also Milner & Goldberg-Hiller 2002, *ibid.* at 355.

[72] Milner & Goldberg-Hiller 2002, *ibid.* at 356.

> exclusive. Nor is it appropriate to presume that law is coherent, holistic, and state-bound. In the very connectedness of national and transnational processes, what should be recognized are the complex political and cultural shifts that underlie the contradictions of the coexisting endurance and vulnerability of law as an expression of national unity. … In short, strategies both endorsing and resisting transnationalism, and through such strategies the reflexive modification of what constitutes a legal system and legal sovereignty, may increasingly have to be recognized as problematizing our understandings of law.[73]

Here, then, we understand global rights not as a distinct development detached from state-based analysis but as an outflow and interweaving of national and transnational processes.

The authors surveyed demonstrate the fluidity of analysis when space is taken into consideration and provide the new politics of rights to bring Scheingold's argument to a globalized world. Milner and Goldberg-Hiller conclude by returning to the American context where Scheingold's original analysis remains. They note that even here, the civil rights movement that initially cultivated the rights myth[74] 'has become a more international issue, and over time, court decisions have become a smaller portion of the mix of cultural, political, and economic forces that affect race in America.'[75] A globalized rights consciousness is clearly at work.

While Milner and Goldberg-Hiller argue for an outward looking analysis by American rights scholars, a reverse reflection beginning outside the American context is likewise beneficial. Milner and Goldberg-Hiller highlight the globalized potential of rights research and Scheingold's new preface seems at least open to such use of his work. I take this as permission to detach the rights scholarship from the state and the courts in an examination of predominantly non-litigious assertions of rights in the refugee context. What follows is thus an application of the politics of rights analysis to the refugee rights movement.

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[73] Darian-Smith, *supra* note 65 at 157, qtd. in Milner & Goldberg-Hiller 2002, *ibid.* at 360.
[74] 'Pictures of federal troops escorting black children up school steps have taught America powerful lessons about law's majesty and limits. Such pictures have been the backdrop for what Stuart Scheingold called the myth of rights'; Milner & Goldberg-Hiller 2002, *ibid.* at 366.
[75] *Ibid.* at 367.

3. Where Rights Go Wrong

Scheingold does more than just expose the call of the law as enchanting mythology lacking descriptive validity;[76] he debunks the myth as a potentially dangerous strategy of social change. The risk of rights campaigns arise out of their own success, as they may create a backlash. Further, Scheingold warns the politics of rights are as easily employed for right-wing purposes as those of the liberal-left.[77] Particularly in the migration context where tension is already building at the borders, the expansion of the American analysis to the world stage seems to heighten the potential risks of a rights-based strategy.

The essence of Scheingold's warning is that 'rights can go wrong.'[78] He references Goldberg-Hiller's observation that 'some social movements mobilize *against* the law and seek to transform discourses about rights – particularly civil rights – into exclusionary limits.'[79] Goldberg-Hiller and Milner refer to this mobilization as the creation of special rights.[80] The appellation 'special' is meant to distinguish these rights claims as beyond the basic rights to which one is entitled. They are characterized as exorbitant demands by those 'who seek to oppose or to qualify other forms of rights mobilization by reference to the excessive quality of the original rights claims.'[81] Goldberg-Hiller and Milner point to an 'inversion process' in which 'the rights claimants become the transgressors, and everyone else becomes the victims of this violation.'[82] The special rights discourse becomes a powerful weapon of exclusion against rights-claimants.

Scheingold provides his own example of the destabilization of the myth of rights corresponding to the special rights discourse. He reviews Carol Greenhouse, Barbara Yngvesson and David Engel's research in Sander County on the litigation of personal injury claims. Scheingold's explanation of the dynamics of the Sander Country discourse connects the myth of rights to special rights:

> newcomers who turn to the law and litigation to deal with personal injury claims are labeled troublemakers by long-time residents who

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[76] Scheingold, *supra* note 3 at 203.
[77] *Ibid.* at xxxii.
[78] *Ibid.* at xxxii.
[79] Goldberg-Hiller 2002, *supra* note 64 at 34, qtd. in Scheingold, *ibid.* at xxxii (emphasis in original).
[80] Goldberg-Hiller & Milner 2003, *supra* note 32 at 1075.
[81] *Ibid.* at 1076.
[82] *Ibid.* at 1078.

> argue that rights-claiming by the newcomers is a threat to the community … rights claiming by newcomers was deemed illegitimate; they were expected to subordinate rights to community solidarity and coherence.[83]

The moniker of 'special rights' is thus also tied to conceptions of community and determinations of how that community is constituted.

Community is central to the special rights discourse as a marker of entitlement. Goldberg-Hiller and Milner note that in the cases they studied, 'rights claimants were labeled as privileged, selfish individuals who in some ways were outside the bounds of proper community life.'[84] Special rights operate as a transformative mechanism. Transformation is achieved by 'highlighting the inappropriate moral credentials for rights claimants and reasserting the limits of a normative community.'[85] Scheingold suggests this is the counter to the myth of rights—the competing 'myth of community.'[86]

The connection to the migration and refugee context is immediately clear.[87] As a result of the nexus between rights and citizenship, migration discourse weaves together discussions of law, rights and belonging.[88] Special rights serve to stigmatize outside rights claimants and remove them from the moral sphere of universal rights and belonging.[89] Refugees, as discussed above, already exist outside the sphere of universal, inalienable rights. Their outsider status makes them easy targets for accusations of special rights. Moreover, despite globalization's growing influence, state borders remain an important marker of community.[90] The community's protective stance is particularly evident in the migration context: 'In the realm of migration law, once a claim is articulated as a rights claim, the liberal nation's "right" to exclude all outsiders is triggered almost as an

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[83] Scheingold, *supra* note 3 at xxvii. Milner and Goldberg-Hiller similarly comment on the community aspect of the Sander County research; see Milner & Goldberg-Hiller 2002, *supra* note 24 at 364-5.

[84] Goldberg-Hiller & Milner 2003, *supra* note 32 at 1077. Their case studies concerned same-sex marriage, property relations between landowners and leaseholders, and Native Hawaiian sovereignty.

[85] *Ibid.* at 1083.

[86] Scheingold, *supra* note 3 at xxxiii.

[87] Goldberg-Hiller and Milner encourage the application of their analysis in other contexts: '…special rights processes and languages appear in other issues as well and can be viewed as a common idiom of anti-rights mobilization'; Goldberg-Hiller & Milner 2003, *supra* note 32 at 1115.

[88] Milner & Goldberg-Hiller 2002, *supra* note 24 at 363.

[89] Goldberg-Hiller & Milner 2003, *supra* note 32 at 1081.

[90] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 61-2 [Walzer].

automatic response.'[91] As will be seen in the next section, this is the hierarchy of rights with the community of citizens in the concentric centre of the nation.

III. Special Rights in Refugee Discourse

This article argues that despite the intriguing potential of globalized rights in the advocacy of refugee protection, the risk is that the myth of rights is misleading and refugee rights claimants fall as easy victims to the special rights discourse. The devotion of energy to a globalized rights claim is therefore not the best strategy for change in refugee protection. While the focus is future-oriented, in order to make the argument I turn now to long-standing theoretical debates and past examples of recognized rights going wrong for refugee rights-claimants. In looking back, the hope is to tread a better path forward.

The question of the validity of the state's right to exclude outsiders is the central axis on which migration's theoretical debate balances. Liberal theory is the usual location for arguments both for and against this exclusion, commonly framed as a case for open or closed borders. Liberalism's open border argument is premised on assertions of the moral equality of all individuals, and that the individual exists prior to the community.[92] This theoretical basis argues against restrictive immigration policies.[93] The communitarian counter to this argument is that closed borders are a necessary pre-condition of justice. Best expressed by Michael Walzer, the argument is as follows:

> Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not) … the right to choose an admissions policy … is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.[94]

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[91] Dauvergne 2005, *supra* note 5 at 168. See also Scheingold, *supra* note 3 at xxviii.

[92] See Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 Rev. of Politics 251 [Carens].

[93] *Ibid.* at 252.

[94] Walzer, *supra* note 90 at 61-2.

The rhetoric of special rights is not used here as a basis for exclusion, nor is the opposing entrance assertion put forth as a rights argument, but the analogies to rights-based claims in the argument can be made.

The moral equality claim of liberalism is deflected by the exertion of a superior community claim. The *right* to self-determination trumps the asserted *right* to equality by demonstrating the false basis of the equality assertion. Equality is here confined to the 'community', and 'strangers' are definitively outside of that community.[95] Entrance demands are therefore considered excessive and unfair. Goldberg-Hiller and Milner likewise remark on their case studies on special rights: 'In each case opponents distinguished rights claimants' "selfish" demands from equality.'[96] The myth of community triumphs; strangers remain strangers and outsiders are left outside. And yet there is more to this special rights discourse than denial.

Beyond a simple negation of the rights claim, rejection is accompanied by a 'trope of vilification'[97]: 'In this stigmatization, an element of moral pollution is attached to these out groups, which are accused of threatening the health and well-being of the community.'[98] The trope can be seen in Walzer's argument where the essence of the community is at stake. It is the very 'shape of the community' and the 'core of communal independence' that is being threatened.[99] However, while Walzer's analysis is theoretically grounded and well-regarded,[100] the distance between scholarly reasoning and political practice must be acknowledged. The theoretical communitarian exclusion does not extend to all rejections of refugee rights claims. Examples of the reactions by the Australian and Canadian governments to asylum-seekers approaching their borders bring the theory into a more troubling reality.

The Australian *Tampa* 'crisis' that erupted in 2001 and the Australian government's self-labeled 'Pacific Solution' is a darker example of actual vilification. The 'crisis' refers to the rescue of 433 mostly Afghan passengers

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[95] Consider, further, Goldberg-Hiller and Milner's assertion that special rights '… place rights mobilizers outside the bounds of moral community'; Goldberg-Hiller & Milner 2003, *supra* note 32 at 1078.

[96] *Ibid.* at 1077.

[97] *Ibid.* at 1078.

[98] *Ibid.*

[99] Walzer, *supra* note 90 at 61-2.

[100] Joseph Carens, the key proponent of the open-door policy, considers Walzer 'the theorist who has done the most to translate the communitarian critique into a positive alternative vision'–one that provides a 'rich and subtle discussion of the problem of membership'; Carens, *supra* note 92 at 265-6.

from a sinking Indonesian fishing boat, the *Palapa,* by the Norwegian freighter *Tampa* in August 2001. The *Palapa*'s passengers were attempting to cross the Timor Sea from Indonesia to Australia's offshore territory in order to make asylum claims. The Australian government, aware of the *Tampa*'s rescue, closed its port at Christmas Island, refused to allow passengers to disembark, and sent special-forces troops to board the ship.[101] While court challenges and appeals were heard in the Federal Court as to Australia's obligations, agreements were concluded between the governments of Australia, Nauru and New Zealand essentially enabling Australia to offload its refugee responsibilities. Ultimately, Australia excised parts of its own territory from its 'Migration Zone'[102] so as to avoid the obligations of Australian migration law and responsibilities to would-be asylum seekers.[103]

The *Palapa* was merely one of boatloads of desperate individuals, mostly fleeing persecution in Iraq or Afghanistan, traveling from Indonesia in order to claim refugee status in Australia. The passengers made these perilous journeys specifically because Australia has codified its commitment to the non-refoulement of recognized refugees under Article 33(1) of the 1951 Convention. Australia voluntarily attached itself to this international convention in 1954.[104] The Australian *Migration Act* has specifically referred to the 1951 Convention since 1980.[105] That asylum-seekers would come was predicted. That recognized refugees would be permitted to stay was enshrined in law. This is not therefore a rights-claim in the vague uncertain realm of globalized rights. The asylum seekers had made the journey on their own; they did not need to get anywhere. They were seeking to assert their unequivocal legal right of non-refoulement set out in international and Australian law—once refugee status was confirmed—to not be sent back to the risk of persecution in their home countries.

Australia framed its response to the *Tampa*'s arrival, however, in the language of a defense against encroachment. The concocted danger was that of Australia being over-run and threatened by an inundation of illegal

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[101] See *Ruddock* v. *Vadarlis* [2001] FCA 1329 (Full Court).

[102] *Migration Act 1958,* (Cth) at s.5 [*Migration Act*]. The 'Migration Zone' defines the land and water areas of Australia for visa purposes and where, upon entering, one could make an asylum claim in Australia.

[103] *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).

[104] Australia ratified the 1951 Convention in 1954 and the 1967 Protocol in 1973. UNHCR, 'States Parties to the Convention and the Protocol' (1 December 2006) [UNHCR 'States Parties'], online: <http://www.unhcr.org/cgi-bin/texis/vtx/protect?id=3c0762ea4>.

[105] *Migration Act, supra* note 102; see also Dauvergne 2005, *supra* note 5 at 94, fn.39.

migrants.[106] The resulting rights claim followed a traditionally litigious path. When the initial Federal Court challenge in *Ruddock v. Vadarlis* (*Vadarlis*) went against the government, Prime Minister John Howard asserted: 'This is a matter that relates to the integrity of Australia's borders and the integrity of our borders is surely a matter for the democratically elected government.'[107] The myth of community is forefront in the rhetoric. A subtitle in the consequent appeal decision made the exclusion point clear: 'The Executive Power - The Gatekeeping Function.'[108] The image of a gate further suggests the need for protection from the excluded outsiders. Now siding with the government, Justice French echoed Walzer in a majority decision of the Federal Court:

> The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering.[109]

As Scheingold predicted, the myth of community trumps the myth of rights.[110]

Assertions of sovereignty are warily pointed to in warnings to rights advocates.[111] Sovereignty claims have the advantage of asserting both the claim of community as well as rights-based claim of their own. In *Vadarlis,* the appeal court's siding with the government confirms the state's right to defend its sovereignty despite the refugee's right of non-refoulement. Scheingold notes that rights can work in this way as a double-edged sword,[112] serving both egalitarian and anti-egalitarian purposes.[113] The dangers amount to Scheingold's warnings of backlash and right-wing use.

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[106] Jeremy Webber argues: 'The Howard government's actions showed a similar desire to drive a deep wedge between the Australian identity and the asylum seekers, to treat the asylum seekers as a dehumanized, threatening other, regardless of their actual threat'; Jeremy Webber, 'National Sovereignty, Migration, and the Tenuous Hold of International Legality: the Resurfacing (and Resubmersion?) of Carl Schmitt' in Oliver Schmidtke & Saime Ozcurumez, eds., *Of States, Rights, and Social Closure* (New York: Palgrave Macmillan, 2008) 61 at 69 [Webber]. See also Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 Pac. Rim L. & Pol'y J. 49.

[107] Qtd. in Webber, *ibid.* at 67.

[108] *Ruddock* v. *Vadarlis, supra* note 101 at para.186 (French J.).

[109] *Ibid.* at para. 193.

[110] Scheingold, *supra* note 3 at xxviii.

[111] Jonathan Goldberg-Hiller, '"Entitled to be Hostile": Narrating the Political Economy of Civil Rights' (1998) 7 Soc. Leg. Studies 517 at 520 [Goldberg-Hiller 1998].

[112] Scheingold, *supra* note 3 at xxxvii.

[113] *Ibid.* at xxiv.

The dueling sovereignty concerns, as Goldberg-Hiller explains, are 'the claims that rights endanger traditional institutions, values and their champions …', and '... at the same time that rights are upheld as integral to the authentic expression of groups whose goal is the conservation of proper sovereignty.'[114] The message on both sides of the sword in the *Vadarlis* decision is that Australian community and sovereignty must be preserved against 'people not part' of Australia.[115]

Similar reactions to asylum seekers have also played out in Canada. In 1987, 174 Sikhs arrived in lifeboats off the Nova Scotian coast. Their arrival sparked an emergency recall of Parliament to 'deal with an issue of grave national importance.'[116] The emergency session resulted in the introduction of Bills C-55 and C-84. The combined bills 'aimed at streamlining Canada's refugee system, curbing alleged abuses and enhancing border control ... [and] radically restructured the in-land refugee determination system and established the Immigration and Refugee Board.'[117] Just over a decade later in 1999, four ships carrying close to six hundred Chinese migrants arrived off Canada's western coast of British Columbia to an angry, unwelcoming Canadian public and government.

While admittedly the majority of refugee claims by these migrants were eventually rejected or abandoned, the public outrage and heavy-handed response of detainment by the government was extreme. Immigration lawyer Doug Canon noted: 'Canada has criminalized and incarcerated a

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[114] Goldberg-Hiller 1998, *supra* note 111 at 528.

[115] Webber adds an interesting addendum to this cautionary tale with the personal example of campaign material delivered around the time the *Tampa* events were playing out. He was living in a Sydney suburb and received a mailing from Liberal MP Alan Cadman with a radar grid of concentric circles superimposed on a bull's eye picture of the *Tampa.* The pamphlet addressed anti-terrorism measures and asylum seekers; Webber, *supra* note 106 at 69. Recalling the concentric circles of the hierarchy of rights with citizenship at the core, the pamphlet presents an example of visual backlash reinforcing the government's rhetoric.

[116] *House of Commons Debates* (11 August 1987) at 7910 (L. Bouchard) (official translation) [Bouchard (*Debates*)], qtd. in Sharryn J. Aiken, 'Of Gods and Monsters: National Security and Canadian Refugee Policy' (2001) 14 R.Q.D.I. 7 at para 14 [Aiken].

[117] Aiken, *ibid.* Bill C-55 was also influenced in favour of refugees by the landmark Supreme Court of Canada decision in *Singh* v. *Canada (Minister of Employment and Immigration)* [1985] S.C.J. No. 11 where the Supreme Court considered the procedural rights of refugee claimants, and in particular whether claimants were entitled to oral hearings. Bill C-55 therefore positively included the concept that refugee claimants would have access to an oral hearing before a quasi-judicial tribunal. The tribunal established by the government went beyond the Supreme Court of Canada's requirements in *Singh.*

group of people whose only crime was desperation.'[118] A commentary in the *Globe and Mail* at the time colloquially reported:

> With each Chinese migrant rustbucket that shows up off British Columbia's coast, a bizarre form of behaviour becomes more commonplace on the streets of Vancouver. Total strangers will accost you and shout these things into your face: (a) The House of Commons should be recalled for an emergency debate; (b) Parliament should invoke its special powers to override the Constitution to deal with the "crisis"; (c) the Constitution should be amended, if needs be, to deal with these people.[119]

While the author intentionally offers a legalistic response unlikely to have been uttered by any actual individual but reflective of the 1987 government response, he does go on to report a man who brought his dogs to the dock at Port Hardy to bark at the migrants and a woman who declared: 'we should force the ships back out to sea and all the better if they sank.'[120] The lack of sympathy for the migrants could be explained by Scheingold's notion of 'blaming' in which '[s]ocial control takes precedence over rights-claiming by those who have abused their freedom and *chosen* to threaten the social and moral orders.'[121] The migrants' active choice to illegally enter Canadian waters serves to justify reactions ranging from detention to desired death. They are seen to have brought these consequences upon themselves. As in the past, and to be repeated soon after with the *Tampa* in Australia, a triptych is created with boatloads of asylum-seekers in the first panel, sovereign panic occupying the centre and revised legislation in the final panel.[122] Bill C-31, the first incarnation of legislation that eventually became Canada's *Immigration and Refugee Protection Act*,[123] was brought in to replace Canada's *Immigration Act*,[124] and is tweaked with even tougher responses to illegal migration.

Another layer of rights-analysis can be applied to the reactions against the 'boatpeople' and to the ever more protective stance Western nations are

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[118] Qtd. in Jane Armstrong, 'The boat people's big gamble' *The Globe and Mail* (22 July 2000) A7.
[119] Terry Glavin, 'Why such loopiness over a few rusty boats?' *The Globe and Mail* (10 September 1999) A11.
[120] *Ibid*.
[121] Scheingold, *supra* note 3 at xxxvi (reference omitted, emphasis in original).
[122] Audrey Macklin, 'New Directions for Refugee Policy: Of Curtains, Doors and Locks' (2001) 19 Refuge 1 at 2.
[123] *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. Bill C-31 was first tabled on 6 April 2000 but died when Parliament was dissolved later that year. Amended legislation, Bill C-11, was introduced and passed in November 2001.
[124] *Immigration Act,* R.S.C. 1985, c.I-2.

taking against outsiders. There is an inherent paradox in increasingly restrictive asylum policies and the incorporation and expansion of rights protections. The conflict appears rooted in the nature of the constitutional state—founded on principles of respect for human rights and inclusion but guided by democratic rule, which may demand exclusion.[125] In resorting to non-arrival measures, states free themselves from the rights obligations they have taken on within their territory;[126] 'the cost of increasingly inclusive practices towards asylum seekers *within* the territory of the state is the rapid development of exclusive measures *outside* it.'[127] Rights advocacy, understood in this light, works against refugees who remain *outside* of the right granting states.

A further undercurrent of these incidents, affecting those asylum seekers *within* the state, is the denial of their legitimacy as refugees. Audrey Macklin labels this the 'discursive disappearance of the refugee,'[128] but the dynamics of the dialogue also demonstrate the assertion of special rights. The discursive disappearing act Macklin points to is performed by the magic of semantics. Migrants are re-categorized into a legal/illegal dichotomy that removes refugees from the equation. The refugee discursively disappears and is replaced by the illegal. While refugees have the right not to be sent back, illegals do not and have by definition already performed a transgression by entering the state illegally. From the outset, the Chinese migrants in British Columbia were labeled illegals rather than refugee claimants. 'Illegal migrants' outlaw designation exceeds the particular violation of immigration law and assumes a kind of existential, totalizing character: they are known simply as "illegals."'[129] This re-labeling permits an accusation that the right to non-refoulement is a special, and undeserved, right. Beyond vilification, the re-labeling illustrates Goldberg-Hiller and Milner's inversion process. The victims of persecution are transformed into transgressors. While 'real' refugees are still acknowledged to exist, they are perpetually left 'over there.'[130]

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[125] Matthew J. Gibney, 'The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy' in Susan Kneebone, ed., *The Refugee Convention 50 Years On: Globalisation and International Law* (Aldershots, Hants, England; Burlington, VT: Ashgate, 2003) 19 at 43.

[126] *Ibid*.

[127] *Ibid*. at 44 (emphasis in original). Scheingold similarly suggests that 'once rights are granted, continued rights-claiming becomes even more culturally suspect'; *supra* note 3 at xxxvi.

[128] Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement' (2005) 36 Colum. H.R.L. Rev. 365.

[129] *Ibid*. at 366. See also Dauvergne 2008, *supra* note 37 at 50-68.

[130] *Ibid*. at 369.

The distinction between asylum seekers claiming refugee status in Western democratic countries and those refugees waiting in camps 'over there' leads to a further semantic inversion. Recall that the one absolute right possessed by refugees is the right to non-refoulement in signatory states to the 1951 Convention. There is no right to get to these states. Yet the discourse of 'need' creates the perception of a reversal of entitlement between right holder and non-right holder. Returning to Australia, the immigration scheme makes an intentional distinction between onshore asylum seekers and offshore refugees, and formally links the intake from the two categories. Refugee numbers are balanced such that the offshore resettlement intake is reduced when onshore claimants increase.[131] This scheme permits Australia the rhetoric of repeatedly labeling those who arrive on its shores as 'queue jumpers' who compromise Australia's ability to help the 'neediest' refugees still overseas.[132] Entitlement to a right is inversed into a justification for exclusion. Need is presented as triumphing over right. In reality, Human Rights Watch has described Australia's system as an attempt to grant asylum 'by invitation only.'[133] The Refugee Council of Australia further found the Australian program to offer not 'a place in a queue but a ticket in a lottery.'[134] The needy refugee gains sympathy in his or her characterization as needy but rarely gains in terms of actual protection. Annual global refugee resettlement sits at less than 1% of the refugee population.[135] Needy refugees still overseas receive sympathy but rarely resettlement.

The Canadian government employs similar manipulations. During the 1987 emergency recall of parliament, the statement was made that: 'we must not forget that our first priority as a country is to help *genuine refugees who are confined overseas*' in contrast to 'refugee claims made in Canada.'[136] The clear

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[131] For a more detailed discussion of Australia's policy see Dauvergne 2005, *supra* note 5 at 92, fn.30; Refugee Council of Australia, 'Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions' (2009) 2009 Intake Submission.

[132] Dauvergne 2005, *ibid.* at 92, fn.31. See also William Maley, 'Receiving Afghanistan's Asylum Seekers: Australia, the Tampa "Crisis" and Refugee Protection' (2002) 13 Forced Migration Rev. 19 at 20 [Maley]; Richard Wazana, 'Fear and loathing down under: Australian refugee policy and the national imagination' (2004) 22 Refuge 83.

[133] Human Rights Watch, 'By Invitation Only: Australian Asylum Policy', online: (2002) 14:10(C) Human Rights Watch <http://hrw.org/reports/2002/australia/>.

[134] Refugee Council of Australia, *The Size and Composition of the 2000-2001 Humanitarian Program: Views from the Community Sector* (Refugee Council of Australia, 2000) at 53, qtd. in Maley, *supra* note 132 at 20.

[135] UNHCR, *Statistical Yearbook 2007*, *supra* note 14 at 39.

[136] Bouchard (*Debates*), *supra* note 116 at 7912 (original English, emphasis added).

message being that refugee claimants in Canada are not genuine. Similarly, when tabling Bill C-31, then Minister of Citizenship and Immigration Elinor Caplan stated: 'Closing the back door to those who would abuse the system allows us to ensure that the front door will remain open.'[137] The 'front door' here refers to refugees brought into Canada through resettlement initiatives. The 'back door' refers to those, like the Sikh and Chinese migrants, who enter illegally on their own to claim refugee status. Canada has been a signatory to the 1951 Convention since June 1969.[138] Article 31 of the 1951 Convention prevents the imposition of penalties for illegal entry by asylum seekers.[139] As with Australia, there is an implicit recognition in signing the 1951 Convention that refugees may come to Canada. That these refugees may need to enter Canada illegally in order to make their refugee claim is predicted, addressed and accepted by the 1951 Convention. Illegal entrance is therefore arguably a legitimate form of 'front door' entrance for a genuine asylum seeker. Reviewing Caplan's presentation of the legislation, Michael Casasola notes:

> Unfortunately the most negative aspect of the legislative package was that the many positive resettlement initiatives were presented as a counter to some of the more punitive actions the government planned in order to limit access to the refugee determination system in Canada. In fact, the resettlement initiatives became an important part of the selling of the bill to the Canadian public. … Resettled refugees were presented as part of the refugees using the "front door." And by providing refugees greater access, Canada suggested it had the moral

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[137] Citizenship and Immigration Canada, News Release 2000-09, 'Caplan Tables New Immigration and Refugee Protection Act' (6 April 2000), online: <http://www.cic.gc.ca/english/press/00/0009-pre.html>.

[138] UNHCR 'States Parties' *supra* note 104.

[139] Article 31 states:

> 1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

> authority to limit access to those refugees described as using the "back door."[140]

Here the special rights discourse is not being applied to distinguish the over-demanding refugee from the Canadian community attempting to preserve its identity and secure its borders. Rather, and more perversely, the right-holding refugee 'over here' is portrayed as furtively preventing the non-right-holding refugee 'over there' from attaining protection to which the refugee 'over there' has no actual entitlement. Rights in this rhetoric are obliterated and protection swings back to the obligation-free zone of voluntary compassion and humanitarianism.

In essence then, refugee rights discourse is left back where it began, lured by the 'lore of the law'[141] to shift from calls of compassion to dignified demands for rights. The conundrum refugees currently face in relation to rights they already possess clearly points to the need for more effective protection and the appealing potential of globalized rights. Scratching at the surface of the refugee dilemma, however, points to the reality that rights have not been—and cannot be, even in a globalized form—the solution. Entitlement to rights has not equated to protection for refugees. The myth of rights holds outside of the litigation context and allegations of special rights are a dangerous weapon against which refugees are particularly vulnerable as the ultimate outsiders. Rather than protection through rights, the refugee identity is corrupted by the invocation of special rights. The very reality that pushes the call for increased rights proves why rights are the wrong answer.

IV. Conclusion

Almost twenty years ago, James Hathaway noted that the perception of refugee law as a rights-based regime was 'largely illusory.'[142] The illusion still stands, even with respect to those rights to which a refugee is clearly entitled in law. Rights attainment does not necessarily equate to social change[143] and may in fact reverberate against the rights claimants. In the

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[140] Michael Casasola, 'Current Trends and New Challenges for Canada's Resettlement Program' (2001) 19 Refuge 76 at 79.

[141] Scheingold, *supra* note 3 at xviii.

[142] James. C. Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 J. Ref. Studies 113 at 115.

[143] But see McCann, *supra* note 48 for a counter argument. McCann counters Scheingold's argument that 'litigation provides at best a momentary illusion of change' with an 'alternative understanding'; *ibid.* at 3. McCann argues 'the evidence suggests that taking legal rights seriously has opened up more than closed debates, exposed more than masked systemic injustices, stirred more than pacified discontents, and nurtured more than retarded the

refugee case, the right to non-refoulement has led to increased obstacles preventing asylum seekers from reaching safe countries on their own[144] and a vilification of those who do so as illegal queue-jumpers. In abandoning compassion for rights, the compassion for the cause is lost without the achievement of dignity and equality. While globalized rights may be increasingly possible in migration, they are not the right path to refugee protection.

development of solidarity …'; *ibid.* at 232. Scheingold takes McCann's research as 'empirical confirmation of the claims made in *The Politics of Rights* about the indirect, rather than direct, payoff of legal rights'; *supra* note 3 at xxx. McCann's argument does nothing to erase the risks explored in this article.

[144] See *Canada-U.S. Safe Third Country Agreement*, 5 December 2002, online: <http://www.cic.gc.ca/english/policy/safe-third.html>. The agreement came into force on 29 December 2004 and requires asylum seekers to make their refugee claims in the first country of arrival. Asylum seekers arriving in the United States, as the majority inevitably do as a result of the greater number of American embassies worldwide and international flight routing through the United States, will be denied entry into Canada. The clear objective of the agreement, instigated by Canada, is to decrease the number of asylum seekers able to gain access to the refugee determination process within Canada. See also *Canadian Council for Refugees v. Canada* [2008] F.C.J. No. 1002, 2008 FCA 229, leave for appeal denied, *Canadian Council for Refugees v. Canada* [2008] S.C.C.A. No. 422.