Regulating the Creation of States
From Decolonization to Secession

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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).

Vol. 5, No. 2, pp. 11-57. ISSN: 1712-2988.

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.